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Investigating Legal Studies

for Queensland

Third Edition

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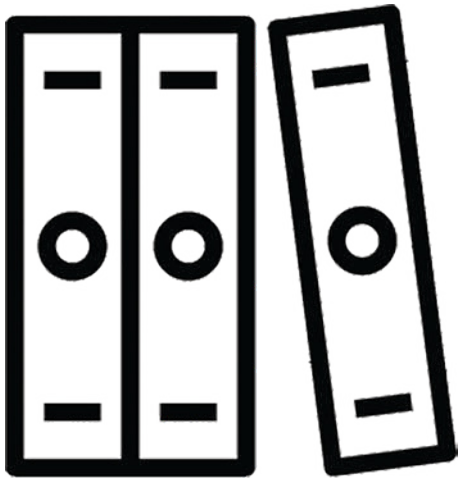

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Strategies for writing effectively in Legal Studies

Reading through the following content will help you better grasp the requirements of the Legal Studies subject. Please note that the authors highly recommend that you pay close attention to chapter 1, sections 1.6–1.9, to further develop your understanding of the scope of the subject and the assessment requirements.

Creating legal responses

The subject of Legal Studies places unique demands on students. In some ways, it is a completely different subject from those you may have studied in previous years. Most students do a version of English, science or mathematics, for example, throughout school. However, with Legal Studies, it is like learning new content as well as a new language, given how some words and phrases in law are specific. Legal Studies is often fun but it is also challenging.

As part of that challenge, it is important to know how to create legal responses that comply with appropriate legal principles, are concise and address the criteria against which you will be assessed. This next section is a brief summation of how students of Legal Studies might approach such responses and do so in a way which maximises the marks allocated in assessment items.

Signposting – what is it?

Signposting is a writing technique that involves providing clear and explicit cues to guide readers through your text. The purpose of signposting is to help readers understand the structure of your writing, follow your argument and navigate your content more easily. It involves:

- Using specific words and phrases that make it clear what you are doing:
  - Thesis statements and topic sentences: In academic written responses, a strong thesis statement at the beginning and topic sentences at the start of paragraphs serve as signposts. They state the main argument or point of the text and provide a roadmap for what to expect.
    For example:
    The issue of government accountability is one that has become progressively more important and has been the subject of much recent public discussion. In recent times, confidence in our political leaders has been undermined and a general perception exists that questions how accountable and therefore responsible our governments are to the people.
    Some believe Australia's government, especially at a federal level, is too secretive. Source 4 is an example of how the legislation surrounding protection of 'whistleblowers' is seen to be ineffective.
  - Transitional phrases: Using transitional words and phrases helps readers understand the logical flow of your ideas. Common transitional phrases include 'firstly', 'in addition', 'on the other hand', 'therefore', 'in conclusion' and 'for example'. These cues signal shifts in thought or direction.

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For example:
In addition, Australia has taken steps to try to ensure more government accountability by joining the Open Government Partnership. This United Nations initiative tries to ensure governments are as transparent as possible while still retaining the ability to function effectively.
Or
In summary, by ensuring better protection for whistleblowers and holding our government responsible for meeting their aims under the Open Government Plan, we would ensure a more responsible and therefore accountable government that governs for all Australians.

- Helping the marker identify sections of your work to make it easier to allocate marks:
  Two types of words can be signposted. Words from:
  — *the question itself* – for example, '*Identify* two differences and *explain* how they might impact on human rights in Australia.'
  These are often cognitive verbs, for example, analyse, evaluate, justify, that are stated or implied in the question.
  — *the criteria used to mark the work.*
  Remember, in the external assessment (EA), these words are not provided with the exam in a criteria sheet, so you need to know the types of words and phrases that are common in assessing student responses so you can ensure, where possible, you properly address what is needed to do well.

How to do this – 'question words'

You should always identify and highlight/underline key words in the question. This ensures clarity about exactly what you are being asked to do and what types of sentences you will write in response.

Make sure you are succinct in answering; for example, if it asks for 'one difference' to be stated, state one difference, not three. Look for quantifiers (e.g. numbers) and make sure you include the correct amount (e.g. two examples).

The question often includes cognitive verbs such as explain, identify or discuss.

For example:
Explain/Discuss = State/Define + give characteristics/detail + example/evidence

Use topic sentences/signposting words such as '_____ means to _____'. The topic sentence can also mean/be further explained by 'One example of this is/For example … '

Generally, marks on a paper will indicate how complex a response should be. This is often related to the types of thinking processes the question requires. For example, a question that requires you to 'identify' will be simpler and generally worth slightly less marks than one that requires you to 'explain' or 'justify'.

4a Identify two ways the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) changed the way legislation passes through federal parliament in Australia.
2 marks

4b Explain how each of the changes identified in Question **4a** improves the protection of human rights in Australia.
4 marks

Question **4b** requires more detailed thought and explanation than just identification. You would have to link the changes to another concept requiring some further understanding (improvement of human rights) and explain the connection between the two points.

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How to do this – 'criteria words'

There are a number of words/phrases that will be present as criteria words/phrases in either the internal assessment (IA) criteria or the EA criteria. You will not know exactly what these are for the EA as the criteria for marking the EA is not attached to the paper. You should have an understanding of what words/phrases may be present in the EA marking criteria to ensure you are able to address them in the answers you give. Examples of the types of words/phrases used in allocating marks are as follows:

- 'Accurate explanation', 'accurate and detailed definition' or 'accurately identifies' = a correct explanation/definition with an answer that requires you to:
  state/define the term/phrase + give characteristics/detail/explanation + examples/evidence
  For example:
  Non-refoulement means 'non-return'. This principle prohibits States from returning refugees and asylum seekers to their home country, or any other place they may face danger, when there are grounds to believe that their lives or freedom would be at risk because of their race, religion, nationality, political opinion or membership of a particular group. The principle applies to all persons recognised as refugees under the Convention.
- Use of information from the stimulus:
  This is about ensuring you use material from the stimulus to inform your answer. This demonstrates your ability to analyse the stimulus material properly and then incorporate this material into a cohesive response. It is important that you make this use of the stimulus material explicit, and you should use multiple stimulus items throughout your answer. It is not necessary to use them all to do well, but the more you are able to refer to correctly, the more complex and considered your answer is likely to be.
  For example:
  As seen in Stimulus 3, there are a number of issues that arise in relation to s 28. One such issue identified is the lack of adequate definition of the term 'abuse' (Stimulus 3).
- Relevant legal alternatives:
  Before you reach a decision, you must consider alternatives (at least one other than what you eventually decide will work). When doing this, you should show why this might be a relevant alternative, but then go on to explain why you decided this was not the best option. This helps you show how you are justifying your decision.
  One alternative is always potentially the *status quo* (remain 'as is') although this is possibly not as complex as considering other options.
  For example:
  One alternative would be to allow the law to continue as it is currently. After all, most of the time it works well for most people as was seen in Source 3 and therefore could be said to be overall just and equitable to most members of society most of the time.
  Another alternative could be some form of *abolition/amendment/change*.
  For example:
  It could be argued the legislation is so deficient that it needs to be completely abolished. It contains so many contradictions as to be confusing and as a result breaches the important rule of law principle that says citizens should be able to know and understand the law.
- Valid decision:
  Once you have considered the alternatives, you must make one clear decision about what needs to be done that addresses/refers to both viewpoints you have analysed.
  For example:
  The appropriate action would be to … This would help address the confusion caused in 18C by … It would also deal with the apparent contradiction of 18D because …
  There is no need to make detailed recommendations, but rather a clear decision stated about what needs to be done.
- Relevant legal criteria:
  In the Evaluation part of the extended response (e.g. when you have reached a

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decision about what is needed), evidence to support your decision should be included.
Three kinds of legal criteria:

— Rule of law:
  This part must do more than just use the words. It must explain how/why the decision is correct according to what principle(s) of the rule of law.

For example:
The legislation is clearly confusing.
The rule of law requires that citizens can *know and understand* the law, so change must be made to ensure the simplification of the legislation to allow this to happen.

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OR
For example:
Changes to the laws allowing the publication of names of those charged with crimes but not yet convicted are at some level problematic. This is because the rule of law requires the *presumption of innocence*, which is those who are accused of crimes are innocent until proven guilty. Allowing publication of the names of those not yet found guilty would seem to be at odds with that principle. It could also be argued the *rights of those accused of crimes* are not being fully protected as a result, which is another principle inherent within the rule of law.

— Just and equitable:
This requires a discussion of how the decision you reached is just and equitable (e.g. fair).
For example:
This change would allow more people to access legal advice, which allows just and equitable access to legal services rather than just for those who can afford it. Therefore, this is fairer to citizens who are financially disadvantaged.
OR
By requiring greater compliance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the government would ensure people in Australia who are impacted by laws passed by parliament can have greater certainty that their human rights are being respected by our government. If Australia is to be considered a society that is fair, just and equitable to its citizens and the rights they have, this increased scrutiny of law-making power that may restrict those rights is essential.

— Common/statute law:
Your decision can refer to cases or statutes as justification/evidence in support.
For example:
The case of *Toohey v the Commonwealth* is one example of such an approach to recognising the rights of all Australians to be free from discrimination. It showed that sexual preference is not a valid reason to withhold rights from a citizen.
OR
Such a decision clearly demonstrates the utilisation of Uniform Civil Procedure Rule 5 in practice. The importance of ensuring proceedings are 'just and expeditious', as required under this rule, is demonstrated if such an approach, as has been recommended, is taken.

- Plausible/relevant implications:
Once you have made and justified your decision, you need to explain clearly how/why/who it will help.
For example:
An important implication of this decision would be that it will provide much needed clarity for those subject to racial discrimination about how to deal with such actions. This is important because …
OR
For example:
As a consequence of amending the Act in this way, it will help those who have a complaint about their treatment under the assessment section of the legislation and provide them with better access to services. This is important as it will send a clear message to those who …

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Using credible evidence

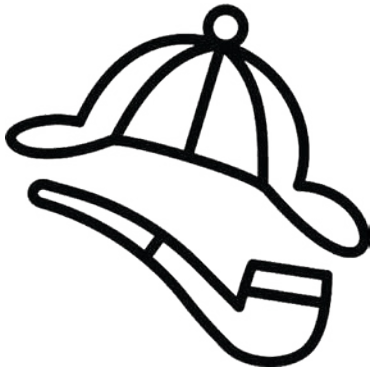
Credible evidence is a phrase used in the 'Analyse' section of your extended response to support your analysis. This section will require you to identify and explain/pull apart the question (e.g. analyse two viewpoints/problems) using the stimulus items and your own knowledge.

You must analyse first, then use 'credible evidence' to support your argument/analysis. There are three kinds:

- General examples from the media
  For example:
  Recently, a news program reported a family from Biloela was almost unlawfully deported. This is a clear breach of …
  OR
  The apparent increase in youth crime has been on the front page of Queensland newspapers or appearing as lead stories on the television news. One recent example was the terrible stabbing death of a north Brisbane mother during a home invasion. The public outrage that followed showed …

  These examples can be referenced in justifying/supporting your argument, even if you do not have specific dates and names, as long as they are legitimate recent examples from the media.
- Case law
  For example:
  The case of *Roach v AEC* demonstrates this principle because it decided rights to vote held by citizens could only be restricted in very limited circumstances …
  OR
  Agar v Hyde was one such case that limited the rights of amateur participants in sport to sue for injury suffered as a result of their participation.

  Using cases to support your argument is clearly a demonstration of your legal knowledge. This can be done even if you are not sure of the case name.
  For example:
  One recent High Court case held that it was not only justice between the parties in a particular dispute that was important, but rather a consideration to all matters currently before the courts. In other words, justice for the system as a whole was considered paramount over that owed to individual parties.
- Hypothetical examples
  For example:
  One example of this would be if a school friend made a comment to another person as a joke but the other person thought it was a racist comment then …
  OR
  For example, if a person was injured while coming to the assistance of another person, the court would likely consider …



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Strategies for revision and tackling assessment tasks in Legal Studies

Revision strategies: The importance of regular and purposeful revision

During this course, there will be times where the amount of content and remembering key concepts might be overwhelming, but regular revision will assist in ensuring the retention of information. Research has shown that the more one engages/utilises information, the greater the recall, especially after several weeks have passed. Think of it in the same way as you would when getting a new phone, you recite your number over and over until it is easily recited as though you always knew it. What is key, is not only the recall of key concepts but the application of the concepts to case studies either seen or unseen, therefore revision should consist of a variety of activities. Regular revision should include reviewing notes at the end of each day as well as weekly. A 'cram session' only assists if you are completely familiar with the concepts; ineffective if by the end of a unit, you are relearning concepts.

Strategies

- Study cards:
  - At the end of each lesson/day, create a study card (size of a palm card) that gives a summary of the concept.
  - At the end of the week, read over the cards.
  - Use the cards with another person as a quiz.
  - Attach the cards to the back of your bedroom door and read each before leaving the room.
- Graphic organisers:
  - Create Venn diagrams to compare and contrast two concepts.
  - Create a concept map each lesson/day and add to it (consider placing this in your study area at home).
- Cubes:
  - Create two cubes out of paper or card.
  - The first cube has six cognitive verbs, for example, identify, describe, compare and contrast (for this one you would need to roll the second cube twice), explain, analyse, evaluate, elaborate (give an example).
  - The second cube has key terms/concepts.
  - Roll the two cubes like dice and complete the task stated, for example, first cube = describe, second cube = separation of powers.
- Colour and music:
  - Consider using a set colour per subject (e.g. Legal Studies on blue paper) or have instrumental background music on when studying. This could assist with recall if you hit a 'blank' (hum the tune or visualise the coloured notes).
- Entry/exit questions:
  - Before leaving your room, or checking social media, ask yourself a revision question. (You could use this guide or questions from the textbook/lesson. If you get the question wrong, take five minutes to review).
- Review questions from the lesson:
  - At the end of each day, create your own revision questions from the key concepts learned.
- Create acronyms:
  - For example, SOPJEL = separation of powers: judiciary, executive, legislature.
- Watch/read the news:
  - Apply key concepts and legislation to current news reports (e.g. crime/sentence being discussed).
  - Consider the possible outcome or evaluate the outcome stated.
  - Identify stakeholder viewpoints.
  - Raise the case/situation in your next lesson with your teacher to clarify your thoughts.

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Tackling assessment tasks in Legal Studies

Strategies for the argumentative essay and inquiry report

Inquiry report

An inquiry report essentially consolidates research. The genre requires headings and subheadings. You will need to provide a full picture of the area of law being investigated and the issues being faced.

Argumentative essay

An argumentative essay differs from an inquiry report in the sense that its purpose is to provide an argument. This will require the identification of stakeholder viewpoints and providing counterarguments.
Note: Both an argumentative essay and an inquiry report follow the same approach. It is the formatting conventions (no headings) that differ.

General advice

- Refer to the task sheet regularly:
  - Review the expectations of the task by using the marking guide provided. Make sure you understand the cognitive verbs being used in the task (refer to *Legal Studies 2025 v1.1 Senior Syllabus © Queensland Curriculum & Assessment Authority* for definitions).
- Language conventions:
  - Do a thorough check of your work without relying on autocorrect tools. It would be advisable to have a peer or parent/guardian read over your piece. They may not be able to provide specific advice on the content, but they can certainly tell if it makes sense and is easy to understand what you are arguing/presenting logically.
  - Write in third person (e.g. *In Australia* not *in our country*).
  - Use subject specific vocabulary (use the legal terminology).
- Referencing:
  - Both in-text referencing and a bibliography are essential. Ensure you understand the expected system of your school (e.g. Harvard or APA).
  - A balance between primary and secondary sources that are academic in nature (hint: avoid blogs and forums including wikis).
  - Paraphrasing information (in-text referencing as an indirect quote) shows good understanding.
  - Before final submission, use a highlighter to identify all your references. Check to see how much of your work is your own.
- Recommendations:
  - Both forms of extended response will require recommendations to be presented to improve the issues raised. After evaluating solutions (options for change), you will decide on one or two final recommendations for implementation.
    - Your recommendation(s) must align with the issues raised. Will it fix/improve what you discussed? The use of legal criteria is essential.
    - Justification is essential – how do you know they could work? Sometimes it is worth identifying the costs of the implementation, but then clearly outlining how the benefits will outweigh this.
    - Think of your recommendation as a recipe for a cake; for example, it will not be enough to state that the

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recommendation for a first birthday party should be a chocolate cake. Provide the details of the cake such as ingredients, cooking time and decorations.

- Structure:
  - Introduction
    - Clearly state the topic being argued/investigated.
  - Body: the legal application
    - Key concepts and legislation
    - Stakeholder perspectives
    - Issues being faced:
      - Is it effective in achieving justice? Why/why not?
      - Evidenced-based approach (How do you know it is an issue? How extensive is it?)
    - Possible solutions
      - Weigh up the options
    - Recommendation (see page xv) using legal criteria
  - Conclusion
    - Summary of your findings/argument
  - Bibliography/reference list.

Examination strategies: The importance of preparation and planning

Exams can be stressful. The unknown questions, time constraints, unseen stimulus or a desire to perform can lead to feelings of pressure. Being prepared and confident with the subject matter prior to an examination can help to alleviate exam-related stress and help to ensure that you can perform at your best. Taking the time to complete revision or past exams is a valuable exercise to equip you with the ability to demonstrate deep knowledge, understanding, analysis and evaluation in a time-constrained situation, and with new or novel scenarios or stimulus. Legal Studies has a large volume of content and requires you to be able to apply legal concepts, processes and information, not just recall and describe it.

The current Legal Studies General Syllabus requires you to sit two combination response examinations, one internal and one external, each worth 25%. This means that 50% of your Legal Studies results are derived from examinations. In a combination response, you will be required to respond to a variety of short- and extended-response questions. Short-response items are designed to assess the comprehension objective and can be diagrams, sentences and/or paragraphs. Extended-response items are designed to assess analysis and evaluation in response to unseen stimulus. In order to maximise your potential for success, you will need to have a clear strategy and approach for:

- how you will best use your time and resources before the exam for preparation to ensure that you have the adequate depth and breadth of knowledge and understanding required
- how you will utilise the planning time allotted at the start of the exam to set yourself up for maximum success and how you map out completing the exam
- how you will create and construct your responses to ensure they demonstrate the attributes and objectives of the examination instrument and are discerning and clear in their meaning.

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Preparation strategies

- Ensure you are familiar with the syllabus objectives and the cognitions attached to these so that you understand exactly what skill you are required to demonstrate and the context of each question.
- Utilise your revision strategies throughout the course to ensure you have the depth and breadth of subject matter. You will not be able to demonstrate depth in understanding, analysis or evaluation if you are relying on your short-term memory of the concepts; you need to engage with continuous revision to ensure core content is in your long-term memory. Being confident with the subject matter and being able to apply your knowledge in a range of situations means that you will be able to spend time constructing your responses and ensuring you answer the questions, and not in trying to recall or remember key information.
- Read through the unit outlines and subject matter details in your syllabus documents to ensure you understand the context and scope of the topics you are learning.
- Create your own study guide in a separate exercise book. Take the subject matter from the syllabus and create a page for each topic or concept, then as you learn about these, use your study guide to record revision notes and key learning for you to come back to during your regular revision.
- Rewrite practice or revision questions into different formats or expressions. This can help you to draw connections between the different cognitions, the way that questions might be worded and the triggers that can lead to the same content. For example, if the question is 'Explain the doctrine of the separation of powers', you might brainstorm how you could reword this to the following variations:
  - Explain the relationship between the legislative, executive and judicial arms of power.
  - Explain why the government is separated into three arms.
  - Explain the differences between separation and levels of power.
  - Describe the role and function of the three arms of the government.
  - Outline a constitutional check and balance that prevents one arm of the government obtaining absolute power.
- Complete practice exams and revision test questions throughout the course, and keep revisiting and editing them as your understanding on a topic or the interrelationship between different concepts deepens.
- Swap revision answers with a peer and take the time to mark each other's work, then make suggestions or teach each other about the key concepts missed in answers.
- Test yourself.
- In the days leading up to the exam, ensure that you have checked the date, time and location of your exam, that you have all the necessary resources and that you eat and sleep well.

Planning strategies

- The fifteen minutes of planning time that you are given at the start of your exams is crucial for ensuring you have a chance to read the questions and plan your approach. It is important that you use this time productively.
- Read the instrument specific marking guide to ensure you know how the marks will be allotted to each question or section. This will help you to decide how much time to spend answering each question and can give indications or reminders of what to include. For example, one of the descriptors in Analyse is 'interpretation of legal information to perceptively examine different viewpoints and their consequences'. This reminds you to look at more than one viewpoint from different perspectives and beliefs and to consider the implications, both positive and negative, of each viewpoint.
- Read all of the questions thoroughly. This will help you to get an understanding of the scope and scale of the exam in its entirety

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and also allow you to plan an approach to answering the questions.
- Decide and make a note of the order you will answer questions in and the time allocations you will give to each question. You might choose to start with the questions you are most confident with or the ones you find most challenging. Either way, you must stick to the time allocations and ensure you attempt every question.
- Ensure you understand exactly what each question is asking by highlighting the key content and the cognitive verb or cognition. For example, in 'explain the doctrine of the … ', the cognition is 'explain' and the subject matter is 'doctrine of precedence'.
- Do a 'brain dump' of all your mnemonics, acronyms and memory triggers on to your planning paper so that you can refer back to them throughout the exam. Once you have written these down, you can also allocate each to the question number for which they are relevant.
- Carefully read and annotate the stimulus, make sure you have interpreted each piece, have made notes of the viewpoints presented and/or the alternatives raised and have identified the relevance of each piece of stimulus to the question.
- Highlight stimulus quotes or information that you might refer to specifically in your response.
- Plan your response or brainstorm the content you will include in your response. For example, using the same response, you might jot down to include:
  — legislative, executive, judicial
  — division of powers to limit absolute power
  — limitation in Australia due to overlap
  — *Australian Constitution Act 1901* (Cth).
- When planning your extended-response answer, do a quick outline of the main points of the response, ensuring you cover all facets of the question. Most questions will have more than one element or focus so you must ensure you carefully read the question to answer all elements.

Response strategies

- Remember that the purpose of the exam is for you to demonstrate your understanding and application of the content, so your responses need to show your ability to implement and apply the knowledge in your own words and not just regurgitate textbook definitions.
- Carefully read the instrument specific marking guides to ensure you understand how your responses are marked according to the criteria.
- Use the lines and allocated space as a guide for the amount of depth each question requires.
- Have a clear idea of the structure you are going to use for each of your responses; for example, your structure for short-response answers could be definition, description, example or evidence, purpose and relevance to context.
- Start responses with a paraphrasing of the crux of the question or a definition of the key legal concepts.
- Support explanations with evidence and examples such as legislation and case law to demonstrate comprehension and understanding of key concepts in context.
- Take care with your spelling, grammar and punctuation while you are writing your responses. This will help to ensure that your answers are readable and will reduce the chance that the meaning is lost or misrepresented through errors and mistakes.
- Ensure you utilise all of the time available. If you finish early, go back over all your questions and responses again to check that your answers read well, that they directly address the question and are free of spelling and grammar errors.
- If you find yourself running out of time, put as much as you can down in dot points. You may not get full marks for communicating, but you may collect marks for the content, recommendations or justification you jot down.

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Summary

Revision strategies

- Regular revision will greatly help you to retain the key information you learn
- Try to review notes at the end of each day as well as weekly
- Useful tools to aid revision include study cards, graphic organisers, mnemonics, acronyms and memory triggers, reviewing questions from each Legal Studies lesson.

Tackling assessment tasks in Legal Studies

Strategies for the argumentative essay and inquiry report

- Both assessment types are a form of written extended response and follow the same general conventions. However:
  - An argumentative essay requires you to put forth an argument and to present different viewpoints
  - An inquiry report is a summary of research into an area of law and the issues involved
- Refer to your task sheet regularly to understand what is expected of you
- Have a strong understanding of QCAA cognitive verbs
- Seek feedback: ask a peer or parent/guardian to read your written work to ensure it flows well
- Use of language: use subject-specific vocabulary and write in the third person
- Referencing: use in-text referencing and a bibliography
- Recommendations: present recommendations to improve the issues raised
- Structure: follow the approach presented on page xvi.

Examination strategies

Preparation strategies

- Revise the Legal Studies syllabus, especially the unit outlines, objectives and cognitive verbs
- Create your own study guide based on the syllabus
- Use your revision strategies to ensure success – this is where your hard work pays off
- Complete practice exams, tests and review questions from across the course.

Planning strategies

- Carefully read the instrument specific marking guide
- Read each question closely
- Decide on the order in which you will answer questions
- Write out your mnemonics, acronyms and memory triggers
- Highlight the key content including cognitions in each question
- Highlight or annotate the key content in any stimulus materials
- Plan out your extended response structure.

Response strategies

- Use the lines and allocated space in the exam paper as a guide for the amount of depth each question requires
- Start with a paraphrasing of the crux of the question or a definition of key legal concepts
- Support explanations with evidence and examples such as legislation and case law to demonstrate comprehension and understanding of key concepts in context
- Take care with your spelling, grammar and punctuation while you are writing your responses
- Ensure you use all of the time available
- If you finish early, go back over all your questions and responses again to check that your answers read well, that they directly address the question and are free of spelling and grammar errors
- If you find yourself running out of time, put as much as you can down in dot points.

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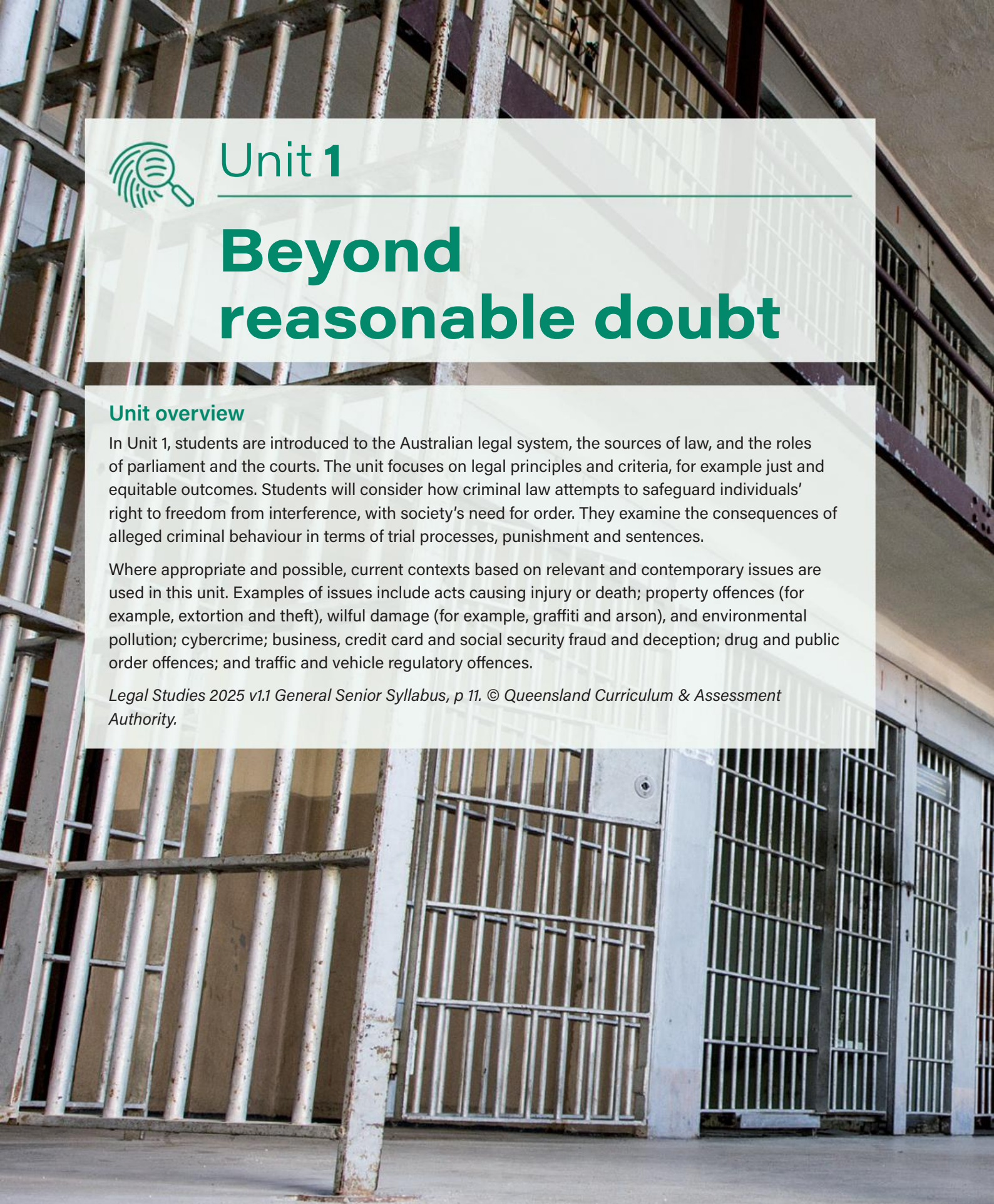

Unit 1

Beyond reasonable doubt

Unit overview

In Unit 1, students are introduced to the Australian legal system, the sources of law, and the roles of parliament and the courts. The unit focuses on legal principles and criteria, for example just and equitable outcomes. Students will consider how criminal law attempts to safeguard individuals' right to freedom from interference, with society's need for order. They examine the consequences of alleged criminal behaviour in terms of trial processes, punishment and sentences.

Where appropriate and possible, current contexts based on relevant and contemporary issues are used in this unit. Examples of issues include acts causing injury or death; property offences (for example, extortion and theft), wilful damage (for example, graffiti and arson), and environmental pollution; cybercrime; business, credit card and social security fraud and deception; drug and public order offences; and traffic and vehicle regulatory offences.

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Unit objectives

By the end of this unit, students should be able to:

1. Comprehend legal concepts, principles and processes of the Australian and Queensland legal systems, with a focus on criminal law.
2. Select legal information from sources relevant to the Australian and/or Queensland criminal justice systems.
3. Analyse legal issues involving the Australian and/or Queensland criminal justice systems.
4. Evaluate legal situations relevant to the Australian and/or Queensland criminal justice systems.
5. Create responses that communicate meaning to suit the intended purpose.

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Concept map

In Unit 1 of the QCAA Legal Studies course, we will cover the following topics and content:

Beyond reasonable doubt

Legal foundations

- The rule of law
- Influences on the law
- Separation of powers
- Statute and common law
- Just and equitable outcomes
- *Constitution Act 1901* (Cth)
- *Criminal Code Act 1899* (Qld)
- *Acts Interpretation Act 1954* (Qld)

Criminal investigation processes

- Types of offences
- Rights and responsibilities
- Police discretionary powers
- Rules of evidence
- *Police Powers and Responsibilities Act 2000* (Qld)
- *Youth Justice Act 1992* (Qld)

Criminal trial process

- Court proceedings and personnel
- Trial by jury
- Full and partial defences
- Appeals processes
- Alternatives
- Due process
- *Jury Act 1995* (Qld)
- *Evidence Act 1977* (Qld)

Punishment and sentencing

- Theories of punishment
- Application of precedent
- Sentencing trends
- *Penalties and Sentences Act 1992* (Qld)

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Chapter **1** Topic **1**

Legal foundations

Chapter overview

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 law.
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Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including jurisdiction, code, justice, equitable outcomes, rule of law, crime, statute law, common law, customary law, onus/burden of proof, standard of proof, arms of government (legislative, judicial and executive), division of powers (residual, concurrent and exclusive), the Australian Constitution, doctrine of precedent, adversarial systems and inquisitorial systems.
- Describe the
  - concept and elements of the rule of law
  - separation of powers doctrine in the Australian legal system
  - difference between onus of proof and standard of proof
  - court hierarchy in Australia and Queensland
  - difference between adversarial and inquisitorial systems of criminal justice.
- Explain
  - the purpose of laws within society
  - the difference between a rule and a law
  - concepts of just and equitable outcomes as a foundation principle of criminal law in Australia
  - characteristics of an effective law, e.g. known to the public, acceptable in the community, able to be enforced, and carry specific penalties or punishment that apply to all
  - sources of law in the Australian legal system and the relationship between common law and statute law
  - the process of statutory law-making, and the role of states, territories and the Australian Government
  - the process of statutory interpretation and the role of courts
  - legal criteria for justification of a recommendation/s.

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- Analyse a range of criminal legal issues to determine the nature and scope of the issue and then examine different relevant viewpoints and their consequences, e.g. scenarios that include crimes that are overt (wilful damage, assault).
- Analyse the role of customary law in Australia's legal system to determine the nature and scope of the issues involved, then examine different relevant viewpoints and their consequences.
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

- *Acts Interpretation Act 1954* (Qld)
- The Charter of the United Nations 1945
- *Commonwealth of Australia Constitution Act 1901* (the Australian Constitution)
- *Crimes Act 1914* (Cth)
- *Criminal Code Act 1899* (Qld)
- *Evidence Act 1977* (Qld)
- *Jury Act 1995* (Qld)
- *Penalties and Sentences Act 1992* (Qld)
- *Police Powers and Responsibilities Act 2000* (Qld)
- *Youth Justice Act 1992* (Qld)

Significant cases

This topic will include the following cases:

- *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256
- *Donoghue v Stevenson* [1932] AC 562
- *Harvester Judgment Ex parte McKay* (1907) 2 CAR 1
- *R v Minor* (1992) 59 A Crim R 227
- *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, 17 December 2012)

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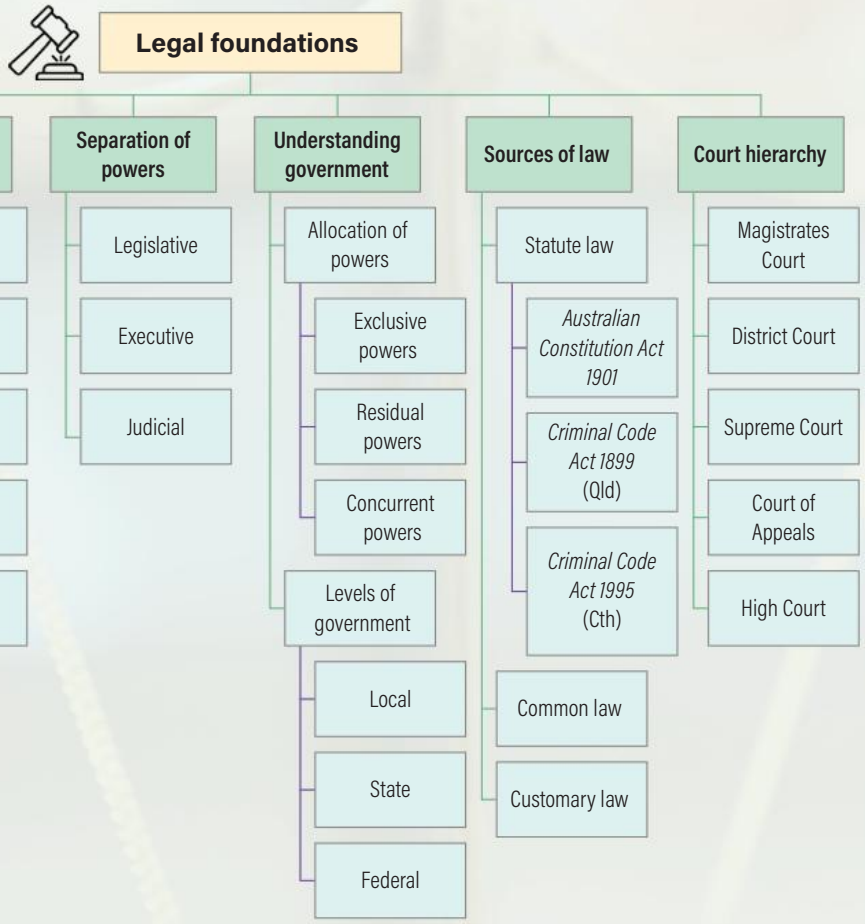
Concept map

In Topic 1 of Unit 1 of the QCAA Legal Studies course, we will cover the following content:



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1.1 Rules and laws in society

Rules and laws

Rules and laws are a part of daily life. They establish rights and responsibilities to regulate how individuals and groups conduct themselves in society by establishing legal requirements or restrictions on behaviour. There are many different legal and non-legal rules and regulations to abide by, so citizens need to understand where rules and laws originate, their importance and the impacts on society of their rights and responsibilities.

Australia is considered a parliamentary or **constitutional monarchy**. This means that the British monarch, currently King Charles III, serves as the ceremonial head of state but is represented locally in each nation by the **Governor-General**. Within this framework, or in any society, rules and laws are essential to maintain order, protect individual rights and define the powers and responsibilities of those within society. Rules and laws are designed and enforced to ensure the consistent and fair governance of the nation, reflecting the shared values and expectations of the Australian people.

Individuals need to understand their role in electing the government, as it is those elected to represent society that determine the rules and laws that govern. A government elected by the people for the people is a **democracy**. Those who live in democratic countries must not take for granted their right to vote when they turn 18 but rather take seriously their major role in the democratic process. This responsibility requires citizens to vote for a member of parliament who will best serve their interests in governing society and informing the rules and laws. Informed citizens understand the world in which they live, respect and reflect on laws, and seek change to benefit society.

constitutional monarchy a system in which the king or queen's power is severely limited, because they act only on the advice of the politicians who form the government

Governor-General the chief representative of the Crown in a Commonwealth country

democracy government by the people, directly or indirectly, through a system of representation, usually involving periodically held free elections

Check this out

Search for the 'I Side With' website and view the current polls. Discuss the contemporary legal issues being polled and the responses to each issue.

Parents, guardians, schools, sporting clubs and associations make decisions about safety and needs every day. These decisions, called **rules**, can range from very basic to very formal. Rules made by governments to ensure that our society functions properly are referred to as **laws**. Laws cover almost every aspect of our lives. There are laws that regulate how we use our roads, how we buy and sell goods, what we can and cannot have in our backyards and how we resolve conflict, as well as laws that ensure our individual rights are protected.

rules the decisions your parents, guardians and school make about your safety and needs

laws rules that are made by government to ensure that our society functions properly

Figure 1.1 Legal and non-legal rules regulate how individuals and groups behave.

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Review 1.1

1 **Classify** the following as rules or laws:
   - **a** wearing a school uniform
   - **b** wearing a helmet when riding an e-scooter
   - **c** speed limits around school zones
   - **d** punching someone in the head
   - **e** lining up at the supermarket checkout
   - **f** not starting a race until a gun is fired
   - **g** attending school.

2 **Create** a list of as many rules and laws as you can that may have affected your life in the last couple of days. **Discuss** the validity of each of the rules or laws identified.

3 **Create** a one-paragraph response to **explain** the function of law and why both rules and laws are necessary in a society.

Influences on the law

Regardless of their age, race, sex, cultural or religious background, most people believe that there are certain ways in which people should behave and treat others. Laws are a formalised version of these beliefs, enacted to regulate, protect and balance the rights and responsibilities of citizens in a society. In Australia, the law aims to reflect the moral, ethical, political, economic, social and cultural influences of the society as a whole.

At times, moral and ethical standards seem to be at odds with modern-day society and with some minority groups within society; however, these laws aim to guide citizens on how to behave, to offer protection, maintain order and ensure justice. As such, the law must constantly change to reflect the values of the people who created the law and those who live in this country.

As societal **viewpoints** change over time, so too does the law in recognition of the changes that have occurred in people's beliefs and values. External factors, such as advances in technology and national emergencies, have also brought about changes.

viewpoint an attitude or opinion, or the circumstances of an individual, group or stakeholder that contribute to an attitude

Research 1.1

Go to the Queensland Government's Queensland Legislation website and click on the link 'Acts as passed' at https://cambridge.edu.au/redirect/10461. This will open a page with a list of letters and years. Click on this current year to see the Acts that have recently passed. Select one law to use for the research activity.

1 **Describe** the purpose of the law that you have selected.

2 **Conduct** research and **identify** what pressure groups may have influenced the law selected.

3 **Explain** any influences on the law that may have led to this law.

4 **Explain** why it is important that pressure groups exist within our democracy.

5 **Create** a short multimodal response using visual evidence to **explain** the findings of your research and the influences that drove the need for the selected law.

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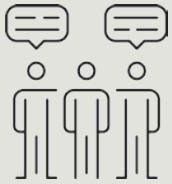
Social



As our society discusses and questions certain topical issues through the many different avenues available to it, especially through the media and social channels, pressure is put on governments to act to ensure that our laws reflect the current needs of citizens.

Moral

We all make decisions about what we believe is right or wrong. A number of different factors shape our moral beliefs such as our parents, religious influences, cultural heritage, education and peers. These and many other factors can have influence on our moral make-up. Debates about artificial intelligence, capital punishment, euthanasia and embryonic stem-cell research are often based on moral beliefs. How the law deals with such complex issues is important, particularly regarding the moral and religious influences that are evident in areas such as criminal law and family law.

Economic

The passing of some laws can either be a response to economic circumstances or have some form of economic impact on our society. These may be influenced by lobby groups such as large multinationals, for example, Shell, Apple, Microsoft or Coca-Cola. Economic influences can take other forms as well. Our law-makers can be influenced by economic market factors such as inflation, interest rates and the stock market.

Political

At local, state and federal levels of government, the governing party of the day influences the types of laws passed. Different lobby groups (e.g. peak bodies that represent certain industries or business) place external pressures on the governing party to try to persuade the them to amend or make new laws on certain topics that will provide the best outcomes for the bodies they represent.

Cultural

As Australia has adopted a traditional British system of law (the Westminster system), this has had a strong influence on our society, especially our parliamentary and legal system. To ensure that fairness exists between different cultural groups in Australia, certain pieces of legislation have been passed. These include the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth).

Figure 1.2 Influences on the law drive change to reflect viewpoints and values of society.

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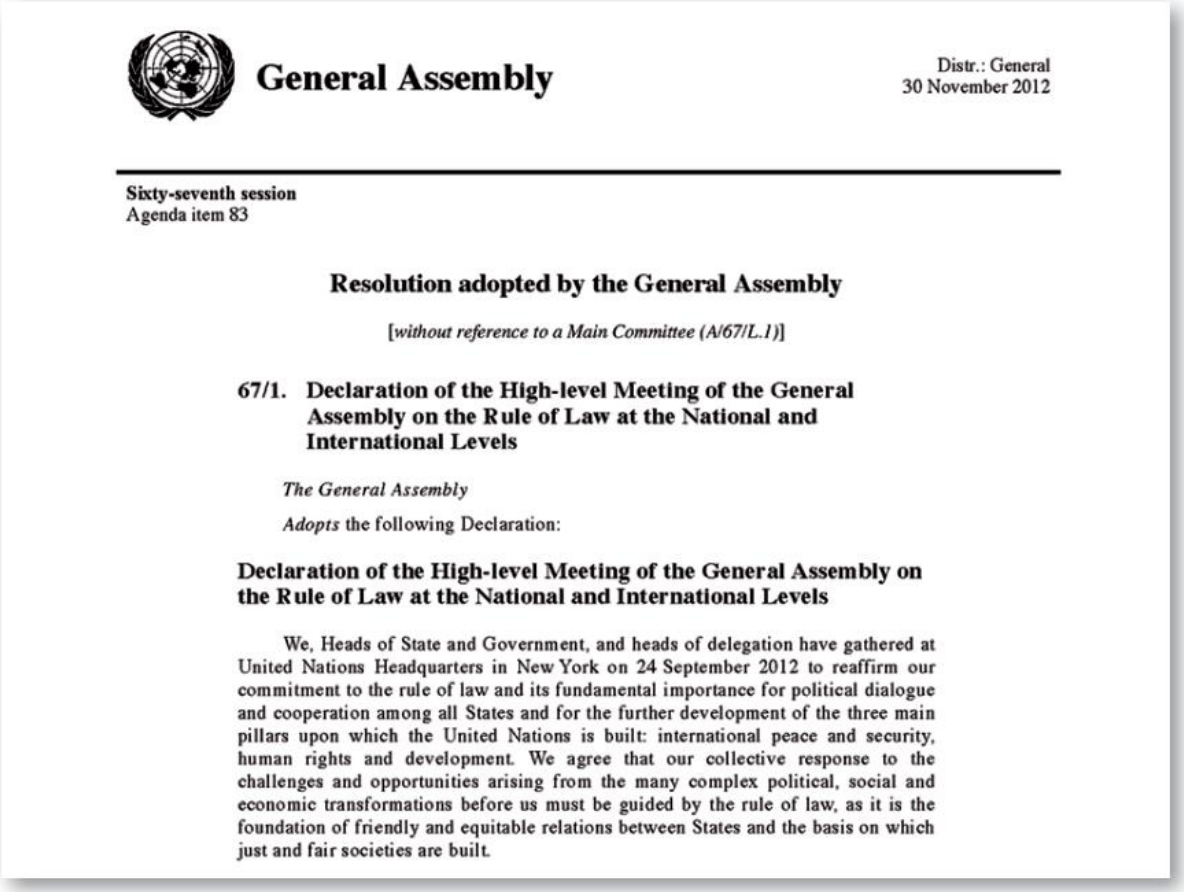
1.2 The rule of law

The **rule of law** is the underlying principle that all people and institutions are equally subject to and accountable to the law. Democratic societies, including Australia, adhere to this principle to ensure governments exercise the appropriate authority and that they themselves abide by the law. As a result, no individual or group is beyond the law, no one can be convicted of a crime without a proper trial using established and valid laws, and the law must be fairly applied and enforced to all. The rule of law is fundamental to the democratic principles of a fair society and to ensuring just and equitable outcomes for all.

rule of law the principle that all people are subject to the law and equal before the law



General Assembly

Distr.: General
30 November 2012

Sixty-seventh session
Agenda item 83

Resolution adopted by the General Assembly

[*without reference to a Main Committee (A/67/L.1)*]

67/1. Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels

The General Assembly

Adopts the following Declaration:

Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels

We, Heads of State and Government, and heads of delegation have gathered at United Nations Headquarters in New York on 24 September 2012 to reaffirm our commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development. We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.

Figure 1.3 The Declaration of the High-Level Meeting of the United Nations General Assembly on the Rule of Law at National and International Levels, adopted on 24 September 2012. According to the United Nations, 'the rule of law applies to all States equally … all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.' (*Source:* United Nations.)

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The concept of the rule of law was first embedded within the Charter of the United Nations, signed in 1945 before the United Nations was formally established, to outline the purpose and principle of governance. It was then reaffirmed and given a central place in the Universal Declaration of Human Rights, signed in 1948. On 24 September 2012, all member States, non-government organisations and civil society represented at the highest level attended a high-level meeting to commit to strengthening the rule of law. With the consensus of a declaration, member States confirmed their commitment to the rule of law and expanded on the efforts required to maintain different aspects of the rule of law.

> ' … 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.'

Figure 1.4 Understanding the rule of law (*Source:* Geoffrey de Q. Walker, *The rule of law: foundation of constitutional democracy*, 1st ed., 1988.)

The United Nations website describes the rule of law as:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Figure 1.5 The United Nations' definition of the rule of law (*Source: What is the Rule of Law*? United Nations)

Figure 1.6 Rule of law wheel (*Source:* © Rule of Law Education Centre 2024)

Review 1.2

1. **Discuss** whether all principles in the rule of law wheel are of equal importance to ensure that the law is fairly applied and enforced.
2. **Create** a one-paragraph response to **communicate** two benefits of the rule of law.

Characteristics of effective law

To meet the rule of law objectives and ensure that all people and institutions are equally subject to and accountable to the law, new laws or amendments must be evaluated before enactment to ensure they are effective laws.

- **Laws must be *clear*.**
  In order for the public to be well informed about all laws, they must be written clearly so they are understood easily. If laws are

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too complicated or contain ambiguity, then uncertainty and confusion may follow. An effective law is clear and easily accessible. The law must also be flexible enough to be changed in order to keep up with the changes in society; for example, laws must be able to keep up with advances in technology to ensure that ambiguity does not arise from a lack of clarity in evolving areas of society.

- **Laws must be *known*.**
  An effective law must be known to the public. For a law to be enforceable, the public must know about it. If people do not know about the new law, they will not be able to follow it. A person can only be found guilty of committing a crime if their actions were illegal at the time. Retrospective laws or laws that change what was legal or illegal in the past should not be created or applied after the fact.
- **Laws must be *accepted* by all citizens.**
  An effective law must be acceptable to the community. While laws need to change with the times, it is important that there is not too much change all at once, which can lead to confusion. If the law was changing constantly, no one would be certain what the law was and there would be chaos. The law also needs to be seen to be in support of society as a whole and applied fairly to all, therefore is acceptable to the community. If a law is not in line with community values, then people may be inclined to disregard the law.
- **Laws must be seen to be *applied fairly*.**
  An effective law must be able to be enforced and must carry specific penalties or punishments that apply to all. If the law is broken, there needs to be a reasonably high likelihood that the person responsible for breaking the law will be caught and punished. An effective law must be enforceable; that is, if people break the law, they must be able to be caught and brought to justice.

1.3 Sources of law

Sources of law are the written and unwritten origins of law from which legal 'norms' or accepted practices are determined. The sources of law identify where the principles and regulations that govern a country are derived from. In Australia, the two main sources of law are **statute law** and **common law**. Laws that are made by parliament and written into Acts of Parliament are referred to as statute law or **codes**.

During the Middle Ages, much of English law was **customary law**. Originally, customary law was not written down but simply developed through practice and common agreement. Customary law may have existed and been practised for hundreds or even thousands of years without having been written down.

statute law the most common form of law within our society, which is a law passed by parliament that can cover any topic and it takes precedence over common law

common law the body of laws made through legal custom as well as the decisions of the courts – as distinct from statute law; also referred to as judge-made law

code a written form of the laws of a society; may also indicate appropriate sanctions for a breach of the code

customary law the practices and systems among First Nations peoples that have developed over time, regulating behaviour and connecting people with each other and the land through a system of relationships

In many societies, most customary law is never written down – as is the case with Aboriginal and Torres Strait Islander societies – while in other societies customary law is eventually transferred

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into written law in complex and formal legal systems. Customary law in Queensland consists of principles and procedures that have developed into rules and laws through general usage according to the customs of a people, a **State** or a group of States.

State a country recognised as having legal standing under international law as they have a defined territory, one government and a permanent population coupled with the ability to enter into relationships recognised by law with other States

Customs arise to deal with problems in the most harmonious way. These customary laws represent accepted practice that operates within a recognised place or community to regulate human behaviour and mandate specific sanctions for non-compliance.

Three areas in which customary law has had an impact on the Australian legal system are:

- Aboriginal and Torres Strait Islander customary law
- English customary law
- international customary law.

The Australian Law Reform Commission (ALRC Report 31) shows that customary law issues tend to be argued in the more serious cases – for example, aggravated assaults and homicides – and to a much lesser extent in the case of minor property and public order offences.

Common law is comprised of legal custom as well as **case law** or judge-made law, also referred to as **precedent**. This is based on judges making decisions about issues that arise in court. The **doctrine of precedent** is an important principle and connects statute law and common law through the courts because it ensures that consistent decisions are made and society sees that the law has been applied fairly.

In criminal law, common law is relevant as a source of law when a situation arises where law has not been codified through statute or parliamentary law.

case law the principles of law arising from judicial decisions as distinguished from statute law; also termed common law

precedent rule or principle established in a previous legal case that is either persuasive to or binding on a court when it is deciding subsequent cases with similar facts or issues

doctrine of precedent a legal principle that obligates courts to follow and apply the legal decisions and interpretations established in prior cases of higher or equal authority when deciding similar future cases

legislation a law or body of laws formally made by parliament

In a particular criminal case, *R v Minor* (1992) 59 A Crim R 227, in which the accused pleaded guilty to two manslaughter charges, the trial judge sought to take into account that the accused would receive a form of 'payback', which involved being speared in the leg, as a consideration for early release from prison. It is also important to note, Mildren J and Martin J and Chief Justice Asche concurred with the trial judge that while they do not condone the customary element of payback, that it was inevitable and so took it into consideration in their ruling to allow the local community to heal and move forward expeditiously.

Table 1.1 Sources of law

Written sources of law	Unwritten sources of law
Statute law: Written **legislation** made by parliament in the form of Acts, statutes or codes.	Common law: The body of law made through legal custom as well as the decisions of the courts – as distinct from statute law.
Case law: Legal principles and rules established through court decisions, serving as precedents for future cases in common law jurisdictions.	Customary law: Rules, including ceremonies, songs, stories, governing a way of life by a system of beliefs.
International treaties: Rules and principles governing relations between States and international organisations, shaping global cooperation and conflict resolution.	

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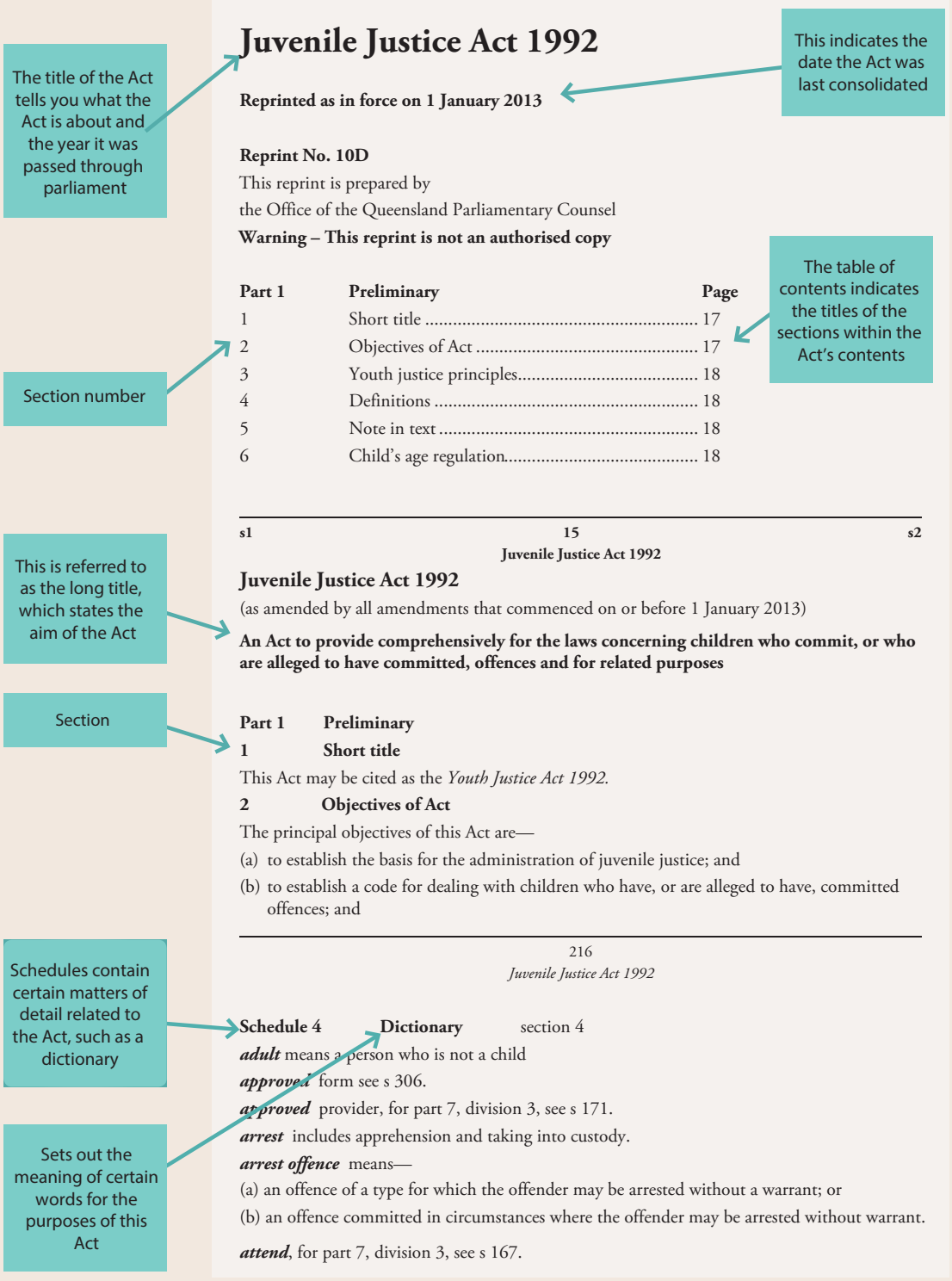
Reading the legislation

When an Act is drafted, it is divided into parts, which assists you to quickly find what you are looking for. Often, a definitions section is included at the beginning of the Act or a dictionary section is included in a schedule at the end of the Act.



Juvenile Justice Act 1992

Reprinted as in force on 1 January 2013

Reprint No. 10D
This reprint is prepared by
the Office of the Queensland Parliamentary Counsel
Warning – This reprint is not an authorised copy

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Juvenile Justice Act 1992

Juvenile Justice Act 1992

(as amended by all amendments that commenced on or before 1 January 2013)

An Act to provide comprehensively for the laws concerning children who commit, or who are alleged to have committed, offences and for related purposes

Part 1 Preliminary
1 Short title
This Act may be cited as the *Youth Justice Act 1992*.
2 Objectives of Act
The principal objectives of this Act are—
(a) to establish the basis for the administration of juvenile justice; and
(b) to establish a code for dealing with children who have, or are alleged to have, committed offences; and

216
Juvenile Justice Act 1992

Schedule 4 Dictionary section 4
adult means a person who is not a child
approved form see s 306.
approved provider, for part 7, division 3, see s 171.
arrest includes apprehension and taking into custody.
arrest offence means—
(a) an offence of a type for which the offender may be arrested without a warrant; or
(b) an offence committed in circumstances where the offender may be arrested without warrant.
attend, for part 7, division 3, see s 167.

Figure 1.7 Parts of an Act

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Case study 1.1

The case: *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, 17 December 2012)

Figure 1.8 Edwin Djambuy and his wife Sheraldine Yakayaka pleaded guilty to having unlawfully supplied a commercial quantity of cannabis.

Citation

This case was decided in the Supreme Court of the Northern Territory and is an unreported decision. This means the case was not published in legal/case reports (publications that summarise and publish important court decisions) and so may be viewed as less authoritative than a reported decision.

Facts

In December 2012, Edwin Djambuy and his wife Sheraldine Yakayaka pleaded guilty in the Northern Territory Supreme Court before Riley CJ to having unlawfully supplied a commercial quantity of cannabis to people living in the Milingimbi community.

Legal issues

The defendants had pleaded guilty, so the only issues were those relating to sentencing, including whether the court could adopt customary law (Yolngu law) or a combination of Northern Territory and customary law. Specifically, the question was whether section 16AA of the *Crimes Act 1914* (Cth) prevented the judge from imposing what was argued to be a lesser sentence by applying Yolngu law.

Matters to which the court do have regard when passing sentence – Northern Territory offences:

1 In determining the sentence to be passed, or the order to be made, in relation to any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:
   - **a** excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates
   - **b** aggravating the seriousness of the criminal behaviour to which the offence relates.

Legal arguments

The prosecution argued that section 16AA of the *Crimes Act 1914* (Cth) applied to prevent the court from imposing a 'punishment that leads to the rehabilitation that may include ostracisation from the community and being sequestered in a place where the community or the elders have deemed it appropriate for them to serve out their time as community punishment ... would offend the rule ... in lessening the seriousness of the criminal behaviour.'

The defence argued that the court should accept a role for Yolngu law as part of the punishment. The defence called a senior lawman to give evidence and to outline what conditions Yolngu law would impose. The court was told that the application of Yolngu law would involve a punishment of being banished to an isolated 'prison' under the supervision of Elders.

The specific issue was who should supervise the proposed suspended sentences.

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Decisions

The judge indicated that he regarded Mr Djambuy as being more culpable, and that he would have sentenced him to imprisonment for 16 months, but taking into account his guilty plea, he sentenced him to 12 months' imprisonment to be suspended after 28 days. In respect of Ms Yakayaka, the judge indicated that he would have sentenced her to 12 months' imprisonment but for her guilty plea. She was sentenced to eight months' imprisonment, to be suspended immediately. Mr Djambuy's suspended sentence was to be supervised under Yolngu law after he was released from prison in 28 days.

Ratio decidendi (reason for the decision)

The judge decided that imposing a punishment incorporating Yolngu law 'doesn't lessen the seriousness of the criminal behaviour, it provides a consequence of the behaviour, which doesn't make it less serious but shows that they are being dealt with or they have consequences'.

Obiter dicta (something to think about)

Mr Djambuy's suspended sentence was not to be supervised by NT Corrections as would normally have been the case; instead, the judge accepted the submission that the offenders would be punished and supervised under Yolngu law. The judge said that supervision by NT Corrections was not 'necessary or indeed appropriate', and added, 'I am told that he will be under strict supervision (under Yolngu law) within the community by community members for a significant period and that would seem to me to be an adequate response to any need for supervision in his circumstances.'

Research **1.2**

1 Use Case study 1.1 and your own research to **explain** the role of customary law in Australia by **identifying** the essential elements, features and components of customary law.
2 **Create** a list of the stakeholders, their perspectives and the legal issues that may arise from the use of customary laws in criminal law matters.
3 **Create** a series of short responses (50–150 words each) to **describe** the nature and scope of the drug offence of supply in Queensland. You will need to research to find the necessary information:
   — definition of supply
   — nature of supply
   — scope of supply
   — stakeholders affected by supply
   — customary law and supply.
4 **Create** a one-paragraph response to **evaluate** the role of customary law in Australia's legal system to deal with drug offences to achieve just and equitable outcomes.

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1.4 Separation of powers

In Australia, our system of government is based on the **Westminster system** of government adopted from England at the time of settlement. Westminster is the name given to the system of parliamentary democracy used in countries such as the United Kingdom, Canada, Australia and New Zealand and is named after the area in central London where the parliament of the United Kingdom is located. All state and territory parliaments in Australia follow the Westminster system.

Under the Westminster system of parliamentary democracy, the power to govern is distributed between the parliament, the executive and the judiciary, each with separate responsibilities.

The Australian Constitution defines and sets out the powers and responsibilities of the Australian Government. This separation or division of power is based upon the **separation of powers doctrine**. The idea that the powers of the three arms of government should be separate was to avoid one arm or group having all of the power, which would be counterproductive in a vibrant democracy such as Australia.

Research 1.3

The Nazi government of Adolf Hitler is an extreme example of a modern elective dictatorship. **Conduct** research into the differences between an elective dictatorship and a parliamentary democracy.

Westminster system a system of government, originating in the United Kingdom, the main features of which are a head of state who is not the head of government, and an executive that is drawn from and directly responsible to the parliament

separation of powers doctrine requires that all three arms be separated to ensure that no individual body or person has complete control; the distinct roles of the executive, the judiciary and the legislature are strictly maintained

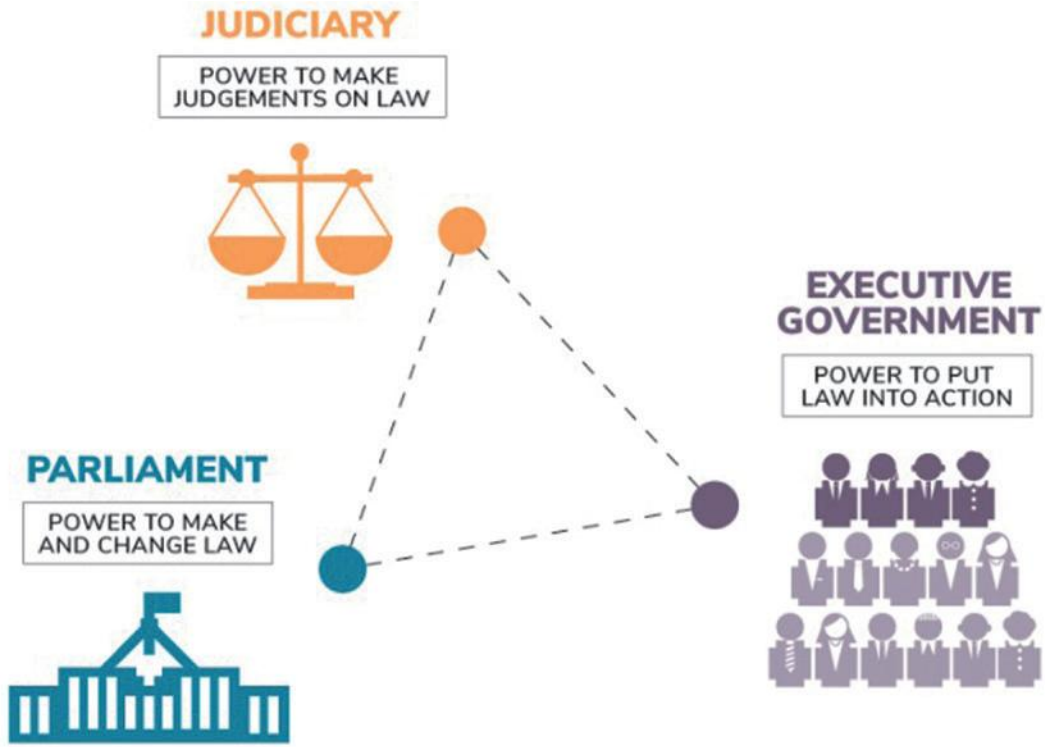

Figure 1.9 Separation of powers (*Source:* Parliamentary Education Office)

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Off the record

The origins of the separation of powers doctrine can be traced back as far as ancient Greece.

It was made popular much later by French philosopher Charles de Montesquieu in 1748 in his work *L'esprit des lois*, meaning 'the spirit of the laws'. He wrote that a nation's freedom depended on the three powers of governance – the legislature, executive and judicature – each having their own separate institution.

This principle has been widely used in the development of many democracies since that time. As Lord Acton put it: 'Power tends to corrupt and absolute power corrupts absolutely'.

Edmund Burke was also aware of the dangers of untrammelled power. Two hundred years ago he wrote that 'in a democracy the majority of citizens is capable of exercising the most cruel oppression upon the minority'.

Discuss what Lord Acton and Edmund Burke meant in their quotes and how this links to the separation of powers. Do you believe that separation of powers is essential in a democratic system of governance? Why or why not?

In the Australian Constitution, Chapter 1 deals with the parliament (ss 1–60), Chapter 2 with the executive (ss 61–70) and Chapter 3 with the judiciary (ss 71–80). The Constitution divided the power to make and manage federal law between these three arms of government.

However, Australia does not have a complete separation of powers, because some of the roles of the parliament, executive and judiciary overlap. For example, the Prime Minister and Cabinet ministers (e.g. Cabinet ministers are typically those ministers who hold the most important portfolios such as Treasury, Defence, Finance and Foreign Affairs – not all ministers are in the Cabinet) are part of the executive and the parliament. High Court judges, the Prime Minister and Cabinet ministers are officially appointed by the Governor-General, who is also part of the parliament and the executive arms of government.

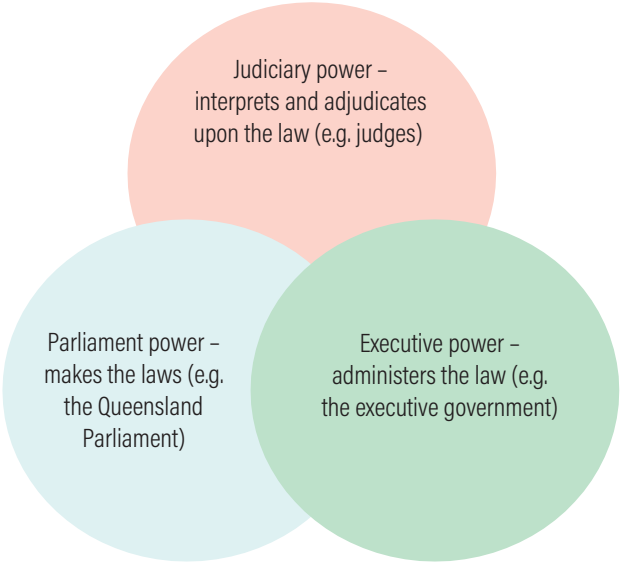

Figure 1.10 Arms of government powers overlap

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Table 1.2 Role and responsibility of the three arms of government

Arm of government	Responsibility	Composition
Parliament	The parliament makes, amends and repeals the law and derives its powers from sections 1–60 of the Constitution.	The parliament (also referred to as the legislature) is made up of the Monarch (represented by the Governor-General), the Senate and the House of Representatives.
Executive	The executive puts the law into action and derives its powers from sections 61–70 of the Constitution.	The executive is made up of the Monarch (represented by the Governor-General), the Prime Minister and Cabinet ministers.
Judiciary	The judiciary makes judgments about the law and derives its powers from sections 71–80 of the Constitution.	The judiciary (also referred to as the judicature) is made up of the High Court and other federal courts.

Source: Adapted from Parliamentary Education Office, Separation of Powers fact sheet.

Section 61 of the Constitution states that 'the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative'. This means that the Governor-General has been given certain powers to act on behalf of the Queen (now King) in the Constitution. However, the role and responsibilities of the Governor-General are also derived from customs and tradition, as the Governor-General is the 'ceremonial' head of state of the Commonwealth of Australia. This means that while executive power is exercised by the Governor-General under the Constitution, this is done on advice from the Prime Minister and Cabinet ministers of the day, who are responsible for governing Australia.

Source: Parliamentary Education Office.

Figure 1.11 Governor-General of Australia, David Hurley, delivers a speech during the state banquet in the presidential palace in Athens, Greece, on 2 May 2023. The Governor-General is the 'ceremonial' head of state of the Commonwealth of Australia.

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1.5 Division of powers

Following the powers allocated in the Constitution, each state has its own parliament and government, and makes laws in relation to areas over which it has control. The powers that are given only to the federal government in the Australian Constitution are known as **exclusive powers**. The remaining powers (the ones not mentioned in the Constitution) were taken over by the states and are referred to as **residual powers**. In some instances, both the states and the federal government have the right to pass laws pertaining to certain areas, such as the environment, health and education. These powers are referred to as **concurrent powers**.

The state parliaments can pass laws on a wider range of areas than the Commonwealth Parliament because they existed before the Commonwealth and had their own separate constitutions; over time, however, the Commonwealth has assumed more authority over state matters. Local councils are given power by way of the states passing Acts of Parliament (Local Government Acts) in each state, which delegate certain authority to local councils.

exclusive powers federal government powers, not shared with states, for example, the power to pass laws in relation to the defence forces and currency regulation

residual powers powers left to the states to pass laws including civil law and urban planning

concurrent powers both the federal and state governments have the power to make laws in areas such as education and taxation

1.6 Statutory law-making and interpretation and the court systems of Australia and Queensland

In Australia, all legislatures and judicatures operate with a constitutional legal and governance system where they enact laws that are in the best interests of the people. The judiciaries have the role of ensuring that this is the case through their interpretation and case law judgments. Australian courts have a long legal history of dispensing ethical justice that is based on consideration of accepted legal principles, doctrines and precedents (case law). In this way, just legal outcomes are achieved that are reflective of the needs and values of contemporary Australian society.

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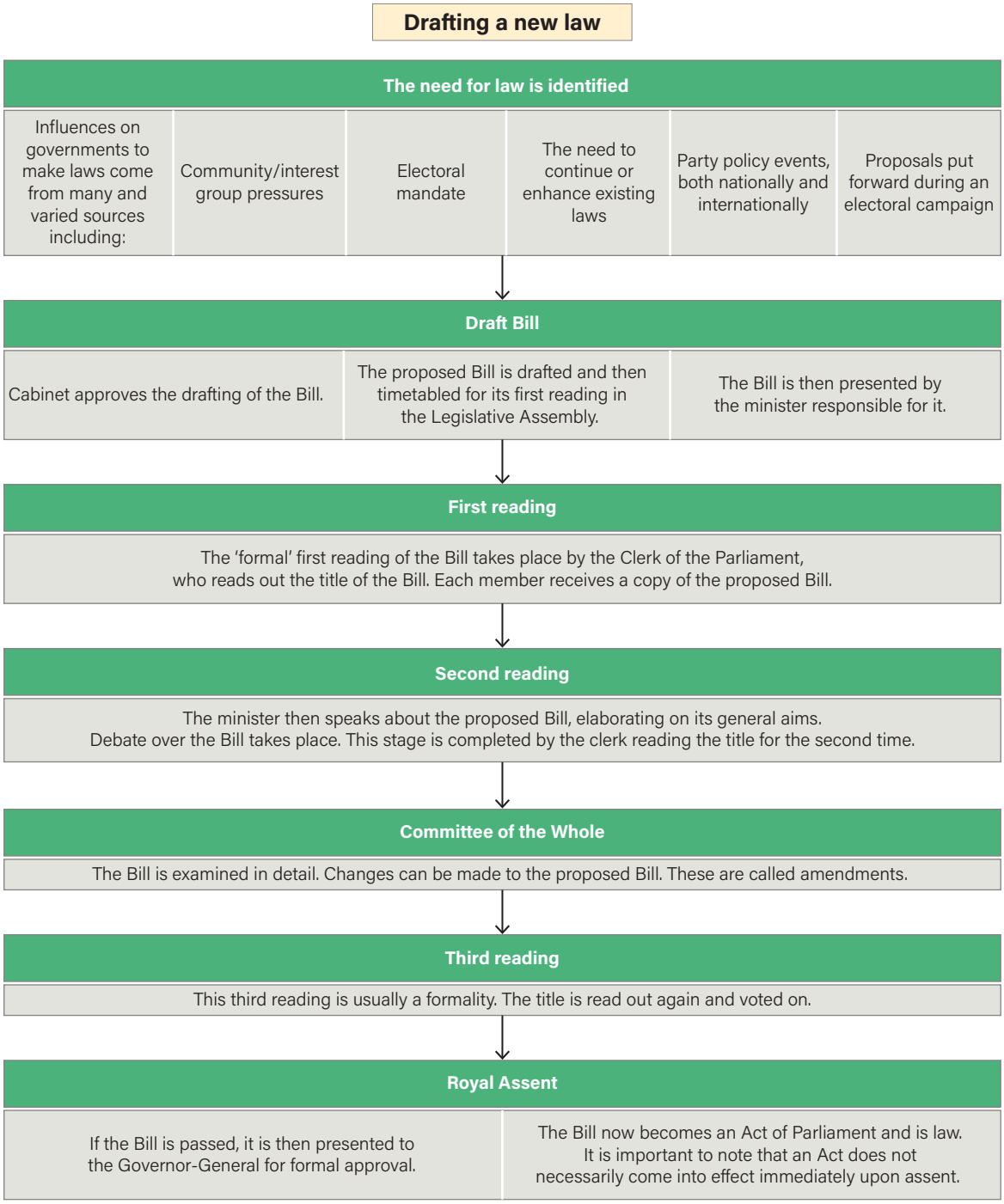

Figure 1.12 Making an Act of Parliament in Queensland

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The court system

The courts have two very important roles to play in the Australian legal system. First, courts are used as a place to resolve disputes. Disputes can range from an argument between neighbours to seeking compensation from someone who has smashed into your car. The role of the courts is also to determine whether or not someone has broken the law and to uphold the laws that apply to society. In criminal law, when a crime is committed and formal charges have been laid, it is the role of the courts to ensure a hearing takes place in the appropriate court. These two different areas are referred to as the court's **jurisdiction**.

jurisdiction the power or authority of a court to hear and try a case, including the geographic area in which a court has power or the types of cases it has the power to hear

The jurisdiction is the authority the court has to hear and to pass judgment on certain types of cases. Many courts have both a *civil jurisdiction* (the authority to hear a civil case) and a *criminal jurisdiction* (the authority to hear a criminal case). Most courts have been given their power by way of an Act of Parliament. For example, the Magistrates Court in Queensland was established by the *Magistrates Court Act 1921* (Qld) and the *Justices Act 1886* (Qld).

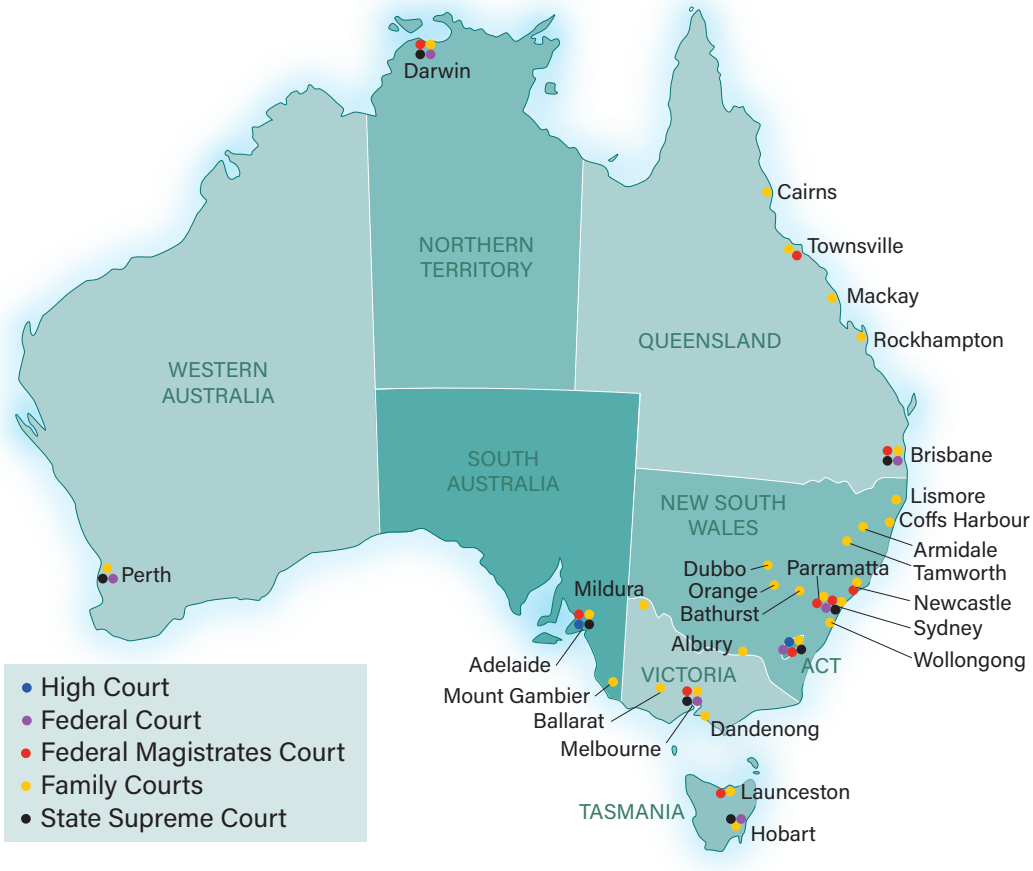

Figure 1.13 Each state and territory court has jurisdiction over certain matters.

Off the record

Discuss the placement of courts and the distribution of each level of court.

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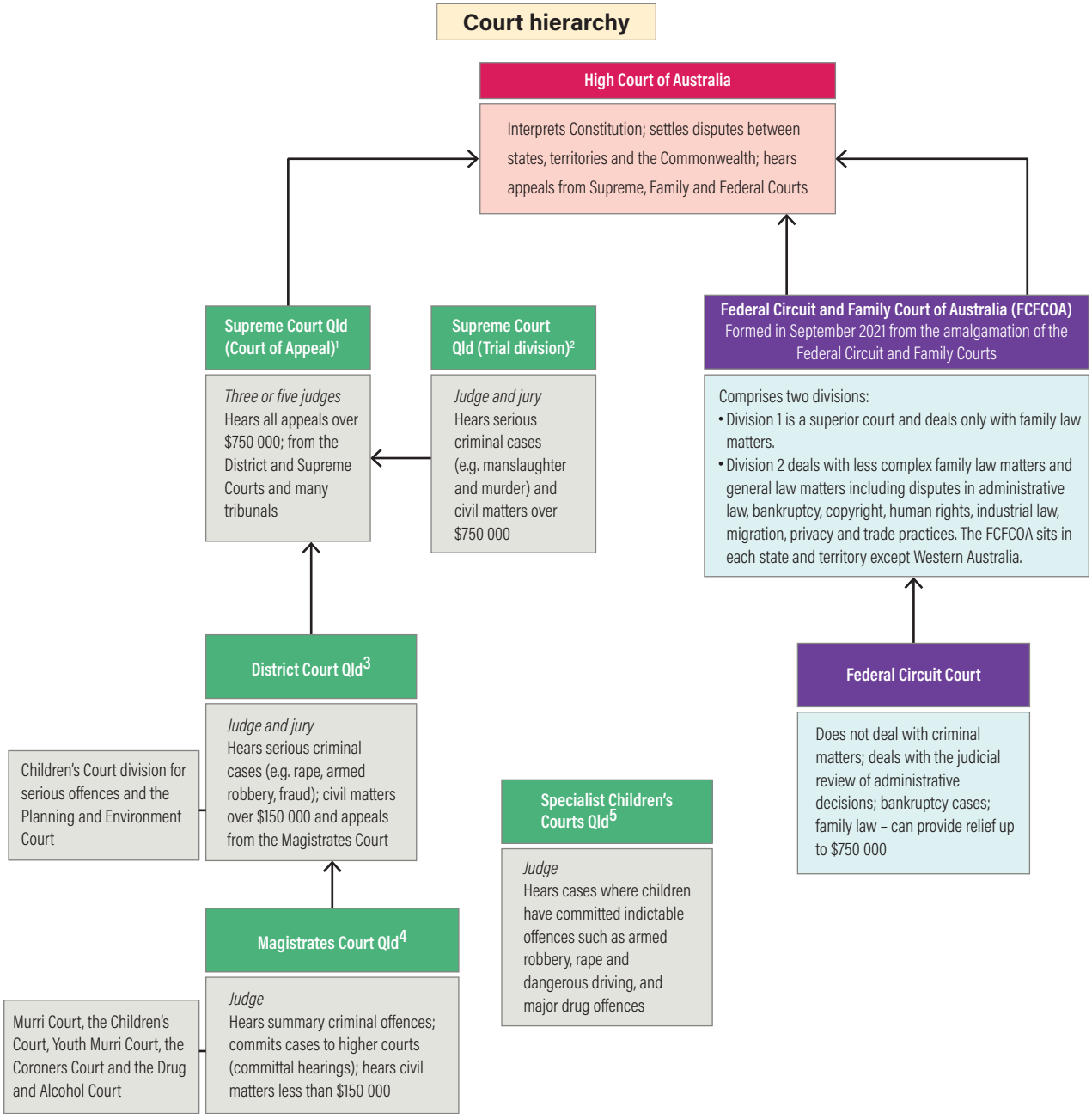

Figure 1.14 Hierarchy of the courts of Australia. This represents the current court structure as of 2024. Note: Refer to the 'Queensland court system hierarchy' section for further detail matching the superscripted numbers in Figure 1.14.

High Court of Australia

The High Court of Australia has two main roles. It hears cases on constitutional matters and it also operates as an appellate (appeals) court.

As the name suggests, the High Court of Australia is the highest decision-making court in the country. The High Court sits permanently in Canberra, but it also sits in the state capital cities to hear some cases. Every court is bound by the decisions of this court. The High Court has the jurisdiction to hear issues relating to the Australian Constitution and disputes that involve the Commonwealth. It also has the authority to hear appeals not only from the federal court system, but from state and territory courts.

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Figure 1.15 The High Court of Australia in Canberra

Appeals are not automatically heard by the High Court. Whether or not the issue is of public importance or in the interests of justice needs to be considered before the High Court will allow leave to appeal.

Queensland court system hierarchy

Refer to Figure 1.14 for the related Court in the hierarchy matching the superscripted numbers.

[1]The Court of Appeal, appellate jurisdiction, consists of either three or five judges who hear appeals from the District or Supreme Courts. The Court of Appeal can hear appeals from or review decisions of a lower court from both criminal and civil cases. This includes an appeal against a sentence in criminal matters.

Supreme Court of Queensland

[2]The Supreme Court is the highest court within the Queensland court hierarchy. It is made up of two parts: the appellate jurisdiction (the Court of Appeal) and the trial jurisdiction. Matters are heard before a judge and jury.

Supreme Court, original jurisdiction:

- **Criminal jurisdiction** – The Supreme Court has the jurisdiction to hear indictable offences which usually carry penalties greater than 14 years' imprisonment, for example, murder, manslaughter.
- **Civil jurisdiction** – Civil cases in the Supreme Court relate to matters involving disputes of more than $750 000. There is no maximum limit.

[3]The District Court, original and appellate jurisdiction, has the authority to hear appeal cases from the Magistrates Court.

- **Criminal jurisdiction** – The District Court has the jurisdiction to hear criminal matters which carry a maximum penalty of less than 14 years' imprisonment. The type of offences are usually indictable offences, such as burglary and rape. Criminal matters are heard before a judge or a judge and a jury.

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- **Civil jurisdiction** – Civil cases in the District Court relate to matters involving disputes between $150 000 and $750 000. Civil cases are normally heard by a judge, but there is the option of a jury trial.

Magistrates Courts of Queensland

[4]The Magistrates Court, original jurisdiction, is the lowest court in the state court hierarchy. The Magistrates Court has both criminal and civil jurisdictions, but also has responsibility for domestic violence matters. Usually a single magistrate presides over the court. There is no jury in a Magistrates Court, with the presiding magistrate being the one who makes all the decisions.

- **Criminal jurisdiction** – All criminal matters must first be heard in the Magistrates Court. The Magistrates Court has the authority to hear and determine minor criminal offences, such as simple and regulatory offences. Examples of these offences include drink driving offences and shoplifting. All other serious criminal offences are heard for the first time in 'committal hearings' – the magistrate needs to determine whether there is sufficient evidence for the person to stand trial in either the District Court or Supreme Court.
- **Civil jurisdiction** – The Magistrates Court hears civil disputes involving up to $150 000.

Specialist Children's Courts

[5]The Specialist Children's Court is presided over by a judge at District Court level. Offences such as murder, attempted murder, treason and major drug offences are dealt with by the Supreme Court – regardless of whether the defendant is a child or an adult.

Specialist Children's Court hearing criminal and civil matters: The Children's Court at this level is presided over by a magistrate. It has the power to hear criminal matters against children. The most common civil matters heard relate to child protection.

Review 1.3

Identify the appropriate court in which each of the following matters will be heard:

1 an indictable offence committed by a minor
2 a serious drug-related offence in which the offender has pleaded guilty and seeks rehabilitation
3 murder
4 rape
5 stealing a gift card from a supermarket
6 a dispute over work not completed amounting to $32 000
7 a dispute between the state government and the Commonwealth
8 an appeal from the District Court
9 manslaughter
10 drink driving
11 a person taking legal action over a car accident in which damages to the car amounted to $15 000
12 a native title claim
13 divorce
14 an offender who has been caught driving without a licence.

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1.7 Just and equitable legal outcomes

In the criminal justice system, the investigative process, the trial process and the role of the courts in punishment and sentencing aim to ensure **just** and **equitable** legal outcomes for all **stakeholders**. This means that the legal outcomes are considered even, impartial, fair and proper in the circumstances, balancing the rights and freedoms of individuals and society. The separation of powers and the independence of the judiciary ensures that the courts are able to remain impartial and protect all citizens' rights.

A just legal outcome is considered to be achieved if the punishment or remedy is proportionate to the crime and serves the broader purposes of retribution, deterrence, rehabilitation, and protection of society. Just outcomes ensure that offenders are held accountable for their actions in a manner that is both fair to them and that acknowledges the harm done to victims and the wider community. A just outcome also ensures that similar cases are treated similarly, maintaining consistency in the application of the law.

Equitable outcomes mean there has been fair and impartial treatment of all individuals, regardless of their background, status or other personal attributes. An equitable legal system does not discriminate on the grounds of race, gender, socioeconomic status or any other distinguishing characteristics. Everyone should expect and receive the same treatment under the law if the outcomes are to be just and equitable.

To ensure these just and equitable outcomes for all citizens, it is the role of judges and magistrates to interpret statute. To do this consistently and to resolve questions of interpretation, in Queensland, judicial officers refer to the *Acts Interpretation Act 1954* (Qld). This process, called **statutory interpretation**, is used by judges and magistrates in court to interpret and apply the legislation, deciding how a particular law will apply to a particular case.

When laws are drafted, important factors need to be considered. The drafter of a new law needs to consider not only the intent of the Act, but also the actual wording of the document to ensure that the future possibilities that may arise will be covered by the new legislation. This can sometimes cause problems where meanings of certain words are ambiguous or unclear, making the interpretation of the new law difficult for the courts.

In the Australian criminal justice system, the principles of just and equitable outcomes are foundational. These principles are intrinsically

Figure 1.16 Judges must ensure outcomes are just and equitable.

just legally right, conforming to that which is lawful or fair and proper in the (or all) circumstances

equitable even and impartial; 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

stakeholder person, group or organisation that is affected by, can affect or is concerned with an issue

statutory interpretation the process used by judges and magistrates in court to interpret and apply the legislation

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tied to the broader concepts of fairness, transparency and impartiality. Together, these concepts underpin a fundamental belief in the rule of law – that all individuals are equal before the law and that laws are applied consistently and fairly. They ensure public confidence in the criminal justice system and reinforce the social contract: the idea that individuals forgo certain freedoms and abide by societal rules in exchange for protection and order provided by the state.

To apply statutory interpretation fairly, a number of rules are used to aid understanding of the intent of an Act, to help the judiciary to interpret the meaning of the law. Some of these rules are stated in the *Acts Interpretation Act 1954* (Qld), including:

- **literal rule** – meaning that the actual words used are given their ordinary meaning
- **golden rule** – meaning courts are to interpret legislation in a manner which avoids an obvious absurdity, ambiguity or inconsistency from using the literal rule
- **purposive rule** – asks the reader to look at the intention of parliament; this can be achieved by reading through speeches from parliamentary debates to help provide interpretation of meanings or the intent of the Act
- **specific rules** – refers to reading a particular section in the context of the entire Act to understand the Act's intention.

1.8 Legal issues and outcomes

In the study of law, a **legal issue** serves as the cornerstone of legal analysis. It represents a subject or matter that demands careful investigation and debate within the framework of the legal system in Australia. Legal issues can be as diverse as contract disputes, constitutional challenges or questions of criminal liability, and they underpin the complexities of the legal landscape. These issues spark the critical thinking and deliberation required for students to develop and then deepen understanding of the complexities of the modern world and how the law seeks to respond (or does not) to these issues.

A proper legal issue analysis is the culmination of a comprehensive examination of a particular legal matter, with the nature, scope and differing perspectives being clearly identified. This process allows for an evaluation or judgment to occur, as a way to the most just and equitable resolution of the **legal situation**. Whether it is a court case, a regulatory challenge or a contractual dispute, a well-defined legal solution is the key to ensuring that the legal system can function effectively and equitably.

legal issue a subject or matter involving the law that is worthy of investigation or debate

legal situation (for the purpose of this syllabus) a legal situation develops from an analysis of a legal issue; a set of circumstances where the nature, scope and viewpoints have been determined or identified, to enable an evaluation or judgment

Focus area of law	Possible legal issues
Environmental law	• Insufficient penalties for polluters • Gaps in regulation for emerging environmental threats • Inadequate protections for endangered species • Weak enforcement of conservation zones • Limited regulation of single-use plastics

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Human rights law	• Vague criteria for asylum claim assessments • Poor oversight of detention centres and delays in visa processing • Insufficient protection against discrimination • Gaps in safeguarding freedom of expression • Inadequate reparations for historical injustices
Property law	• Ambiguities in strata title disputes • Inadequate protections for renters • Unclear regulations on land use zoning • Insufficient regulations on heritage properties • Limited rights for long-term tenants
Family law	• Delays in court proceedings for custody disputes • Insufficient protection for domestic violence victims • Inequities in property division post-divorce • Limited provisions for families with special needs • Gaps in regulations for international custody battles
Criminal law	• Disproportionate sentencing guidelines • Gaps in rights for the accused • Inadequate rehabilitation provisions • Limited access to legal representation • Ambiguities in self-defence laws
Employment law	• Weak enforcement against wage theft • Limited protections for gig economy workers • Insufficient whistleblower protections • Lack of provisions for mental health considerations • Limited oversight of cross-border transactions
Consumer law	• Gaps in protection against digital scams • Inadequate redress mechanisms for faulty products • Limited regulations on deceptive advertising • Insufficient consumer data protection • Weak regulations on telemarketing practices
Cybersecurity law	• Outdated regulations on emerging cyberthreats • Insufficient penalties for data breaches • Limited scope on protecting user privacy • Gaps in laws related to ransomware attacks • Limited oversight of digital currency transactions
Youth law	• Limited legal representation for youth in courts • Inadequate focus on rehabilitation in juvenile detention • Discrimination against youth in employment • Gaps in consent laws for medical treatments • Insufficient provisions for youths with disabilities

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Research 1.4

1 Choose one contemporary legal issue to **conduct** further research and answer the following questions:
   - **a** Is the issue considered legally and morally acceptable in today's society?
   - **b** What are three different viewpoints on this legal issue?
   - **c** Do the laws on the issue safeguard individuals' right to freedom while balancing society's need for order?
   - **d** Have any changes to the laws been made to meet the changing needs of society?

2 **Create** an extended response to communicate the nature and scope of the legal issue you have researched in the form of one of the following:
   - **a** a short presentation using digital technology
   - **b** one-page letter to one of the stakeholders you discussed above
   - **c** an oral presentation for an online podcast or radio segment.

Legal outcomes

The ability of the Australian legal system to achieve just and equitable outcomes is due to the application of what is **fair**, equitable and reasonable. For example, if your neighbour entered your property and took your garden hose because they did not have one, then used it to put out a fire in their house, it might be unreasonable, in the circumstances, to charge them with trespass and stealing.

fair treating people equally without favouritism or discrimination

The Australian legal system is founded on the concept of the rule of law. The three main principles of that legal system are fairness, equality before the law and justice. The system and its law-makers strive to achieve equal outcomes for the protection of all citizens by making fair and just decisions.

Our courts, judges, law enforcers and individuals all have a responsibility to work towards achieving the ideals of fairness, equality and justice.

Fair and reasonable outcomes

What is fair and reasonable is an important legal concept. The aim of the law is to achieve fair and equitable outcomes and to treat all citizens equally before the law. In the courts, the principle of fairness is applied by taking individual circumstances into account. The court will make provision for people from different cultures and languages, or people with a physical and mental disability, in a fair and reasonable manner, for example, providing access to an interpreter or medical professional or ensuring wheelchair access is available to the court. The court will also take into consideration any other circumstances or personal history to help it bring down a fair judgment or impose a remedy (tort matter) or punishment (criminal matter).

Equal before the law

The application of equality by the courts means that everyone should be treated equally, that every person is equal before the law, regardless of their position or socioeconomic status or cultural background. The expectation is that everyone will have access to the same legal rights and opportunities, and that no one will be disadvantaged. The principle of equality is reflected in federal, state and territory laws that provide equal opportunities for education, health services, freedom of religion, anti-discrimination, access to legal aid and dispute-resolution procedures, equal employment and a minimum standard of living for all citizens within their jurisdictions.

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Figure 1.17 Everyone is equal before the law in Australia's legal system.

Just legal outcomes

Achieving just legal outcomes also includes fairness and equality, and access to basic human rights. In Australia, all legislatures and judicatures operate with a constitutional legal and governance system where they enact laws that are in the best interests of the people. The judiciaries have the role of ensuring that this is the case through their interpretation and case law judgments. Australian courts have a long legal history of dispensing ethical justice that is based on consideration of accepted legal principles, doctrines and precedents (case law). In this way, just legal outcomes are achieved that are reflective of the needs and values of contemporary Australian society.

Review 1.4

1. **Explain** the three main principles of the legal system.
2. **Describe** the relationship between the main principles of the legal system and just and equitable outcomes.
3. **Evaluate** the importance to parliamentary democracy of achieving fair and reasonable outcomes for all citizens.
4. **Analyse** the principle of equality before the law by presenting two viewpoints and their consequences.

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1.9 Nature and scope

When considering laws and the legal issues that arise from the regulation of behaviour in society, it is important to understand the **nature** or the essence and elements of the legal issue being considered first. Once the nature has been established, the **scope** or the extent of the components of the legal issue can then be determined to help understand the impact of the regulations and the need for rules and laws to safeguard the rights of individuals and society's need for order. These rules and laws are designed to regulate the behaviours of and interactions between members of society and the State, and are categorised into either civil law or criminal law.

nature (of a legal issue) the essence and elements of the legal issue being considered

scope (of a legal issue) the extent of the components of the legal issue

For example, we could consider an issue like cyberbullying. An analysis of the nature of cyberbullying should address the following:

- A definition of cyberbullying and a brief explanation or example of it
- An explanation/description of the legal framework that currently tries to regulate such behaviour at a state/national level
- A discussion of the success of such framework including a possible identification of the problems with it.

An analysis of the scope of cyberbullying as an issue might address the following:

- The number of people affected by cyberbullying – in Queensland, Australia or internationally
- The cost to the economy or mental health of citizens resulting from the issue
- The scale of the problem in different demographics in society.

Essentially, nature of an issue is the 'what is it' part of the issue.
The scope of an issue is a consideration of 'how big the issue is'.

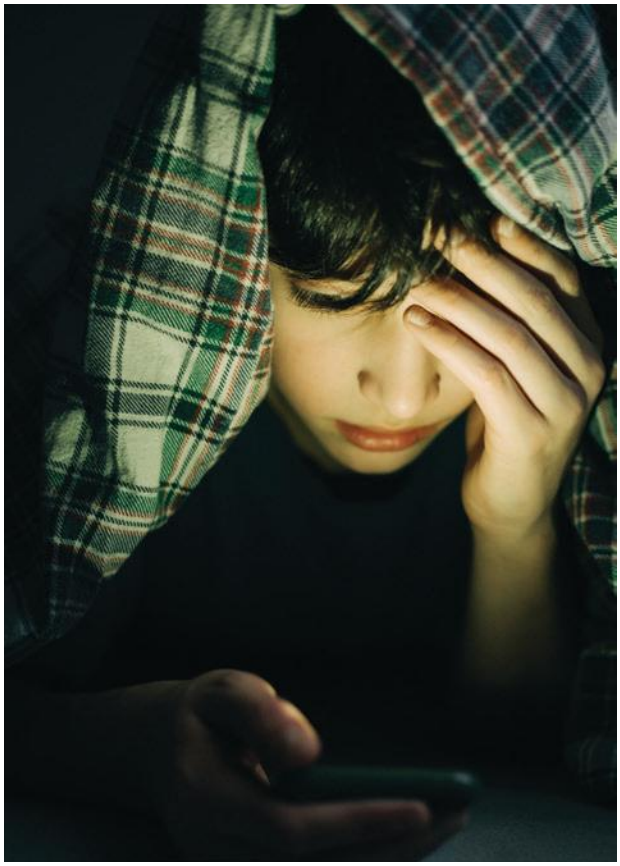

Figure 1.18 Cyberbullying is a constant issue for modern society and law-makers to deal with.

Off the record

Consider the following topics and identify the nature and scope of the issues:

1 Environmental protection laws for the Great Barrier Reef
2 Right to privacy in the Australian legal system
3 Social media regulation in Australia
4 Regulation of artificial intelligence and intellectual property in Australia
5 Data security and legal implications for data leaks in Australia.

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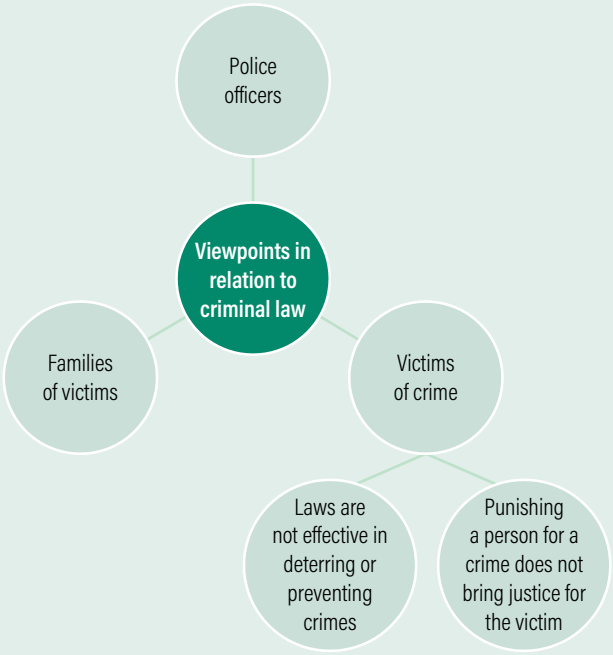
1.10 Topic review

Topic summary

- Laws cover almost every aspect of our lives and can be categorised into criminal or civil law.
- There are several influences on our laws: social, cultural, moral, political and economic.
- The rule of law ensures that all are equal before the law and that laws must be clear, accepted, known, and seen to be applied fairly.
- Customary law is an important consideration when looking at our legal system.
- In criminal law, the onus of proof lies with the prosecution to prove the accused is guilty. The standard of proof must be beyond reasonable doubt.
- Each court sits within a hierarchy and has a jurisdiction governing what cases are heard in which courts.
- An effective law is one that is known, accepted, adaptable, able to be enforced and carries specific penalties or punishment that apply to all.

Short-response questions

1 **Explain** in sentences and short paragraphs the difference between rules and laws.
2 **Describe** some elements of the use of customary law within our legal system.
3 **Describe** the functions of parliament.
4 **List** four differences that exist between parliaments and courts.
5 **Create** a mind map to brainstorm all the possible viewpoints that may be held in relation to criminal law. Look at the example to the right for inspiration.
6 **Explain** how and why the powers of government are separated.
7 **Explain** the role of the Australian Constitution and its place in our legal system.
8 **Explain** the role of the High Court in interpreting the Australian Constitution.



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Extended-response questions

1 **Create** an analytical essay in response to the statement: 'Australia should become a republic.' **Consider** different the viewpoints to make a decision regarding Australia's independence.

You could consider:

- the history of the republicanism debate
- the relevance of the Commonwealth to Australia today
- other countries that left the Commonwealth to become republic nations
- the practicalities and implications of a legal separation.

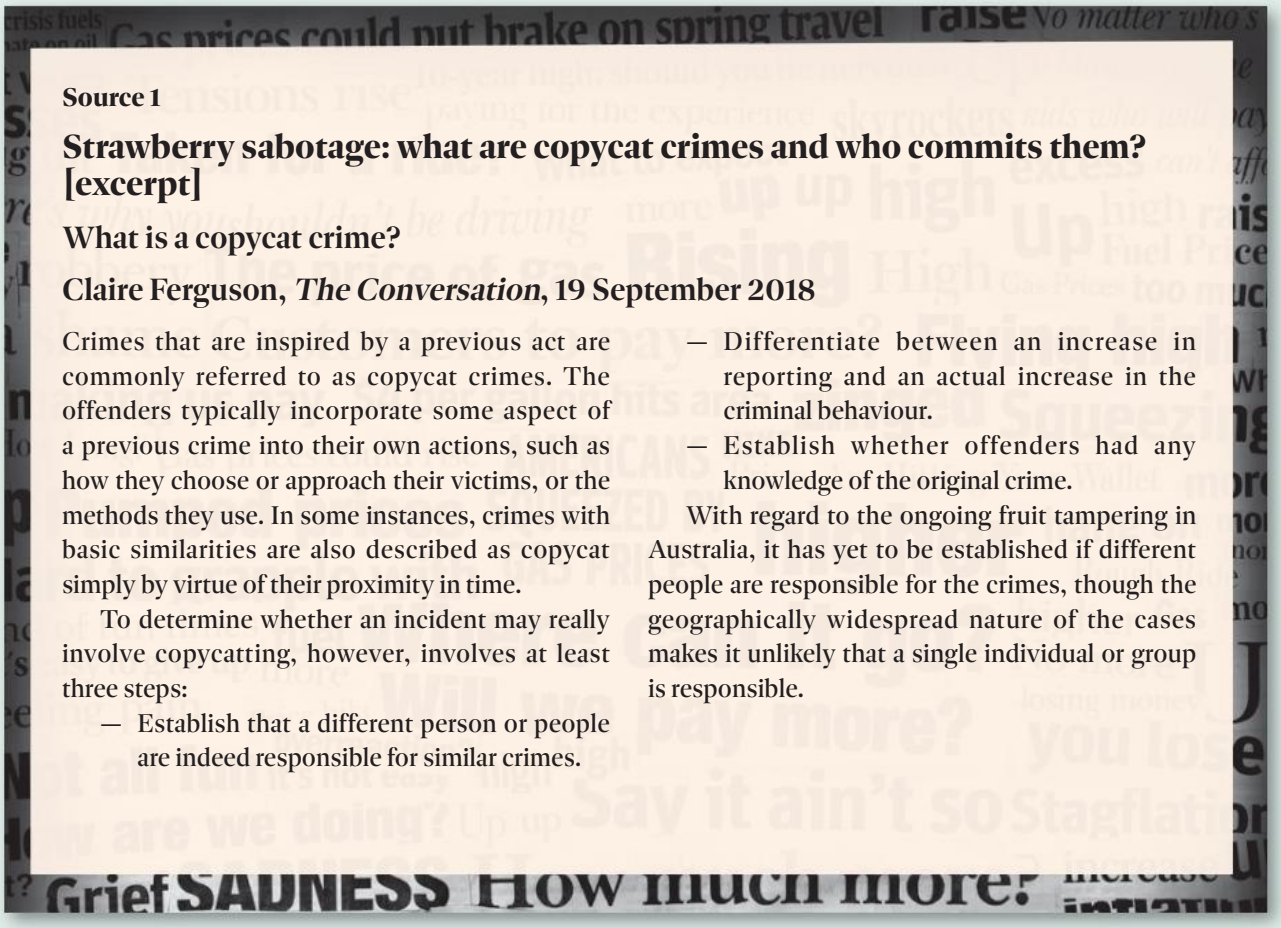
2 **Create** an analytical essay in response to the question: 'Does a true separation of powers exist in the Australian Government?' **Provide** one recommendation for how the arms of government can be more clearly distinct.

You could consider

- the aim of the separation of powers doctrine
- the implications of 'true' separation and the efficiency of government.

Response-to-stimulus questions

Read the following articles and answer the questions.



Source 1

Strawberry sabotage: what are copycat crimes and who commits them? [excerpt]

What is a copycat crime?

Claire Ferguson, *The Conversation*, 19 September 2018

Crimes that are inspired by a previous act are commonly referred to as copycat crimes. The offenders typically incorporate some aspect of a previous crime into their own actions, such as how they choose or approach their victims, or the methods they use. In some instances, crimes with basic similarities are also described as copycat simply by virtue of their proximity in time.

To determine whether an incident may really involve copycatting, however, involves at least three steps:

— Establish that a different person or people are indeed responsible for similar crimes.

— Differentiate between an increase in reporting and an actual increase in the criminal behaviour.

— Establish whether offenders had any knowledge of the original crime.

With regard to the ongoing fruit tampering in Australia, it has yet to be established if different people are responsible for the crimes, though the geographically widespread nature of the cases makes it unlikely that a single individual or group is responsible.

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Source 2

Strawberry sabotage: what are copycat crimes and who commits them? [Excerpt]

Who perpetrates copycat crimes?

Claire Ferguson, *The Conversation*, 19 September 2018

The available research on copycat crimes generally discusses the impact of media on violent behaviour more generally. The evidence suggests that those who watch violent films and television or play violent video games are more likely to learn specific techniques for violence, understand when violence is accepted by society and develop attitudes supportive of aggressive behaviour.

Although many people have the potential to be influenced by the media, those viewing violent content in childhood may be particularly susceptible to aggressive behaviours, especially if they also have models of violence in their lives.

There appear to be some personal characteristics that make people more prone to copycat behaviour, too. For instance, those who have an avid interest in crime reporting, as well as those who favour video games and the internet over other types of media, are generally more susceptible to copycat crimes.

A person's criminal history is also thought to influence whether he or she will attempt a copycat crime. Other factors also include low self-control, high innovativeness, disinhibition and a propensity for sensation seeking.

Figure 1.19 On his farm in the Glass House Mountains, Queensland, 20 September 2018, farmer Aidan Young poses amid strawberries he will destroy following a nationwide needle scare. A nationwide scare involving the piercing of supermarket strawberries with sewing needles prompted a series of supermarket recalls.

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Source 3

Morrison flags new laws to stop social media platforms being 'weaponised'

Michelle Grattan, *The Conversation*, 26 March 2019

Scott Morrison is foreshadowing tough new criminal laws to crack down on social media companies which fail to quickly remove footage like that streamed by the gunman in the New Zealand massacre. Under the proposal, it would not be just the companies that faced heavy penalties but individual executives based in Australia could be found personally liable. The laws would make it a criminal offence for the companies to fail to rapidly take down footage filmed by perpetrators of extreme violence.

The Prime Minister will meet representatives of the social media giants in Brisbane on Tuesday. Also present will be Home Affairs Minister Peter Dutton, Attorney-General Christian Porter and Communications Minister Mitch Fifield. They will discuss the responsibilities of these companies and how the use of their platforms for spreading dangerous terrorist and other harmful material can be curbed. "We need to prevent social media platforms being weaponised," Morrison said ahead of the meeting.

Morrison said if social media companies failed to show they were willing immediately to make changes to prevent the use of their platforms for material like the New Zealand footage, "we will take action". At the meeting will be representatives of Google, Facebook and Twitter.

The proposed laws would:

- Make it a criminal offence to fail to remove the offending footage as soon as possible after it was reported or it otherwise became known to the company
- Allow the government to declare footage of an incident filmed by a perpetrator and being hosted on a site was "abhorrent violent material". It would be a crime for a social media provider not to quickly remove the material after receiving a notice to do so. There would be escalating penalties the longer it remained on the social media platform.

The government says that there cannot be special rules for these companies. They should operate under the same conditions as the print and broadcasting media, and the services they provide need to be safe. The new laws would be based on existing offences which require social media companies to notify police of child abusers on their sites, and require content host sites to remove offending material.

Morrison has already moved to have the G20 take up the issue of getting this sort of violent content off social media. He has asked for the issue of social media governance to be put on the agenda for the June summit of the G20 in Japan.

1 Using Sources 1 and 2, **analyse** the nature and scope of copycat crimes.

2 **Analyse** Source 3 to identify and explain the legal issue being addressed by the proposed laws.

3 **Explain** who the stakeholders are in the issue from Source 3 and the nature and scope of the issue.

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Chapter **2** Topic **2**

Criminal investigation process

Chapter overview

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.

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Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including summary and indictable offences, criminal act (*actus reus*), criminal intent (*mens rea*), alleged, accused, witness, suspect, victim, evidence, offender, warrants, arrest, charge, and summons.
- Explain
  - what constitutes criminal behaviour, and identify the different roles in an alleged criminal situation
  - the criminal investigation process and the features that contribute to just and equitable outcomes, including reasonable suspicion and the right to silence
  - the types of evidence police may collect at a crime scene and during an investigation process.
- Contrast summary and indictable offences, and classify offences into categories (e.g. against the person, property and the public interest) in reference to the Criminal Code[1].
- Analyse and apply elements of offences to a range of criminal scenarios.
- Explain the rights and responsibilities of police (*Police Powers and Responsibilities Act 2000* (Qld)), suspects, accused and victims, e.g. police discretionary powers; search and arrest warrants.
- Select legal information and data about Queensland crime rates and criminal offences, choosing current and relevant sources to analyse crime in Queensland and/or Australia to ascertain relationships, patterns and trends.
- Analyse and evaluate the extent to which the criminal investigation process balances individuals' rights with society's need for order (e.g. legal approaches to youth justice issues (*Youth Justice Act 1992* (Qld)); deoxyribonucleic acid (DNA) testing and storage, databases and data banks, and

[1] The various offences are set out in the Criminal Code in Schedule 1 to the *Criminal Code Act 1899* (Qld).

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fingerprints, whether evidence should be destroyed at the completion of a trial; the collection of metadata, and telecommunications data), justify using legal criteria and discuss implications.
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:
- *Animal Care and Protection Act 2001* (Qld)
- *Australian Security Intelligence Organisation Act 1979* (Cth)
- *Child Protection Act 1999* (Qld)
- *Children's Court Act 1992* (Qld)
- *Commonwealth of Australia Constitution Act 1901* (Cth) (the Australian Constitution)
- *Criminal Code 1995* (Cth)
- *Criminal Code Act 1899* (Qld)
- *Domestic and Family Violence Protection Act 2012* (Qld)
- *Drugs Misuse Act 1986* (Qld)
- *Police Powers and Responsibilities Act 2000* (Qld)
- *Regulatory Offences Act 1985* (Qld)
- *Summary Offences Act 2005* (Qld)
- *Transport Operations (Road Use Management) Act 1995* (Qld)
- *Youth Justice Act 1992* (Qld)
- *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld)

Significant cases

This topic will include the following cases:
- *Stuart v The Queen* [1974] HCA 54; (1974) 134 CLR 426
- *The Queen v Baden-Clay* [2016] HCA 35

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Concept map

In Topic 2 of Unit 1 of the QCAA Legal Studies course, we will cover the following content:

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2.1 Criminal behaviour

In modern Australian society, when an individual or group breaks the law through an act or **omission** against the community at large, the action is referred to as a **crime** and is punishable by the state. Criminal law attempts to balance the rights of individuals to freedom from interference with person or property and society's need for order. We expect that if someone violates our rights in some way through a criminal act, the perpetrator will be punished.

In order to balance individuals' rights with society's need for order and to uphold society's beliefs about what is considered morally right or wrong and what is considered socially acceptable or unacceptable, regulations have been **prescribed** in certain Queensland laws. These laws outline the acts or omissions that have been prohibited by statute law and are punishable by the state.

Under the *Criminal Code Act 1899* (Qld), crime is defined as 'an act or omission which renders the person doing the act or making the omission liable to punishment' (s. 2 Criminal Code). Each of these actions or omissions is defined and categorised as an **offence** that violates criminal law.

Every offence against Queensland law is deemed a criminal offence unless explicitly labelled as a **regulatory offence** (s. 3 Criminal Code). This categorisation means that even minor infractions, for example, public urination, are considered criminal offences in Queensland. Regulatory offences are set out in the *Regulatory Offences Act 1985* (Qld) and must be finalised in the Magistrates Court. All regulatory offences carry fines as their maximum penalty. For example, stealing something valued at $150 or less from a shop or leaving a restaurant without paying the bill of less than $150 is a regulatory offence.

omission a failure to act resulting in a breach of duty or damage

crime or offence an act or omission which renders the person doing the act or making the omission liable to punishment

prescribed (in this context) something that is laid down in legislation – contained in Acts and regulations

regulatory offence an act that is prohibited by legislation and carries a fine as its maximum penalty

Figure 2.1 Criminal law attempts to balance the rights of individuals to freedom from interference with person or property and society's need for order.

3 Division of offences

(1) Offences are of 2 kinds, namely, criminal offences and regulatory offences.

(2) Criminal offences comprise crimes, misdemeanours and simple offences.

(3) Crimes and misdemeanours are indictable offences; that is to say, the offenders can not, unless otherwise expressly stated, be prosecuted or convicted except upon indictment.

(4) A person guilty of a regulatory offence or a simple offence may be summarily convicted by a Magistrates Court.

(5) An offence not otherwise designated is a simple offence.

Figure 2.2 The *Criminal Code Act 1899* (Qld) divides crimes into criminal and regulatory offences.

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While the primary criminal legislation in Queensland is the Criminal Code, numerous other Queensland Acts also detail criminal offences including the *Transport Operations (Road Use Management) Act 1995* (Qld), the *Summary Offences Act 2005* (Qld), *Domestic and Family Violence Protection Act 2012* (Qld), *Drugs Misuse Act 1986* (Qld), *Animal Care and Protection Act 2001* (Qld), *Child Protection Act 1999* (Qld) and *Regulatory Offences Act 1985* (Qld).

The physical performance of the **criminal act** is known as ***actus reus***; this is the action taken or omitted by a person. Examples of such acts include hitting another person (assault), stabbing a person to death (murder) or hacking into a computer system (computer hacking). Along with the physical performance is the mental element – a person's awareness of the fact that their conduct is criminal: this is the **criminal intent (*mens rea*)**.

In Queensland, differentiating between *actus reus* (the act of the crime) and *mens rea* (the state of mind) offers clarity for legal interpretation and distinguishes between specific crimes and defences that are applicable to ensure proportionate sentencing and criminal accountability.

Criminal offences are predominantly covered in the *Criminal Code Act 1899* (Qld) and can be divided further into **summary offences** and **indictable offences**.

criminal act (*actus reus*) the physical performance of a crime (guilty act)

criminal intent (*mens rea*) a person's mental state and awareness of the fact that their conduct is criminal

summary offence a simple or less serious criminal offence heard by a magistrate

indictable offence a more serious criminal offence that requires a committal hearing and trial

Summary offences, also known as simple offences, are matters that are tried by a magistrate; they are usually less serious offences, such as traffic offences and minor crimes. If you are charged with a summary offence, you do not have the right to have a trial by jury. Indictable offences are more serious crimes and misdemeanours, which require a trial by judge and jury. Indictable offences include murder, rape, robbery, serious assault, and break and enter.

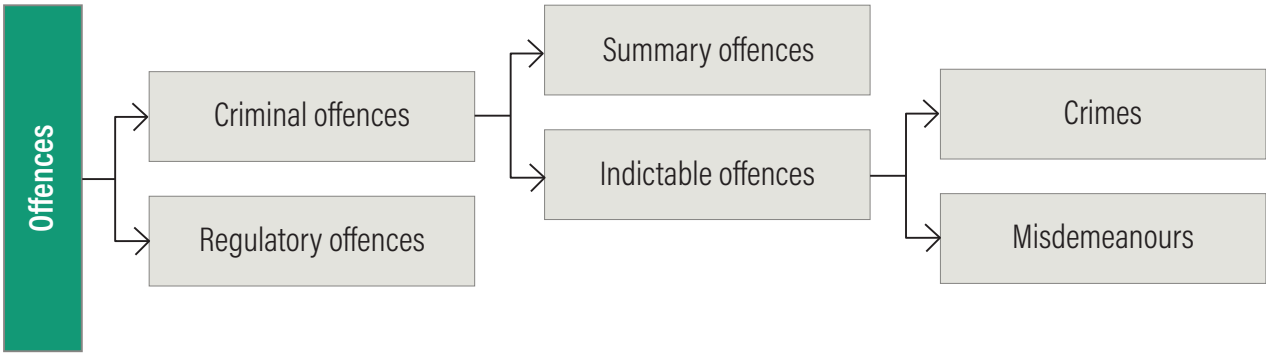

Figure 2.3 The *Criminal Code Act 1899* (Qld) further divides criminal offences into summary (simple) and indictable offences.

Research 2.1

1 Research and **explain**, using an example, a so-called 'victimless crime'.
2 Research and **discuss** the division of offences and why the classification of regulatory and criminal offences is used in Queensland. Why are criminal offences then classified further?

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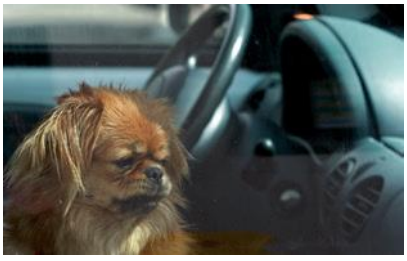
Review 2.1

1 **Describe** the difference between criminal and regulatory offences.
2 **Explain**, using an example, how an omission can be classified as a crime.
3 Using examples, create a one-paragraph response to **explain** the difference between summary and indictable offences.
4 Consider each of the scenarios below to **identify** whether a criminal act (*actus reus*) and/or criminal intent (*mens rea*) is present.

a Timothy was charged with assault after he lost his temper at the cinema. He felt the candy bar prices were too high. He pushed a display shelf over, hitting a child standing near the counter and cutting his forehead open. The boy required six stitches at the hospital.

b Jessica is at work but has decided she needs to go home because she's not feeling well. She starts driving but is having a hard time focusing on the road. Jessica falls asleep at the wheel and hits a tree. Luckily, no one is seriously hurt. She is charged with dangerous driving.

c Samantha is 18 and babysits the children of a local family. She picks them up from school and drives them to their afternoon activities. One afternoon, she decided to watch the children's soccer game. Samantha is also responsible for the family dog when she is babysitting, but decided on this occasion that she didn't want to have to look after it at the game. She decided to leave the dog in the car for a few hours, even though it was 35°C outside. Before the end of the game, someone walked by, noticed the distressed dog and called the RSPCA. Charges are yet to be laid.



d Shaun has been bullied at school for an extended period of time and has decided he needs to take matters into his own hands to stop the bullying. He pays some older boys from a local sporting club to 'rough' the bullies up a little. Things get out of hand and one of the bullies falls on the cement, fracturing his skull. He is in an induced coma and is not expected to recover.

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The criminal justice system

In Australia, the criminal justice system is based on the **adversarial system** of law. The adversarial system is about contest. This requires the involvement of two parties who argue their differing versions of the facts and the related law before the court. There are two main elements of the adversarial system:

- **Two parties who present their cases.** Each side decides what points are in issue, which arguments to rely upon and what **evidence** should be presented. This freedom to decide how the trial will proceed is limited only by the rules of evidence and rules of procedure, including court rules about case-flow management.
- **An independent and impartial judge (or magistrate).** This person presides over the proceedings and decides questions of law and, where there is no jury, questions of fact.

In an **inquisitorial system**, the judge plays more of a role in the investigations into the events that have taken place. An inquisitorial system is where the court or a part of the court is actively involved in determining the facts of the case, as opposed to an adversarial system where the role of the court is solely that of an unbiased umpire between parties. Inquisitorial systems are used in most countries in Western Europe and Latin America, and in some areas of Australian law, such as in Coroners Courts or Royal Commissions.

adversarial system a system of law in which each side presents evidence in order to prove their case

evidence facts or information indicating whether a belief or proposition is true or valid

inquisitorial system a method of legal practice in which the judge endeavours to discover facts while simultaneously representing the interests of the state in a trial

Adversarial system	Inquisitorial system
The trial consists of a contest between two parties in dispute. Each side puts forward its own version of the facts and tests the opposing side's version of the facts.	The trial is presided over by a judge, who questions the accused, gathers the evidence and then decides the truth.
Judge's role: ▪ essentially an umpire ▪ ensures that the rules are followed ▪ decides what evidence is allowed ▪ decides issues of law ▪ decidesverdictwhen no jury is present ▪ sentencing.	**Judge's role:** ▪ actively seeks out evidence ▪ applies the law and the facts of the case ▪ decides the verdict ▪ sentencing.
Jury's role: ▪ listens to the evidence presented by opposing sides ▪ makes decisions on guilt (criminal matter) or which party's version of events appears more true (civil matters).	No jury

Figure 2.4 The contrast between the adversarial and inquisitorial systems

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2.2 Enforcing criminal law

In criminal law, an **alleged criminal situation** is where an unproven accusation of a crime is reported; for example, a break and enter may have been reported to police but it is currently unproven, and no charges have yet been laid. When a crime is reported, police are provided with an account of the details of the alleged event so they can investigate and pursue the matter. The aim of investigating crimes and proceeding with prosecution is to protect the community and to ensure just and equitable outcomes for all stakeholders.

Within an alleged criminal situation, a number of stakeholder roles may be investigated and several people may be interviewed and required to present evidence important to the criminal investigation and court proceedings. They include:

- **the victim** – a person who has suffered a loss (physical, emotional or economic) due to the actions or omissions of another
- **the accused** – a person who is charged and on trial for a crime but who has not yet been found guilty
- **a suspect** – a person who is thought to have committed a crime and is being investigated
- **a witness** – a person who has seen or heard information relevant to an alleged crime
- **an expert witness** – a person who is called to give an opinion as a result of their specialised knowledge, based on training, study or experience
- **the offender** – a person who has broken the law.

alleged criminal situation where an unproven accusation of a crime is reported to the police for investigation

In Queensland, the general responsibility for investigating reports of alleged crimes and enforcing criminal law lies with the Queensland Police Service. The police are part of the executive arm of government and are given special powers separate from the legislative and judicial powers. These powers are given to police officers to carry out the criminal investigation process outlined in the *Police Powers and Responsibilities Act 2000* (Qld).

Despite these specific legislated powers, every day police must make choices and decisions about what crimes to investigate, what should be reported or not, what processes to implement and what charges to lay. This decision-making power, known as **police discretionary powers**, affords the power to police to decide what seems to be the most appropriate course of action within a set of circumstances. This may include deciding what areas to patrol, what crimes to target, what reports to investigate and what offences to pursue; implementing the criminal investigation process; and determining for which behaviours to file charges or which crimes or situations warrant the issue of a warning.

police discretionary powers powers afforded to police to make decisions based upon what seems to be the most appropriate action in the circumstances

Figure 2.5 The Queensland Police Service investigates alleged criminal situations and enforces criminal laws within the state.

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Review 2.2

1 **Explain** the difference between a suspect and the accused in an alleged criminal situation.
2 **Explain** how police discretionary powers apply to alleged criminal situations.
3 **Create** a table to analyse the advantages and disadvantages of police discretionary powers in Queensland.
4 **Create** a one-paragraph response to each of the following:
   a **Evaluate** the impact police discretionary powers may have on the just and equitable outcomes for those suspected or accused of criminal behaviour and the victim.
   b **Decide** whether the use of such powers is appropriate in enforcing criminal law.

Those charged with an indictable offence who choose to plead 'not guilty' are entitled to the right to presumption of innocence and a fair trial. To prove that the accused has committed the crimes with which they are charged, the **prosecution** will need to show, in court through evidence, that the person physically committed the act **beyond reasonable doubt**, and in some crimes, they must also show the intent of the offender to commit the act. Forensics, evidence and witness testimony are all vital parts of the investigation process. It is through these methods of investigation and evidence collection that an accused can be linked to the scene of the crime and the criminal act.

prosecution the party who presents and argues the case on behalf of the Crown against the accused

beyond reasonable doubt the highest standard of proof in a criminal trial, where the prosecution must prove the defendant's guilt to the extent that there is no reasonable doubt left in the minds of the jurors

Review 2.3

1 **Describe** the concept of beyond reasonable doubt and what this means in Queensland's criminal trials.
2 **Explain** the role of the prosecution in criminal trials in Queensland.
3 **Evaluate** how the concept of beyond reasonable doubt contributes to just and equitable outcomes in Queensland.

2.3 Types of offences

All crimes, whether summary or indictable, can be classified into a type of offence, including offences against the person, offences against property and other offences. Those classified as other offences are generally offences detected by the police rather than being reported by the public, for example, public order offences, motor vehicle offences and drug offences. In Queensland, the *Criminal Code 1899* (Qld), along with other Acts of Parliament such as the *Drugs Misuse Act 1986* (Qld) and the *Transport Operations (Road Use Management) Act 1995* (Qld), defines what actions are considered criminal.

Check this out

Use the Online Crime Map website to consider the crime statistics in your region.

Research 2.2

1 **Discuss** your findings from Crime Map, considering the following:
   a What crimes appear to be most prevalent? Why?
   b What is the comparison of crime rates for summary and indictable offences?
   c Which crimes are most likely to be subject to police discretionary powers?
2 **Compare** the statistics of your region with those for another region. **Discuss** the differences.
3 **Create** a one-paragraph response to **explain** why these data are publicly available and what benefits publishing such data might have for society.

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These Acts clearly identify the crime as either a summary or indictable offence. They also set out the **elements of an offence**, which allow the courts to determine whether the offence is one of **strict liability** or there is a full or partial **defence** to the crime available. The criminal law in Queensland also prescribes the **punishment** for criminal offences when an offender is found guilty.

Strict liability does not require the prosecution to show that criminal intent was present or that the accused had any criminal intent to commit the crime. For example, speeding offences do not require the police or prosecution to prove that the offender intended to speed. Instead, strict liability for these minor offences puts a greater onus on society to comply with the laws, lowers the level of proof required for criminal conviction and assists the criminal justice system to cope with the volume of minor offences.

elements of an offence the facts of an offence that must be proven to find the offender guilty

strict liability offences where only the criminal action (*actus reus*) needs to be proved

defence the claims of the defendant in opposition to complaints against them; the party who presents and argues the case on behalf of the accused or the defendant

punishment financial loss, confinement or another penalty imposed for wrongdoing

Infringement Notice
State Penalties Enforcement Act 1999
Queensland Government
SAMMY SAMPLE
1 SAMPLE ST
SAMPLE QLD 4000
Issue Date: 27/07/2023
Infringement Notice Number: Q 300000170 8
Customer Reference Number: 99999999
AMOUNT DUE: $341.00
DUE DATE: 24/08/2023
Service Method: POST
Offence Details
Offence: Fail to stop at red light
Location: 100 SAMPLE ST SAMPLE QLD 4000
Offence Date: 27/07/2023
Offence Time: 9:14 AM
Driver Licence Number:
Licence State:
Vehicle Registration: SAMPLE
Vehicle Description: SAMPLE
Vehicle Colour: Black
Alleged Speed Travelled: 70 km/h
Speed Limit: 60 km/h
Demerit Points: 3
For further information on demerit points go to www.qld.gov.au
Officer's Signature:
Officer's Number:
Station:

Figure 2.6 Strict liability means only the criminal act, not criminal intent, is required to be proven for some summary offences, for example, speeding tickets. (*Source:* Queensland Government.)

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Understanding the elements of an offence

Every offence has certain elements that must be established by the prosecution before a person can be found guilty of that offence. These elements are outlined in the *Criminal Code Act 1899* (Qld) and are the nature of the crime or criminal offence. Consider the following:

> 'Stealing' is defined in the *Criminal Code 1899* (Qld), section 391(1) as:
> A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.

Considering the first part, the elements of 'stealing' are:

- taking something capable of being stolen
- with fraudulent intent.

How do we know what each of these elements means? The *Criminal Code 1899* (Qld) assists us by including extra details such as 'Things capable of being stolen' described in section 390, which includes (from the *Criminal Code 1899* (Qld) and cases):

- any inanimate thing which is movable or capable of being made movable
- a tame animal (except pigeons)
- oysters in an oyster bed.

'With fraudulent intent' is described in section 391(2) and includes:

- an intent to permanently deprive the owner of the thing
- an intent to deal with it in such a manner that it cannot be returned in its original condition.

Figure 2.7 In the *Criminal Code 1899* (Qld) section 391(1), stealing includes anything capable of being stolen, such as a puppy.

Offences against the person

Offences against the person are those offences that directly affect a person's physical and emotional health. These effects can be very significant for the victim and the victim's family, depending on the nature of the crime. A number of offences outlined in the *Criminal Code Act 1899* (Qld) and details of some of the offences against the person are provided in Table 2.1. The principles of penalties and sentencing for these offences are discussed in Chapter 4.

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Table 2.1 Count and rate of recorded offences against the person reported in the 2021–22 and 2022–23 financial years

Offences against the person	Offences recorded			Offences recorded per 100,000 persons		
	2021–22[(a)]	2022–23	change	2021–22[(a)]	2022–23	change
Offence	-number-		%	-rate-		%
Homicide (murder)	**42**	**55**	**31.0**	**0.8**	**1.0**	**28.3**
Other homicide	**95**	**81**	**–14.7**	**1.8**	**1.5**	**–16.5**
Attempted murder	56	51	–8.9	1.1	0.9	–10.8
Conspiracy to murder	0	1	0.0	0.0	0.0	0.0
Manslaughter (excl. by driving & striking)	6	4	–33.3	0.1	0.1	–34.7
Manslaughter – unlawful striking causing death	0	1	0.0	0.0	0.0	0.0
Driving causing death	33	24	–27.3	0.6	0.4	–28.7
Assault	**48 347**	**55 716**	**15.2**	**917.0**	**1035.4**	**12.9**
Grievous assault	1150	1143	–0.6	21.8	21.2	–2.6
Serious assault	20 443	23 810	16.5	387.8	442.5	14.1
Serious assault (other)	6043	6732	11.4	114.6	125.1	9.1
Common assault	20 711	24 031	16.0	392.8	446.6	13.7
Sexual offences	**9516**	**10 065**	**5.8**	**180.5**	**187.0**	**3.6**
Rape and attempted rape	3442	3766	9.4	65.3	70.0	7.2
Other sexual offences	6074	6299	3.7	115.2	117.1	1.6
Robbery	**2612**	**3029**	**16.0**	**49.5**	**56.3**	**13.6**
Armed robbery	1268	1507	18.8	24.1	28.0	16.4
Unarmed robbery	1344	1522	13.2	25.5	28.3	11.0
Other offences against the person	**7203**	**10 899**	**51.3**	**136.6**	**202.5**	**48.2**
Kidnapping, abduction etc.	382	546	42.9	7.2	10.1	40.0
Extortion	123	158	28.5	2.3	2.9	25.9
Stalking	1072	1987	85.4	20.3	36.9	81.6
Life endangering acts	5626	8208	45.9	106.7	152.5	42.9
Total	**67 815**	**79 845**	**17.7**	**1286.3**	**1483.8**	**15.4**

(a) From 1 July 2021, police officers have been required to record all criminal offences associated with domestic and family violence investigations.

Source: Queensland Treasury. 'Crime report, Queensland, 2022–23: Recorded crime statistics', Table 3, page 8, 2024.

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Check this out

On the Queensland Government Statistician's Office website, search for 'Crime and justice statistics.' View the recorded crime reports for 2022–23. at https://cambridge.edu.au/redirect/10463. Discuss the patterns and trends identified and analysed in the report for offences against the person.

Review **2.4**

Consider the elements of the offence of stealing and **decide** whether each of the scenarios satisfies all elements and would be considered as the crime of stealing.

1 The person in front of you drops $20. You pick it up and pocket it.

2 You borrowed a stranger's phone to make an emergency call and, during the commotion, forgot to give it back.

3 You took some flowers from your neighbour's yard to give to your mother.

4 You see an unlabelled computer left on the back seat of the bus. You take it.

5 A friend owes you $50 and has taken too long to pay you back so you take her new running shoes from her locker instead of the payment. You tell her after you have already taken them what you have decided.

Research **2.3**

1 Go to the Queensland Police Service website and select the current data about offences against the person. **Compare** these figures with data from previous years and **consider** the patterns and trends over time and the types of offences against the person.

2 Go to the Australian Bureau of Statistics website and search for the reported offences against the person. **Compare** this data with the reported offences against the person in other states. What impact does each state have on the data?

3 **Discuss** what the data show about the relationships, patterns and trends of crimes against the person in Australia.

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Murder

- **Elements:** kills another person unlawfully.
- **Mandatory sentence:** life imprisonment.

According to section 300 of the *Criminal Code 1899* (Qld), any person who unlawfully kills another is guilty of either murder or manslaughter. Murder is the more serious of the two offences, as it usually requires intent to kill another person (s. 302). Another circumstance in which a person who kills another is guilty of murder is when the person who killed was committing a criminal act when the death occurred, whether or not that person intended to kill. An example of this may be if a person was robbing a bank and they fired a warning shot that killed a passer-by. This person will be charged with murder as they were committing an illegal act when the death was caused. A person can also be charged with murder, according to section 302, if they intended to cause grievous bodily harm to another and that person later dies. Furthermore, as *Stuart v The Queen* illustrates, a person also can be convicted of murder (or any offence) if they 'counsel or procure' another person to commit the offence or if persons 'form a common intention to prosecute an unlawful purpose'.

Figure 2.8 Any person who unlawfully kills another is guilty of either murder or manslaughter.

Off the record

Look up the definition of 'killing' in section 293 of the *Criminal Code 1899* (Qld) and then consider why this definition would be listed, and not just murder.

Case study **2.1**

The case: *Stuart v The Queen* [1974] HCA 54; (1974) 134 CLR 426

Citation

Stuart v The Queen [1974] HCA 54; (1974) 134 CLR 426 was heard and decided by the High Court of Australia in 1974. Stuart is the name of the appellant (the party who is appealing the previous decision) and The Queen (or 'R' for Regina) represents the respondent, which is the state or crown in criminal cases.

This case was reported as the 54th case in the High Court's decisions for that year, and published starting on page 426 in volume 134 of the Commonwealth Law Reports.

Facts

The Whiskey Au Go Go nightclub in Brisbane was firebombed on 8 March 1973. Fifteen people died in the incident. John Andrew Stuart and James Finch were arrested two days later and charged with the murder of Jennifer Davie (one of the deceased). Police alleged that Stuart was the instigator of the offence and that Finch had lit the firebomb. There were also allegations of links between Stuart and a Sydney-based crime syndicate and a suggestion that extortion was a motive.

Stuart and Finch were found guilty of murder and sentenced to life imprisonment. They appealed to

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the Queensland Court of Appeal. Their appeal was dismissed, and the verdict was upheld (*R v Stuart and Finch* [1974] Qd R 297). Stuart further appealed to the High Court. In his judgment, McTiernan ACJ set out the facts as follows:

> The two accused were tried together and each pleaded 'not guilty.' The circumstances of the case shortly stated are: Finch and the applicant planned to extort money from the owners of nightclubs in Brisbane by means of what is described in the evidence as a 'protection racket.' The scheme required Finch to light a fire in the building in which one of the clubs called the 'Whisky Au Go Go' Night Club carried on, at a time when its customers were enjoying its facilities. The object of lighting the fire was to convince proprietors of similar places of the necessity to hand over money to Finch and Stuart and their associates to get protection against such criminal interference. At 2.08 am on 8 March 1973, Finch lit the fire which killed Miss Davie and other persons who, like her, were customers of the 'Whisky Au Go Go' Night Club. It appeared from the evidence given at the trial that Stuart had arranged an alibi for use in the event of his being charged with an offence. (Para 3)
>
> *Source:* Judge Tiernan's closing remarks in *R v Stuart and Finch* [1974] Qd R 297.

Legal issues

The trial was controversial. Stuart dismissed his counsel and swallowed pieces of wire during the trial, which required surgery in Royal Brisbane Hospital. Thus he was not present in court for some of his trial. Section 617 of the *Criminal Code 1899* (Qld) gives the trial judge discretion to allow a trial to proceed in the absence of the accused. This discretion was exercised, and the verdict was upheld on appeal. The major points at issue in Stuart's High Court appeal related to sections 7 and 8 of the *Criminal Code 1899* (Qld) to do with parties to offences and offences committed in prosecution of a common purpose. Section 7(d) of the *Criminal Code 1899* (Qld) provides that 'any person who counsels or procures any other person to commit the offence' is guilty of the offence. Section 8 provides that 'when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

Legal arguments

The points that were in contention relating to these two sections were summed up by the trial judge (and adopted by the High Court).

Decisions

The High Court refused the leave to appeal. This means that the court has reviewed Stuart's application for permission to appeal and decided that the case does not meet the necessary criteria for further consideration.

Ratio decidendi (reason for the decision)

The High Court adopted the instruction and reasoning of the trial judge in the interpretation of the *Criminal Code 1899* (Qld) and commented very favourably on the work of the trial judge.

Figure 2.9 Fire damage to the Whisky Au Go Go Night Club in Brisbane in 1973

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Manslaughter

- **Elements:** killed another person unlawfully; circumstances of the case do not constitute murder.
- **Maximum penalty:** life imprisonment.

Manslaughter is defined in section 303 of the *Criminal Code 1899* (Qld), which states that regarding any unlawful killing of another person where that person's actions do not constitute murder, they will be guilty of manslaughter. Circumstances in which a person can be found guilty of manslaughter include causing the death of another by wrongful act and manslaughter by criminal negligence, that is, by failing to act as a reasonable person and causing the death of another person. Partial defences, as discussed in Chapter 3, can reduce a murder charge to manslaughter.

The major difference between murder and manslaughter is the underlying intention. If manslaughter is to prevail as the offence, it will need to be established that the accused had no intention of causing death. If the intention of the accused is to cause the death of another, the only charge that can be brought against them is murder.

Assault

Assault is defined in section 245 of the *Criminal Code 1899* (Qld) as:

> A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an 'assault'.
>
> *Source:* Section 245 of the *Criminal Code 1899* (Qld)

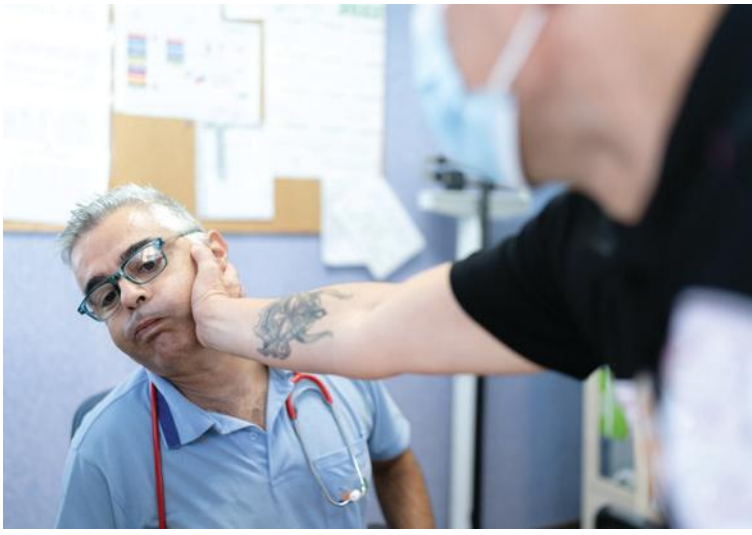

Figure 2.10 Assaults can range from minor assaults that cause minor damage, such as a bruise, to assaults that cause serious damage, such as broken bones and internal bleeding.

assault the unlawful, intentional threat of force or infliction of injury on another person

Assault can further be categorised into common assault, assault occasioning bodily harm, serious assault and grievous bodily harm.

- **Common assault** is the least serious offence. It is outlined in section 335 of the *Criminal Code 1899* (Qld). This offence can include threats of violence where no actual harm was inflicted, or instances where violence was inflicted upon the victim but where very little, if any, damage was sustained by them.
- **Assault occasioning bodily harm** is the infliction of actual personal violence that causes actual bodily harm to the victim. Assault occasioning bodily harm is a crime in Queensland according to section 339 of the *Criminal Code 1899* (Qld). To prove that this offence occurred, the prosecution would have to show evidence of actual harm that was suffered by the victim of the crime.

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- **Serious assault** is the threat or infliction of harm, where the victim of the assault is a police officer; a person over the age of 60 years; a person who relies on a wheelchair, guide dog or any other remedial device; or a prisoner assaulting a working correctional services officer. Serious assault is a crime according to section 340 of the *Criminal Code 1899* (Qld). It is clear that law-makers felt the need to include such an offence in the Act to protect people who work in dangerous professions, such as police officers and corrections officers, as well as people who would struggle to protect themselves due to age or physical impairment. Serious assault does not mean that the injury inflicted needs to be very serious, as the main factor that distinguishes this offence from the other two types of assault is the status of the victim involved. Spitting, biting or applying in any way bodily fluids to a police officer is also considered serious assault.
- **Grievous bodily harm** means inflicting an injury upon another person of a very serious nature and carries a maximum penalty of 14 years' imprisonment. Section 320 of the *Criminal Code 1899* (Qld) makes grievous bodily harm a criminal offence. Physical assaults that cause serious and potentially fatal force to the victim are known as assaults causing grievous bodily harm. These are the most serious forms of assault and can often lead to the victim being permanently injured in some manner.

Review 2.5

1 **Create** a table to **contrast** each of the types of assault explained in this section. **Explain** why each of the different definitions of assault is important for protecting the rights of individuals.
2 **Discuss** the descriptions of victims in serious assault. Do you agree or disagree that the classification of the victim increases the seriousness of the offence?
3 Using the definitions from the *Criminal Code 1899* (Qld), **explain** the difference between murder and manslaughter.

Stalking

- **Elements:** an act intentionally directed at the stalked person; it can include following, watching or approaching the person, contacting the person in any way, giving offensive material to the person, **loitering** near the person's home or place of work, and threatening to use or actually using violence against the person.
- **Maximum penalty:** seven years' imprisonment.

Stalking is an offence according to section 359B of the *Criminal Code 1899* (Qld). The conduct may be engaged in on one occasion if it is protracted or on more than one occasion. The elements of this offence make it clear that stalking is not simply following a person around, but can include any number of actions, all of which can be very frightening and intimidating for the victim.

loiter linger idly by; to move slowly about

In section 1 of the Criminal Code 1899 (Qld), grievous bodily harm is defined as:
(a) the loss of a distinct part or an organ of the body, or
(b) serious disfigurement, or
(c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health, whether or not treatment is or could have been available.

Figure 2.11 Grievous bodily harm is defined in section 320 of the *Criminal Code 1899* (Qld).

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Figure 2.12 Stalking is an offence according to section 359B of the *Criminal Code 1899* (Qld).

Rape

- **Elements:** having **carnal knowledge** of a person without consent or permission. The element of carnal knowledge is 'complete upon penetration' according to section 6 of the *Criminal Code 1899* (Qld).
- **Maximum penalty:** life imprisonment.

Rape is a crime according to section 349 of the *Criminal Code 1899* (Qld). The elements of the crime that are outlined in the Code show that it is not just carnal knowledge without consent that can lead to a rape conviction. Virtually any sexual act performed without consent that has been freely and voluntarily given can be considered rape. The person giving the consent must also have the **cognitive capacity** to give the consent.

carnal knowledge the act of engaging in sexual intercourse

cognitive capacity capable of understanding the nature and effect of decisions about the matter and freely and voluntarily able to make decisions about the matter and communicate decisions in the same way

Check this out

Go to the Youth Law Australia website and consider the information relating to criminal liability and young people regarding sexual offences.

Sexual assault

- **Elements:** unlawful and indecent assault of another person without their consent.
- **Maximum penalty:** between 10 years' and life imprisonment (depending on the seriousness of the offence).

Sexual assault is defined in section 352 of the *Criminal Code 1899* (Qld). Such acts include indecently exposing oneself, indecently touching another person or forcing a person to witness an act of gross indecency by the person or any other person. The offence is viewed as more serious when:

a immediately before, during or immediately after the offence, the offender is, or pretends to be, armed with a dangerous or offensive weapon or is in company with any other person

b the indecent assault includes the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or a part of the person's body that is not a penis

c the act of gross indecency includes the person who is procured by the offender penetrating the vagina, vulva or anus of the person who is procured or another person to any extent with a thing or a part of the body of the person who is procured that is not a penis.

Carnal knowledge of a child

- **Elements:** having or attempting to have carnal knowledge of a child under the age of 16 years.
- **Maximum penalty:** life imprisonment (child under the age of 12 years) or 14 years' imprisonment (child between 12 and 16 years).

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Carnal knowledge of a child under 16 years of age is a crime according to section 215 of the *Criminal Code 1899* (Qld). This is an offence, as the law considers a person under the age of 16 to be incapable of giving informed consent to such an act, due to immature age.

Indecent treatment of a child under 16

- **Elements:** unlawfully and indecently dealing with a child under the age of 16 years or wilfully exposing a child under 16 years to an indecent act, film or other indecent matter.
- **Maximum penalty:** 14–20 years' imprisonment, depending on the age of the child and the relationship between offender and child.

Indecent treatment of a child under 16 is an offence under section 210 of the *Criminal Code 1899* (Qld).

Offences against property

Offences against property are those offences that include the removal or destruction of another person's property. There are a number of offences outlined in the *Criminal Code Act 1899* (Qld). Details of some of the offences against property are included in Table 2.2.

Research **2.4**

1 Using the *Criminal Code 1899* (Qld), research and **explain** the elements and maximum penalty for the following offences against the person:
   a incest (s. 222)
   b unlawful wounding (s. 323).
2 Research and **compare** the definition of an offence against the person in Queensland to that in another jurisdiction.
3 **Create** a one-paragraph response to **discuss** why the elements of a crime may differ from state to state. What legal issues might this cause?

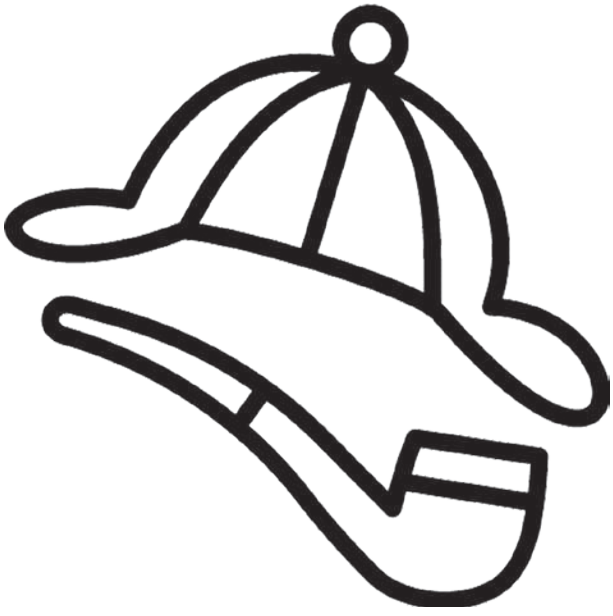

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Table 2.2 Count and rate of offences against property reported in the 2021–22 and 2022–23 financial years

Offences against property	Offences recorded			Offences recorded per 100 000 persons		
	2021–22[a]	2022–23	change	2021–22[a]	2022–23	change
Offence	– number –		%	– rate –		%
Unlawful entry	**41 993**	**51 544**	**22.7**	**796.5**	**957.9**	**20.3**
Unlawful entry with intent – dwelling	26 645	31 366	17.7	505.4	582.9	15.3
Without violence	*25 870*	*30 540*	*18.1*	*490.7*	*567.5*	*15.7*
With violence	*775*	*826*	*6.6*	*14.7*	*15.4*	*4.4*
Unlawful entry with intent – shop	2691	3789	40.8	51.0	70.4	38.0
Unlawful entry with intent – other	12 657	16 389	29.5	240.1	304.6	26.9
Arson	**1250**	**1537**	**23.0**	**23.7**	**28.6**	**20.5**
Other property damage	**38 157**	**41 255**	**8.1**	**723.7**	**766.7**	**5.9**
Unlawful use of motor vehicle	**17 219**	**20 378**	**18.3**	**326.6**	**378.7**	**15.9**
Other theft (excl. unlawful entry)	**118 214**	**143 920**	**21.7**	**2242.2**	**2674.5**	**19.3**
Stealing from dwellings	6301	7144	13.4	119.5	132.8	11.1
Shop stealing	24 503	33 072	35.0	464.8	614.6	32.2
Vehicles (steal from/enter with intent)	29 306	34 257	16.9	555.9	636.6	14.5
Other stealing	58 104	69 447	19.5	1102.1	1290.6	17.1
Fraud	**23 167**	**22 515**	**–2.8**	**439.4**	**418.4**	**–4.8**
Fraud by computer	1259	482	–61.7	23.9	9.0	–62.5
Fraud by cheque	22	53	140.9	0.4	1.0	136.0
Fraud by credit card	10 312	10 209	–1.0	195.6	189.7	–3.0
Identity fraud	1659	1244	–25.0	31.5	23.1	–26.5
Other fraud	9915	10 527	6.2	188.1	195.6	4.0
Handling stolen goods	**5402**	**6309**	**16.8**	**102.5**	**117.2**	**14.4**
Possess property suspected stolen	2150	2605	21.2	40.8	48.4	18.7
Receiving stolen property	229	290	26.6	4.3	5.4	24.1
Possess etc. tainted property	2966	3351	13.0	56.3	62.3	10.7
Other handling stolen goods	57	63	10.5	1.1	1.2	8.3
Total	**245 402**	**287 458**	**17.1**	**4654.7**	**5342.0**	**14.8**

(a) From 1 July 2021, police officers are required to record all criminal offences associated with domestic and family violence investigations.

Source: Queensland Treasury. 'Crime report, Queensland, 2022–23: Recorded crime statistics', Table 4, page 9, 2024.

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Stealing

- **Elements:** fraudulently (dishonestly) taking the property (that is movable or capable of being made movable) of another with an intent to permanently deprive the owner of the thing.
- **Maximum penalty:** five years' imprisonment.

Stealing is an offence in Queensland according to Chapter 36 of the *Criminal Code 1899* (Qld), in particular, sections 390, 391 and 398. Stealing is discussed in more detail earlier in the chapter.

Check this out

All things are capable of being stolen, but what about wild animals? See section 390 of the *Criminal Code 1899* (Qld).

Figure 2.13 Theft, such as bag-snatching, is a punishable offence.

Research **2.5**

1. Go to the Queensland Police Service website and select the current data about offences against property. **Compare** these figures with previous years' data and **consider** the patterns and trends over time and the types of offences.
2. Go to the Australian Bureau of Statistics website and search for reported offences against property. **Compare** these data with the reported offences against property in other states. What impact does each state have on the data?
3. **Discuss** what the data show about the relationships, patterns and trends of crimes against property in Australia.

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Robbery

- **Elements:** stealing something when, directly before, during or directly after the stealing, using or threatening to use actual violence in order to obtain the stolen thing or to overcome resistance to it being stolen.
- **Maximum penalty:** 14 years' imprisonment, which increases to life if (a) a dangerous weapon is used, (b) more than one person is involved or (c) violence is used.

Robbery is a crime according to section 409 of the *Criminal Code 1899* (Qld). The maximum penalty for robbery is more severe than it is for stealing, as violence has been threatened or has actually occurred in the crime of robbery. Armed robbery is where the violence is threatened through the use of a weapon.

Figure 2.14 Armed robbery is where violence is threatened through the use of a weapon.

Burglary

- **Elements:** entering a dwelling with intent to commit an indictable offence.
- **Maximum penalty:** 14 years' imprisonment, which increases to life imprisonment if there is more than one offender, or if the offence is committed at night, or if threatened or actual violence is used, or if the offender pretends to be or is actually armed with a dangerous weapon, or if any property is damaged.

Burglary is sometimes referred to as 'break and enter' and is a crime under section 419 of the *Criminal Code 1899* (Qld).

burglary the act of entering a building or other premises with the intent to commit an indictable offence

Other offences

Table 2.3 Count and rate of other recorded offences as reported in the 2021–22 and 2022–23 financial years

	Offences recorded			Offences recorded per 100 000 persons		
Other offences	**2021–22**	**2022–23**	**change**	**2021–22**	**2022–23**	**change**
Offence	**-number-**		**%**	**-rate-**		**%**
Drug offences	**62 382**	**62 110**	**–0.4**	**1183.2**	**1154.2**	**–2.5**
Traffick drugs	454	421	–7.3	8.6	7.8	–9.1
Possess drugs	28 375	29 221	3.0	538.2	543	0.9
Produce drugs	1428	1137	–20.4	27.1	21.1	–22.0
Sell/supply drugs	6068	5214	–14.1	115.1	96.9	–15.8
Other drug offences	26 057	26 117	0.2	494.2	485.3	–1.8
Liquor offences (excl. drunkenness)	**3008**	**2603**	**–13.5**	**57.1**	**48.4**	**–15.2**
Breach domestic violence protection order	**46 749**	**59 483**	**27.2**	**886.7**	**1105.4**	**24.7**

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Table 2.3 Count and rate of other recorded offences as reported in the 2021–22 and 2022–23 financial years (Continued)

Trespassing and vagrancy	**5646**	**6683**	**18.4**	**107.1**	**124.2**	**16.0**
Weapons Act offences	**6553**	**7192**	**9.8**	**124.3**	**133.7**	**7.5**
Unlawful possession of concealed firearm	141	191	35.5	2.7	3.5	32.7
Unlawful possession of firearm – other	564	642	13.8	10.7	11.9	11.5
Bomb possession and/or use of	32	35	9.4	0.6	0.7	7.2
Possession and/or use other weapons; restricted items	1838	2069	12.6	34.9	38.4	10.3
Weapons Act offences – other	3978	4255	7.0	75.5	79.1	4.8
Good order offences	**41 985**	**41 754**	**–0.6**	**796.4**	**775.9**	**–2.6**
Disobey move-on direction	660	615	–6.8	12.5	11.4	–8.7
Resist, incite, hinder, obstruct	19 371	19 858	2.5	367.4	369	0.4
Fare evasion	1153	1082	–6.2	21.9	20.1	–8.1
Public nuisance	20 801	20 199	–2.9	394.5	375.4	–4.9
Traffic and related offences	**40 460**	**44 162**	**9.1**	**767.4**	**820.7**	**6.9**
Dangerous operation of a vehicle	3054	2920	–4.4	57.9	54.3	–6.3
Drink driving	26 818	28 199	5.1	508.7	524.0	3.0
Disqualified driving	10 551	12 998	23.2	200.1	241.5	20.7
Interfere with mechanism of motor vehicle	37	45	21.6	0.7	0.8	19.2
Miscellaneous offences [(a)]	**5652**	**5412**	**52.3**	**107.2**	**100.6**	**43.1**
Total other offences	**212 435**	**229 399**	**8.0**	**4029.4**	**4263.0**	**58**

(a) Also includes gaming, racing and betting offences; prostitution offences; and stock-related offences.
Source: Queensland Treasury. 'Crime report, Queensland, 2022–23: Recorded crime statistics', Table 5, page 10, 2024.

Figure 2.15 Fare evasion is considered an offence.

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Figure 2.16 Burglary is an indictable offence.

Research 2.6

Using the *Criminal Code 1899* (Qld), research and **explain** the elements and maximum penalty for the following offences against property:

1 Wilful damage to property (s. 469)
2 Arson (s. 461)
3 Receiving (s. 433).

Review 2.6

1 **Describe** how robbery is different from stealing.
2 **Explain** the circumstances that would make an offender who is guilty of burglary liable for a life sentence.
3 **Explain** the elements of the crime of receiving. **Decide** whether you believe receiving is a crime or not.
4 **Discuss** if those who receive unknowingly should be subject to the same penalties as those who receive goods they know are stolen.

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Research 2.7

1 Go to the Queensland Police Service website and select the current data about drug, traffic or public order offences. **Compare** these figures with previous years' data and **consider** the patterns and trends over time and the types of offences.
2 Go to the Australian Bureau of Statistics website and search for reported drug, traffic or public order offences. **Compare** these data with the reported drug, traffic or public order offences in other states. What impact does each state have on the data?
3 **Discuss** what the data show about the relationships, patterns and trends of drug, traffic or public order offences in Australia.

Public order offences

Public order offences are those behaviours in a public place that affect or are likely to have an effect on other people. This effect could be through harm, endangerment, embarrassment, disruption or annoyance. Queensland police officers have a responsibility to uphold the public 'peace', which means they must stop offences that disrupt public order.

In Queensland, most public order offences are covered by the *Summary Offences Act 2005* (Qld). This Act makes the following activities illegal:

- unlawfully entering farming land and the like
- persons unlawfully gathering in or on a building or structure
- unlawful driving of a motorbike on public land
- trespass
- being drunk in a public place
- wilful exposure
- begging in a public place
- public nuisance
- unregulated high-risk activities
- possession of an implement in relation to particular offences
- unlawful possession of suspected stolen property
- possession of a graffiti instrument
- unlawful use of vehicles
- piercing body parts of a minor
- tattooing of a minor
- preventing public meetings
- false advertisements/notices about births, deaths, marriages or employment
- imposition
- sale of potentially harmful things
- throwing things at a sporting event.

Check this out

Visit the Australian Legal Information Institute website for a full explanation of the offences listed above. These actions are called 'public order offences', because if they are illegal, then public order within the community is maintained.

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Why the media aren't helping to solve the 'youth crime crisis' they're reporting

Andrew Hickey & Rachael Wallis, *The Conversation*, 27 July 2023

Media outlets across Australia have carried headlines about a 'youth crime crisis' in recent months. While drawn from actual events, often involving serious criminality and antisocial behaviour, these often sensational reports have the same narrative subtext. The story is one of 'bad kids' doing bad things in otherwise 'good communities'.

Our understanding, as a society, of who we are is informed in part by the media. What the youth crime crisis is and who we understand young offenders to be corresponds with media framings of these individuals and their actions.

More often than not, the reports present a 'good-bad' binary: where 'bad' young people who do bad things should be locked up to protect 'good' people. It's a basic, albeit understandable, reaction that makes sense in terms of a logic of punishment and retribution.

For the Youth Community Futures research project, we have been working with groups of young people to explore how they engage with the community and how they feel about it. Our young people have said they are increasingly fearful and are conscious of being perceived negatively. They do not feel accepted by others or their communities.

In short, these young people feel they are viewed as 'bad' because they are young. And when young people feel marginalised, the outcomes include withdrawing and becoming socially isolated. It also increases the potential for problematic anti-social behaviour – including crime.

Figure 2.17 The front page of the *Courier Mail* on 21 February 2023, when the newspaper launched its 'Enough is Enough' campaign.

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Fuelling the fear of 'folk devils'

There is, of course, far more to the situation. Research shows young people who engage in criminal activity are likely to have been victims themselves. The lives of many young offenders are complicated. Yet rarely are these situations and backgrounds factored into the media reports.

Beyond the circumstances of young offenders themselves, a further problem exists. When young people, as a defined social category, are presented in the media in such narrow terms, it becomes difficult to see them as anything other than threatening and dangerous.

Stanley Cohen's seminal sociology of British youth from the 1960s demonstrates the ways that public sentiment often divorces from the facts of situations to create 'folk devils'. When portrayals of young people, including those in the media, present them as threatening and menacing, it follows that public sentiment will be cast in similar ways.

Blinding us to the complexities

The challenge then is that it becomes difficult to understand the complexities of the situation and show empathy. This applies not only to 'bad' young people, but to others who aren't engaged in such problematic behaviour but who are caught within the narrow perceptions of who young people are.

This forms the central claim in our argument: the current youth crime crisis is as much a media-generated problem as it is a criminological problem. The way we understand and position young people as 'folk devils' runs the risk of invoking fear and trepidation. Such fears lead the public to categorise all young people in problematic ways while failing to understand the complex challenges young people encounter.

More complex social narratives are required if we are to avoid a situation in which young people feel marginalised.

So, what is the solution?

We need to develop deeper and more accurate understandings of who our young people are. This applies particularly to those who are caught up in criminality and anti-social behaviour.

Most young people do not set out in life to be 'bad'. Their problematic behaviours are likely to be the result of complex challenges. Once we accept that, we have a responsibility to seek deeper understandings of the situations our young people face.

Sensationalist headlines that feed on public fears are not helpful. These might sell newspapers, but they do not make us stronger as a society. They create folk devils out of young people who probably require support, and they produce a fearful community.

We need to move beyond easy explanations and simple distinctions. While it is horrendous that homes are being broken into and cars stolen, understanding that the young people engaged in these activities are likely also victims themselves is important for realising that we, as a society, have an obligation to all individuals.

We need to ask why young offenders are in this situation. Once we acknowledge the importance of a better understanding of their circumstances, we can start to meaningfully resolve these social problems before they occur.

Review 2.7

Read *The Conversation* article 'Why the media aren't helping to solve the "youth crime crisis" they're reporting' and answer the following questions.

1 **Identify** the public order offences committed in the article.
2 **Evaluate** whether public order offences appropriately balance individuals' rights and society's need for order.
3 **Create** a one-paragraph response to **explain** why public order offences are mostly summary offences – that is, not regulatory offences.

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Traffic and related offences

Traffic and related offences include those offences that occur when driving a car or other vehicle. These offences range from driving unlicenced to speeding and even dangerous driving causing death. Penalties can range from receiving a fine and incurring demerit points to a probation order or imprisonment. This depends on the type of offence, the circumstances and the traffic history of the offender.

Dangerous operation of a vehicle

- **Elements:** dangerous operation of a motor vehicle.
- **Maximum penalty:** depends on outcome of act – see Table 2.4 for details.

Section 328A of the *Criminal Code 1899* (Qld) states that the dangerous operation of a motor vehicle is a criminal offence. Some examples of what courts have said, which are indicators regarding particular circumstances, are referred to in section 328A(5).

The word 'dangerous' is not defined in the Code, so it is up to the court to consider all the relevant circumstances of the incident in order to decide whether a person was actually driving dangerously. The penalty for this offence depends on the circumstances behind the dangerous driving, along with the outcomes of any accident that may occur.

Drink driving

- **Elements:** driving while under the influence of an intoxicating substance.
- **Maximum penalty:** the penalties likely to be imposed for an offence of drink driving depend partly on whether the offence is classified as major or minor.

Drink driving offences in Queensland are covered under the *Transport Operations (Road Use Management) Act 1995* (Qld). Drink driving is a very serious offence. The law in Queensland allows police officers to conduct random roadside breath tests to catch drink drivers. If a person refuses to give a breath sample to police, they are presumed to be guilty of the most serious drink driving offence.

Certain drivers are required to have a blood or breath alcohol concentration (BAC) of 0 per cent when operating a vehicle. These include learner drivers, drivers on a provisional licence who are under the age of 25, commercial truck drivers, bus drivers, taxi drivers and drivers of vehicles carrying dangerous goods. All other drivers in Queensland must have a BAC of less than 0.05. This means that the driver has less than 0.05 milligrams of alcohol per 100 millilitres of blood.

Table 2.4 Dangerous operation of a vehicle offences and corresponding maximum penalties

Offence and element present	Maximum penalty
Dangerous operation of a vehicle	Three years' imprisonment
Dangerous operation of a vehicle causing death or grievous bodily harm	Ten years' imprisonment
Dangerous operation of a vehicle while intoxicated	Five years' imprisonment
Dangerous operation of a vehicle while intoxicated causing death or grievous bodily harm	Fourteen years' imprisonment
Dangerous operation of a vehicle while intoxicated (high alcohol limit according to the *Transport Operation (Road Use Management) Act 1995* (Qld))	Fourteen years' imprisonment

Drivers who are convicted of three drink driving offences within a five-year period face a mandatory term of imprisonment; the magistrate in such cases cannot exercise any discretion over this punishment.

Figure 2.18 Drink driving is a serious offence.

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Minor offences

Minor offences include all offences involving a BAC reading above the relevant limit but less than 0.15 per cent. First offences generally attract licence disqualification periods from one month to 12 months, and fines can range anywhere from a few hundred dollars up to $2000. The magistrate can still impose prison sentences, but such a penalty is generally reserved for repeat offenders.

Major offences

Penalties for major offences are likely to include fines from about $1000 up to $3000 and involve a minimum licence disqualification period of six months. It is also possible for the magistrate to order a period of imprisonment; however, such a penalty is not common for first-time offenders. There are three forms of major offences:

- BAC is equal to or greater than 0.15 per cent (in which case you are said to be 'under the influence')
- Driving under the influence of some other intoxicating substance, such as an illicit drug
- Failure to provide a breath or blood specimen as lawfully required.

Drug offences

The law in Queensland that deals with drug offences is the *Drugs Misuse Act 1986* (Qld). Each dangerous drug that is illegally used has a different impact on the body and on society as a whole. For this reason, it is necessary to categorise drugs into different groups so that the penalties for drug offences can be proportionate to the seriousness of the drug in question. Under Queensland law, dangerous drugs are broken into two categories: 'Schedule 1' and 'Schedule 2'.

Schedule 1 drugs are considered to be 'harder' or more dangerous substances and are listed under steroid and non-steroid drugs. They carry much harsher penalties than those on the Schedule 2 list.

The category of the drug is combined with the amount of the drug the offender possesses, produces, supplies or traffics to produce a maximum penalty to be applied for the offence committed. The most serious penalties apply when offenders have large amounts of Schedule 1 drugs. Penalties are also more severe for offenders who supply drugs to children.

Schedule 1 drugs include:

- heroin
- lysergide (LSD)
- cocaine
- phencyclidine (PCP)
- methamphetamine (ICE)

Schedule 2 drugs include:

- cannabis
- morphine
- pethidine
- amphetamines
- opium
- gamma hydroxybutyric acid (fantasy/GHB)

Figure 2.19 Examples of some of the drugs listed in Schedules 1 and 2 of the *Drugs Misuse Act 1986* (Qld)

Possession

- **Elements:** having actual physical control of a dangerous drug.
- **Maximum penalty:** 25 years' imprisonment.

Section 9 of the *Drugs Misuse Act 1986* (Qld) states that any person who unlawfully has **possession** of a dangerous drug is guilty of a crime. Depending on the schedule of the drug under the *Drugs Misuse Regulation 1987* (Qld) and the quantity of the drug, a person found guilty of possession can face a maximum penalty of 25 years' imprisonment. This maximum penalty will only apply if the offender is found with a large quantity of Schedule 1 drugs.

possession for a person to be in possession of a drug, they generally have to be aware of its existence and be exercising control over it; they must also know that the substance is a drug or have reason to suspect that it is a drug

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Figure 2.20 The *Drugs Misuse Act 1986* (Qld) outlines the offences of supplying, producing, trafficking and possession.

Producing

- **Elements:** to offer, prepare to or actually prepare, manufacture, cultivate, package or produce a dangerous drug.
- **Maximum penalty:** 25 years' imprisonment.

Section 8 of the *Drugs Misuse Act 1986* (Qld) states that any person who unlawfully produces a dangerous drug is guilty of a crime. Depending on the quantity of the drug and its schedule under the *Drugs Misuse Regulation 1987* (Qld), a person guilty of producing may face a maximum penalty of 25 years' imprisonment.

Supplying

- **Elements:** to supply means to offer, prepare to or actually give, distribute, sell, administer, transport or supply a dangerous drug.
- **Maximum penalty:** 25 years' imprisonment (for aggravated supply).

According to section 6 of the *Drugs Misuse Act 1986* (Qld), a person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime. A person found guilty of supplying a Schedule 1 drug faces a maximum penalty of 20 years' imprisonment, and a person found guilty of supplying a Schedule 2 drug can face a maximum penalty of 15 years' imprisonment. Different punishments apply for what is known as 'aggravated supply'. Aggravated supply includes an adult supplying to a minor, a person with an intellectual impairment, a person in an educational institution, a person within a correctional facility or a person who is unaware of what they are being supplied. The maximum penalty for the aggravated supply of a Schedule 1 drug is 25 years' imprisonment, and the maximum penalty for the aggravated supply of a Schedule 2 drug is 20 years' imprisonment.

Trafficking

- **Elements:** carrying on the business of unlawfully trafficking a dangerous drug.
- **Maximum penalty:** 25 years' imprisonment.

According to section 5 of the *Drugs Misuse Act 1986* (Qld), a person who carries on the business of unlawfully **trafficking** in a dangerous drug is guilty of a crime. Trafficking is not defined in the Act, however. Usually, courts consider trafficking to mean running a business that sells drugs commercially. A person found guilty of this offence can face a maximum penalty of 25 years' imprisonment for trafficking a Schedule 1 drug, and 20 years' imprisonment for trafficking a Schedule 2 drug.

trafficking typically, selling drugs; however, 'trafficking' is of wider import, meaning 'knowingly engaging in the movement of drugs from source to ultimate user'

Check this out

Queensland Police invite citizens to help keep the community safe by creating opportunities for them to report crimes, such as drug dealers and labs, directly to them.
https://cambridge.edu.au/redirect/10572

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Figure 2.21 A significant amount of narcotics would usually indicate the desire of the offender to sell the drugs for profit.

2.4 Rights and responsibilities in criminal situations

During a criminal situation, the investigation process and the trial proceedings, a number of stakeholders are involved. The rights and responsibilities of each of these stakeholders ensure that due process is followed and just and equitable outcomes are sought for all those involved. Whether they are suspects, police, alleged criminals, accused criminals, witnesses to a crime or victims of crime, the role each stakeholder plays in the criminal investigation process is important to ensuring efficient and effective enforcement of criminal law.

The right to silence

When a person is suspected of committing an offence, they must provide the police officer who is arresting them with their name so they can be identified. They are also required to provide their address if asked. This power is provided to the police in section 40 of the *Police Powers and Responsibilities Act 2000* (Qld). Apart from this, a person is not required by law to answer any other questions police officers ask them, as they may be incriminating themselves by doing so. Many people will refuse to answer questions until they have a lawyer present, which they are legally entitled to do. This right is outlined in section 418 of the *Police Powers and Responsibilities Act 2000* (Qld) – every person who is arrested must be given the opportunity to contact a lawyer or a friend. Therefore, apart from providing their identity to police officers, citizens do have the right to remain silent.

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In recognising the right to silence, section 431 of the *Police Powers and Responsibilities Act 2000* (Qld) provides that a person sought to be questioned in respect of an indictable offence must be cautioned by police in that anything they say may be used as evidence against them. The police officer must be positively satisfied that the person understands that warning.

When questioning Indigenous peoples, section 25 of the *Police Powers and Responsibilities Regulation 2012* (Qld) outlines that police must ask questions to ascertain the person's level of education or understanding. If the police officer reasonably suspects the relevant person is at a disadvantage in comparison with members of the Australian community, generally, and the person has not arranged for a support person to be present during the questioning, the police officer must arrange for a support person to be present.

The *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) provides that national security and counterterrorism come under a different system, whereby the right to silence does not apply. The Australian Government can legally detain a suspect for questioning for up to seven days in secret, with no right to silence and no access to a lawyer if they consider it is for the purpose of gathering information about a terrorist offence. They may not even be a suspect. This means that journalists, priests – even you – can be detained under these powers.

The powers given to ASIO were enacted under sections 34D–34H of the *Australian Security Intelligence Organisation Act 1979* (Cth) in response to the Bali bombings in 2002. Although these powers clearly undermine the fundamental underpinnings of our democratic society and the rule of law – such as the right to silence; the right to an attorney; the right to a fair trial; freedom from arbitrary detention, torture or cruel, inhuman or degrading treatment or punishment; and the right to liberty – they were considered necessary in a time of public emergency to prevent terrorist attacks. Since these powers were established, they have only been used once.

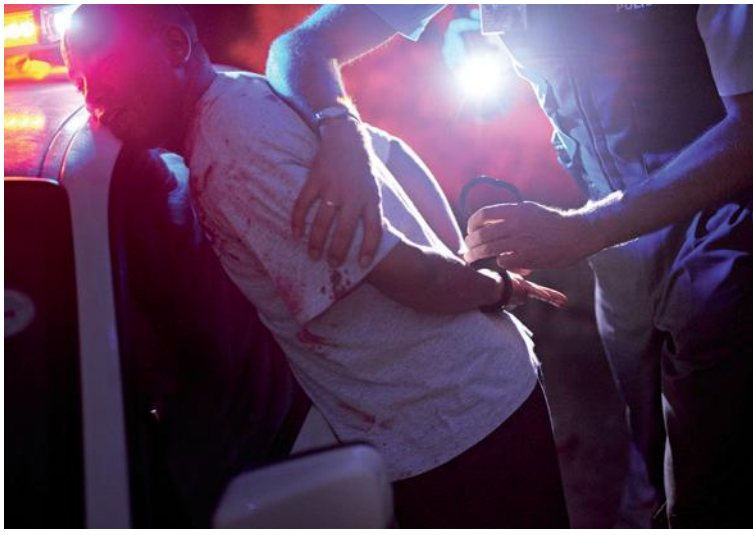

Figure 2.22 Police may detain a suspect for questioning relating to an indictable offence for a reasonable period of time.

Off the record

Research the coercive questioning powers of the Australian Security Intelligence Organisation (ASIO). Discuss the circumstances in which this power may be used and why the right to silence does not apply to citizens when they are being questioned by ASIO in such circumstances. Do you agree that these powers are necessary for the protection of society?

Rights and responsibilities during searches

Section 624 of the *Police Powers and Responsibilities Act 2000* (Qld) sets out the general provisions that apply to searches of persons by police officers. Usually, the police officer conducting the search must be of the same sex as the person being searched. If there is no police officer of the same sex available, then the police officer may direct another person of the same sex (e.g. a doctor) to conduct the search. The police officer must ensure that the search is carried out in a manner that respects the dignity of the person. They must also ensure that the

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search causes minimal embarrassment. A search in public must be restricted to a 'pat-down' search of the outer clothing. Any more thorough search must be conducted out of public view.

'Out of public view' can mean at a police station if there is one nearby or in a private room in some other establishment.

It may be necessary under some circumstances to complete an immediate, thorough search of an individual. If this is necessary, a police officer of the opposite sex to the person being searched may conduct the search if there is no one else available. Such a search may also be more thorough than a pat-down search in public view. An example of when an immediate search is necessary is when the police officer has a **reasonable suspicion** that the person to be searched may have a bomb strapped to their body or has a concealed firearm or knife.

reasonable suspicion facts that would cause a reasonably minded person to conclude something – this may be an incorrect suspicion, but it must be a reasonable one

Figure 2.23 Examples of when police officers may search a suspect without a warrant include, but are not limited to, having a reasonable suspicion that the person is concealing a weapon, carrying a bomb or has a dangerous drug in their possession. Here we see a young man having his possessions checked by police during Schoolies Week on the Gold Coast.

Search warrants

Usually, police officers will need a warrant to be able to search a place. The warrant will state the place that is to be searched and the item for which the police are searching and will state the reason for the search. The police are also given a timeframe in the warrant stating by when the search must be conducted. Sometimes it is necessary for the police to conduct a search without a warrant. The *Police Powers and Responsibilities Act 2000* (Qld) sets out certain circumstances under which such a search may be necessary, such as the search of a car, public place or private property. Other situations that may allow a search without a warrant include where police reasonably believe a person may harm themselves or others, or when they reasonably suspect there are unlawful weapons, drugs or stolen property on the premises.

Rights and responsibilities during arrest

When a person is arrested, the police officer's responsibility, as soon as is reasonably practicable, is to tell the arrested person the nature of the offence for which they have been arrested. A police officer must give the arrested person the name, rank and station of the arresting officer, in writing, before they are released from police custody (if they are released from custody): see section 391 of the *Police Powers and Responsibilities Act 2000* (Qld).

Arrest warrants

A police officer can apply for a warrant (a court document that directs a law enforcement officer to arrest a person and bring them to court) for a person's arrest. A judge, magistrate or justice of the peace may issue a warrant if they reasonably believe that the person for whom the warrant will be issued has committed an offence. Section 372 of the *Police Powers and Responsibilities Act 2000* (Qld) requires that such a warrant contains the rank, registered number and station of the

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Figure 2.24 The rights and responsibilities of police during the criminal investigation process are outlined in the *Police Powers and Responsibilities Act 2000* (Qld). Here police investigators arrive at Dreamworld on the Gold Coast after a fatal ride accident in October 2016.

officer applying for the warrant, as well as the offence the person is alleged to have committed.

Police can arrest an adult without a warrant if the police officer reasonably suspects the person has committed or is committing an offence and one of the prescribed circumstances exists. Section 365 of the *Police Powers and Responsibilities Act 2000* (Qld) gives police this power.

Detention

Section 403 of the *Police Powers and Responsibilities Act 2000* (Qld) states that police may detain a suspect for questioning relating to an indictable offence for a reasonable period of time.

Generally, a person cannot be detained for more than eight hours. However, this time period may be extended by a magistrate if the offence is a very serious one or if more than one offence has been committed and the police require more time to interview the suspect.

Review 2.8

1. **Describe** the purpose of the *Police Powers and Responsibilities Act 2000* (Qld).
2. **Explain** why you think the law requires a police officer to provide the arrested person with information about themselves.
3. **Explain** why warrants are required during the criminal investigation process. What protections does the need for warrants provide?
4. **Explain** the situations in which police can search or arrest a person without a warrant.

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2.5 Evidence

During the criminal investigation process, in order to establish that a crime has taken place, the prosecution will need to prove in court through evidence that the accused person physically committed the act beyond reasonable doubt. Forensics, the collection of evidence and witness testimony are all vital parts of the process. It is through these methods of investigation that an accused can be linked to the scene of the crime and the criminal act.

This evidence may be collected directly from the crime scene or throughout the investigation process. Section 196 of the *Police Powers and Responsibilities Act 2000* (Qld) gives police the right to seize property that they reasonably suspect is evidence of the commission of an offence. The police must have lawful reason to be at the location where the evidence is located.

A witness may be ordered legally to provide documents or appear in court to present their direct or circumstantial evidence, particularly as a witness for the prosecution. This legal order is called a **summons** if the witness is called to give evidence in a Magistrates Court, or a **subpoena** if the evidence is to be presented by the witness in a District or Supreme Court.

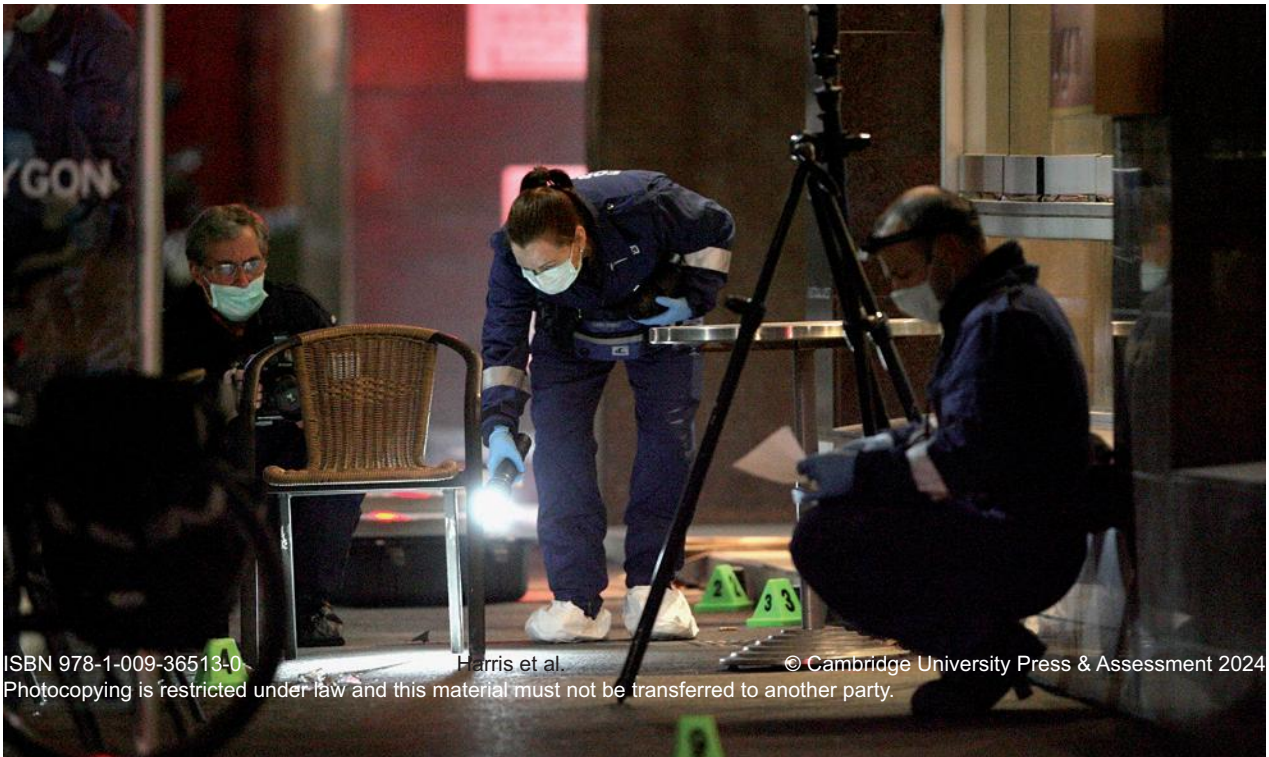
summons an official document that requires a person to give evidence in the Magistrates Court

subpoena an official document that requires a person to give evidence in the District or Supreme Court

The evidence that is collected by police during their investigation and presented in court can be classified as direct or as circumstantial.

- **Direct evidence** is evidence that tends to prove a fact directly, for example, when the witness testifies about something which that witness personally saw or heard.
- **Circumstantial evidence** is evidence of circumstances or indirect evidence that can be relied upon not as proving a fact directly, but instead pointing to its existence. It requires that an inference be made about the likelihood of the scenarios being presented.

Figure 2.25 Evidence is collected and used by the prosecution to prove the accused committed the offence beyond reasonable doubt. Here we see police investigators assess the crime scene where two men were shot dead on Lygon Street in Melbourne on 13 August 2010.



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Both direct and circumstantial evidence must be considered by the jury. For the jury to come to a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances. The rules of evidence will be explored in Chapter 3.

Case study 2.2

The case: *The Queen v Baden-Clay* [2016] HCA 35

The Courier Mail

THE PROSECUTOR'S INTERROGATION

'You killed your wife, Mr Baden-Clay?'

'You killed her either in or at your house at Brookfield that night or in the early hours of the morning?'

'You attacked her and the only way she could respond was to lash out and claw at your face and leave marks upon it?'

'Probably as you smothered her. And took the life from her?'

'you overpowered her pretty quickly, didn't you?'

'Perhaps her jumper came up as you tried to fight her off...?'

'You transported her to Kholo Creek and then dumped her underneath the bridge unceremoniously?'

'You started covering your tracks then, I suggest to you Mr Baden-Clay?'

GERARD: NO I DID NOT

POLICE PROBE MAROON PUB CLASH

Figure 2.26 Gerard Baden-Clay was committed to stand trial and was found guilty of the murder of his wife, Allison. *Courier-Mail* front-page newspaper coverage during the murder trial is pictured here.

Facts

Gerard Baden-Clay was arrested in June 2012 and charged with murdering his wife Allison and interfering with a corpse. He had earlier reported her missing; later, her body was found. There was much publicity surrounding the case, as Mrs Baden-Clay was well known in the area where they lived. The publicity also included discussion of business, personal and insurance matters. Baden-Clay was committed to stand trial. On 15 July 2014, following a trial in the Supreme Court of Queensland before Byrne SJA and a jury, Gerard Baden-Clay was found guilty of the murder of his wife, Allison Baden-Clay.

Legal issues

No direct evidence was presented to the jury that convicted Gerard Baden-Clay of murdering his wife, but the prosecution's circumstantial case was strong enough to convince the jury that Baden-Clay was guilty beyond reasonable doubt.

Law

Baden-Clay was convicted of the murder of his wife according to the definition of murder in the *Criminal Code 1899* (Qld). Baden-Clay appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland on the ground that the jury's verdict was unreasonable. The Court of Appeal (Holmes CJ, Fraser and Gotterson JJA) allowed the appeal on that ground, set aside the respondent's conviction on the charge of murder and substituted a verdict of manslaughter.

Legal arguments

On further appeal to the High Court, the Crown contended that it was open to the jury, having regard to all the evidence, to be satisfied beyond reasonable doubt that the respondent killed his wife with intent to kill her or to cause her grievous bodily harm. That contention should be accepted.

Decisions

The original conviction of murder was reinstated.

Ratio decidendi (reason for the decision)

The High Court said the Court of Appeal had '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 Gerard Baden-Clay unintentionally killed his wife.'

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DNA evidence

Figure 2.27 DNA evidence can be collected from blood, hair, skin cells and other bodily substances. Here we see police investigators bagging evidence at the same 2010 Melbourne murder scene featured in Figure 2.25.

Collecting DNA

Police can collect DNA samples with consent, by court order or with the permission of a senior police officer. A DNA sample may be taken by an authorised police officer, a doctor or a nurse using a mouth swab or by collecting hair.

Generally, DNA samples and results are destroyed if the arrest does not proceed to charges being laid or a court finds the accused not guilty. DNA samples will not be destroyed if the accused is investigated or charged with another serious offence or is unfit for trial due to mental illness; instead they are stored.

DNA databases

The National Criminal Investigation DNA Database (NCIDD) which is managed by the Australian Criminal Intelligence Commission, has been operational nationally since 2001 and since then more than 837 000 DNA profiles have been uploaded.

The NCIDD contains DNA profiles from samples collected by Australian police from crime scenes, convicted offenders, suspects, items belonging to missing persons and unknown deceased persons.

Under the *Police Powers and Responsibilities Act 2000* (Qld), if a suspect is found guilty or has been convicted of an indictable offence, their DNA will remain on the database. If they are found not guilty, or if the police decide not to proceed with the case, the DNA will be destroyed after 12 months, but this is only if the person does not consent to the sample being taken or gives consent but limits what the police can use the DNA for.

If the sample was provided with consent as an 'unlimited' sample, it will be analysed and remain on the NCIDD.

Research 2.8

1 Research the collection and storage of telecommunications or technology metadata evidence in Queensland, then answer the following questions:
   - **a** **Explain** what metadata is and why this is collected.
   - **b** **Discuss** the relevance metadata has to the evidence collected.
   - **c** **Describe** the implications of collecting metadata.

2 **Create** a one-paragraph response to **justify** the use of metadata in evidence collection and storage.

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2.6 Juveniles and criminal law

Children are not treated in the same way as adults by the criminal justice system. The *Youth Justice Act 1992* (Qld) and the *Children's Court Act 1992* (Qld) are the two main laws that deal with juvenile offenders in Queensland. Prior to February 2018, a person 17 years of age or older was treated as an adult in Queensland; however, on 3 November 2016, the Queensland Parliament passed the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) to bring 17-year-old people into Queensland's youth justice system. This brings Queensland into line with Australia's other states and the United Nations Conventions on the Rights of the Child.

Off the record

Discuss why 17-year-old offenders would once have been considered adults in the criminal justice system in Queensland. What impact will the change of this age have on the criminal justice system in Queensland?

The courts deal with child offenders differently from adults, as they are considered to be more vulnerable. Schedule 1 of the *Youth Justice Act 1992* (Qld) states that children should only be detained as a last resort, and that if they do have to be detained, they should only be held in a facility that is suitable for children. Sentencing options, which are discussed in more detail in Chapter 4, are also different for children. This is because the courts, wherever possible and in accordance with the principles of the *Youth Justice Act 1992* (Qld), try to ensure that children are not detained in custody unless they have an extensive criminal history or have committed a very serious or very violent offence. It is believed by many that if children are not exposed to the harsher side of the criminal justice system, such as detention centres, then they are less likely to enter a cycle of reoffending.

Matters involving children are most often heard by the Children's Court, in which a magistrate hears and decides the case. The Children's Court is closed, which means that the general public

Figure 2.28 How would juvenile offenders be treated differently to adults by the criminal system?

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cannot enter and view the proceedings. However, as with adults, very serious offences such as murder must be heard in the Supreme Court, which is an open court. Juvenile offenders are generally protected from publicity and cannot be named in the media; this is to protect their reputation and so they are less likely to see themselves as criminal heroes. However, section 234 of the *Youth Justice Act 1992* (Qld) sets out circumstances in which a court may allow the publication of identifying information of juvenile offenders who have committed a very serious offence. The theory behind this provision, often referred to as 'naming and shaming', is that it may act in the interests of justice and be a deterrent to potential juvenile offenders, and that the public may be informed.

There are separate Queensland laws dealing with juvenile offenders – namely, the *Youth Justice Act 1992* (Qld) and the *Children's Court Act 1992* (Qld) – and some different sentencing options for children. There are also different police procedures for dealing with children, that is, those who have not turned 18 years of age by the commencement of the proceedings. These procedures cover questioning and fingerprinting, for example.

One of the persistent debates about juvenile offenders concerns whether they are treated too harshly or (a more common accusation) too lightly. It is claimed, with some justification, that placing children in detention centres is likely to reinforce in them a criminal image of themselves and lead to reoffending.

Figure 2.29 Brisbane Youth Detention Centre. Does placing children in detention lead to them reoffending as adults?

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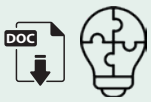

2.7 Topic review

Topic summary

- Criminal behaviour can consist of both a criminal act (*actus reus*) and criminal intent (*mens rea*).
- Crimes can be divided into different categories: offences against the person; offences against property; public order offences; driving offences; and drug offences.
- Strict liability means only the criminal act, not criminal intent, needs to be proven.
- When police officers arrest a person, they must tell the person the nature of the arrest and provide their name, rank and station to the arrested person.
- A warrant can be issued for a person's arrest.
- The adversarial system of trial is used in Australia.
- Strict guidelines exist with respect to the search of persons and places, and the collection, storage and disposal of evidence.
- Police can seize property as evidence.
- Discretionary powers are afforded to police to make decisions based upon what seems to be the most appropriate course of action when enforcing criminal law.

Short-response questions

1 Provide **explanations** to show your comprehension of the following legal concepts, principles and processes:
   - **a** what constitutes criminal behaviour
   - **b** the difference between an alleged and an accused offender
   - **c** the difference between summary and indictable offences
   - **d** the difference between a search and an arrest warrant
   - **e** the difference between direct and circumstantial evidence.

2 **Describe** and **analyse** the role of police in the investigation process.

3 **Describe** three specific items of evidence that police may collect at a crime scene.

4 Brainstorm and **create** a list of all the possible stakeholders who may be impacted in relation to criminal law.

5 **Explain** why the statement 'no person is found guilty of a crime unless adequate evidence is provided by the prosecution' could be considered a disadvantage to the prosecutor.

Extended-response questions

1 **Create** an essay response to evaluate the statement 'the more records added to the NCIDD database, the greater the odds of making an accidental match.' **Evaluate** the relevance of such a statement and decide what impact the inclusion of every person's DNA profile in the database may have on just and equitable outcomes for Queenslanders.

2 **Create** a presentation using digital technology to **analyse** three key stakeholders in the criminal investigation process. **Decide** how effective just and equitable outcomes are for each stakeholder. **Explain** whether the current process in Queensland balances the individual's rights with society's need for order.

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Response-to-stimulus questions

Read the following article and answer the questions that follow.

Source 1

Woman charged with arson after fire guts two rooms in Cairns COVID-19 quarantine hotel

Nibir Khan, ABC News, 28 November 2021

A 31-year-old woman has been charged with arson and wilful damage after allegedly lighting a fire under a bed at a Cairns quarantine hotel.

More than 160 guests were evacuated from the 11-storey Pacific Hotel early Sunday morning as flames took hold of two rooms on an upper floor.

Queensland Police said in a statement on Sunday all occupants were safely evacuated, but the building had suffered "significant damage".

Chief Superintendent Chris Hodgman said the woman had been at the facility for a "couple of days" after arriving from interstate.

She is due to appear in Cairns Magistrate Court on Monday charged with one count each of arson and wilful damage.

Refer to Source 1 to answer the following questions.

1 Research and **analyse** the penalties for arson and wilful damage to property.
2 **Discuss** why the penalties are significantly different. Do you agree with the differences?
3 Do you agree with both charges being laid for this offence? If yes, **explain** your opinion and state why. If no, **explain** which charges would be most appropriate in this case and why.

Read the following article and answer the questions that follow.

Source 2

Fourth teenager charged over Townsville car crash that killed Jennifer Board

Siobhan Heanue, ABC News, 19 February 2021

Police have charged a fourth teenager in connection to a car crash in north Queensland that resulted in the death of Townsville woman Jennifer Board.

The 17-year-old male was arrested in Mackay on Thursday and charged with five counts of unlawful use of a motor vehicle and three theft offences.

Police in Mackay were investigating other matters when they found and arrested the teenager.

The teenager faced Mackay Children's Court on Friday afternoon and did not apply for bail.

He will remain in custody for his case to be heard at a later date.

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"We're satisfied that we have located all four people that were in the stolen vehicle at the time of the traffic crash," Detective Chris Inspector Lawson said.

Jennifer Board, 22, was killed when her motorbike was hit by a car that veered onto the wrong side of the road in Kirwan on February 5.

Police have alleged the vehicle that hit Ms Board had been chasing a stolen car through the streets before it lost control.

The allegedly stolen vehicle was driven from the scene and dumped in another suburb.

Two 18-year-old men and a 17-year-old girl have already faced court over their alleged involvement.

The 18-year-old alleged to have been driving the car being pursued, Gregory Clubb, and 18-year-old alleged passenger Layne Newman both remain in custody.

The 17-year-old girl pleaded guilty to all charges and was released on probation.

Christopher Michael Hughes, 25, who was allegedly driving the car chasing the stolen car, has been charged with murder.

Mr Hughes, from Bushland Beach, remains in custody.

"The involvement of other people in the crash itself is subject to further investigation and whether other charges will be laid in the future is something we can't really comment on," Detective Inspector Lawson said.

He said a significant amount of police resources had gone into the investigation, with the workload aided by the arrival of additional police from Brisbane after the Queensland Government announced a new taskforce to tackle youth crime. Children's Court and were remanded in custody.

Refer to Source 2 to answer the following questions.

4 **Discuss** the murder charge for the four accused offenders. Do you agree that their actions constituted the crime of murder?

5 **Explain** how the investigation process for these offenders would have differed from the criminal investigation process for adult offenders.

6 Using the definitions of criminal behaviour and the elements of crimes, **explain** why a person involved in a serious offence, such as armed robbery, can be held liable for the crime of murder if a person is killed during the commission of that offence.

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Chapter **3** Topic **3**

Criminal trial process

Chapter overview

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.

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Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including the Crown, prosecutor, defendant, double jeopardy, defences and excuses, committal hearing, arraignment, jury, bail, bailiff, judge, verdict, adjournment, remand, conviction, solicitor, barrister, and counsel.
- Explain the trial process, including
  - the court hierarchy as it applies to criminal trials
  - key personnel
  - court processes, including appeals processes
  - the presumption of innocence and the burden of proof as a legal right to fairness.
- Explain, using scenarios where relevant
  - bail conditions and decisions under the *Bail Act 1980* (Qld)
  - jury selection under the *Jury Act 1995* (Qld)
  - unanimous verdict, majority verdict, and standard of proof – beyond reasonable doubt
  - rules of evidence, for example direct, indirect, admissible and inadmissible, and circumstantial.
- Explain the attributes of a fair trial, for example due process, natural justice, procedural fairness and judge-only trials.
- Analyse a relevant criminal case/s to examine legal concepts, principles and processes.
- Analyse and apply defences to a range of criminal scenarios.
- Select legal information and analyse the legal issues concerning court processes as experienced by different groups (e.g. women, youth, children, Aboriginal peoples and Torres Strait Islander peoples, migrants and those with a disability) that may create barriers to justice and equity or impede a right to a fair trial, including access to legal aid, bail and appeals by
  - determining the nature and scope of the legal issue
  - examining different relevant viewpoints and their consequences.

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- Evaluate the above legal situations by
  - presenting legal alternatives to make a recommendation/s
  - justifying using legal criteria and
  - discussing implications.
- Analyse and evaluate legal issues where justice may be impeded during a criminal trial process (e.g. because of language, culture or capacity), by presenting legal alternatives, making recommendations, justifying recommendations using legal criteria and discussing their implications.
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

- *Bail Act 1980* (Qld)
- *Children's Court Act 1992* (Qld)
- *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld)
- *Criminal Code 1995* (Cth)
- *Criminal Code Act 1899* (Qld)
- *Drug Legislation Amendment Act 2006* (Qld)
- *Evidence Act 1977* (Qld)
- *Jury Act 1995* (Qld)
- *Legal Aid Queensland Act 1997* (Qld)
- *Penalties and Sentences Act 1992* (Qld)
- *Youth Justice Act 1992* (Qld)

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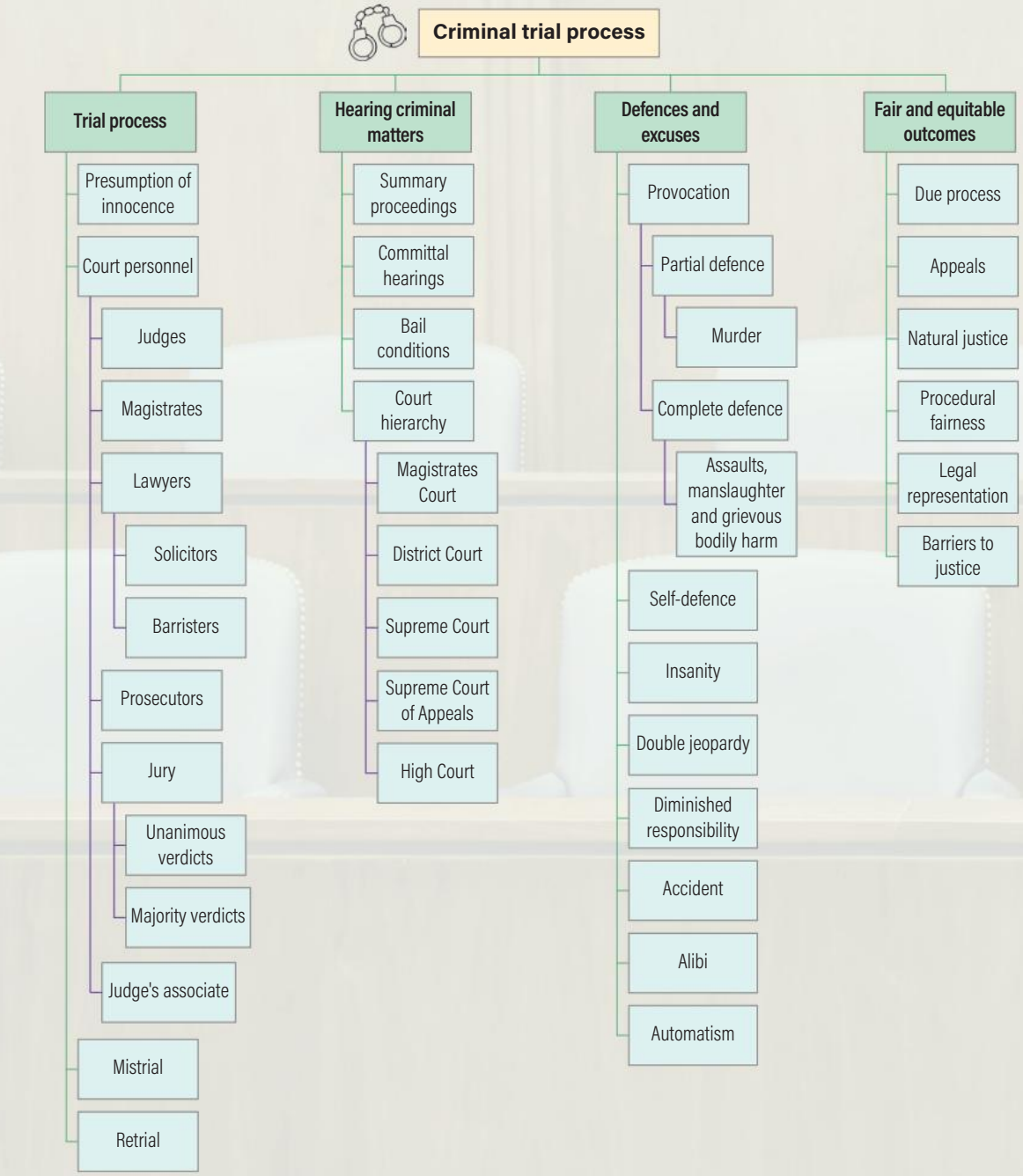
Significant cases

This topic will include the following cases:

- *Hawkins v The Queen* (1994) 179 CLR 500
- *Kioa v West* (1985) 159 CLR 550
- *R v Cox* [2016] QCA 165
- *R v Goode* [2004] QCA 211
- *R v Huni* [2014] QCA 324
- *R v Munray* [2018] QCA 057
- *R v Sebo; Ex parte A-G* (Qld) [2007] QCA 426
- *Woolmington v DPP* [1935] AC 462

Concept map

In Topic 3 of Unit 1 of the QCAA Legal Studies course, we will cover the following content:



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3.1 Hearing criminal matters

In criminal law, after the investigation process is completed and the accused is charged with an offence, the person must be brought before a court. Unless the person pleads guilty, a hearing or trial is held. The relevant court and procedures for these hearings or trials depend on whether the offence is a summary (minor) offence or an indictable (more serious) offence and the original jurisdiction of each court (see Chapter 2).

There are many people involved in the process of having a matter dealt with by the courts. In a criminal case, the Crown (the prosecution) brings a case against a person. For example, with *R v Green*, Green would be referred to as the 'accused' or the 'defendant' and would be represented by the defence. The 'R' stands for the Latin terms of *Regina* (Queen) or *Rex* (King). *R v Green* therefore means 'the Crown against Green'.

Before the hearing or trial, a **first mention** is held in the Magistrates Court. The prosecutor reads out the charges and the defendant or their legal representatives will be called upon to advise the court of the **plea** – either guilty or not guilty – to be entered. Where a change to the date set by the court is needed for any reason, either party can apply for an **adjournment** to reschedule the proceedings.

first mention the first time that a matter is heard in the Magistrates Court; at the first mention, the matter can finish with a plea of guilty or be adjourned for further mentions

plea (in criminal proceedings) the answer given of 'guilty' or 'not guilty' in response to the charges

adjournment the postponement of legal proceedings to a later date

If the proceedings at this first mention are not finalised, a further mention date will be set to confirm that each party is ready to proceed. If the magistrate deems the accused a risk of not returning to the court, or a danger to the community or themselves, they may be held in custody on **remand**. If the magistrate does not think they are a risk, then the accused may be released on **bail**. However, if the criminal charge is for murder, bail applications must be made directly to the Supreme Court.

remand (in custody) the procedure of keeping an accused person in legal custody while waiting to appear at a committal hearing or trial

bail a process whereby a person who is accused of a criminal offence is allowed to remain in the community until their trial, rather than being remanded in prison

Bail

Bail is the procedure that allows a prescribed police officer or a court to release a person from custody until they are due to appear in court. A person may be held in a watchhouse (a secure building, usually attached to a police station) while they are awaiting bail. Bail requires an undertaking by the defendant to surrender into custody as required (e.g. on the day of the court appearance). If a defendant applies for bail for a criminal charge, a court may require a surety. A surety is a person that agrees to pay an amount of money to the court if the accused does not show up for the next hearing. Bail can be granted with or without sureties and with or without the deposit of money, this is dependent on the nature of the offences.

Figure 3.1 To be granted bail a defendant may need to pay an amount of money known as a surety.

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Figure 3.2 The hearing of criminal matters determines the guilt or innocence of the accused and delivers the sentence for the crimes of which the accused pleads or is found guilty.

The law in Queensland that deals with bail procedures is the *Bail Act 1980* (Qld). Section 11 empowers a court or a police officer to grant bail subject to conditions. The general conditions include that the person does not commit an offence or endanger the safety or welfare of the public or interfere with witnesses. Other discretionary conditions may include having to report to police or refrain from contacting a certain person or people.

There is a general presumption that a person should be granted bail unless there is an unacceptable risk the defendant will fail to appear on the adjourned date, commit further offences, endanger other people, be a danger to himself or herself or interfere with witnesses.

Only the Supreme Court can grant bail to a person who has been charged with a serious offence where, if found guilty, a mandatory life sentence must be imposed or where an indefinite sentence may be imposed under the *Penalties and Sentences Act 1992* (Qld).

Bail shall be refused if there is an unacceptable risk that the defendant would:

- fail to appear and surrender into custody
- commit an offence
- endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare
- interfere with witnesses or otherwise obstruct the course of justice.

This section also states that bail shall be refused if the court or police officer is satisfied that the defendant should remain in custody for their own protection.

Source: Section 16 of the ***Bail Act 1980*** (Qld)

Review 3.1

Read each of the following scenarios and **decide** whether you would grant bail to the accused. **Explain** the reason for your decision using the *Bail Act 1980* (Qld).

1. A 28-year-old man whose brother belongs to a 'bikie gang' is charged with drink driving. He has no criminal record but his 'close ties' to the motorcycle gang are raised by the prosecutor.
2. A 43-year-old woman is charged with shoplifting. She has a long criminal record for theft and fraud, and she has spent many months in prison in the past, but she has never committed a violent offence. She has no children but has a job in a fast-food restaurant.
3. A 33-year-old woman has been charged with dangerous driving causing bodily harm. The victim is in a serious but stable condition in hospital and is expected to make a full recovery. The accused has no criminal record. She has three young children to care for and will lose her job if she is not released.
4. A 17-year-old person is accused of taking part in a violent break-and-enter in the home of an elderly couple. They are seeking release on bail. They and the 19-year-old co-accused broke into the couple's home, tied them up and ransacked the home. The couple were threatened but not harmed.

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Hearing criminal matters in the Magistrates Court

In Queensland, all criminal matters must come before a magistrate in the first instance. In summary proceedings, where the court has original jurisdiction, the magistrate will hear the evidence and make the final decision as to guilt or innocence. In more serious offences where jurisdiction falls to either the District or Supreme Court, a committal hearing is held where the magistrate decides whether there is sufficient evidence to commit the accused to trial before referring the matter to the appropriate court and setting a trial date to be heard at a later date. If the accused enters a guilty plea, the magistrate will refer the matter to the appropriate court for a sentencing hearing. There is no jury present in the Magistrates Court. While a magistrate can deal with some indictable offences, in most cases indictable offences are committed to be decided in the District or Supreme Court.

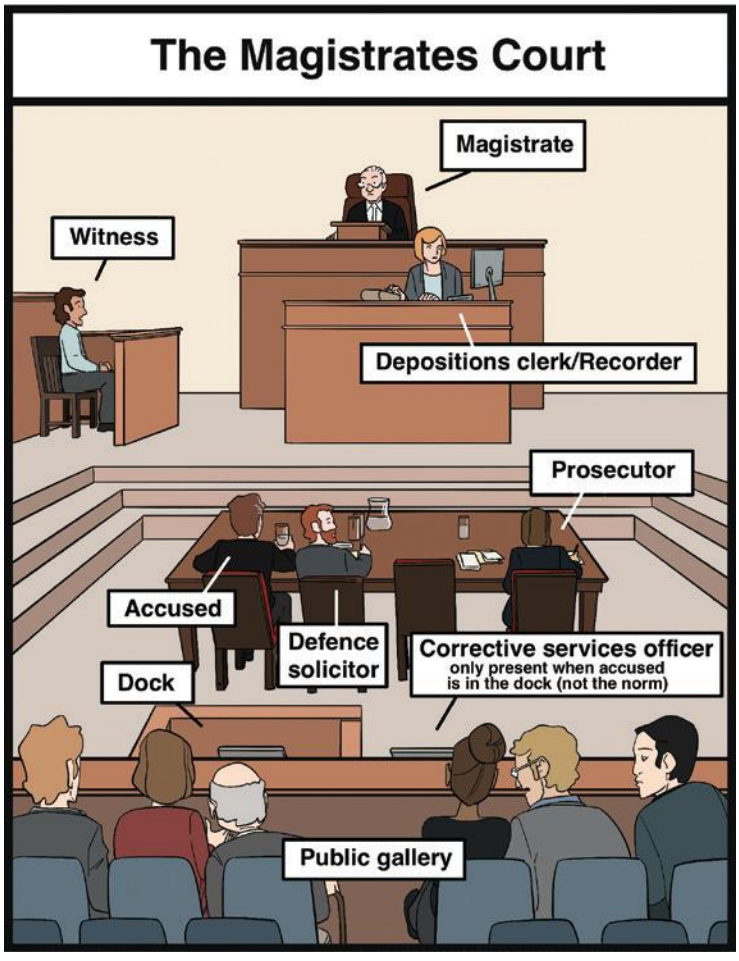

Figure 3.3 The personnel involved in a Magistrates Court in Queensland.

Check this out

There are now a number of offences to which offenders can plead guilty online. View the types of offences on the Queensland Government's Plead Guilty Online website. Discuss why these would have shifted from a court appearance to an online plea.

Domestic violence matters and orders (DVOs) are also within the Magistrates Court's jurisdiction. However, following consistent increases in domestic violence applications in Queensland, a specialist Domestic and Family Violence (DFV) Court was trialled in Southport in 2015. After a two-year trial period, the specialist DFV Court at Southport became Queensland's first permanent specialist DFV courts to provide quicker, coordinated and more consistent responses to these applications.

The rollout of further specialist DFV courts was then staged over the next six years (2018 to 2023) with specialist DFV courts now based in local Magistrates courts in Southport, Beenleigh, Townsville, Mount Isa and Palm Island.

These courts deal with domestic and family violence cases and have magistrates who are specially trained to hear such matters. However, if a person commits a more serious domestic and family violence offence, the case would still be heard and sentenced in a higher court. For example, if a person is charged with attempted murder, the Supreme Court would hear the case and, if the person is found guilty, decide the sentence.

There are a number of other specialist courts in Queensland and Australia that hear both criminal and civil matters. These are explored in Chapter 8.

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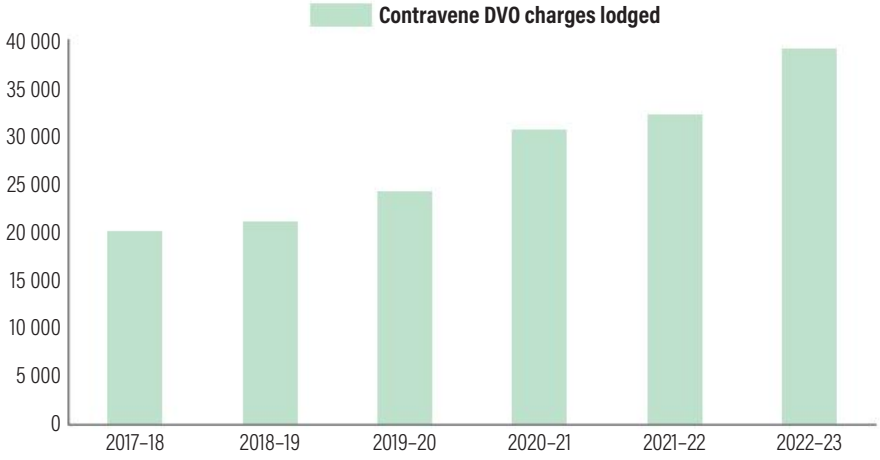

Figure 3.4 Contravene DVO charges are those where the respondent has breached a condition of their DVO. These are recorded in the defendant's criminal history.

Off the record

Discuss why the data from Queensland courts show that offences relating to contraventions of DVOs have increased in frequency every year since 2017–18.

Discuss whether you think the rate of domestic violence or just the rate of reporting is increasing.

Data from Queensland courts show that offences relating to contraventions of DVOs have increased in frequency every year since 2017–18. But the increase in DVO breaches in 2022–23 was incredibly significant – jumping by 21.6 per cent year on year. Along with all other statistics covered so far, these paint a grim picture for the state of domestic violence in Queensland.

Fewer than 20% of alleged breaches of Queensland domestic violence orders result in charges

Eden Gillespie, *The Guardian*, 11 July 2022

Figure 3.5 Queensland police assistant commissioner Brian Codd says officers are 'fatigued' by a high domestic violence caseload.

Criminal charges have been laid in fewer than 20% of cases where Queensland police lodged an application for a contravention of a domestic violence order over the past year, a commission of inquiry has heard.

A public hearing on Monday heard police lodged 50,704 applications for contraventions of domestic violence protection orders in 2021–22, while 9,347 charges were laid for a range of domestic and family violence related criminal offences.

Breaching an order – which sets out specific rules for perpetrators, such as not approaching a victim at home or work – can result up to three years in jail for the first offence and up to five years if they breach again within five years.

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Gas prices could put brake on spring travel

The commission of inquiry, which has the powers of a royal commission, is examining police culture and the response to domestic violence.

On Monday Queensland police's head of the domestic, family violence and vulnerable persons command, assistant commissioner Brian Codd, said officers were working to address their own responses to domestic violence as the state moves towards criminalising coercive control.

"What we're learning is that our ability to recognise some of those more subtle controlling behaviours, which might also relate to a criminal offence ... is an area that we've got to improve on," Codd told the inquiry.

"But we're also mindful that a number of the applications for instance, may well be for behaviours that don't meet a criminal threshold."

Codd also noted figures, from the Domestic and Family Violence Death Review and Advisory Board, that either the victim or the perpetrator had domestic-violence-related contact with police in 65% of homicide cases.

"It raises the notion that there might have been an opportunity to intervene and therefore played some part in preventing the homicide," he said.

Domestic violence incidents previously sat under the Queensland police's crime, counter-terrorism and specialist operations unit until March 2021.

Codd said police had "a long way to go" in making sure the dedicated unit was adequately resourced, as there was "very limited" analytical and research capacity. Two key researchers had also been seconded to the women's safety and justice taskforce "for quite some time".

Officers were also feeling "fatigued" as they respond to an enormous caseload, with Queensland police spending over 40% of their time attending to domestic and family violence incidents, Codd said.

"Last week I was speaking to a senior constable from Logan who explained that her shift can involve going to five different domestic incidents and at the end of the shift, she will go home at night and cannot sleep for worrying about ... whether she missed something," Codd said.

The inquiry heard there were several issues with a draft manual for Queensland police officers, including that it does not identify domestic violence as a gendered issue despite the majority of victims being women.

Further issues were raised with a confusing statement in the unpublished police manual.

The statement advised officers to comply with commissioner directives or "seek advice from the officer in charge" if content in the manual conflicts with legislation or commissioner directives.

"I don't think that's a very healthy or helpful statement," Codd told the hearing.

"We shouldn't be putting out a manual that's in conflict with legislation, policies, procedures. The point of it is to ... make things simpler for our officers."

Public hearings will continue in Brisbane this week. The inquiry will later hold four weeks of hearings in regional Queensland.

The inquiry will hear from experts, legal representatives, support workers and First Nations and regional officers.

The inquiry is expected to report to the government by 4 October.

Review 3.2

1 **Explain** why the specialist Domestic and Family Violence Court was introduced.
2 **Identify** the responsibility that the court has in protecting victims of domestic violence.
3 **Evaluate** the role of the Domestic and Family Violence Court and **decide** whether this provides more just and equitable outcomes for stakeholders.

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Check this out

Watch the *Southport Domestic and Family Violence Specialist Court* video from the Queensland Courts website.

Summary proceedings

In summary proceedings, non-indictable offences or less serious offences such as drink driving offences, shoplifting and some minor drug offences are decided and dealt with by the magistrate. At a summary hearing, the accused can plead guilty or not guilty. In the case of a guilty plea, the magistrate will then listen to the submissions of the prosecutor and defence and either decide the penalty or set a date for sentencing.

In a not guilty plea, the magistrate will listen to the submissions of the prosecutor and defence, the evidence presented and the calling and questioning of witnesses. Once all submissions have been made, the magistrate will decide whether there is enough evidence to find the accused guilty beyond reasonable doubt or whether to dismiss the charges.

If the magistrate finds the accused guilty, they will set the penalty or a date for sentencing in the Magistrates Court. In the sentencing, the magistrate will decide whether or not to record a **conviction**. The magistrate must record a conviction if the offender is sentenced to imprisonment but for some sentences (e.g. a good behaviour bond), the magistrate may choose not to record a conviction. If a conviction is not recorded, this can potentially reduce the impact of the sentence on the offender by, for example, reducing the likelihood that they will miss out on employment or visas to travel overseas.

conviction the finding, by a court, that a person has committed a criminal offence; this either happens after a trial resulting in a verdict of guilty or after a plea of guilty

Committal hearings

In the case of indictable offences, a **committal hearing** takes place in a Magistrates Court. The case against the accused is presented to the magistrate, who then decides whether sufficient evidence exists to commit the matter to a higher court for trial or sentencing. The accused may plead guilty, not guilty or enter no plea at the committal hearing.

committal hearing when a charge is more serious, the magistrate must decide whether the evidence against the accused is strong enough for the case to go to trial in a higher court; if the magistrate is satisfied that there is sufficient evidence, the case is committed for trial in the District Court or the Supreme Court, depending on the seriousness of the charge

If the accused pleads guilty, they will be committed to the higher court for sentencing. If the accused pleads not guilty and there is sufficient evidence for a trial, they are committed to the higher court for a trial by judge and jury.

Figure 3.6 Pleading guilty at a committal hearing can be considered cooperation with the courts and may be taken into account during sentencing.

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There are three formats of committal proceedings for the magistrate to determine whether there is sufficient evidence:

1 Full **hand-up committal** without cross-examination:
   - No witnesses give evidence.
   - The prosecutor gives (hands up) evidence to the magistrate.
   - Evidence includes written statements, videos, audio tapes, fingerprint reports and any other evidence which police have to prove their case.
   - The matter is committed to the higher court for trial or sentence depending on whether the accused pleads guilty or not guilty.
   - The accused can choose to plead guilty, plead not guilty, or enter no plea at this stage.
2 Registry committal:
   - The accused must have legal representation.
   - All documents the police say are evidence against the accused are filed in the court, or their lawyer submits documentation confirming they have the evidence against them.
   - The matter is transferred to the higher court without the accused having to go to court for the committal. A notice will be sent explaining what has happened.
3 A committal hearing:
   - All or some of the witnesses appear in person to give evidence and can be cross-examined.
   - This kind of committal is only available if the prosecutor consents, or the court gives permission. There must be a reason why the witnesses need to come to court.
   - The magistrate decides whether there is enough evidence for the case to go to a trial in the higher court (this is called a *prima facie* case). If the magistrate doesn't think the police have shown enough evidence (i.e. they haven't proven they have a *prima facie* case), the magistrate can dismiss the case.
   - The accused can choose to plead guilty, plead not guilty, or enter no plea at this stage.

Source: Legal Aid Queensland

hand-up committal the prosecutor gives (hands up) evidence to the magistrate without having the witnesses present; this procedure was introduced to promote efficiency during committal proceedings

The purpose of the committal proceeding is to ensure that the time of the higher courts is not wasted by cases where there is insufficient evidence on which a reasonable argument could be put for a conviction. If the magistrate decides that sufficient evidence does exist (a *prima facie* case), it does not mean the accused person is guilty; it simply means the magistrate believes that the prosecution has sufficient evidence to justify a trial. During the committal, the accused person does not present their defence (if they have one). So it is quite possible that there would be a sound *prima facie* prosecution case, but that the accused will still be acquitted once they bring their defence.

The committal hearing is also of benefit to the accused, as it means they do not have to go through the hardship of a trial if sufficient evidence does not exist. If the magistrate decides that there is not sufficient evidence to proceed, then the case against the accused will be dismissed.

Review 3.3

1 **Describe** a summary proceeding.
2 **Explain** the purpose of a committal hearing.
3 **Explain** the difference between a hand-up committal and a committal hearing.
4 **Describe** what happens if a defendant pleads guilty at their committal hearing.

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Hearing criminal matters in the District or Supreme Court

If the committal hearing has found that there is sufficient evidence to proceed to trial, the case is committed to the District or Supreme Court for trial, depending on the plea and the seriousness of the offence. If a guilty plea was entered, a sentencing hearing will occur in the District or Supreme Court, depending on what sentence could be imposed for the crimes committed.

The trial in the District or Supreme Court is deemed to begin at the **arraignment** of the accused. This means the indictment is presented to the court and the accused is called upon to plead. An **indictment** is a document that brings the matter to trial and contains all appropriate information about the charges the accused is facing. Once the indictment has been read, the accused may enter a plea of guilty or not guilty. If the accused does not enter a plea, then the court will enter a plea of 'not guilty' on their behalf.

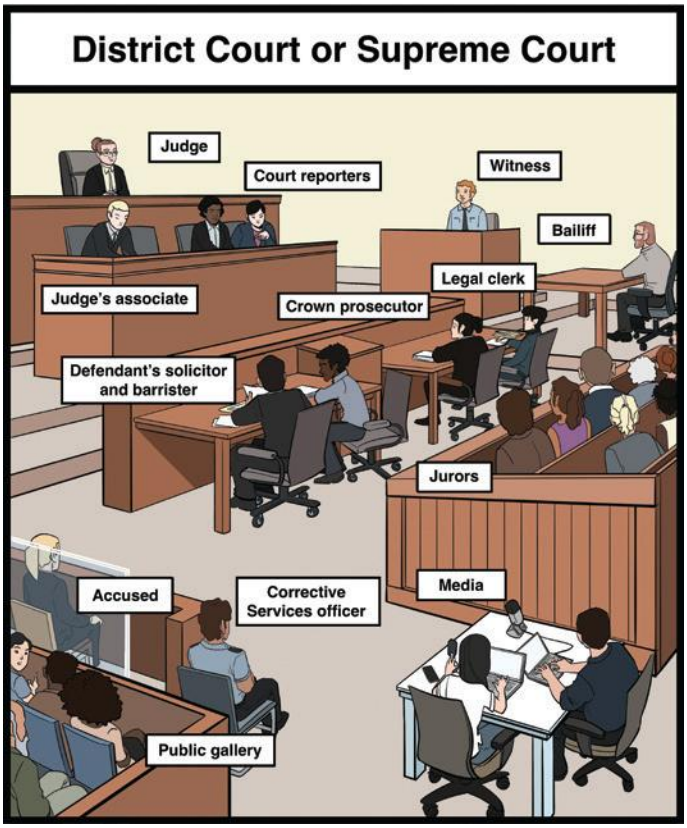

Figure 3.7 The personnel involved in a District or Supreme Court in Queensland.

arraignment formal reading of the charges in the District or Supreme Court

indictment the document that brings the matter to trial and sets out all the appropriate information about the charges the accused is facing

judge the senior judicial officer presiding in the District Court or higher courts, including the Supreme Court, Court of Appeal, Federal Court, Federal Circuit and Family Court and the High Court of Australia

3.2 Court personnel in a criminal trial

There are many people involved in the efficient operation of the court system. Courtroom personnel will differ depending on the type of court and the reason for attending court. The following are the main court personnel:

- **Judges.** Whatever the reason or whichever court you visit, you will either see a **judge** or a magistrate. Judges are commonly referred to as the 'judiciary', and they take their place in courts such as the District Court and Supreme Court of Queensland. In court, judges are referred to as 'Your Honour' and will usually wear robes (and often a wig). Judges have the responsibility of ensuring that the rules of the court are adhered to. The judge also has the responsibility of passing sentence in a criminal trial if the accused is found or pleads guilty to the offence with which they have been charged. A judge is appointed for life (in reality, this means a judge retires on reaching the age of 70). This is important because it allows judges to be truly independent – they cannot be sacked just because the government does not like their decisions.

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- **Magistrates.** A **magistrate** presides over the Magistrates Court, where they are referred to as 'Your Honour'. The role of the magistrate is to decide on matters of law as well as matters of fact. That is, the magistrate has the responsibility of deciding whether or not sufficient evidence exists to meet the required standard of proof. In criminal matters, if the accused is found guilty, the magistrate also imposes the sentence. A magistrate is appointed for life (in reality, this means a magistrate retires on reaching the age of 65).

- **Lawyers.** There are many different areas of specialisation for lawyers, such as criminal law, family law, personal injuries and business law. In Queensland, lawyers can be **barristers** or **solicitors**. It is the job of a barrister to argue cases in court proceedings, while solicitors provide a wide range of legal information to their clients, along with briefing and supporting barristers during appearances. There seems to be a growing trend for some lawyers to work in very specialised areas, for example, solicitors employed by a business to provide legal advice just to that organisation. This type of solicitor is referred to as a 'general counsel'.

- **Prosecutors.** A police **prosecutor** is a specially trained police officer who generally wears the police uniform when presenting cases on behalf of the Crown in the Magistrates Court. The Crown prosecutor is involved in criminal cases on behalf of the Director of Public Prosecutions (DPP). The Crown prosecutor is a highly trained barrister who generally appears in the District Court or the Supreme Court.

- **Jury.** In a criminal trial, the jury is an important element of court proceedings. The jury is made up of 12 members who are ordinary citizens between the ages of 18 and 70 years, selected at random from the electoral roll to decide whether an accused is guilty or not guilty based on the facts of the case. For the jury to return a guilty **verdict**, it must be proven beyond a reasonable doubt that the accused has committed the offence(s).

- **Judge's associate.** Assists a judge in the District Court or the Supreme Court, usually sitting in front of and below the judge. They normally wear a black robe. Their role includes assisting the judge in research.

magistrate the judicial officer presiding over the Magistrates Court

barrister argues cases in court proceedings

solicitor provides a wide range of legal information to clients

prosecutor a government official who conducts criminal prosecutions on behalf of the state

verdict the finding of a judge or jury in a trial

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- **Bailiff.** Responsible for the general running of the courtroom. Their duties include administering oaths and attending to the jury.
- **Corrective services officer.** In criminal trials, it is their responsibility to supervise the accused as they are brought to and from the holding cells during court proceedings.

3.3 Trial by judge and jury

In a criminal trial, when the accused pleads not guilty, the prosecutor must prove in court that the accused did in fact commit the crime. The jury decides guilt or innocence, while all other decisions – including sentencing – are made by the judge. Some criminal trials may be held without a jury, in which case the judge will also decide whether an accused is guilty or not guilty.

The *Evidence Act 1977* (Qld) outlines some of the processes for collecting, using and destroying evidence, including who is able to give testimony and what evidence is admissible in court. However, most of the rules of evidence in Queensland come from common law – that is, from previous rulings made by superior courts over hundreds of years.

As explained in Chapter 2, the evidence collected during the investigation process may be direct or indirect – also known as circumstantial. The rules of evidence then govern what information is able to be placed before a court, which means the evidence is either **admissible** or **inadmissible** in court.

admissible evidence that is introduced and allowed during trial

inadmissible evidence against the accused that cannot be used in court during trial

Police collect evidence to be presented by the prosecution to prove that the accused is guilty of the crime beyond reasonable doubt. The three issues to be considered during the collection and submission of evidence are:

- how to present the evidence of the fact to the court
- whether the evidence is admissible
- the weight of the evidence.

Presumption of innocence

As explained in Chapter 1, when it comes to proving criminal guilt, the onus or burden of proof falls on the prosecutor or the prosecution. As such, the accused is presumed innocent until they are proven guilty; this is often referred to as the **presumption of innocence**. In Australia, the presumption of innocence is a fundamental right. This is one of the cornerstones of our justice system, as it attempts to ensure that no person is found guilty of a crime unless adequate evidence is provided by the prosecution. It is not the defence's role to prove that the accused is innocent. This is why the prosecution brings all of their evidence first in the trial process. It means that there is sufficient evidence provided and the defendant knows what they are actually defending themselves against.

presumption of innocence the concept that the accused is innocent until proven guilty

This right is supported by the fact that Australia is a signatory to the International Covenant on Civil and Political Rights 99 UNTS 1. Article 14(2) states that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law'.

Within Australian domestic law, the presumption of innocence can be found within the *Criminal Code 1995* (Cth). One key section is section 13.1, which relates to the legal burden

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Figure 3.8 In Australia, the accused is presumed innocent until they are proven guilty; this is often referred to as the presumption of innocence.

of proof the prosecution has in a criminal case in proving every element of an offence. Another is section 13.2, which states that guilt must be proven beyond reasonable doubt.

In Queensland, the presumption of innocence is derived from a very famous English case called *Woolmington v Director of Public Prosecutions*, in which the court described the presumption of innocence as the 'golden thread' running through criminal law.

Research 3.1

1 Research the grounds on which evidence may be deemed inadmissible.
2 **Create** an infographic to **explain** these grounds of inadmissible evidence.

Jury selection

The selection of jurors is covered under the *Jury Act 1995* (Qld), which explains the role and eligibility of jurors in Queensland. As mentioned earlier, in a criminal trial there are 12 jury members who are ordinary citizens between the ages of 18 and 70, randomly selected from the electoral roll and **empanelled** to serve on the jury. During the empanelling of jurors, at any time before the bailiff begins to recite the oath or affirmation, the prosecutor may say 'stand by' or the defence counsel may call 'challenge', meaning the juror has not been selected to serve on that jury. Each side is allowed to challenge, or call 'stand by' against a maximum of seven prospective jurors. The juror returns to the back of the court. There are some exemptions to eligibility for jury service, and some reasons for which, when called for jury duty, citizens may apply to be considered for excusal, including:

empanelled the process of being chosen for jury service for a particular trial

Video 3.1 *Woolmington v DPP [1935]*

- previous service as a juror in the past 12 months
- the state of health of the prospective juror
- where jury service would result in personal financial hardship
- where jury service would result in substantial financial hardship to a business at which the person is employed
- where jury service is against the person's religious beliefs
- where there are personal commitments during all or part of the time the person would be required that would make jury service impossible, for example, carer's responsibilities or work commitments
- certain professions – most notably lawyers – are not eligible to sit on juries.

Review 3.4

1 **Explain** what is meant by the term 'presumption of innocence'.
2 **Describe** what is meant by 'beyond reasonable doubt'.
3 **Discuss** why the burden of proof lies with the prosecution and not the defence. **Explain** what impact this has on just and equitable outcomes during the trial process.

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Figure 3.9 In Australia, ordinary citizens between the ages of 18 and 70 can be randomly selected from the electoral roll and empanelled to serve on a jury.

Research **3.2**

1 Research the *Jury Act 1995* (Qld) and **create** a list of those people who are ineligible for jury duty in Queensland.
2 **Explain** why these particular groups would be considered ineligible for duty.
3 **Discuss** the impact these groups might have on the outcome of the trial.

Review **3.5**

A 47-year-old male truck driver is on trial for the rape of a 21-year-old female hitchhiker in central Queensland. The case is being heard in the Bundaberg Supreme Court. The following prospective jurors have been called from the ballot. **Discuss** and make a decision on which jurors would be ineligible and which would likely be challenged by either the defence or the prosecution. **Explain** your decisions.

1 John Smith, 50, Bundaberg, Plumber
2 Sarah Johns, 30, Bundaberg North, Childcare Worker
3 Mitchell Wong, 27, Norville, Financial Planner
4 Margaret Thomas, 72, Kepnock, Retired Bank Clerk
5 Craig Pritchard, 60, Bundaberg West, Retired Lawyer
6 Sharon Abbott, 35, Norville, Home Duties
7 Chester Crawford, 18, Kensington, Student
8 Barry Mathis, 63, Walkervale, Teacher
9 Linda Rhodes, 21, Kensington, Student
10 John Esquivel, 38, Walkervale, Builder
11 Vincent Valenzuela, 45, Kepnock, Self-employed
12 Roger Foulds, 48, Avoca, Royal Australian Air Force Pilot
13 Jared Higgins, 25, Bundaberg North, Restaurant Manager
14 Rosemarie Castro, 28, Bundaberg West, Unemployed
15 Lois Abbott, 22, Avoca, Retail Assistant

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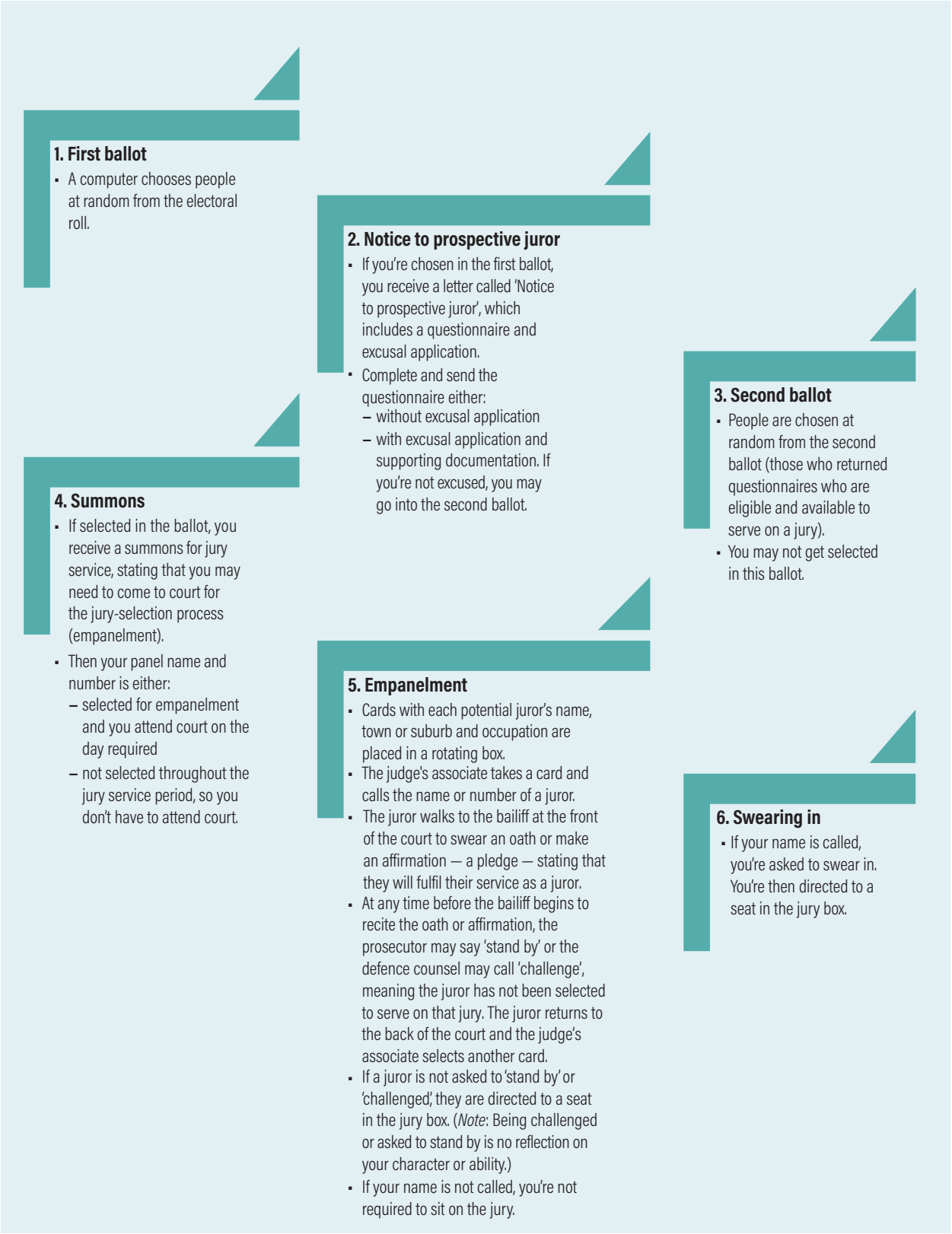

Figure 3.10 The jury selection process (*Source:* Queensland Courts)

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The Magistrates Court process in Queensland: The criminal trial process

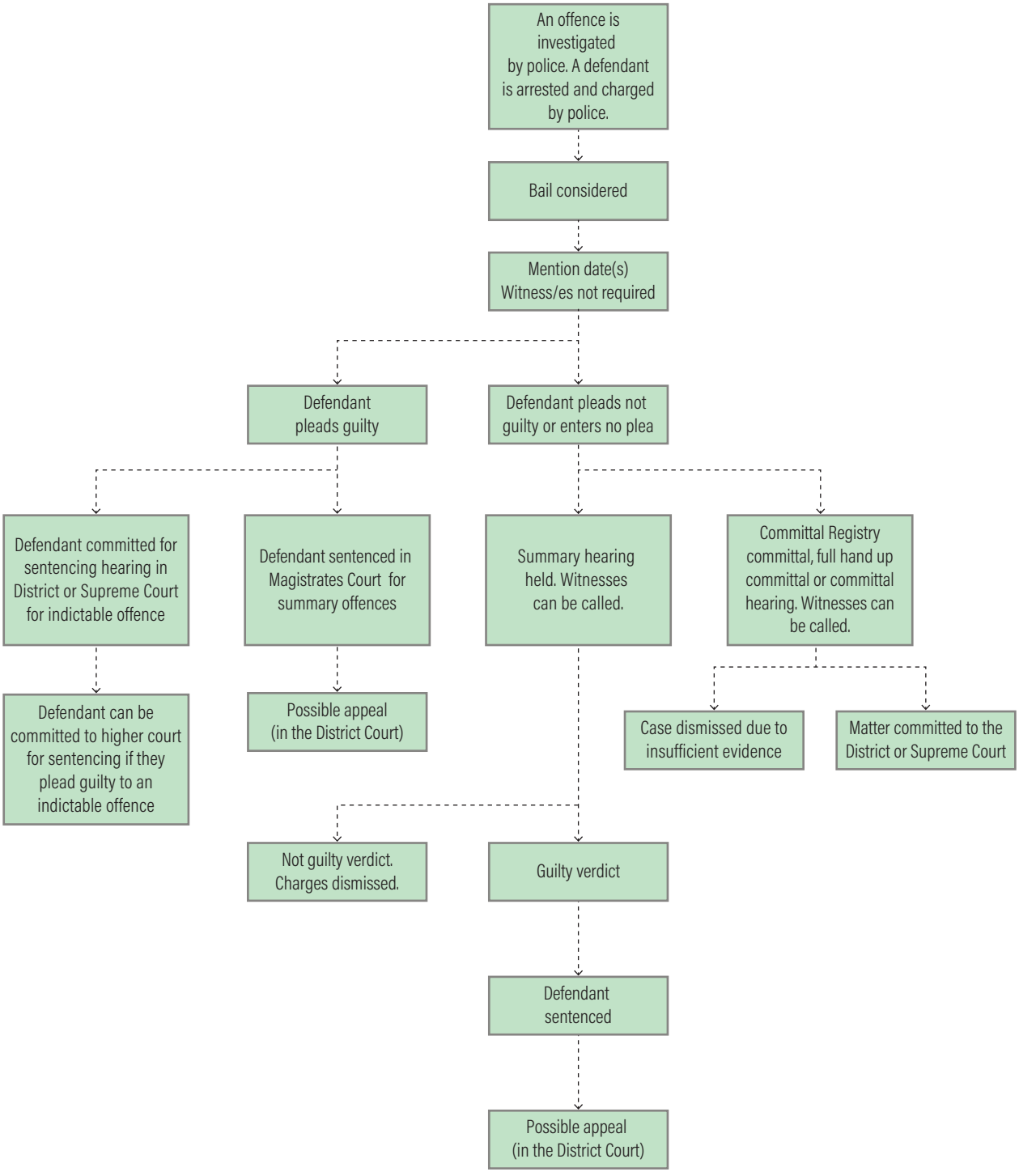

Figure 3.11 The criminal trial process in Queensland: Magistrates Court (*Source:* Queensland Department of Justice and Attorney-General)

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The trial process

In a criminal trial, the prosecution is the first to call witnesses and present evidence. It will first complete what is called the 'examination-in-chief' of each of its witnesses. This is the first time the witnesses have been examined by the court. Once the prosecution has completed the examination-in-chief, the defence gets the opportunity to cross-examine each of the prosecution's witnesses. Once the cross-examination is completed, the prosecution is given the opportunity to re-examine each of the witnesses. It may choose to do this to clear up any uncertainties that arose out of the cross-examination. After the prosecution has called all of its witnesses and presented its evidence, the defence gets the opportunity to call witnesses and present evidence. The same process is then followed with defence witnesses as is followed by prosecution witnesses. They are subjected to the examination-in-chief by the defence, they are cross-examined by the prosecution, and they may then be re-examined by the defence.

If, after the prosecution has presented its evidence and called its witnesses, the defence believes there is no case to answer, it can make a submission to the judge to that effect. If it does this, the judge will hear arguments while the jury is not present, and then decide on the submission. If the judge agrees that there is no case to answer, then the matter is discharged. However, it is rare for cases to be discharged at this point in the proceedings, as a magistrate has already heard much of the evidence and previously determined that there is sufficient evidence to suggest that the accused has a case to answer. It usually only happens if witnesses do not 'come up to proof' by saying the things the prosecution (at committal) expected they would say.

Once all of the evidence has been presented to the jury by both sides, including their summing up, the judge then sums up the evidence and gives the jury directions on any relevant points of law. It is then the duty of the jury to deliberate and decide the facts of the case – that is, consider its verdict – and return to the court. The speaker of the jury announces the verdict to the court.

In 2008, the *Jury Act 1995* (Qld) was changed to provide for **majority verdicts** in criminal trials. This means that for some trials where the jury has a majority vote of 11 out of 12 members, the defendant can be found guilty. However, section 59 clearly outlines that **unanimous verdicts** are still required in trials on indictment for murder, and offences against the executive and legislative power and demands with menaces on agencies of government and Commonwealth offences. The accused person is acquitted if the jury returns a verdict of 'not guilty'. If the jury returns a verdict of 'guilty', the accused is convicted. If the jury is unable to reach a verdict, the court will discharge the jury and exercise its discretion as to whether to order a **retrial**.

majority verdict where a jury consists of 12 jurors, at least 11 jurors agree; or where a jury consists of 11 jurors, at least 10 jurors agree

unanimous verdict where all jurors collectively agree on the verdict

retrial a new trial ordered after a jury has been unable to reach a verdict and has been discharged

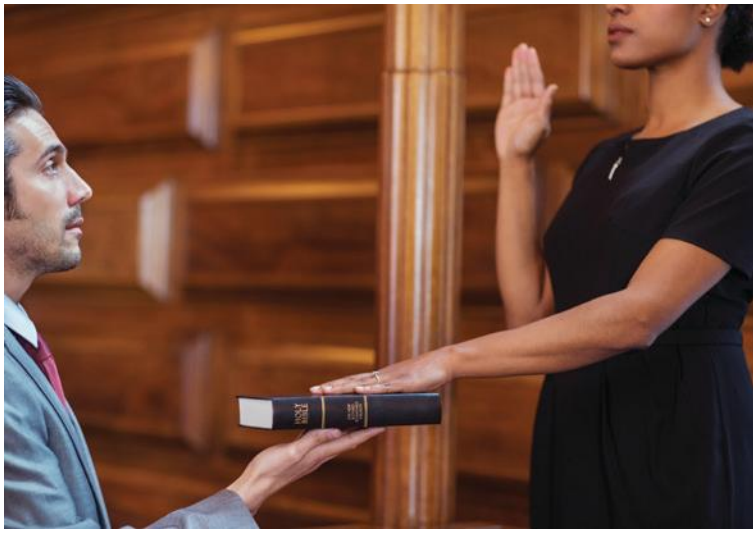

Figure 3.12 Witnesses can be called by both the prosecution and the defence.

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The District Court and Supreme Court process: The criminal trial process

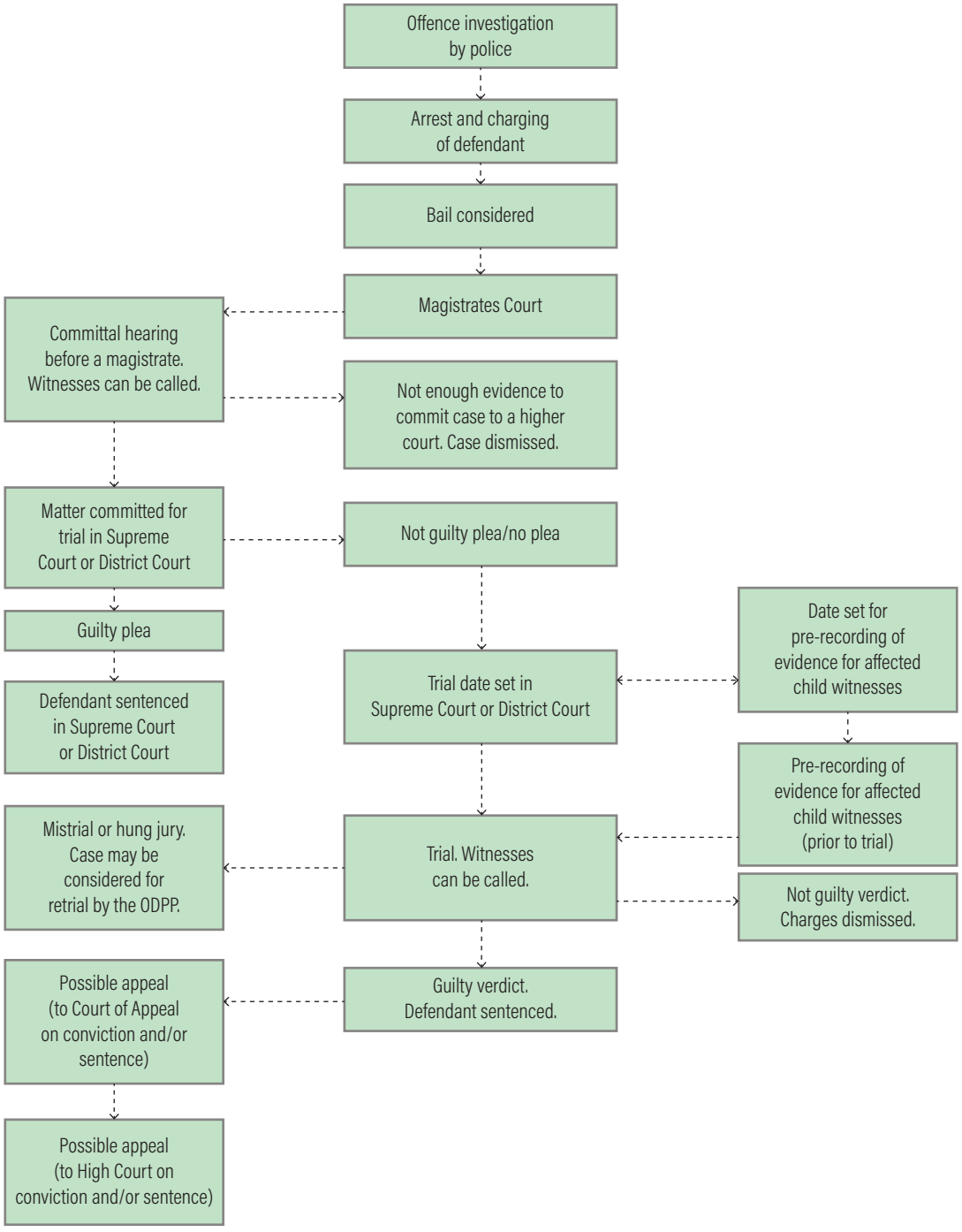

Figure 3.13 The criminal trial process in Queensland's District Court and Supreme Court (*Source:* Queensland Department of Justice and Attorney-General)

When a not guilty verdict is delivered and the accused person is discharged, as a general rule the accused can never be tried for the same crime again. This is referred to as not allowing an accused person to face **double jeopardy**. However, in 2007, an amendment to the *Criminal Code 1899* (Qld) through the *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld) allowed

double jeopardy a procedural defence that forbids a defendant from being tried again on the same (or similar) charges following a legitimate acquittal or conviction

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two exceptions to this rule. (Note that the new law did not apply retrospectively – that is, it only applies to cases dealt with since 2007.) The relevant sections of the Criminal Code are as follows:

678B Court may order retrial for murder – fresh and compelling evidence

The Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for the offence of murder if satisfied that –

a there is fresh and compelling evidence against the acquitted person in relation to the offence; and

b in all the circumstances it is in the interests of justice for the order to be made.

678C Court may order retrial for 25-year offence – tainted acquittal

The Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for a 25-year offence if satisfied that –

a the acquittal is a tainted acquittal; and

b in all the circumstances it is in the interests of justice for the order to be made.

Research 3.3

Look up the definitions of the terms to **explain** the concepts of:

1. '25-year offence' – see *Criminal Code 1899* (Qld), s. 678(1)
2. 'fresh and compelling evidence' – see *Criminal Code 1899* (Qld), s. 678D
3. 'tainted acquittal' – see *Criminal Code 1899* (Qld), s. 678E
4. 'matters for consideration' in considering 'the interests of justice' – see *Criminal Code 1899* (Qld), s. 678F.

Off the record

A highly publicised case on double jeopardy is *R v Carroll* (2002) 213 CLR 635. Research the details of this case and consider whether the law on double jeopardy should be amended further to allow the prosecution of matters decided before 2007 if compelling new evidence is available.

3.4 Defences and excuses

In Queensland, a criminal defence allows the accused to claim a circumstance or reason to either partly or wholly excuse them from the charges brought against them. The *Criminal Code Act 1899* (Qld) outlines how defences, or excuses for actions, can be invoked in certain situations, such as murder or assault, and whether they are complete or partial defences. Defences that only reduce the charges are known as 'partial defences'. Some defences that can be used are provocation, self-defence, defence of property, necessity, duress, accident, insanity, diminished responsibility and intoxication.

Using any form of defence in a criminal case is extremely difficult, and while such excuses often bring a great deal of media scrutiny, the elements that must be proven in a court of law are not always black and white, but far more complex. Of course, some forms of defence are more straightforward.

In Queensland, according to the *Criminal Code 1899* (Qld), the existence of a full or partial defence to the crime is also identified and explained. This means that when the accused is guilty of committing a crime but seeks to apply a defence or excuse as justification for their behaviour, they are seeking to either:

- reduce the offence charged to a lesser offence, for example, have murder downgraded to manslaughter, or
- provide a complete defence to the charge, which results in the person being acquitted of the offence.

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Provocation

The defence of provocation is available as a partial defence for those charged with murder and as a complete defence for:

- common assault
- assault occasioning bodily harm
- unlawful wounding
- manslaughter
- grievous bodily harm.

To succeed in the defence of provocation, a person who is charged with an assault must establish the following:

- They were provoked into committing the assault.
- The provocation deprived the accused person of their power of self-control.
- They acted before their passion had time to cool.
- The force used was not disproportionate to the provocation.
- The force used was not intended or was not likely to cause death or grievous bodily harm.

Figure 3.14 A lawyer must convince a jury of their side of the argument one way or the other.

The defence of provocation is in section 269 of the *Criminal Code 1899* (Qld), which states:

> (1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
> (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.

Figure 3.15 Defences seek to reduce the offence charged to a lesser offence or provide a complete defence to the charge.

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As with many statutory provisions, it is left to the courts to interpret the legislation and develop how the statute or section of statute is to be used in practice. Thus, while section 269 of the *Criminal Code 1899* (Qld) establishes provocation as a valid defence, it does not clearly explain what is needed for a person to be successful in their defence.

The defence of provocation is also listed in section 304 of the *Criminal Code 1899* (Qld), where it applies to a person charged with murder. An amendment passed in 2011 had the effect of limiting provocation as a defence to murder to exclude where the argument is based on 'words alone, other than in circumstances of a most extreme and exceptional character'. This section of the *Criminal Code 1899* (Qld) states:

1 When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.
2 Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.
3 Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if –
   a a domestic relationship exists between 2 persons; and
   b one person unlawfully kills the other person (the deceased); and
   c the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done –
      i to end the relationship; or
      ii to change the nature of the relationship; or
      iii to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

Figure 3.16 The defence of provocation is outlined in section 269 of the *Criminal Code 1899* (Qld).

Review 3.6

1 **Describe** the act of provocation and what an accused must prove to be successful.
2 **Describe** two situations that may lead to an accused person using a defence of provocation.
3 **Create** an analysis table to list the 'for' and 'against' reasons for the use of provocation as a defence.
4 **Create** a one-paragraph response to evaluate whether provocation should be a partial defence or a full defence, or not be an allowable excuse.

Research 3.4

1 Research and **explain** how the defence of provocation applies for murder where the accused is a victim of domestic violence.
2 **Discuss** what legal issues and impacts may arise from allowing such a defence and state whether you agree with this as a valid defence.
3 Research and **explain** why the 2011 amendment excluding provocation where the argument is based on words alone was enacted.

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Self-defence

Self-defence acts as a complete defence. As with provocation, to use this defence the accused must admit to having committed the act that caused the death of another person. This defence is found in sections 271 and 272 of the *Criminal Code 1899* (Qld), as outlined below.

self-defence the lawful use of force against a person who is threatening the life or wellbeing of another

Section 271: Self-defence against unprovoked assault

(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

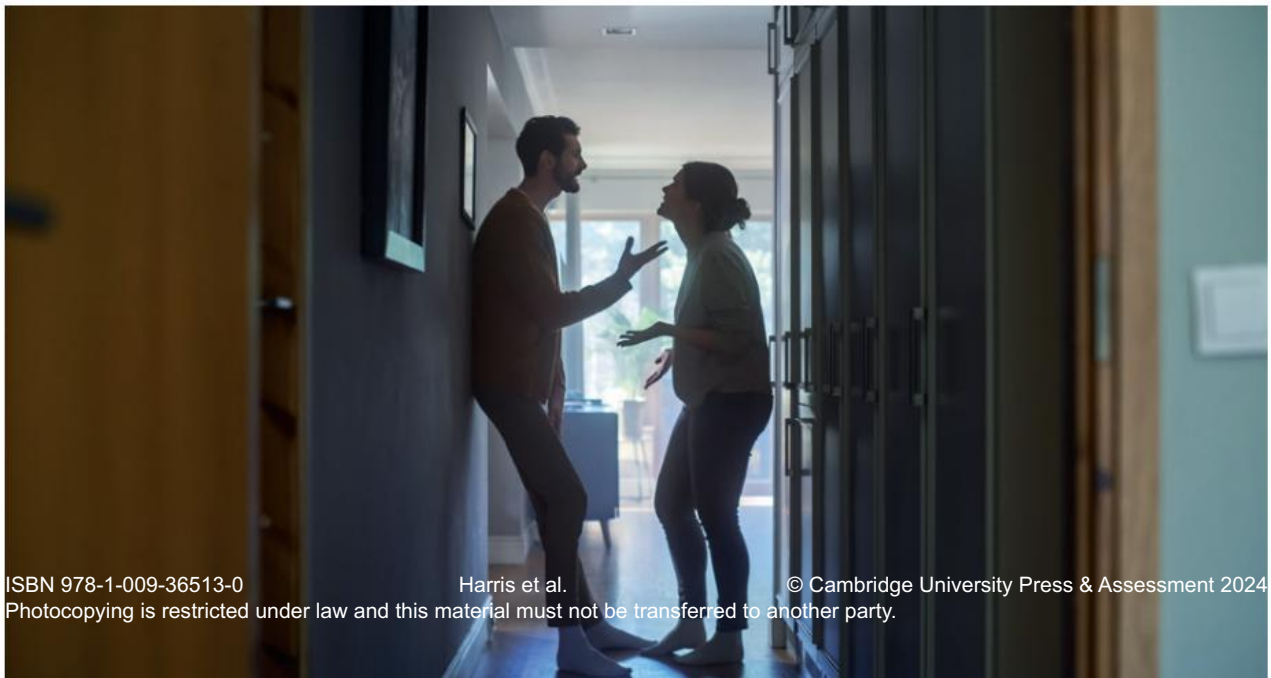
(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Section 272: Self-defence against provoked assault

(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self- defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

(2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

Figure 3.17 Self-defence uses an objective test to determine whether the defence applies.



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Self-defence uses an objective test but has a series of elements that need to be met in order to be used successfully. That is that the right to physically defend oneself was exercised with reasonable force and that the force is authorised, justified or excused by law. The aspect of reasonable force in the circumstances is the aspect that has often drawn the most attention in the media. One thing to remember is that when self-defence is evoked, there are two sides to the story, and it is this, in particular, that the jury is asked to evaluate.

Although self-defence is still commonly referred to as a defence, the ultimate onus of proof with respect to self-defence does not rest on the accused. Since the famous English case of *Woolmington v DPP* [1935] AC 462, it has been clearly established that once the evidence discloses the possibility that the fatal act was done in self-defence, a burden falls upon the prosecution to disprove that fact, that is to say, to prove beyond reasonable doubt that the fatal act was not done in self-defence. The jury must be instructed accordingly whether or not the plea is actually raised by the accused.

Off the record

The Crown or Prosecution has the task of proving the guilt of an accused person beyond reasonable doubt. In *Woolmington v DPP* [1935] AC 462, the principle was expressed as 'one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt … [beyond] reasonable doubt.' The meaning of the words 'beyond reasonable doubt' in criminal law keeps to its common everyday English language meaning.

Defence of property

Another form of self-defence is defence of property. This defence is found in section 278 of the *Criminal Code 1899* (Qld), which states that a person can reasonably defend their home. This, like other forms of self-defence, means any form of defence that is reasonable and not excessive.

The effect of home invasions is often discussed in the media, with current affairs programs suggesting that the law favours criminals, and that any action taken to defend the home can result in the person being charged with a crime. While this is sometimes true, these stories need to consider that a person charged with a crime in this manner must prove that the defence was legitimate.

Check this out

To see the advice often given to people on how to protect their home, examine the Home Security tips on the Queensland Police Service website.

Intoxication

Section 28 of the *Criminal Code 1899* (Qld) deals with the excuse of **intoxication**. This section sets out what must be proven in a court of law in order for a person to use the defence. The first important point is that this defence cannot be relied upon if the individual relying upon it has voluntarily consumed the drugs or alcohol that caused the intoxication.

intoxication the state of impairment caused by the consumption of alcohol or drugs

This is an important issue, as many people have argued that intoxication should never be an

Review 3.7

1 **Explain** the elements of self-defence.
2 **Describe** a scenario that could see self-defence used in a court of law.
3 **Explain**, using examples, what is meant by the statement 'when a person defends him or herself against the threat of harm, his or her actions must be proportionate to the harm threatened.'

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excuse. However, in a society in which the spiking of drinks is becoming more common, this defence does have relevance if the person who has been affected did not choose to ingest the offending substance. There are some very important limits to this defence, though. Even if intoxication was accidental, the accused will be afforded the insanity defence only.

As with the other defences, an accused using intoxication as a defence must admit that they committed the act of which they are accused. If successful, intoxication will act as a full defence to criminal liability, as at the time of the act being committed the person was unable to determine right from wrong. This means that the accused will not be convicted of the crime they are accused of committing.

Figure 3.18 When using intoxication as a defence, the accused must admit that they committed the act of which they are accused.

Insanity

'Insanity' is a somewhat dated word now, and reflects a much earlier, less well-informed social understanding of mental illness – however, it currently remains the word used in the statute. **Insanity** as a defence is recorded in section 27 of the *Criminal Code 1899* (Qld), which states that a person is not criminally responsible at the time of an offence if they are in a state of mental disease or natural mental infirmity. The condition does not have to be present at birth but can be due to any number of mental disorders.

insanity state of mental disease or natural mental infirmity

Where a person is facing a serious charge on indictment and is relying on the defence of insanity, their matter will be decided by the Mental Health Court. The Mental Health Court consists of a Supreme Court judge and two clinicians. A criminal case can be referred to the Mental Health Court if it is believed that a person is/was mentally ill or has an intellectual disability and was deprived of the ability to understand or know what they were doing.

The Mental Health Court decides if the person:

- was of unsound mind at the time of the offence (this means the person is not criminally responsible for their behaviour)
- is fit for trial – meaning the person understands what is happening in court and can properly defend themselves; and, if they are unfit, whether this is permanent or temporary

Research 3.5

1 Research and then **create** a list of the facts to **explain** a situation in which a crime occurs that give rise to the defence of intoxication.
2 Research and then **create** a list to **explain** the facts of a situation in which a crime occurs and intoxication is involved but does not give rise to the defence.
3 **Explain** the difference between the two situations.
4 **Explain** why the legislature has distinguished voluntary intoxication from involuntary intoxication. Do you agree with such a distinction?

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- should be charged with manslaughter by reason of diminished responsibility if they were charged with murder.

The court mainly hears cases for serious offences that would usually be dealt with in the Supreme or District Court. (Magistrates can also refer more serious cases if the person may have been of unsound mind or is unfit for trial.)

If this defence is to be used by the accused, there will be a number of expert witnesses called upon in court to prove or disprove the first element of this defence: that there is indeed some form of mental illness. The second element that must be proven is that, at the time of the crime, the person did not know that what they were doing was wrong. Thus, if a person suffers from a mental illness but still knows that killing is wrong, they will not be able to use the defence.

This is often the hardest element to prove, as it is difficult to evaluate the state of mind of the person at the time of the crime – particularly given that the evaluation is done at a later date. The more time that elapses before the person is found and evaluated, the more difficult an accurate assessment is.

The case of *Hawkins v The Queen* (1994) 179 CLR 500 states that the key element for the jury to consider is the state of the defendant at the time of the crime. To do this, evidence must be considered regarding the person's personality and background, including evidence of a mental disease or disorder.

An accused who successfully pleads the defence of insanity is likely to be detained in a psychiatric facility or come under a mental health order with strict supervision.

Diminished responsibility

Section 304A of the *Criminal Code 1899* (Qld) establishes the excuse of **diminished responsibility** where unlawful killing is involved. This section states that at the time of the crime, the person must be of abnormal mind and that this abnormality prevents the person from being able to understand that what they are doing is wrong and they cannot control their actions. If this can be proven, a person will be found guilty of manslaughter and not murder.

diminished responsibility a defence that is used when an accused does not fully understand what they have done

Diminished responsibility in this sense acts as a partial defence, as it reduces the conviction to manslaughter, but it does not result in them being acquitted. As with insanity, to prove this defence a court will rely on expert testimony to support the claim by the accused. The experts will help prove the elements that the court considers, namely that:

- there was an unlawful killing that the accused acknowledges
- at the time of the killing, the person was of abnormal mind
- they did not know that what they were doing was wrong
- they were unable to control their actions.

Diminished responsibility can be difficult to prove, as one of the most difficult issues with which courts and juries deal is that those using this defence will often claim that their faculties were temporarily diminished.

Extraordinary emergency

Extraordinary emergency is a defence covered by section 25 of the *Criminal Code 1899* (Qld). According to section 25, a person cannot be held criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise. In a criminal case, this definition basically allows the jury in a case to apply a 'reasonable person' test to situations of sudden or extraordinary emergencies to see whether the accused acted in the same way as any other ordinary person would have. If the circumstances do equate to a sudden or extraordinary emergency, and the accused acted as any reasonable person would have, then they will not be found guilty of the crime.

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So, for example, ordinarily smashing someone's car window would be a crime. However, if a person came across a car, on a hot day, with a distressed child alone in the car, they could lawfully break the window to rescue the child – the sudden and extraordinary emergency turns otherwise criminal actions into lawful actions.

Check this out

Visit the Murdoch University Electronic Journal of Law website and read the article 'Sleepwalking: Insanity or automatism' (vol. 3, 1996) about sleepwalking and the defence of insanity.

Review 3.8

1 **Determine** why extraordinary emergency can only be used as a defence if other defences are not applicable.
2 **Describe** any situations that may give rise to a defence of extraordinary emergency arising.
3 **Evaluate** the use and success of the insanity defence in Queensland. **Explain** why some lawyers might recommend against using this defence.

Figure 3.19 The defence of accident must prove that the ordinary person would not have been reasonably able to foresee the eventual outcome of the behaviours resulting in a criminal situation.

Duress

Duress is found in section 31 of the *Criminal Code 1899* (Qld). This defence is available in criminal law when a person, through some form of threat, is forced to be involved in a crime in which they otherwise would not willingly participate.

The *Criminal Code 1899* (Qld) states that this defence will not extend to the crime of murder.

duress an act carried out because of a threat to you or a loved one

Accident

A genuine accident, as detailed under section 23 of the *Criminal Code 1899* (Qld), will ensure that an accused person will not be found guilty as there is no motive or intent – an element necessary for most crimes. Another essential element that must be proven if a person relies on this excuse is that the ordinary person would not reasonably have been able to foresee the eventual outcome.

Ignorance of the law – honest claim of right

Ignorance of the law is not usually a defence against a criminal charge. However, according to section 22 of the *Criminal Code 1899* (Qld), a person is not criminally responsible for an offence relating to property if the person believed they had an honest claim of right to that property and they had no intent to defraud the rightful owner of the property.

Intention – motive

According to section 23 of the *Criminal Code 1899* (Qld), a person is not criminally responsible for an act or omission that occurs independently of the exercising of the person's will. Examples of the use of this excuse are if a person commits an offence while sleepwalking or while they are affected by a temporary condition over which they have no physical control, such as concussion.

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Mistake of fact

According to section 24 of the *Criminal Code 1899* (Qld), a person who does or omits to do an act under an honest, reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act. They are, however, responsible for the act if, even if their mistaken belief was true, they would still have been committing a criminal act. This defence cannot be used in relation to a very few offences, called *absolute liability offences*. Some examples of absolute liability offences include drink driving, drug driving and being an accessory to a crime after the fact.

Immature age

According to section 29 of the *Criminal Code 1899* (Qld), a person who is younger than 10 years of age cannot be held criminally responsible for any act or omission. This section of the Act also states that a person under the age of 14 years is not criminally responsible for any act or omission unless, at the time of committing the act or making the omission, they had the capacity to know that they ought not to make the act or omission. Therefore, a child under the age of 10 cannot be charged with a criminal offence. A child under 14 can be charged with a criminal offence – however, the prosecution must prove that the child knew that what they were doing was wrong. The test often used is to ask, 'Would the young person have done the same conduct in front of a parent, teacher or police officer?' If the answer is yes, then it is likely they did not know they ought not to be behaving that way.

Review 3.9

1 **Describe** the main factors necessary for a successful duress defence.
2 **Determine** whether ignorance of the law is ever a legal excuse. **Explain** why or why not.
3 **Provide** an example of when mistake of fact could be used as a defence in criminal law.

Alibi

A commonly used term, and a plea that may be made in a criminal trial, is a claim made by a person that they have an alibi. The *Queensland Supreme and District Courts Bench Book*, in Chapter 41.3, offers this description of 'alibi' (Criminal Code 1899 (Qld) s. 590A):

> The defence is that the defendant was not at the place of the crime when it was allegedly committed but was instead somewhere else. As it is for the prosecution to prove the guilt of the defendant, it is for the prosecution to prove, beyond a reasonable doubt, that the defendant was present at the time and place when the offence was committed.
>
> Source: *Queensland Supreme and District Courts Bench Book*, Chapter 41.3, (*Criminal Code 1899* (Qld) s. 590A).

Sections 590A(1) and (2) of the *Criminal Code 1899* (Qld) set out strict rules concerning notice that a defendant must follow if they intend to introduce evidence or call someone to give evidence in support of an alibi. Notice has to be given within the prescribed period.

Figure 3.20 No child under the age of 10 years can be guilty of an offence.

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Research **3.6**

Research each of the following cases and **identify** what defence was claimed by the defendant. Was the claim successful? Do you agree with the application of the defence in each case?

1 *R v Cox* [2016] QCA 165
2 *R v Sebo Ex parte A-G* (Qld) [2007] QCA 426
3 *R v Huni* [2014] QCA 324
4 *R v Murray* [2018] QCA 057
5 *R v Goode* [2004] QCA 211 (S, A, E)

Review **3.10**

1 **Identify** the first two requirements concerning the notice of alibi (s. 590A(6)).
2 **Describe** what is meant by 'prescribed period' (s. 590A(7)).

3.5 Appeals

In Queensland, the Court of Appeal is a division of the Supreme Court that hears all appeals from the Supreme Court and the District Court, and many tribunals. An **appeal** is an application to the courts when a party believes that the judge or jury made the wrong decision, or the trial was not conducted according to the law.

appeal an application to the courts when a party believes that the judge or jury made the wrong decision, or the trial was not conducted according to the law

The court does not hear entire cases or have a jury. It deals only with the subject of the appeal listening to the arguments by the opposing sides and decides whether an error of law was made or some crucial fact was overlooked in the original hearing. An appeal is not a retrial or a re-sentencing, but rather the revisiting of a specific point from the hearing. It is not a chance to show new evidence as the Court of Appeal will only consider the evidence that was given at the original trial or sentence. In criminal law, only a guilty verdict can be appealed. A not guilty verdict is final.

In Queensland, the court comprises three or five judges of the Supreme Court. Only the parties involved in the trial are able to appeal, so the defendant can appeal the guilty conviction or the sentence, and the Crown can appeal the sentence.

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3.6 A fair trial

Australians have a common law right to a **fair trial** – or, as some have expressed it, if they are facing trial, the right not to be tried unfairly. Article 14 of the International Covenant on Civil and Political Rights 99 UNTS 1 provides guidelines for ensuring that all persons are afforded **due process** and the right to a fair trial.

fair trial a court hearing in which the procedures are fair to both sides

due process the concept that the fair and equal treatment of all persons can be ensured during trial through procedural legal processes

In the criminal law, this right has traditionally been upheld through the process of trials being presided over by experienced judicial officers and the development of rules related to the admissibility of evidence. There are also some relevant statutory provisions. The *Evidence Act 1977* (Qld) and the *Police Powers and Responsibilities Act 2000* (Qld) have a bearing on matters of evidence and investigation of crime.

Figure 3.21 The statue of Lady Justice, often seen outside courthouses, holds a sword and scales, and sometimes is blindfolded. She is an allegorical personification of justice and equality in legal matters. Pictured is a stone statue outside the Supreme Court in Melbourne.

For example, section 130 of the *Evidence Act* recognises unfairness to the accused.

The foundation of a fair trial is that all persons face an assumption before the courts that they are equal. In a court hearing, fairness involves everyone being treated equally and the proper application of rules of evidence.

The right to due process begins at the start of any action, well before any hearing. In criminal matters, there are rules that police must follow, and warnings that police must give, when seeking to interview a suspect. Children are afforded additional rights and protections in these areas, to ensure fairness – these rights are enshrined in Article 40 of the UN Convention on the Rights of the Child.

More recently, the High Court has been active in considering procedures and remedies relating to the investigation of crime and the trial process, incorporating the right to a fair trial; and the legality of the means of collecting evidence. The High Court has recognised abuse of process (of the court) and unfairness, including the right to legal representation, as grounds to intervene. A usual remedy is to grant a stay of proceedings – usually temporarily – so the potential unfairness is able to be remedied. The court, however, also recognises that this is a discretionary power that involves balancing the interests of the accused and the public interest – the right to expect that an accused person will be brought to trial

The attributes of a fair trial, or **natural justice**, mean that decision-making during the trial process must be fair and reasonable. Natural justice, or **procedural fairness** (these terms are

natural justice rules of fair play originally developed in the common law courts; rules and procedures to be followed by a person or body with the power to settle disputes

procedural fairness a common law duty to act fairly in the making of administrative decisions that affect a person's rights, interests and legitimate expectations; the right to due process

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often used interchangeably; in criminal law, it is more often referred to as procedural fairness), means that during the criminal trial process the following principles must be upheld:

- informing the accused of the case against them or their interests
- giving the accused a right to be heard (the 'hearing' rule)
- no decision-makers or stakeholders having a personal interest in the outcome (the rule against 'bias')
- all decision-makers acting only on the basis of logically probative evidence (the 'no evidence' rule).

These principles or rules are implemented through due process and the presumption of innocence. While procedural fairness or natural justice rights are recognised as important in criminal law, they also apply to civil law, particularly where administrative decision-making is involved and where there is the potential for an adverse outcome for an individual. Although not a criminal law case, Case study 3.1 establishes important principles relating to the place of natural justice and procedural fairness in Australian law.

Check this out

Visit the Australian Government's Smartraveller website and investigate the information provided for people travelling overseas if they are arrested or imprisoned. Why is the Vienna Convention on Consular Relations 596 UNTS 261 important for Australian travellers?

Review 3.11

1 **Explain** how the principle of procedural fairness applies to criminal law cases.
2 Research the case of *Crump v Attorney-General and Minister for Justice* [2016] QSC 56.
   a **Consider** and **discuss** whether the applicant's argument that he was denied natural justice and procedural fairness when the Attorney-General didn't refer his matter to the Court of Appeal is a valid argument, or whether he was in fact afforded natural justice.
   b **Create** a letter to the editor to **explain** your evaluation of the case and whether you agree or disagree with the judgment delivered.

Case study 3.1

The case: *Kioa v West* (1985) 159 CLR 550

Citation

The case of Kioa v West, reported in volume 159 of the Commonwealth Law Reports starting at page 550. It was decided in 1985 and is a landmark decision in Australian administrative law regarding the application of due process.

Facts

Mr and Mrs Kioa, from Tonga, entered Australia on temporary entry permits in 1981. They had changed their address without informing the authorities when their permits expired. Mr Kioa was arrested as a prohibited immigrant in 1983. Mr and Mrs Kioa had a daughter prior to his arrest; she was born in Australia, and therefore was an Australian citizen.

In 1983, a delegate of the Minister for Immigration and Ethnic Affairs decided that the Kioas should be deported. The Kioas unsuccessfully appealed the decision to the Federal Court and the Full Federal Court. They then appealed to the High Court.

Legal issues

The Kioas' principal argument was that the decision-maker had failed to afford them procedural fairness in not disclosing and allowing an opportunity to respond to the adverse allegations made in the departmental submission that they were involved with people circumventing immigration laws. The Federal Court upheld the

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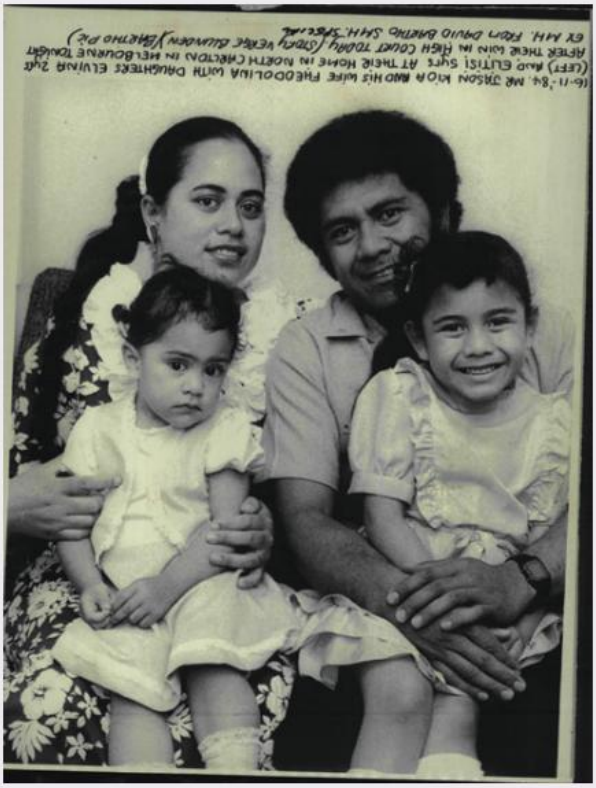

Figure 3.22 Mr. Jason Kioa and his wife Fheodolina with daughters Elvina (2 years; left) and Elitisi (5 years) at their home in North Carlton in Melbourne after their win in the High Court on 16 November 1984.

decision of the delegate under the *Migration Act 1958* (Cth) dismissing the Kioas' appeal. The decision was once again affirmed on appeal to the Full Court of the Federal Court.

Law

Under the *Migration Act 1958* (Cth), Mr and Mrs Kioa were illegal immigrants and were to be deported. Mr and Mrs Kioa appealed this decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in the Federal Court of Australia.

Legal arguments

The Kioas argued that the delegate had wrongly failed to take into account:

- the detrimental effect the decision may have on their child
- the provisions of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Decisions

The High Court was tasked first with determining whether the rules of natural justice had to be followed in the given situation and, if so, whether they had been breached. The court held by a majority of four to one that the rules of natural justice applied to a decision under the *Migration Act 1977* (Cth) to deport a prohibited immigrant. The court distinguished previous cases that had come to the opposite conclusion on the basis that these cases had been superseded by legislative developments.

Ratio decidendi (reason for the decision)

The decision in *Kioa* radically increased the number of decisions to which natural justice and procedural fairness applied, so today the question is often not whether procedural fairness should be afforded but the extent to which it should be afforded. Mason J said, 'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.' This same principle also extends to criminal law appeals on the grounds of procedural fairness.

Video 3.2
Kioa v West (1985)

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Can jury trials still be fair in the age of social media?

By Elizabeth Byrne, 20 May 2017

Jurors running their own criminal investigations using the internet and social media are increasingly risking Australians' right to a fair trial, two senior legal minds in Canberra have warned.

Overseas jurors have been jailed for consulting the internet during trials and while nothing that severe has happened yet in Australia, there have been close calls.

A Queensland murder trial was aborted in 2014 after a juror researched the case on Facebook and admitted it to another juror. And last year in Western Australia, a juror was dismissed after posting on Facebook about the case.

One of the ACT's top defence barristers, James Lawton, said while juror misconduct was nothing new – an English jury in the 1990s consulted a Ouija board to arrive at their decision – the internet age meant jurors were finding it harder to switch off from the outside world.

'It's probably a bigger problem than we actually know about because I suspect a lot of it occurs but doesn't get discovered,' Mr Lawton said.

Jurors behaving badly

Juries are supposed to only consider the details provided to them in court. Often aspects of the crime and even the accused's criminal history are deliberately kept from the jury so as not to taint their opinions. But Associate Professor of Law at the Australian National University, Mark Nolan, said a quick internet search could sometimes reveal all. 'There is a real risk that the deliberations of the jurors will include inadmissible evidence or evidence that's not really known to the prosecution or the defence,' Associate Professor Nolan said. 'That introduces inherent injustices and illegalities.'

Do the crime, serve the time

Queensland, New South Wales and Victoria all have laws targeting jurors who offend. Associate Professor Nolan said the threat of punishment worked. '[That is a] quite good deterrent, and what's important is that the direction is given to the jury at the start of the trial, at the earliest possible opportunity,' he said.

Mr Lawton also suggested ways of curbing the desire to check information online. 'I think we need to give juries a way of investigating, but put limits on it,' he said. 'Perhaps give them a data base in terms of questions they might want to ask ... so they aren't tempted to go to Google or to go to their smartphone during the trial.'

Mr Lawton said the internet age should also prompt a rethink for jurisdictions like the ACT, where juries are required for all sex offence and murder trials. 'They are the sort of trials where it's very hard to put emotions to one side and very hard to put initial prejudice against the type of offence to one side,' Mr Lawton said. Mandatory jury trials are thought to better meet community standards and save time by avoiding the need for judges to produce lengthy written reasons justifying their decision.

But Mr Lawton said sometimes it was important to see how a decision was reached, particularly in difficult cases. He suggested the ACT might be better served by a model similar to that of NSW where offenders could elect to have a judge alone trial, under particular conditions.

Review 3.12

1. **Create** a list of all the technology devices you currently use.
2. **Discuss** the laws that surround the use of these devices. Are you aware of your legal rights and responsibilities regarding technology use?
3. Debate the idea that the rapid growth of technology could impact on the fundamental foundation of our legal system: that a person is innocent until proven guilty, and that they are entitled to a fair trial.

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Figure 3.23 Information has never been easier to access and spread than today.

Barriers to justice

Along with the rights of procedural fairness or natural justice, the right to access justice is fundamental to a fair and inclusive society. Therefore, it is essential that the criminal justice system implements procedures and processes aimed to address disadvantage and inequality. These disadvantages and inequalities become barriers to justice for those involved, and may stem from ethnicity, culture, capacity, socioeconomic status or gender.

Certain groups can face difficulties in accessing legal services during the criminal trial process, including the following:

- **Homeless people.** The people in this group have a range of urgent competing needs and often cannot prioritise even significant legal issues. Furthermore, they often cannot be released on bail because they cannot give an address where they will be living while on bail.
- **People of culturally and linguistically diverse backgrounds.** Many of the people in this group need access to translators to be able to access legal services. The cultural competencies of police may also pose difficulties for them. In addition, although the international human rights framework recognises that free access to an interpreter is necessary for procedural fairness in some trials, in Queensland there is no right to an interpreter in either criminal or civil trials.
- **People in rural, regional and remote areas.** People living outside major cities face a range of barriers when accessing the legal system. These include the limited number of solicitors available; frequency of conflict of interest (with limited number of legal firms in one location); additional travelling and communication costs; and a heavy reliance on communication technology (such as email, internet and teleconferencing), which is often inappropriate, unreliable or inaccessible.
- **Aboriginal and Torres Strait Islander peoples.** This group faces significant barriers to accessing legal services, including distrust of the legal system, a lack of cultural awareness of mainstream services, language barriers, systemic discrimination and a lack of understanding of potential legal resolutions to an issue.
- **Women.** The greatest legal needs of women are in the areas of family and civil law, as reflected by Legal Aid Queensland figures which show that women are less likely to have their legal aid applications granted than men, at 70.99 per cent compared with 81.38 per cent.
- **Older people.** The elderly may be dependent on a family member, friend or carer to facilitate access to a solicitor for matters such as wills or powers of attorney, leaving them vulnerable to abuse. Although legal services for seniors have been established, they are limited and are only able to assist clients who are capable of providing instructions.
- **People with disabilities or cognitive impairment.** This group may face a range of barriers to accessing legal services, including but not limited to physical access, limited access to Auslan interpreters, a lack of understanding of the legal aspects of their situation, communication difficulties, reliance on others to access lawyers, fear of retribution and discriminatory attitudes towards people with a disability.

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Figure 3.24 The elderly can face many challenges in dealing with legal matters.

Review 3.13

1. **Create** a table to **analyse** the issues faced by each of the groups listed on page 111. **Consider** the impact that barriers to justice have on their right to a fair trial, and to achieving just and equitable outcomes.
2. **Explain** why it is important for the legal system to ensure fair and equitable access to justice for all members of society.
3. **Discuss** why women's legal aid applications appear to be approved at a lower rate than those of male applicants.
4. **Evaluate** the implementation of due process and natural justice for these groups.
5. **Propose** recommendations for the improvement of access to the criminal legal system for each of these groups.
6. **Discuss** the implications of recommendations (e.g. cost, access, timeframes).

Legal representation

Every person charged with an offence should be able to have **legal representation** – in other words, they should be able to engage a lawyer to represent them in court. However, not every person can afford a lawyer, and this is dealt with in the *Legal Aid Queensland Act 1997* (Qld).

legal representation the legal work that a lawyer performs on behalf of a client

This Act provides for the establishment of Legal Aid Queensland, which gives legal assistance to socially and financially disadvantaged Queenslanders by providing Legal Aid solicitors and solicitors and barristers from private firms to act on behalf of clients. These private lawyers receive a small sum of money for their services from Legal Aid Queensland, but due to budget constraints they do not receive the full fee they would charge their full fee-paying clients.

Youth and child offenders

Children are not treated in the same way as adults by the criminal justice system, as they are considered to be more vulnerable, but also more open to rehabilitation due to their young age and immaturity. The *Youth Justice Act 1992* (Qld) and the *Children's Court Act 1992* (Qld) are the two main laws that deal with juvenile offenders in Queensland. A person under the age of 18 years in Queensland is considered a juvenile in the eyes of the criminal law.

Schedule 1 of the *Youth Justice Act 1992* (Qld) states that children should only be detained as a last resort and that if they do have to be detained, they should only be held in a facility that is suitable for children. Sentencing options are also different for children than for adults. This is because the courts, wherever possible and in accordance with the principles of the *Youth Justice Act 1992* (Qld), try to ensure that children are not detained in custody unless they have an extensive criminal history or have committed a very serious or very violent offence. It is believed by many that if children are not exposed to the harsher side of the criminal justice system, such as detention centres, they are less likely to enter into a cycle of reoffending.

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Matters involving children are most often heard by the Children's Court, in which a magistrate hears and decides the case. The Children's Court is closed, which means that the general public cannot enter and view the proceedings. However, as with adults, very serious offences such as murder must be heard in the Supreme Court, which is an open court.

Review 3.14

1 **Explain** the role of Legal Aid Queensland.
2 **Identify** the law enacted to establish Legal Aid Queensland.
3 **Evaluate** whether such a scheme is necessary in Queensland. **Explain** why it is needed or not needed.

3.7 Alternatives to a criminal trial: The Drug Court

The *Drug Legislation Amendment Act 2006* (Qld) was passed to establish the **Drug Court** as a permanent feature of the Queensland criminal justice system. Drug courts were trialled in different parts of Queensland from 2000 and the success of these programs led to the court's permanent introduction. A key intention of the Drug Court is to keep offenders – particularly first-time offenders – out of the prison system so that they have a much higher chance of not reoffending. The Drug Court is also based on the idea that drug problems can often be treated as health problems rather than as legal problems. Treatment, rather than punishment, may be the best option.

Drug Court a Queensland Court that offers some drug dependent offenders intensive rehabilitation instead of prison

The Drug Court sentences selected people who have pleaded guilty to certain drug offences in Queensland. An offender can only choose to appear before the Drug Court if they are over the age of 18, have been charged with a drug offence, have not been charged with any other offences (such as sexual offences), have not been imprisoned for a period exceeding 12 months, are not currently in prison, or are drug dependent and intend to plead guilty to their offences. They must also be a suitable candidate for intensive drug rehabilitation.

Off the record

Discuss the advantages and disadvantages of using the alternative processes for criminal matters.

Research 3.7

1 Research and **explain** the main aim of the Drug Court.
2 **Evaluate** whether the introduction of the Drug Court is helping to achieve justice in Queensland.
3 **Create** a one-paragraph response to **explain** your findings and to make a decision on whether or not the drug court is succeeding. (**Consider** the viewpoints of offenders as well as people who are the victims of drug offenders.)

Figure 3.25 Offenders in the Drug Court must meet a certain set of criteria in order to be sentenced within it.

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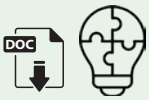

3.8 Topic review

Topic summary

- People have rights to natural justice before the law, specifically to due process and a fair hearing.
- A summary proceeding is when a case is heard and decided in the Magistrates Court.
- A committal hearing is when a magistrate considers whether sufficient evidence exists to send the accused to trial at a higher court.
- An indictment is prepared by the prosecution if the magistrate decides there is enough evidence to proceed to trial.
- Bail is the procedure that allows the accused to be released from police custody until they are due to appear in court, and for the court to release a person pending a further court appearance.
- A court process exists in Queensland that ensures both the prosecution and the defence are given a fair and equitable opportunity to present their case to the judge and jury.
- Legal Aid Queensland aims to provide legal representation to socially and financially disadvantaged Queenslanders.
- The onus of proof in a criminal case rests with the prosecution.
- The standard of proof in a criminal trial in Queensland is beyond reasonable doubt.
- Strict liability offences are offences that do not allow the use of a defence or excuse to escape conviction.
- Defences and excuses are used as a partial defence to either reduce the charge or as a complete defence to acquit a charge

Short-response questions

1 Provide **explanations** to show your comprehension of the following legal concepts, principles and processes:
   - **a** the importance of natural justice, procedural fairness and due process in the criminal trial process
   - **b** what bail is and when it will not be granted
   - **c** two advantages and two disadvantages of the jury system in Queensland
   - **d** the difference between majority and unanimous verdicts
   - **e** the purpose of committal hearings.

2 **Describe** the function/role of three court personnel.

3 **Identify** and **explain** the three types of 'examinations' witnesses may be required to undergo during a court case.

4 **Explain** why a jury should be a 'cross-section of the community.'

5 **Explain** where appeals from the Magistrates Court would be heard.

Extended-response questions

1 **Create** an extended response of 400–600 words that **explains** why the previous convictions of an offender are withheld from the court until the accused is being sentenced. Do you think this is fair? Why or why not?

2 The 'presumption of innocence' is a cornerstone of our justice system. Research this statement and then **create** a short essay response that **explains** why this is the case. Make sure you give examples of situations where, without the presumption of innocence, a just and equitable outcome was not achieved.

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Response-to-stimulus questions

1 Using Source 1, **create** a table to analyse the advantages and disadvantages of judge-only trials for high-profile cases and **decide** whether a judge-only trial is a suitable alternative to a criminal trial.

Source 1

Trial by judge alone may not be the answer to giving high-profile defendants a fair hearing [excerpt]

John Eldridge, *The Conversation*, 16 April 2018

There are two primary models used, with some jurisdictions blending elements of the two. The first allows trial by judge alone if the accused requests it. The second utilises an 'interests of justice' test and allows trial by judge alone at the judge's discretion.

2 Research the case of *R v Dudley and Stephens* (1884) 14 QBD 273. **Create** a short multimodal presentation that details the facts of the case and what defence would be used in Queensland if the same situation happened today.

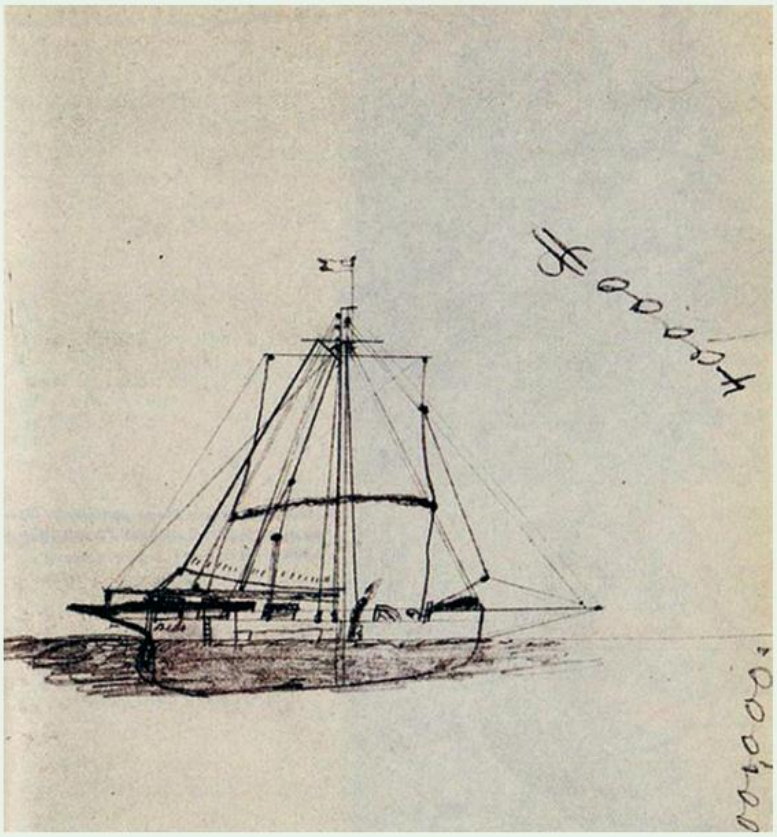

Figure 3.26 *R Dudley and Stephens* (1884) concerned events which took place on English yacht *Mignonette* in the 1880s. Pictured is a sketch of the boat by captain Tom Dudley.

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Chapter **4** Topic **4**

Punishment and sentencing

Chapter overview

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.
Legal Studies 2025 v1.1 General Senior Syllabus, Page 15. © Queensland Curriculum & Assessment Authority.

Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including concurrent and cumulative sentencing, custodial and non-custodial sentences, obiter dicta, ratio decidendi, deterrence, retribution, rehabilitation, incarceration, denunciation, prevention, restorative justice, and recidivism.
- Describe the range of sentencing options, including fines, good behaviour bonds, probation, suspended sentences, community service orders, intensive correction orders and imprisonment.
- Explain the principles that affect sentencing decisions in Part 2 of the *Penalties and Sentences Act 1992* (Qld), e.g. the purposes of punishment, the nature and gravity of the offence, current sentencing practices, the relevance of prior convictions, mitigating/aggravating circumstances, and the impact on the victim.
- Analyse the principles of sentencing as they apply to scenarios.
- Evaluate, using legal criteria, the effectiveness of sentencing and punishment.
- Select legal information, analyse legal issues about criminal justice, and evaluate legal situations, e.g.
  - sentencing trends over time
  - the rates of incarceration in the general population and/or within specific groups
  - reasons for the rate of criminal reoffending by different groups within Australia and/or Queensland.
- Analyse legal issues related to punishment and sentencing by
  - determining the nature and scope of the legal issue
  - examining different relevant viewpoints and their consequences.
- Using the analysis (above), evaluate this legal situation by
  - presenting legal alternatives to make a recommendation/s
  - justifying using legal criteria and
  - discussing implications.
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

- *Criminal Code 1889* (Qld)
- *Penalties and Sentences Act 1992* (Qld)
- *Victims of Crime Assistance Act 2009* (Qld)
- *Youth Justice Act 1992* (Qld)

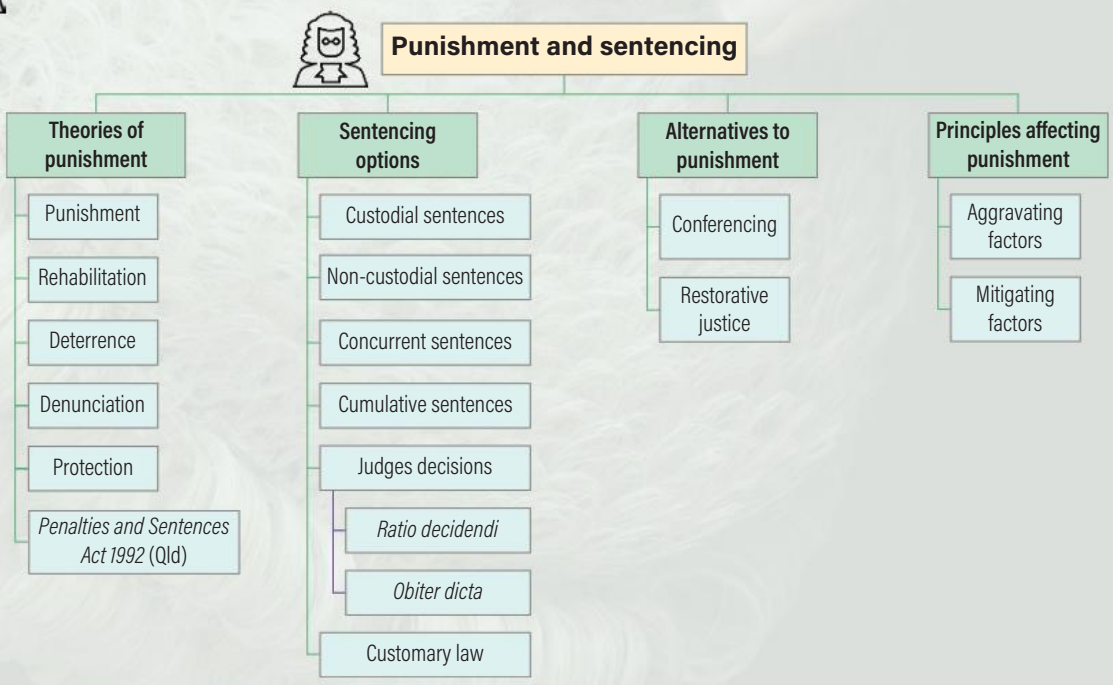
Significant cases

This topic will include the following cases:

- *Markarian v The Queen* (2005) 228 CLR 357
- *Mill v The Queen* (1988) 166 CLR 59
- *R v Bramwell* [1995] QCA 622
- *R v Byrnes; Ex parte Attorney-General (Queensland)* [2011] QCA 40
- *R v F and P* [1997] QCA 098
- *R v H* (1993) 66 A Crim R 505

Concept map

In Topic 4 of Unit 1 of the QCAA Legal Studies course, we will cover the following content:



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4.1 Punishment and sentencing

Virtually all of us are familiar with the concept of punishment:

- We find it in our families: *If you don't eat your vegetables, then you can't have dessert!*
- We find it when we play sports: *A netball umpire calls out, Travelling! Free throw, Blue!*
- We find it at school: *If you don't stop talking, I will place you on detention!*
- We find it online: *When a person on social media is suspended or banned for refusing to obey the rules.*

Why do these punishments exist? If you think about it, they really all have three objectives:

- First, the fact that punishments exist makes people more likely to follow the rules.
- Second, they impose consequences on a person who does not follow the rules.
- Third, when one person is punished, it reminds everyone *else* of what will happen if they too fail to follow the rules.

If the criminal law is our society's way of making rules to determine what behaviour is allowed and what behaviour is forbidden, then it makes sense that the criminal law also imposes *punishments*, which we call *sentences*, on people who are convicted of criminal offences. In this chapter, we look at this difficult and highly emotional topic.

Figure 4.1 Sometimes refusing to eat broccoli is worth the punishment.

Verdict and sentence

Before there can be a **sentence**, the person who is before the court (the **defendant**) must be convicted of a crime. This happens in two ways: either the defendant pleads guilty or they are convicted after a trial.

sentence the punishment imposed by the court on a person who has been convicted of a criminal offence

defendant (criminal offence) a person who has been charged with a criminal offence and brought before the court to face that charge

Plea of guilty

If a defendant pleads guilty, they are essentially admitting that they have committed whatever offence they have been charged with. Strictly speaking, it means that they are accepting that every *element* of the charge is true. The judge will then accept their plea and issue a verdict of guilty.

A plea of guilty is considered proper and decent behaviour by the person who has been charged. It saves the court considerable time and effort required to conduct a trial. It saves the witnesses from the trauma of appearing in court and being questioned. Perhaps most importantly, a plea of guilty allows the defendant to stand up and accept responsibility for their own conduct.

For these reasons, as we will see, a plea of guilty inevitably results in a substantially lower sentence for the offence.

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Conviction after trial

We have already seen, in Chapter 3, that every person is presumed to be innocent of any charge which has been levelled against them. The prosecution must then prove the charge beyond reasonable doubt and must also prove that there is no reasonable defence open to the defendant. The defendant, if they wish, is entitled to stand silent throughout the entire process of investigation and trial.

At the end of the trial, there will be a verdict, issued either by the jury or by the judge (if there is no jury). If the verdict is 'guilty', then the judge or the jury have accepted that the prosecution has proven its case, and there is no defence to excuse the defendant. Again, this means that every *element* of the charge has been proven.

If a person is convicted after a trial, the court will assume that they have known all along that they were guilty. They will not be seen as a person who has taken responsibility for their crime. Instead, they will be seen as a person who has denied that responsibility to the very end.

Once the verdict has been given, the process of sentencing begins.

4.2 Reasons for punishment

We have already thought about some of the objectives of punishment in other contexts, such as sport and school. The objectives of criminal punishment are very similar.

In Queensland, there is a specific piece of legislation which provides the framework for criminal sentencing: the *Penalties and Sentences Act 1992* (Qld). Section 9(1) of that Act says that the *only* purposes for which a sentence may be imposed are:

- to punish the offender in a way that is just
- to provide conditions that will help the offender be rehabilitated
- to deter the offender or other persons from committing the same or similar offences
- to make it clear that the community denounces the sort of conduct in which the offender was involved
- to protect the community.

If you think about it, these purposes are similar to the three objectives we outlined for family, sport and school punishment. The objectives in the *Penalties and Sentences Act 1992* (Qld) impose consequences, and they do so in a way that is intended to stop people from committing crimes in the first place or to stop them from committing *further* crimes after they are sentenced.

In addition, the *Penalties and Sentences Act 1992* (Qld) has a couple of other objectives. These are rehabilitation, denunciation and protection. These are worth thinking through.

Rehabilitation

Rehabilitation starts by thinking about *why* offenders commit offences in the first place. Many years ago, the law simply assumed that people who committed offences were bad, and punishment was intended to force them to cease being bad. These days, we understand that there are a range of different drivers of criminal activity. For example, we understand that poverty and inequality tend to increase crime. We understand that people who are addicted to drugs, including alcohol, are more likely to engage in criminal activity. We understand that people with mental illnesses may commit criminal offences. The study of the various drivers of different types of crimes is called **criminogenesis**.

rehabilitation an objective of sentencing, which helps the offender to change whatever factors in their life led them to offending. This might involve health interventions and counselling, addressing addiction or increasing education and skills.

criminogenesis factors which lead to criminal offending such as poverty, mental health crisis and substance addiction

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A rehabilitative approach to punishment looks for ways to help offenders overcome the circumstances which led them to criminal offending. For example, a person who lived in poverty might benefit from vocational training and assistance in finding work. A person dependent on drugs might benefit from support to overcome their addiction. These rehabilitative approaches might be the best way to prevent future offences.

Figure 4.2 A rehabilitative approach to punishment looks for ways to help offenders overcome the circumstances which led them to criminal offending.

Denunciation

Denunciation is a way that the community, through the courts, can make it clear that there are types of criminal offending which will not be tolerated. These tend to be offences which carry a strong *moral* impact. So, for example, minor speeding and drink driving are both offences, and both will bring punishment, but most people would *denounce* drink driving. Our approach to sentencing should help to denounce those crimes which the community believes to be truly despicable.

Protection

Protection is a matter of last resort and great regret. There may be certain people who are considered so dangerous, and so likely to commit further serious offences, that they must be excluded from the community, for the protection of the community. Imprisonment is the most obvious means of protection, but not the only means of protection.

denunciation (an objective of sentencing) where the sentence imposed upon a person is meant to show that society as a whole forbids the criminal conduct that they have engaged in

protection (an objective of sentencing) if a person's history suggests they are so dangerous that they must be segregated from society in order to keep society safe, then they are imprisoned (or imprisoned for a longer period)

Before we move on from these principles, have you noticed that they don't all move in the same direction? Consider, for example, an offender who is now being sentenced for their eighth burglary, but all the offences were committed to support the offender's drug habit. On the one hand, such behaviour deserves strong consequences to punish the offender and deter further offending. On the other hand, a rehabilitative approach would suggest that the focus should be on drug treatment rather than punishment.

The courts, and the justice system, are required to do their best to balance these differences and, often inconsistent, objectives. Let's look at how they do so.

Figure 4.3 Appropriate sentencing is about getting the balance right.

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Review 4.1

1 **Explain** the objectives of criminal punishment.
2 **Distinguish** how punishment is different to sentencing.
3 **Describe** the various ways a person can be convicted of an offence.
4 **Explain** why a plea of guilty always results in a lower sentence for the offender.
5 **Define** what it means to say that a judge or jury has 'returned a guilty verdict'.
6 **Identify** which piece of legislation sets out the purposes for sentencing in Queensland.
7 **Discuss** the purposes of sentencing a criminal offender.
8 **Summarise** the meaning of the rehabilitative approach to punishment.
9 **Define** criminogenesis and describe at least one real-life example of this concept.
10 Create a one-paragraph response to the following:
   a **Analyse** how the criminal punishments of denunciation and protection serve the community.
   b **Justify** whether the use of these punishments are effective.

4.3 Decisions of judges

After a guilty plea has been entered or a guilty verdict has been imposed, the judge is required to consider the appropriate sentence.

The starting point for the judge is set out in the legislation which established the offence. In each case (with a very few minor objections), the legislation sets out the **maximum penalty** that can be imposed by the judge. For example, section 411(1) of the *Criminal Code 1899* (Qld) says: 'Any person who commits the crime of robbery is liable to imprisonment for 14 years.'

However, because this is the maximum penalty, it is the penalty reserved for the *worst imaginable* type of that crime – though it is rare for the court to impose the maximum sentence. So, the court must have some mechanism by which to determine what punishment will be imposed up to that maximum.

At the end of the trial, the judge asks the prosecutor and the defence lawyer to make **submissions** on the appropriate sentence. Each side makes an argument as to what the appropriate penalty should be, and the judge decides. There are usually two aspects to this decision.

First, the judge will look at *comparative cases*. The prosecutor and defence lawyer will put before the judge similar cases from the past and describe the penalties in those cases. It stands to reason that the more similarities there are between the current case and previous cases, the more similarities there should be in terms of the penalty. This allows the court to ensure that, over time, the penalties imposed do not favour earlier or later offenders compared to one another.

Second, the judge will carefully consider the **sentencing principles** set out in section 9 of the *Penalties and Sentences Act 1992* (Qld) (the same section that sets out the purposes of sentencing).

maximum penalty the penalty which should be imposed in the worst imaginable case of the offence; when parliament establishes an offence, it usually sets out the maximum penalty for the offence

submissions on sentence the arguments made to the court by the prosecutor and defence lawyer, after an offender has been convicted; the purpose of the submissions is for each side to state what the appropriate penalty should be

sentencing principles a series of principles set out in section 9 of the *Penalties and Sentences Act 1992* (Qld), which provide guidance to the court regarding the principles the court should apply when determining the sentence to impose upon an offender

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Figure 4.4 Both sides make submissions to the judge about the appropriate sentence.

There are nearly twenty sentencing principles. Some of the key ones include:

- **The offender's character, age and intellectual capacity.** It seems just that an offender who is younger and less mature, or an offender with impaired intellectual capacity, ought to face a reduced punishment. In the same way, a person who is generally of good character and who has committed a single offence in a way that is quite out of character for that person is likely to merit a lower punishment. In this way, the court can fit the punishment to the individual person. 'Cookie-cutter' or 'one-size-fits-all' punishments could easily become unjust.

  When considering the offender's character, the court must also consider the offender's criminal history – their criminal record. This helps to establish the character of the person. Obviously, a person who has committed the same offence ten times previously might well need a harsher punishment, because they can hardly argue their offending was out of character.

- **Whether the offender has taken responsibility.** An offender is given credit, as we have already discussed, for their plea of guilty. If they have pleaded guilty, they are also given credit if they have shown remorse towards their victim, or if they have attempted to make amends for the harm they have caused.

  Similarly, offenders who cooperate with police from the outset are given credit for that cooperation, although it is important to understand that the process of *plea bargaining*, or negotiating about sentences, is not a feature of Australian law in the way that it is a feature of the US law that we see on television and streaming shows.

  Finally, within this category, an offender will be given credit if they have taken steps to address the underlying causes of their offending. For example, a person who has committed an assault might show the court that they have commenced anger management counselling, or a person whose drug addiction led to their offending might show that they have commenced a rehabilitation program.

- **The harm caused by the offending.** We have already learned, in previous chapters, that a criminal proceeding is essentially a legal dispute between the Crown (or the community) and the individual. It is not a dispute between the offender and their victim. However, the victim (together with the people close to the victims) is the person who has suffered the most. They have a special stake in the process.

  As a result, a victim is entitled to make a **victim impact statement** to the court, where they explain to the court the effect that the offender has had on their lives. The judge

victim impact statement a statement, unsworn and not cross-examined, made by a victim of crime to tell the court about the effects of an offence upon the victim

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Case study 4.1

The case: *R v Byrnes; Ex parte Attorney-General (Queensland)* [2011] QCA 40

Citation

[2011] QCA 40 means this case was heard in the Queensland Court of Appeal in 2011 and was the 40th judgment reported by that court in that year.

Facts

Byrnes, a teacher, pleaded guilty to many counts of serious offences against his Year 4 students. The judge formed the view that the head sentence for this offending should be in the range of 12 to 14 years in prison, and the judge then reduced the sentence to 10 years in prison as a result of the plea of guilty and other sentencing factors. The Attorney-General appealed on the basis that the sentence was too lenient.

Legal issues

What reduction in penalty should be given as a result of the offender pleading guilty?

Decision

The reduction in sentence given by the judge due to the plea of guilty was found to have been appropriate.

Ratio decidendi (reason for the decision)

By pleading guilty, an offender saves the community the cost of a trial and saves other parties the need to give evidence in court. This justified a reduction in penalty.

Obiter dicta (something to think about)

If a person pleads guilty but shows no remorse for their actions, should they still receive a penalty discount due to the sorts of factors mentioned above? Or should a guilty plea only receive a sentencing reduction if the person pleading guilty is sorry for their offending?

is then entitled to consider this statement when convicting the offender. The judge is also entitled to consider other evidence of the extent of harm caused by the offender upon the victim directly and upon society more broadly.

For example, an offence involving police corruption or police violence not only has a direct impact on the individual victim but also has a broader impact on the relationship of trust between the community and the police, generally. The court is entitled to take this into account.

It stands to reason that even if two offenders have committed similar offences, the offender who has caused the most harm, should also suffer the harsher punishment.

- **Mitigating factors and aggravating factors.** **Mitigating factors** are factors which tend to reduce the blame that should be cast upon the offender for their offending. **Aggravating factors** do the opposite, suggesting that the penalty should be harsher.

mitigating factor a factor which suggests to the court that a lighter, rather than a heavier, punishment would be appropriate in a particular case

aggravating factor a factor which makes a criminal offence objectively worse and which, therefore, suggests the need for a heavier, not a lighter, punishment

Figure 4.5 A victim impact statement can allow a victim to express the way an offender has adversely affected their life and can play an important role in the decision of the court.

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Some of these aggravating factors are general. For example, any offence committed by a person who is part of a *criminal organisation* is automatically considered to merit harsher punishment than the same offence committed alone.

However, some offences set out specific circumstances of aggravation. For example, section 339 of the *Criminal Code 1899* (Qld) states that if a person assaults another person, the maximum penalty is seven years in prison; but if they assault another person with a weapon, or as part of a group, then the maximum penalty is 14 years.

When the judge has considered the submissions made by the prosecutor and the defence lawyer, the maximum sentence, the comparative cases and all the sentencing factors, the judge will then formulate a final sentence. It is important to understand that there is no *mathematical* method for the judge to do so. Sometimes judges will explain their 'headline' sentence and any adjustments they have made after considering the sentencing principles, but ultimately the role of the judge is holistic. They must consider all the matters we have described above and then produce from them a final sentence.

Case study **4.2**

The case: *Markarian v The Queen* (2005) 228 CLR 357

Figure 4.6 Markarian was a drug addict who had been sentenced in a NSW court for five counts of supplying heroin.

Citation

(2005) 228 CLR 357 means this case was heard in the High Court of Australia in 2005, and the decision was published in volume 228 of the Commonwealth Law Reports starting on page 357.

Facts

Markarian was a heroin addict being sentenced for five counts of supplying heroin, an offence which he undertook in order to obtain payment in the form of heroin which he then used. He came before

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the court for sentencing on all of those offences, and his sentence was appealed, first to the Court of Appeal and ultimately to the High Court.

Legal issues

The Court of Appeal had taken the approach of starting with the maximum available sentence for these offences, and then reducing that sentence by considering mitigating factors, and increasing the sentence by considering aggravating factors. The High Court was asked to consider whether this was the appropriate way to determine a criminal sentence.

Decision

The court found that, particularly in complex cases, such a structured approach to sentencing was likely to lead to injustice. The court favoured a more organic process, a style of reasoning which McHugh J and Kirby J described as 'instinctive synthesis.'

Ratio decidendi (reason for the decision)

The best way to achieve a just sentencing outcome is for the judge to bring human considerations to bear on the situation, rather than approaching sentencing as a scientific or mathematical exercise, because human experience and criminal conduct is so varied.

Obiter dicta (something to think about)

Have you ever been punished in a way that you felt was too harsh? Or have you ever felt that a punishment was so light that you had almost gotten away with whatever you did wrong? How did you know whether a punishment was too heavy or too light? Do you think everyone else would agree with your opinion?

There is one final matter that the judge then needs to consider: the judge must consider the *total* effect of *all* punishments which the offender is undergoing, including punishments for previous crimes. The judge must ensure that the total punishment represents a just, and not a crushing, punishment when compared to the overall nature of the offender's conduct.

In many cases, prison sentences are served **concurrently** rather than **cumulatively**. That is, if an offender commits three offences, and the judge determines that the proper sentence for each offence is two years in prison, then the most likely outcome is a total sentence of two years in prison, with the three sentences being served concurrently. It is much less likely that the offender will be sentenced to six years in total, with the three sentences to be served cumulatively.

Overall, the objective of the judge is to ensure that the overall punishment is **proportionate** to the offending: that the punishment fits the crime.

concurrent punishment a punishment served at the same time such as a person sentenced to two or more criminal offences will often serve those sentences concurrently, so a sentence of five years each for two charges, will be served as five years in total

cumulative punishment punishments served one after another such as a person sentenced to five years each on two charges cumulatively will serve ten years in prison

proportionate sentencing a key principle of sentencing, which reflects the concept that the punishment should fit the crime, so the punishment is neither too light nor too heavy when considered in the context of the criminal offending which is being punished

Figure 4.7 Judges must consider the total effect of all the punishments imposed.

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Case study **4.3**

The case: *Mill v The Queen* (1988) 166 CLR 59

Citation

(1988) 166 CLR 59 means the case was heard in the High Court of Australia in 1988 and was reported in volume 166 of the Commonwealth Law Reports starting on page 59.

Facts

Mill was convicted of three armed robberies, two in Victoria and one in Queensland. He was tried in Victoria and sentenced to 10 years in prison, with parole after eight years. He was released after eight years, and then returned to Queensland and sentenced for the armed robbery in Queensland. He was sentenced to a further eight years in prison, with three years to serve. Had he been sentenced in Victoria for all three offences, his total sentence would have been much less than the 18 years of prison with 11 years to serve, which he received in total from the two courts.

Legal issues

The High Court had to consider the extent to which the court in Queensland should have taken account of the time already served by the prisoner in Victoria.

Decision

The court emphasised the 'totality principle.' This principle means that a sentencing court should consider not only the penalties for each individual offence, but also whether the total penalty properly reflects the total amount of offending. In this case, the court found that the total penalty was too high, and that the court in Queensland should have given more attention to the penalty imposed in Victoria.

Ratio decidendi (reason for the decision)

In order to do justice, the court should think about the overall offending and compare that to the overall penalty. The alternative could be penalties of hundreds of years in prison, as we see in the United States.

Obiter dicta (something to think about)

The totality principle means that a person who commits three offences on three different occasions will probably receive a heavier sentence overall than a person who commits all three of those offences on a single occasion. Do you think this is fair? Why or why not?

Figure 4.8 Mill was convicted of three armed robberies, across two states.

Review **4.2**

1. **Explain** why the maximum penalty in criminal legislation is rarely served by a judge.
2. **Describe** the circumstances in which an offence would obtain the maximum penalty.
3. **Identify** the sentencing principles under section 9 of the *Penalties and Sentences Act 1992* (Qld).
4. **Describe** the mathematical process for calculating the penalty to be imposed for a criminal offence.
5. **Distinguish** the differences between concurrent and cumulative sentences.

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4.4 Types of punishment

Off the record

From the beginning of European settlement until well into the twentieth century, capital punishment (the death penalty) was practised in Australia. These executions were carried out in public. Queensland was the first part of the British Commonwealth to abolish hanging in 1922.

A sentencing judge does not only consider the amount of punishment to be imposed on an offender, but also the *type* of punishment. The judge in fact has quite a comprehensive menu of types of punishment which can be imposed, and these will form part of the submissions by the prosecutor and defending lawyer, and then part of the judge's considerations using the method we have outlined above.

Let's look at the different types of punishment, from lightest to heaviest.

Conviction recorded

The first consideration for a judge will be whether to officially record the offender's conviction. Recording a conviction can have serious consequences for the offender in terms of things like future employment or the ability to travel overseas. If offending was relatively minor, and if there are substantial mitigating factors, the judge may impose a penalty, but also declare that no conviction will be recorded.

Unconditional discharge, or release without further punishment

In rare instances, a judge might observe that an offender has committed an offence, but the judge might decide not to impose a punishment, either because the crime was very minor or technical or because the offender has already been punished sufficiently (e.g. by being on *bail* or *remand* for an extended period of time). This is known as an **unconditional discharge**.

unconditional discharge when a person has been convicted of an offence, but the court considers that in all circumstances they do not require further punishment

Good behaviour bonds

A **good behaviour bond** is essentially a formal promise by the offender that they will keep the peace and be of good behaviour for a set period, usually one year. A good behaviour bond acts much like a warning – the judge decides not to impose punishment, but the offender must promise to cease offending. If the offender fails to abide by that promise, then the *next* time they come before the court, the second judge will know that they have already been given the opportunity to abide by a good behaviour bond, and so the second judge is much less likely to be lenient.

good behaviour bond a form of penalty, much like a warning, which is a promise by the offender not to commit further offences; if they reoffend, next time they will be sentenced as a person who has already had the benefit of a good behaviour bond, but who has broken that bond

Probation

If a person is sentenced to a period of **probation**, then they are required to be supervised by officers from the probation and parole section of Queensland Corrective Services. They are allowed to live in the community, but the court can impose various conditions that they must

probation a form of punishment where the offender is allowed to remain in the community, but they are placed under the supervision of Queensland Corrective Services; it is enforced in an effort to avoid imprisoning offenders except as a last resort

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abide by (including, of course, not committing further offences). A person who is on probation might be required to participate in rehabilitation programs or to check in regularly with probation officers. They might be subject to drug or alcohol testing or might have a curfew imposed. They will often not be allowed to leave Queensland without permission.

Probation gives the judge options which allow a person to be supervised in the community, rather than putting them in prison. It allows them to continue to work and to meet their family responsibilities in a way that is impossible in prison.

A person can only be placed on probation if they agree. If they break the terms of their probation, they are likely to be imprisoned.

Fines

Fines involve the payment of an amount of money. Money paid in fines goes to the government to be included in the government's normal budget. Fines do not go to the victim or to the court.

Often the parliament will establish a maximum fine for an offence. The legislation will usually describe the fine according to a number of *penalty units*. In 2024–25, a penalty unit was worth $161.30; the amount rises by a small margin each year. So, in 2024–25, an offence with a maximum fine of 100 penalty units had a maximum fine of $16 130.00. The use of penalty units allows the value of fines to remain the same despite economic changes.

Fines are the most common punishment when the criminal offences are committed by a *corporation* (e.g. by a company). The court can hardly send a company to prison!

Finally, let's consider the fact that one of the drivers of criminal offending is poverty and inequality. It makes little sense to impose a large financial fine on a person who is already in poverty. Indeed, this is quite likely to drive them towards further offending, because the fine will drive them into deeper poverty. Once upon a time, this was made even worse, because if people did not pay their fines, they were imprisoned. Essentially, this meant people were imprisoned for being poor. Nowadays, when a fine is imposed, the offender can ask to have the fine referred to the State Penalties Enforcement Registry, or SPER, which allows people to pay off their fines over time.

fine a punishment where the offender is required to pay money to make amends for their offending; these are often paid off over a long period of time, with the money going to the government

Community service

An offender may be ordered to perform a certain amount of **community service** – up to 240 hours – within a 12-month period after sentencing. Community service work includes cleaning up public spaces (litter removal), working in parks and gardens, helping to prepare food for volunteer kitchens and assisting in certain types of charity work.

Community service is an attractive sentencing option for those with limited means to pay fines. It not only provides the offender with a form of punishment; it also enables them to contribute to the community and build skills which might then translate into paid employment.

community service a criminal punishment whereby the offender is required to give up a certain amount of their free time to complete public projects such as litter removal

Figure 4.9 Community service work can include gardening.

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Punishment for driving offences

Nobody has a *right* to drive motor vehicles on public roads. When someone does drive a motor vehicle, they are in a position where inattention, intoxication or any other failure to drive safely, might cause injury or death to other people. For this reason, new drivers are required to pass a driving test, and then all drivers are required to abide by the road rules.

If a person commits a driving offence, then one of the options available to the court is to suspend, or even cancel, the driver's licence. The court can also provide the driver with a limited licence, allowing them only to drive for the purposes of getting to and from their place of employment.

Figure 4.10 Loss of licence is an unhappy, but probably inevitable, outcome for driving offences.

Intensive correction orders

An **intensive correction order** (ICO) is the most serious form of punishment short of actual imprisonment. An offender sentenced to an ICO is regarded as being in prison but serving their sentence of imprisonment *in the community*. They are therefore subject to very close monitoring by Queensland Corrective Services, including meetings at least twice a week, and they are required to perform community service. When a person is placed under an intensive correction order, a conviction is always recorded.

An intensive correction order is essentially the community's last-ditch attempt to keep the offender out of prison.

intensive correction order an order which places an offender under close supervision but allows them to continue living in the community

Suspended sentence of imprisonment

If a person is sentenced to a term of imprisonment for five years or less, all or part of their prison sentence may be *suspended* for a period of time (up to five years). During the period of their suspension, the offender is required to commit no further offences punishable by prison. If they do, they are likely to be sent to prison to serve their entire prison sentence.

So, imagine an offender who has been sentenced to three years in prison, suspended for two years. If, 18 months later, they commit another offence punishable by imprisonment, then they can be sent to prison to complete their entire three years.

Suspended sentences are quite controversial. Some people consider that a suspended sentence is really not a punishment at all. The offender continues to live their life with no more than minor inconveniences, and they will not go to prison if they do not commit further offences (and, of course, nobody is supposed to commit offences anyway).

Other people consider that a suspended sentence is an inefficient way to rehabilitate an offender, who may benefit from the structured environment and programs available in prison, and who may be 'set up to fail' if they are returned to the same social, physical and economic environment which led to their offending in the first place.

suspended sentence a sentence which occurs when a person is convicted of a criminal offence and sentenced to a period of imprisonment but is not actually required to go to prison, with the sentence being 'suspended' for a period of time, but if the offender commits any further offences, they may be required to serve their original sentence plus any new sentence

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Case study **4.4**

The case: *R v H* (1993) 66 A Crim R 505

Note

In cases like *R v H*, involving child victims, the offender is sometimes referred to simply by random initials to protect the identity of the victim – *not* to protect the identity of the offender.

Citation

(1993) 66 A Crim R 505 means this is a Supreme Court of Queensland case heard in 1993 and reported in volume 66 of the Australian Criminal Reports starting on page 505.

Facts

The offender committed a serious offence against a young girl not yet two years of age. He was sentenced to four years' imprisonment, but the sentence was wholly suspended.

Legal issues

What was the nature of a suspended sentence? Was it appropriate in a case such as this?

Decision

The court found that while a suspended prison sentence is a genuine punishment which can have serious consequences for the offender, at the same time it was not a sufficiently serious punishment for severe offending of this type.

Ratio decidendi (reason for the decision)

While suspended sentences are 'real punishment', under some circumstances they do give the impression of being cosmetic and not having real consequences.

Obiter dicta (something to think about)

A person who receives a suspended sentence knows that if they put even the slightest foot wrong during the operative period for the suspension, they may end up in prison. Is a person who receives a suspended sentence actually being punished at all? Is the social perception that a person with a suspended sentence is 'getting away with' their offending justified?

Imprisonment

Imprisonment is the detention of a person in a prison or other correctional services institution. Imprisonment involves depriving the person of many aspects of their liberty and segregating them from the rest of the community. Prisoners have limited contact with friends and family, and they virtually have no capacity to do many of the things that citizens at liberty take for granted. Prison is *not* fun.

However, prisoners have rights, and while a prisoner is in prison, they should not be subject to further punishment beyond the imprisonment itself. Prisoners are therefore entitled to proper living conditions, to nutritious food and drink, to visits from family or friends, to regulated phone calls, to safety and security and to programs intended to rehabilitate.

Not all prisons are the same. Some prisons, known as *maximum security* prisoners, have

Figure 4.11 Aerial view of Arthur Gorrie Correctional Centre near Brisbane, a maximum-security prison for males and not a fun place for anyone.

imprisonment a punishment where a person is deprived of their liberty and held in a prison for a set period of time, or until they earn their release on parole

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limited living conditions and limited freedom. Other prisons, known as *residential units*, have greater levels of freedom and individual autonomy. Finally, there are *prison farms* or *minimum-security* facilities, where the prisoners have greater freedom. The idea of these facilities is to gradually prepare prisoners so that when they are released, they are able to live as successful members of the community.

When a person is sent to prison, the court will nominate a period of time for their imprisonment. This is not usually the actual amount of time the prisoner will spend in prison. Often, prisoners will be released on **parole** before the end of their sentence. Sometimes, the sentencing court will nominate a *court-ordered parole date* upon which the prisoner must be released; in other cases, the court nominates a *parole eligibility date* where the prisoner is released on that date if the Parole Board agrees that they should be released.

The harshest penalty of imprisonment is a *life sentence*. Offenders receive a life sentence for the worst of crimes. An offender sentenced to life in prison must serve at least 15 years in prison before being eligible for parole; and in some cases, they must serve at least 30 years in prison. The worst type of life sentence is called an **indefinite sentence**. A person sentenced to an indefinite sentence must never be released from prison – even if they would otherwise be eligible for parole – unless the court (not the Parole Board) determined that the prisoner is no longer a threat to the community.

parole the conditional release of a prisoner prior to the end of their sentence; the prisoner is closely monitored and is allowed to complete their sentence while living in the community

indefinite sentence a prisoner who is never to be released from prison unless a court determines that they are no longer a threat to the community

Case study **4.5**

The case: *R v Bramwell* [1995] QCA 622

Figure 4.12 *R v Bramwell* dealt with the theft of a large quantity of alcohol.

The citation

[1995] QCA 622 means the matter was heard by the Queensland Court of Appeal in 1995 and was the 622nd matter decided that year.

Facts

Bramwell, along with a number of other people, was convicted of breaking and entering the canteen operated by the Palm Island Aboriginal Council and stealing a large quantity of alcohol. He was held in prison on remand for 91 days before his sentence was dealt with. When he was sentenced, the judge felt that the 91 days he had already served was far more severe than the penalty which would have been imposed on him. The judge felt that in ordinary circumstances a community-based order would have been appropriate. As a result, the judge sentenced Bramwell to 91 days in prison, with the practical effect that he was released immediately.

Legal issues

Even accepting that the practical effect of the sentence was Bramwell's immediate release, should he have been sentenced to prison in circumstances where the judge clearly felt that in other circumstances a lighter sentence would have been more appropriate?

Decision

As a matter of principle, Bramwell should not have received a higher sentence just because he

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had already served time in prison while awaiting sentence.

Ratio decidendi (reason for the decision)

Prison is our most significant form of punishment, and people should not be sentenced to prison unless it is truly necessary; and even then, for the minimum time possible.

Obiter dicta (something to think about)

How can the community do justice in circumstances like this, where a person serves time in prison, even though they did commit the criminal offending, but it turns out that the offending was not at a level that would have required them to go to prison? Is this a reason why we should be more prepared to give bail in circumstances where prison seems unlikely?

Parole

A person who is on parole has not been released. They are no longer in prison; instead, they are serving their sentence in the community. Like people who are on probation or intensive correction orders, offenders on parole are required to be supervised by Queensland Corrective Services. If they commit further offences or if they fail to meet the conditions of their parole (e.g. by failing a drug test), they can be returned to prison at any time. Parole is therefore both a carrot and a stick – prisoners released on parole know that they are given a privilege by returning to the community early; but the privilege comes with the threat of harsh consequences if they do not meet the standards of behaviour required of them on parole.

Figure 4.13 Release on parole is an opportunity, both for the prisoner and the community.

Review 4.3

1 **Describe** the circumstances in which a conviction may not be recorded in relation to an offence.
2 **Explain** how a pre-sentence punishment may impact the court's decision to release an offender without further punishment.
3 **Describe** what happens if a person on a good behaviour bond commits a further offence while the bond is in place.
4 **Define** probation and identify the conditions and exclusions placed on the offender.
5 **Explain** the use of penalty units for an offence and comment on the limitations of this form of punishment.
6 **Create** a table to **analyse** the advantages and disadvantages of community service as a form of punishment.
7 **Describe** the penalty of a suspended sentence and **explain** why this sentencing is controversial.
8 **Assess** the following statement and comment on the reasons for this position in Queensland's criminal justice system:

Being sent to prison is a punishment for an offence, and there is no need for punishing prisoners further once they are there.

9 **Discuss** the purposes of parole in sentencing and explain under what circumstances it may not be not granted.

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4.5 Implications of punishment

Conviction of a criminal offence also carries with it a range of other consequences which are not precisely punishments – their intention is not, for example, to influence the behaviour of the offender.

First, the court might order the offender to pay **restitution** to the victim. So, for example, if a person steals your debit card and they use it to buy $200 worth of goods, the court might order them to pay you back the $200 that they have stolen. This is not the same as a fine: it is not punishment, but rather is compensation to make up for the offender's conduct.

Second, the *Victims of Crime Assistance Act 2009* (Qld) establishes a scheme where victims of violent crime can claim compensation from a government organisation called Victim Assist, which can then seek to recover that money from the offender. Again, the purpose is not to punish the offender in the way that a fine punishes the offender; rather, it is to provide compensation to the victim – to restore the victim to their circumstances prior to the offending.

Third, offenders can be required to pay an amount as *court costs*. This requires offenders to make a contribution to the expenses incurred by the court and by the prosecutors in conducting the criminal proceedings. This, too, is really a form of compensation – but this time the offender is compensating the community (whose taxpayers fund the courts).

restitution part of the sentencing process, which involves the offender paying back any benefit they have received from their crime; for example, a person who has stolen money might be required to pay that money back

Figure 4.14 Even if a fine is not imposed, punishment can have serious financial implications.

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Finally, convictions might have other administrative consequences. For example, a person who is convicted of a criminal offence might lose their *blue card* (which allows them to work with children) or their weapons licence or their certificate to practice law. There are many more examples. For people who are not Australian citizens, and who are in Australia on a visa, conviction of a criminal offence will often result in cancellation of the visa, and the person being *deported*. None of these things are punishment: they are merely administrative consequences of the offending. We would not, for example, want a person working with children if they had just committed a serious violent offence.

4.6 Alternatives to punishment

At the start of this chapter, we referred to *criminogenesis*, or the circumstances which lead a person to commit offences in the first place. We noted that sometimes we might have a better opportunity of preventing future offending if we address those underlying reasons for offending.

These programs often focus on young offenders and First Nations peoples, and we will turn to those next. For offenders not in those categories, however, one of the key alternatives to punishment is the Illicit Drug Court Diversion Program. This program is only open to people who plead guilty to relatively minor drug-related charges. It is not available to people who are convicted after pleading not guilty.

The person who has pleaded guilty will then be placed on a good behaviour bond, and one of the conditions of that bond will be attendance at the diversion program, which is intended to provide support to address the reasons for their drug use. The idea is that the offender can be assisted to overcome their drug use at an early stage before they commit more serious drug offences or other types of offences (such as property offences) which often accompany a drug habit.

4.7 Special punishment regimes

The *Penalties and Sentences Act 1992* (Qld) is a sentencing regime established to sentence adults, in the general community, who are of full legal capacity. However, the community, through the parliament, recognises that this sentencing process is not always effective for all populations. As a result, there are three other distinct criminal punishment regimes for communities with particular characteristics in our justice system: young people, people with mental illness and First Nations people.

Young people

The law recognises that young people often lack the intellectual development of adults, and that young people are, by definition, still developing in terms of their maturity and experience of the world. The law also recognises that sometimes the consequences of criminal offending can be lifelong, and it is not fair to penalise someone for their entire life for things they may have done when they were a child, regardless of how unfortunate those things might have been.

The law also recognises that criminal offending can sometimes obtain massive publicity, and this can lead to an unhelpful level of notoriety for a young person who is accused of criminal offending.

In order to address these needs, the *Youth Justice Act 1992* (Qld) sets out a youth justice pathway which is similar to the adult criminal law, but specifically adapted to young people.

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Case study **4.6**

The case: *R v F and P* [1997] QCA 098

Figure 4.15 *R v F and P* dealt with teenage girls who, in several incidents, demanded cigarettes and cash from other teenage girls and then viciously attacked them when they refused.

Note

When children are sentenced for criminal offences, they are almost always known only by an initial, because one of the principles of youth justice is that offending as a young person should not be allowed to destroy that young person's prospects of a future.

Citation

[1997] QCA 098 means the matter was heard in 1997 in the Queensland Court of Appeal and was matter 98 for that year.

Facts

F and P were teenage girls at a school in Brisbane who, in several incidents, demanded cigarettes and cash from other teenage girls and then viciously attacked them when they refused. They were both sentenced to a period of juvenile detention, and both appealed their sentences for being manifestly excessive.

Legal issues

How do the principles for sentencing young people differ from the principles for sentencing adults?

Decision

Sentencing of young people should be undertaken solely in accordance with youth justice legislation, and without any reference at all to the equivalent adult sentencing. Sentencing for young people should be designed to allow them to accept responsibility for their conduct, while maximising their opportunity to develop and grow in ways that do not involve offending. This means that juvenile detention will rarely be the appropriate punishment.

Ratio decidendi (reason for the decision)

In the case of young offenders, the purpose of sentencing is overwhelmingly focused on rehabilitation rather than on punishment.

Obiter dicta (something to think about)

If the penalties for young people committing criminal offences is much less than the equivalent adult penalty, does this simply mean that young people will be more likely to commit offences? Have you, in your own experience, encountered young people who already have experience of the youth justice system? In your view, what do they need in order to change their path away from a lifetime of offending?

Young people under the age of 10 are said to be younger than the **age of criminal responsibility**. A young person under 10 therefore cannot be charged with, or punished for, a criminal offence.

Young people between the ages of 10 and 14 have *limited* criminal responsibility. These young people are only punished if the court agrees that they understood what they were doing was the wrong thing.

Young people aged between 14 and 17 are dealt with under the *Youth Justice Act 1992* (Qld).

age of criminal responsibility the age at which a young person can be held responsible for their action

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Figure 4.16 The way we punish young people has come a long way.

When it comes to sentencing, the *Youth Justice Act 1992* (Qld) has a number of additional options which are not available to judges who are sentencing adults. First, a court can **reprimand** a young person. The judge, on behalf of the community, tells the young person that their behaviour is unacceptable, and they are warned not to repeat that behaviour.

Second, if the young offender agrees, the court can order their participation in a **restorative justice conference**, where they are brought face to face with their victim and encouraged to understand the consequences of their offending. These conferences can result in conference agreements, where the offender agrees to take specific steps in relation to their own behaviour and in relation to restoring the position of the victim.

In addition, the court has the full range of sentencing options available in respect of an adult, including, in the last resort, detention in a juvenile justice detention facility.

There are two further key features of our youth justice system. First, the presumption in youth justice is that a conviction should *not* be recorded. The court will only list youth justice offences on a young offender's record if they are at the worse end of the scale. Second, there are almost always orders in place preventing the media, including social media, from naming young offenders who are being punished. This protects the young person from the harmful notoriety they might otherwise acquire, especially in the modern world where the internet forgets nothing.

reprimand under the *Youth Justice Act 1992* (Qld), a court can choose to formally tell the young person that their conduct has been unacceptable, and that there will be much worse consequences if that behaviour should be repeated

restorative justice conference under the *Youth Justice Act 1992* (Qld), a young offender is provided the opportunity to come face to face with their victim and to understand the consequences of their offending for other people

People with mental illness

If a person has a mental illness and their mental illness causes them to commit an offence, then in one sense we as a community have no business punishing them at all. If a person truly does not know that they are doing the wrong thing or if their mental illness causes them to have such a distorted understanding of reality that they are unable to properly understand their actions or the consequences of those actions, then none of the objectives of sentencing apply.

We cannot hope, for example, that a punishment will deter a mentally ill person from repeating their action – they may not have understood their action in the first place. It is not appropriate to impose consequences on them for something they did not mean to do or did not understand. Furthermore, it is certainly improper to *denounce* a person for the effects of their mental illness.

At the same time, however, if a mentally ill person has committed an offence and that offence has resulted in harm to the community or some person within the community, it is proper for the law to take steps to prevent such a thing

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from happening again. And the best way for this to happen is by connecting that person with treatment.

You have already learned, in Chapter 3, about the Mental Health Court. If the Mental Health Court determines that a person is either temporarily or permanently mentally unfit to stand trial, then the court must impose either a *forensic order* or a *treatment support order*. These have the effect of compelling the mentally ill person to participate in treatment.

The court can order the mentally ill person to undergo treatment in an inpatient facility, where they are segregated from the community or they can order the mentally ill person to be treated in the community.

First Nations peoples

The relationship between First Nations peoples and the criminal justice system is extraordinarily complicated, and very difficult to condense down to a few paragraphs. It is clear, however, that First Nations peoples in Australia are imprisoned at an extraordinary rate, many times more often than the rest of the community.

It is also clear that much of this offending arises from cultural incompatibility between First Nations cultures and the criminal law; from the effects of poverty and alcohol; from the historical destruction of Indigenous communities; from limited access to education, health and social infrastructure taken for granted by many Australians; from a complicated relationship with police; from racism in the general community; and from dozens of other factors.

The outcome is that many First Nations peoples were, for many decades, effectively punished simply for being Indigenous.

Of course, before colonisation, Indigenous cultures had their own laws, their own systems for resolving disputes and their own means of punishing people who broke those laws. Australian and Queensland law has generally been reluctant to incorporate recognition of traditional cultural criminal law, but some steps have been made. For example, Queensland has a court called the Murri Court.

In the Murri Court, defendants who identify as Aboriginal or Torres Strait Islander people and who intend to plead guilty to minor charges which can be dealt with by a magistrate can have the opportunity to speak with community Elders and respected people, in order to develop a plan to move forward in their lives without further offending. This often involves connecting the offender with a range of support services. The offender is then required to meet with the magistrate and explain how they intend to take steps to be responsible for their offending and ensure they do not recommit. The offender is then required to report on their progress regularly. Finally, after about three months, the magistrate will sentence the offender for their original offence, taking into account the offender's progress in the interim.

When an Indigenous person is sentenced in any court, even in the higher courts for more serious offences, the judge is required to take into account 'any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender'.

These steps represent progress in terms of the relationship between First Nations peoples and the criminal law, but it is clear that there is still considerable work to be done by all members of our community in this area.

Review 4.4

1 **Compare** the differences between the Victim Assist payment and restitution.
2 **Describe** the additional options available to a judge under the *Youth Justice Act 1992* (Qld) in sentencing a young person.
3 **Evaluate** the circumstances under which a *treatment support order* can be made.
4 **Explain** the significance of the Murri Court for First Nations people in Queensland.

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4.8 Effectiveness of punishment and sentencing

In Queensland, half of all prisoners released from prison end up either back in prison or on an intensive corrections order within two years of their release from prison.

While, of course, this means that half of all prisoners do *not* end up back before the courts, this figure is still interpreted by most people as a sign that there is still considerable work to be done in designing a criminal justice system which protects the community by reducing **recidivism**. Our sentencing laws aim to reduce recidivism, but how well they do so is highly contested.

recidivism when a person who has been punished for a criminal offence then commits further criminal offences

Figure 4.17 Is prison effective in preventing recidivism?

Beyond that, though, community debate usually splits into two very distinct camps.

For one group, the high rate of recidivism is evidence that prison sentences should be longer and harsher. These community members, and the politicians who represent them, often use the catchphrase 'tough on crime'. The theory of these community members is that harsher penalties for offending is likely to make potential offenders think twice before offending.

For the other group, the high rate of recidivism is evidence that we need to improve our criminal justice system's ability to rehabilitate offenders and to address the underlying causes of their offending. These community members are often comfortable with *reducing* reliance on imprisonment and other harsh forms of sentencing (prisons are, after all, very expensive to operate).

Overall, the evidence tends to suggest that the latter of these approaches is more likely to have success. More than half of all prisoners have, before their first experience of prison, either been in residential mental health care or have been in contact with the child protection system. This figure alone suggests that investments in mental health support and in child protection programs might reduce recidivism.

In 2019, the Queensland Sentencing Advisory Council found that since 2005, the annual number of individual offenders had decreased, but that the annual number of offences overall had remained stable. This suggests that there is increased recidivism or increases in the number of offences for each offender. The report showed that 44.1 per cent of offenders were sentenced more than once during the period 2005–19. This apparent increase in recidivism occurred despite the fact that rates of imprisonment increased in both the Magistrates Court and the higher courts and that the length of prison sentences increased.

For some people, these trends will suggest that our current approaches to punishment are ineffective. For others, it will suggest that we need to impose more and harsher penalties. What are your thoughts?

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Reflection questions on punishment and sentencing trends

Question 1: How does our criminal justice system interact with poverty?

During this chapter, you were introduced to the concept of criminogenesis, the study of the factors which lead to crimes being committed in the first place. One of the most highly contested of these factors is poverty.

On the one hand, it stands to reason that a person who is in poverty might well commit criminal offences in order to obtain resources when they have no other choice. It is also quite likely that the factors which have caused a person to be in poverty (e.g. a drug use problem) also drive that person towards criminal offending.

On the other hand, other commentators point to the fact that many people who have low incomes are honest and law-abiding and do not commit criminal offences. It is unlikely that this debate will be resolved soon. However, it is also helpful to consider the other impacts which poverty has in relation to the criminal law.

For example, you have learned in this chapter that one key form of punishment is the imposition of a fine. From one perspective, a fine can be an extremely unfair way of imposing punishment. A punishment of $1000 might be impossible and life changing for some people and yet trivial and insignificant for others. Is it fair that some people should receive what amounts to a much less onerous punishment because they have greater financial resources?

In order to reduce this inequality, Queensland has introduced the State Penalties Enforcement Register (SPER). This allows for fines to be paid off over time, and in many instances over a very long period of time. However, if a person is only required to pay back their fine at the rate of a few dollars a week, are they still being punished at all?

Poverty also affects people who are completing a period of imprisonment. You have learned in this chapter that parole can be extremely beneficial both for the offender and for the community as a whole. However, one basic requirement for parole is that the person released on parole must be able to nominate an address. At present it can be difficult, even for people without a criminal history and with a full-time job, to find a place to live. For a person leaving prison without independent financial resources, finding a place to live could be all but impossible.

Figure 4.18 State Penalties Enforcement Register (SPER) allows for fines to be paid off over time.

Research 4.1

As a class, or in small groups, undertake independent research and share your views, based on that research, about the links between poverty, criminal offending and criminal punishment.

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Question 2: Can a system be punitive and rehabilitative at the same time?

In this chapter, you have learned that, on the one hand, punishment is meant to be unpleasant. A proper punishment will serve as a form of just retribution against a wrongdoer, should deter the individual from committing the same offences again and should also deter other people from committing that offence.

On the other hand, you have also learned that another objective of the criminal justice system is to rehabilitate offenders. Our criminal justice system begins from the perspective that every person has the capacity to be a law-abiding citizen. Even in jail, people are given the opportunity to improve themselves, to improve their likely opportunities upon the release from prison, to obtain medical and psychological support and, ultimately, to live a better life with no further contact with the criminal justice system.

Are these two objectives actually compatible? The criminal justice system has long struggled with the issue of recidivism; that is, once a person has spent time in prison, they are far more likely to return to prison. There is even some evidence to suggest that sending a person to prison makes them more likely, rather than less likely, to commit future offences.

On the other hand, a truly rehabilitative justice system might choose not to actually punish an offender at all; instead choosing to address those circumstances which need rehabilitation, whether this is housing security or mental health or education or any other factor. For some people within the community, often victims of crime themselves, it can be difficult to see an offender receiving little or no punishment, and instead receiving substantial support. It might even seem as though the offender is being rewarded for their criminal offending.

Research **4.2**

As a class, or in small groups, undertake independent research to **consider** whether punitive and rehabilitative justice can in fact go hand-in-hand.
If you form the view that they cannot, **consider** whether the system should focus more on punishment or rehabilitation.

Question 3: Should the justice system promote a plea of guilty?

In this chapter, you have learned that one of the factors taken into account when a judge passes sentence is whether or not the defendant pleaded guilty. You have learned that the rationale for this sentence discount is that by pleading guilty, the defendant saves the resources of the court, saves the victim and other witnesses from the requirement to give evidence in court and be cross-examined, and has the opportunity to show remorse (on the basis that a defendant can hardly show remorse for something they claim not to have done).

However, it is possible to see a downside to a criminal justice system which places a heavy emphasis on a plea of guilty. It is not difficult to see how a person who believes in their own innocence might well plead guilty in order to lock in a lesser sentence rather than taking a matter to trial and risking conviction at trial, which would inevitably be followed by a greater sentence.

It is also well understood that legal representation is expensive and not everybody can afford to have a lawyer take their matter all the way to trial. It is technically possible for an individual to represent themselves in a criminal proceeding, but this would be very challenging and difficult (and the more serious the charge, the more serious the consequences, and the more challenging the trial).

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Research 4.3

As a class, or in small groups, **consider** whether it is possible for us to ever truly know whether a person pleading guilty is doing so because they actually are guilty or because they are accepting a lower penalty rather than taking the risk of a higher penalty.

Consider whether we as a community should be comfortable with a criminal justice system which risks pushing people who are not guilty of criminal offences to plead guilty regardless.

Can you suggest any improvements which might reduce or resolve this issue?

Question 4: What are some of the different approaches to sentencing?

In this chapter, you have learned that when the parliament creates a criminal offence, the parliament typically establishes a maximum penalty for that offence. You have learned that the maximum penalty is to be applied in the worst possible example of that offence. This means that almost every time a person is sentenced for that offence, the penalty which they will receive will be substantially lower than that maximum penalty.

One criticism of our system of criminal justice is that the penalties which are imposed are said to be too 'soft', because the maximum penalty is seldom awarded. People who hold this view often argue that the parliament should impose either a minimum sentence or a mandatory sentence for each offence rather than a maximum sentence.

The counterargument is that such an approach to sentencing means that courts are unable to take account of the individual circumstances of each offence or the individual circumstances of the offender. This might well mean that a judge would be forced to impose a sentence which was harsher than the judge felt was actually just.

Research 4.4

As a class divide into two teams. One team should prepare the best possible arguments in favour of the imposition of minimum or mandatory sentencing; the other team should prepare the best possible arguments against this approach to sentencing (and therefore in favour of the current approach).

In class, participate in a debate based on these arguments. If you are studying alone, set out the best argument for each case.

4.9 Sentencing trends: criminal reoffending

We have learned in this chapter that *individual deterrence* and *social deterrence* are two of the purposes of criminal sentencing. In an ideal world, people who suffer criminal punishments should be deterred from further offending (in order to avoid further punishment), and others should be deterred from offending at all (having seen the punishment endured by those already sentenced). Reality, however, is much more complicated.

We have also learned in this chapter that criminal conduct does not simply arise from nowhere: it is often the product of social disadvantage, substance addiction, mental illness or a range of other, similar factors. Mere punishment, which does not address these underlying factors, will do little or nothing to prevent further crime. Indeed, some forms of punishment will simply make the situation worse: merely having a criminal record can make it harder for people to obtain work or secure housing, leading to worse social disadvantage, and in many cases, inevitably leading to further offending.

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Figure 4.19 According to the Analysis and Policy Observatory website, more than 60 per cent of Australia's prison population has been previously incarcerated. This is one of the highest reoffending rates in the world.

As a result, while it is entirely understandable that victims of criminal conduct want a system which is 'tough on crime', with heavy sentences and an emphasis on imprisonment, such sentencing processes may well be counterproductive.

Another purpose of criminal punishment is *rehabilitation*: the notion that the offender's brush with the criminal justice system may enable them to access support and development to change their circumstances for the better, for example, by accessing support for drug addiction, mental health support or programs in prison to develop work skills.

Sadly, experience demonstrates that rehabilitation has a very limited track record, at least for those who enter the prison system. A report in 2019 by the Queensland Productivity Commission titled *Inquiry into Imprisonment and Recidivism* bluntly stated that prisons are not effective at rehabilitation and can increase the likelihood of offending. The report found that roughly half of all prisoners return either to prison or to the broader community corrections system within two years of their release from prison. The report strongly recommended a greater focus on diversion and alternative forms of punishment, such as those we have discussed in this chapter.

In all likelihood, our criminal justice system – and our political leaders – will continue to grapple with the need to balance, on the one hand, the public calls for harsh punishment in retribution for criminal offending with, on the other hand, considerable evidence that less harsh, more supportive sentencing systems are more likely to prevent future crimes.

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4.10 Topic review

Topic summary

- The law imposes punishments, called sentences, on people who are convicted of criminal offences when they plead guilty or are issued a guilty verdict by a judge or jury.
- The objective of punishment is to deter people from committing crimes or to stop them from committing further crimes after they are sentenced.
- Rehabilitation, through the study of criminogenesis, looks for ways to help offenders overcome the circumstances which led them to criminal offending such as poverty, mental illness or addiction.
- Certain crimes are denounced by society as they carry a strong moral impact, often resulting in the imprisonment of the offender to protect the community.
- Several principles influence the decision a judge makes on sentencing, including the offender's character, age and intellectual capacity, whether the offender has pleaded guilty, the harm caused via a victim impact statement, as well as mitigating and aggravating factors.
- The different types of punishment beyond imprisonment include good behaviour bonds, fines, probation, community service, intensive correction orders, suspended sentences and in some cases a judge may issue a penalty or grant an unconditional discharge rather than record a conviction for the offence. Some of these sentences, especially suspended sentences, are controversial.
- A judge rarely imposes the maximum penalty for an offence as it is reserved for the worst imaginable type of that crime.
- Punishment is intended to be just and proportionate to the crime; in many cases when an offender has been convicted on multiple accounts, they will serve their prison sentences concurrently rather than cumulatively, and are often released on parole before the end of their sentence, unless they are serving an indefinite sentence.
- Special punishment regimes apply to unique categories of offenders including young people, those living with a mental illness, or First Nations people, and offer alternative approaches to punishment such as restorative justice conferences through youth justice pathways, treatment support orders under the Mental Health Court, and the Murri Court for minor charges against First Nations people.
- The high rate of recidivism in Queensland has created much speculation and debate in the community on the effectiveness of the criminal justice system's approach to sentencing, punishment and rehabilitation.

Short-response questions

1 **Explain** the implications that aggravating and mitigating factors can have on the punishment or sentence imposed by a judge.
2 **Explain** why corporal and capital punishment are no longer adopted as sentencing options in Queensland.
3 **Explain** the role of the Parole Board in Queensland and their underlying principle that parole is a method to reduce the rate of reoffending.
4 **Discuss** why retribution may not be considered an effective method of punishment in modern day society, and discuss alternatives if retribution was no longer a sentencing option.

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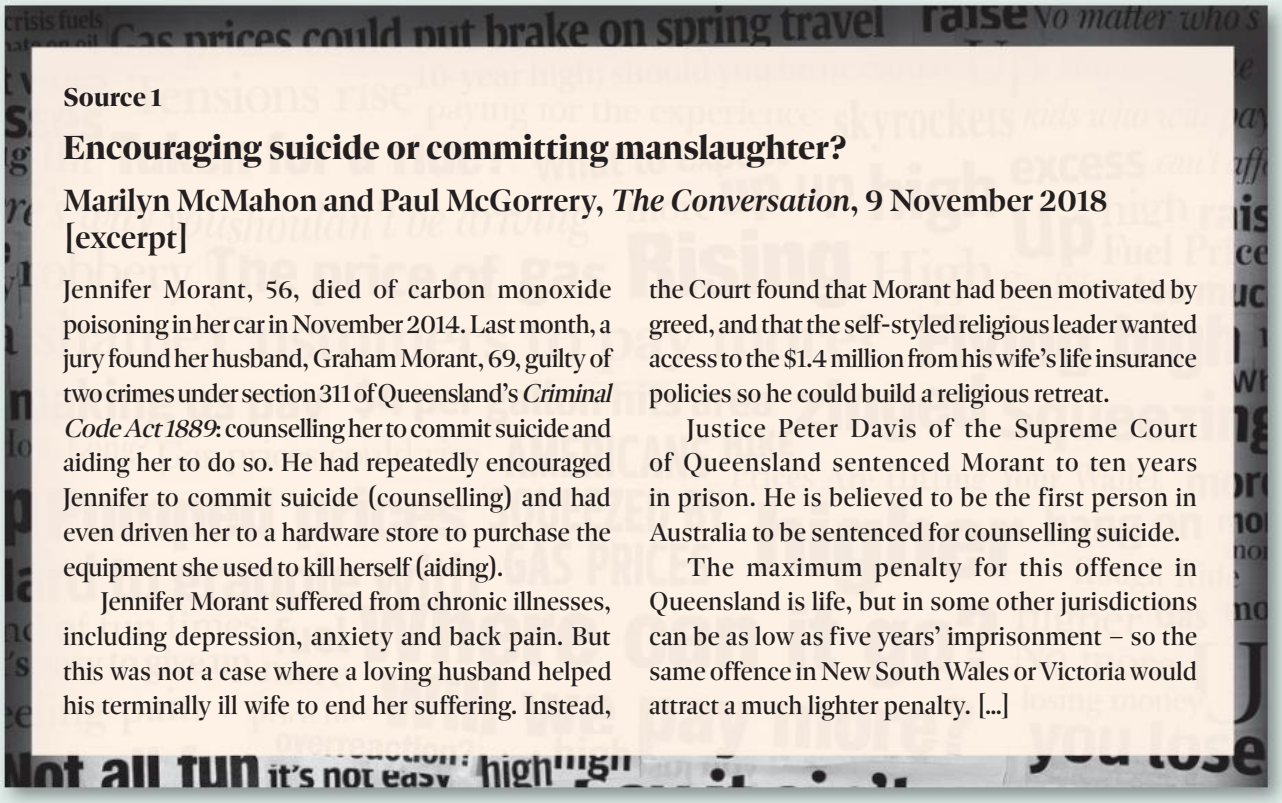
5 **Explain** the reasons why a judge may not record a conviction for an offender who pleads guilty or is found guilty of an offence.

6 **Create** a table to **identify** the key elements of good behaviour bonds awarded under sections 19, 24, 30, 31 and 32 of the *Penalties and Sentences Act 1992* (Qld).

7 **Create** a mind map to brainstorm all the reasons that different groups in society might commit offences or be inclined to reoffend.

8 **Create** a flow chart that **explains** the process for appeals in Queensland.

9 Using Source 1, **analyse** the viewpoints of two stakeholders in the legal issue of encouraging suicide and **discuss** whether the sentence issued was appropriate and would act as a deterrent.



Source 1

Encouraging suicide or committing manslaughter?

Marilyn McMahon and Paul McGorrery, *The Conversation*, 9 November 2018 [excerpt]

Jennifer Morant, 56, died of carbon monoxide poisoning in her car in November 2014. Last month, a jury found her husband, Graham Morant, 69, guilty of two crimes under section 311 of Queensland's *Criminal Code Act 1889*: counselling her to commit suicide and aiding her to do so. He had repeatedly encouraged Jennifer to commit suicide (counselling) and had even driven her to a hardware store to purchase the equipment she used to kill herself (aiding).

Jennifer Morant suffered from chronic illnesses, including depression, anxiety and back pain. But this was not a case where a loving husband helped his terminally ill wife to end her suffering. Instead, the Court found that Morant had been motivated by greed, and that the self-styled religious leader wanted access to the $1.4 million from his wife's life insurance policies so he could build a religious retreat.

Justice Peter Davis of the Supreme Court of Queensland sentenced Morant to ten years in prison. He is believed to be the first person in Australia to be sentenced for counselling suicide.

The maximum penalty for this offence in Queensland is life, but in some other jurisdictions can be as low as five years' imprisonment – so the same offence in New South Wales or Victoria would attract a much lighter penalty. [...]

10 Using legislation and case law **identify** and **explain** a sentence that you consider to be appropriate for each of the following examples.

a Joshua Yao was caught attempting to leave David Jones with a designer suit jacket concealed in his jumper. The store security guard approached him, and Joshua punched the security guard, causing a laceration to his face. Joshua Yao pleaded guilty to robbery and has not been remanded while awaiting his sentence. He is 19 years old and this is his first offence.

b Elisha Jacobs is a 34-year-old homeless woman known to police and the courts. She has been in and out of rehabilitation for possession charges and is a known substance abuser. Elisha was recently caught with a large quantity of methamphetamine in her possession and charged with trafficking of a schedule 2 drug and possession of drug paraphernalia. She pleaded not guilty and was committed to stand trial where the jury found her guilty of all charges. Her previous sentences have included drug diversion, rehabilitation, good behaviour bonds and most recently a suspended sentence. Elisha has been in remand for a total of 112 days while awaiting her trial and sentence.

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c Jack Simons is 56 years old and has recently pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm. He was charged after driving at excessive speeds led him to lose control of his car, crashing into another vehicle. The other driver was rendered a paraplegic because of the accident. Jack has previously lost his licence from the accumulation of low-level speeding offences but has no other criminal history or convictions.

Extended-response questions

1 **Create** an argumentative essay in response to the statement 'the introduction and use of mandatory sentences for all criminal offences are necessary to reduce the increasing crime rates in Queensland.'

You could consider:

- the nature and scope of criminal offences in Queensland
- the crimes that currently have a mandatory sentence
- the effectiveness of mandatory sentencing in other jurisdictions
- alternatives to mandatory sentencing as a means to reduce crime.

2 **Create** an argumentative essay in response to the statement 'allowing appeals in criminal trials deteriorates the confidence in the ability of the Queensland judicial system to provide just and equitable outcomes.' **Analyse** two stakeholder viewpoints and **evaluate** the effectiveness of the appeals process to criminal trials in Queensland.

You could consider:

- the rates and outcomes of appeals in Queensland
- the implications of justice for the victims of criminal offences when an appeal is successful
- the economic impacts of lengthy appeals processes
- possible processes for ensuring original decisions and sentences would not require appeals.

Response-to-stimulus questions

1 Choose a recent criminal case that has been heard in the Supreme Court to research. Create an inquiry report to **analyse** the legal issues associated with mitigating factors that affect sentencing decisions. Research the reasons for judges considering such factors and the implications of individualised approaches to sentencing and **decide** whether this approach does in fact lead to just and equitable outcomes.

You could consider:

- the types of sentences and cases that have appeals
- the costs and barriers associated with appeals
- the statistics and trends of outcomes of appeals
- the alternatives to appeals to ensure just and equitable outcomes for all stakeholders.

2 Choose an indictable criminal offence that is often a repeated crime to research. Create an inquiry report to **analyse** the nature and scope of the criminal offence and the rates of recidivism in Queensland. **Evaluate** the effectiveness of sentencing trends for the offence chosen and make recommendations to reduce the rate of recidivism.

You could consider:

- the sentencing patterns and trends for the chosen criminal offence
- the rates of recidivism and reasons for reoffending
- the effectiveness of incarceration as a deterrent.

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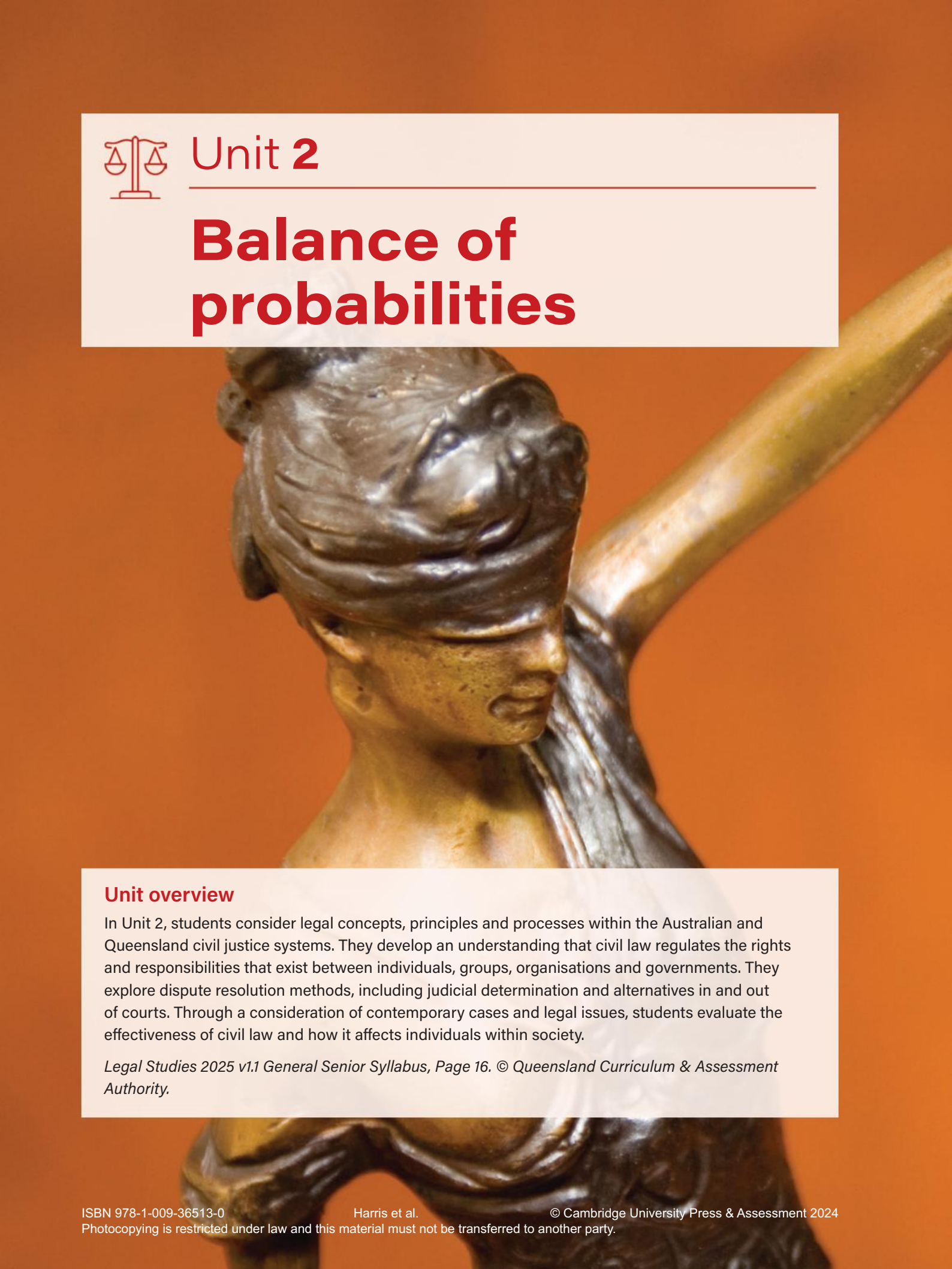
Unit 2

Balance of probabilities



Unit overview

In Unit 2, students consider legal concepts, principles and processes within the Australian and Queensland civil justice systems. They develop an understanding that civil law regulates the rights and responsibilities that exist between individuals, groups, organisations and governments. They explore dispute resolution methods, including judicial determination and alternatives in and out of courts. Through a consideration of contemporary cases and legal issues, students evaluate the effectiveness of civil law and how it affects individuals within society.

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Unit objectives

By the end of this unit, students should be able to:

1. Comprehend legal concepts, principles and processes of the Australian and Queensland civil justice systems, and in legal interactions that are planned (contract) and unplanned (the concept of negligence).
2. Select legal information from sources relevant to the Australian and/or Queensland civil justice systems.
3. Analyse legal issues involving the Australian and/or Queensland civil justice systems.
4. Evaluate legal situations relevant to the Australian and/or Queensland civil justice systems.
5. Create responses that communicate meaning to suit the intended purpose.

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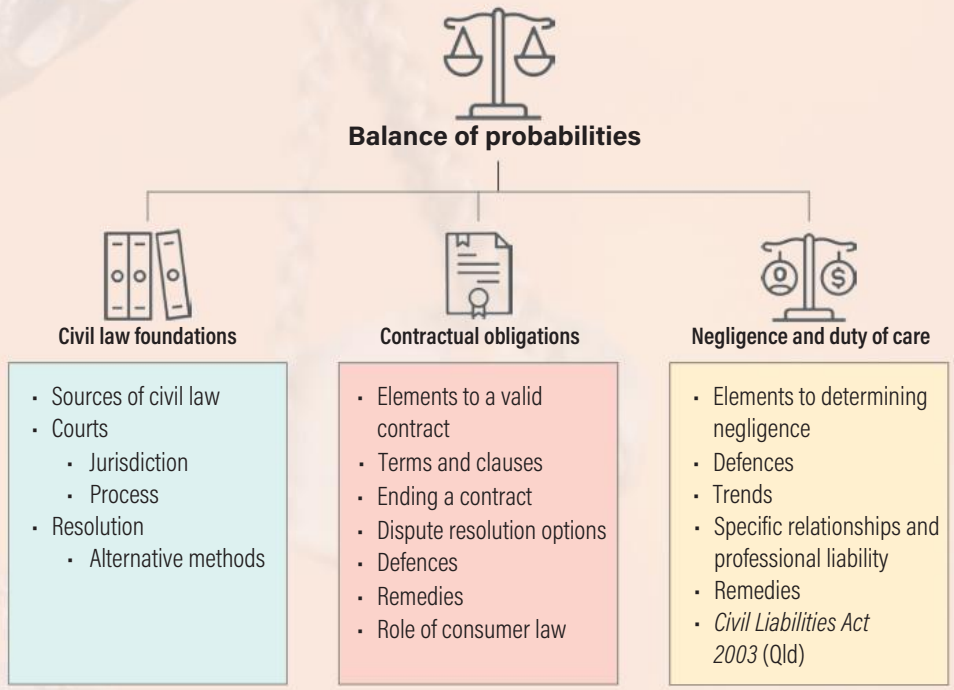
Concept map

In Unit 2 of the QCAA Legal Studies course, we will cover the following topics and content:



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Chapter **5** Topic **1**

Civil law foundations

Chapter overview

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.

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Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including precedent, ombudsman, balance of probabilities, burden of proof, plaintiff, defendant, tribunal, alternative dispute resolution, class action, counter claim, damages, and injunction.
- Explain
  - rights that are protected by civil law, and link these to obligations imposed by laws
  - sources of civil law, and the relationship between common law and statute
  - the doctrine of precedent
  - the civil jurisdiction and the court hierarchy for civil matters.
- Compare civil and criminal actions, including pre-trial procedures and court processes.
- Describe the different methods of resolving civil disputes, through judicial determination and alternative methods in courts, tribunals and independent bodies, ombudsman, alternative dispute resolution, class action, counter claim, damages and injunction.
- Distinguish the role of civil courts from the criminal system, including key roles and personnel, civil trial procedure, burden of proof and standard of proof.
- Explain
  - the role and types of alternative dispute resolution processes, e.g. facilitative process (mediation); advisory process (conciliation); and determinative process (arbitration)
  - the objectives of the *Civil Dispute Resolution Act 2011* (Cth) and discuss its role with respect to Part 6 of the *Civil Proceedings Act 2011* (Qld)
  - the relationship between courts and alternative dispute resolution processes.
- Analyse and evaluate equitable access to the civil justice system, and how personal, social or economic circumstances or background can present legal barriers for groups within society.

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- Select legal information and analyse legal issues concerning a civil issue taken to an independent authority, e.g. the Queensland Civil and Administrative Tribunal (QCAT), Administrative Appeals Tribunal (AAT) or ombudsman by
  - — determining the nature and scope of the legal issue
  - — examining different relevant viewpoints and their consequences.
- Evaluate the above legal situations by
  - — presenting legal alternatives to make a recommendation/s
  - — justifying using legal criteria and
  - — discussing implications.
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

- *Acts Interpretation Act 1954* (Qld)
- *Administrative Appeals Tribunal Act 1975* (Cth)
- Australian Consumer Law (ACL)
- *Civil Dispute Resolution Act 2011* (Cth)
- *Civil Liability Act 2003* (Qld)
- *Civil Proceedings Act 2011* (Qld)
- *Competition and Consumer Act 2010* (Cth)
- *Criminal Code Act 1899* (Qld)
- *Dispute Resolution Centres Act 1990* (Qld)
- *Limitation of Actions Act 1974* (Qld)
- *Ombudsman Act 2001* (Qld)
- *Public Interest Disclosure Act 2010* (Qld)
- Queensland Civil and Administrative Tribunal Rules 2009 (Qld)
- Uniform Civil Procedure Rules 1999 (Qld)

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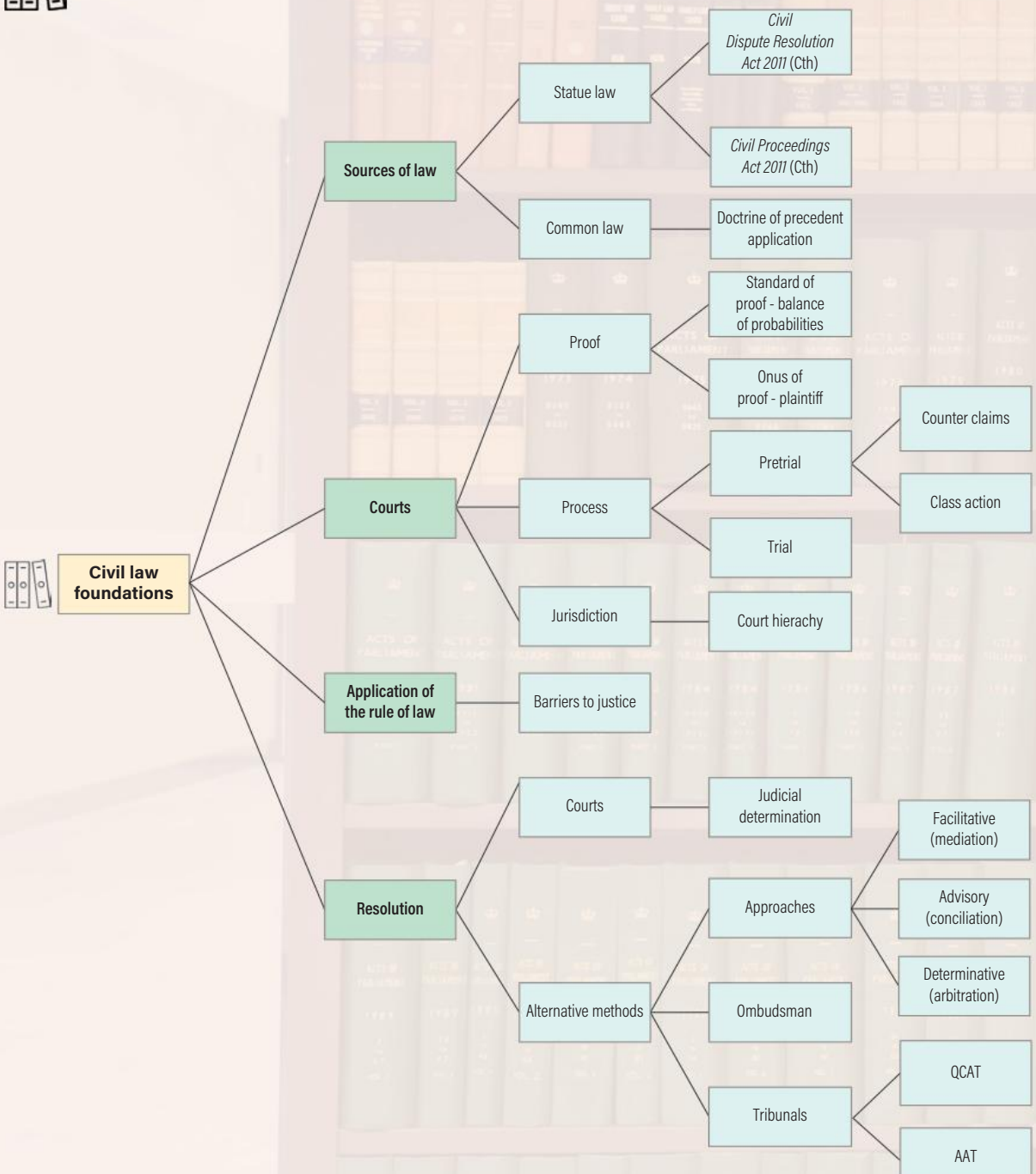
Significant cases

This topic will include the following cases:

- *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256
- *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447
- *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465
- *Matthews v Inspirations Furniture Design & Ors* [2016] QCAT 525i

Concept map

In Topic 1 of Unit 2 of the QCAA Legal Studies course, we will cover the following content:



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5.1 Differences between civil law and criminal law

The two main areas of law in Queensland are criminal law and civil law.

Criminal law attempts to protect society from criminal offences while ensuring that only those who are guilty suffer punishment. Criminal laws are codified in the *Criminal Code Act 1899* (Qld), while other Acts of Parliament deal with more specific types of criminal offences. As we have seen in previous chapters, criminal law imposes sanctions on offenders who have been found guilty of crimes. Sanctions include fines, court orders or imprisonment.

Civil law attempts to protect the rights and responsibilities of individuals in their behaviour and interactions with others. If this freedom is infringed or breached by another party (another individual, organisation or government agency), the aggrieved person has the right to request compensation for the suffering, injury and/or financial loss incurred. This compensation often takes the form of **damages** (in the form of money) paid to the aggrieved person for the loss or injury suffered. A breach of civil law does not normally constitute a criminal offence.

damages monetary compensation awarded by a court to a party as a remedy for harm or loss suffered due to the wrongful actions of another party

Review 5.1

State whether each scenario below is criminal law, civil law or both.

1 An individual has his trade secret stolen (intellectual property) by a competitor.
2 A middle-aged man is charged with drink driving.
3 A man burns his lips drinking coffee at a fast-food takeaway restaurant.
4 An employee has been unfairly dismissed without notice.
5 A claim for insurance has been summarily rejected without a just reason.
6 A woman sets fire to a friend's house.
7 A patient dies due to a mistake during a surgical procedure.
8 A prominent businessman has his reputation attacked in a newspaper report.
9 A subcontractor is left with nothing when a construction company goes bankrupt.
10 Thousands of bank customers bring a class action against a bank due to unfair interest rates on credit cards.
11 A person is accused of taking part in a break and enter robbery.
12 A second-hand car salesman has told a customer lies about the car in order to sell the vehicle.
13 An investor feels that he has lost a large amount of money due to the advice of a financial adviser.
14 An elderly man steals some apples from the local fruit market.

Figure 5.1 Car salespeople have an obligation in law to not mislead or deceive customers.

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Table 5.1 Civil law definitions

	Civil wrong (private)	Community wrong (criminal)
Objective/remedy	Compensatory damages	Punishment of offender
Nature	*Plaintiff v Defendant*	*R (The Crown) v Accused*
Name of court action	Suit	Trial
Source of law	Common law, but increasing trend of statute law	*Criminal Code 1899 Act* (Qld)
Initiated by	Person injured or 'wronged' claiming compensation	The Crown
Parties involved	Plaintiff/claimant/appellant	Prosecution/defendant/accused
Standard of proof	Balance of probabilities	Beyond reasonable doubt
Aim	Protect the individual	Protect the public
Burden of proof (generally)	Plaintiff	Prosecution

Criminal law and civil law have a number of differences that it is important to recognise, as explained below, and summarised in Table 5.1.

In a civil case, the person who brings the matter to the courts is referred to as the **plaintiff** or applicant. The plaintiff's name appears first in the case title, such as Zapata in *Zapata v Gunce*. The person against whom an action is taken is called the **defendant** or respondent, and their name appears second in the case title (Gunce in the example provided). In an appeal case, the person who is appealing the original decision is referred to as the appellant, and the person who the appeal is against is referred to as the respondent. In our example, if Gunce is appealing the original decision, then the case would be represented as *Gunce v Zapata*.

In a criminal case, the Crown (the prosecution) brings a case against a person. For example, with *R v Green*, Green would be referred to as the accused or defendant. The 'R' stands for the Latin terms of Regina (Queen) or Rex (King). *R v Green* therefore means 'The Crown against Green'.

In a civil case, the standard of proof is on the **balance of probabilities**. A fact is proved to be true on the balance of probabilities if its existence is more likely than not. In comparison, criminal cases work on the standard of beyond reasonable doubt. In *R v Standley* (1996), the court directed the jury as follows, 'If you think there is a reasonable possibility that the accused is not guilty, then he is entitled to be found not guilty.'

The **burden of proof** referred to by courts defines who has the obligation of having to prove or disprove a disputed fact. In civil matters, this is the plaintiff/applicant; in the criminal system, it is the prosecution.

A research report *Legal Australia-Wide Survey: Legal Need in Australia*, compiled by the Law and Justice Foundation of NSW in 2012, studied the most common legal matters reported across Australia. The results of this survey are indicated in Figure 5.2.

plaintiff the party who initiates a lawsuit and seeks a legal remedy in a civil court, typically by claiming damages or other relief against the defendant

defendant (civil offence) the party against whom a lawsuit is filed, accused of wrongdoing or facing legal action in a civil case

balance of probabilities the standard of proof in civil cases, requiring that a party's claims are more likely true than not, or 'probably true', for the court to rule in their favour

burden of proof the obligation in a legal proceeding for one party to provide sufficient evidence to support their claims or allegations

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It is obvious from this survey that civil law, not criminal law, is of most concern to the majority of Australians. People are worried that their personal rights and freedoms are being encroached upon by other parties.

There are several situations that can give rise to both criminal and civil proceedings. For example, when a person is assaulted, they will normally go to the police, who after investigating the matter may commence criminal proceedings against the accused. If found guilty, the accused will be sentenced and given an appropriate penalty. But while justice has been served, the victim of the assault has not been adequately compensated for their loss and is not in the same position that they were in before the assault was committed, for example, where there are severe physical injuries. In this case, the victim can commence a civil action seeking compensation for damages and losses suffered.

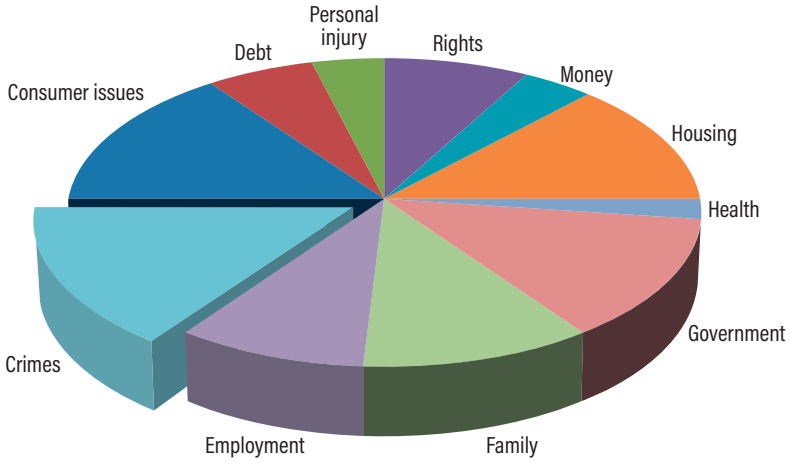

Figure 5.2 Prevalence of legal problems

5.2 Sources of civil law

The government and the courts have a duty to protect members of society with laws that are clear, concise, understandable and able to be enforced. These rights of an individual are protected by civil law principles and obligations imposed by laws. Laws are based on both common law and statute law.

Common law

Common law is developed, and constantly changing, based on judges' decisions handed down over hundreds of years. As a result, common law is sometimes referred to as judge-made law. Quite often, judges refer to the common law to find a case of a similar nature to the one over which they are presiding to help them make their current decision. This is known as the doctrine of precedent (see page 13). Courts in common law systems are bound by decisions made in higher courts and often consider previous rulings when deciding cases. These precedents help establish legal principles and consistency in the application of the law. When all judges are following the same precedents, then theoretically at least, it should not matter which judge decides a case – the understanding of the law should be the same. For example, *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 looked at the legal principle of what constitutes 'acceptance' of a contract. The decision in that case then formed the basis upon which all other similar cases dealing with contracts were adjudicated and decided across Australia. You will find more information on this case in Chapters 6 and 8.

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Figure 5.3 The decisions judges make in legal cases form part of the common law.

The knowledge and the associated reasons for decisions, or *ratio decidendi*, of these precedent cases are regularly researched by the courts, the judges and the general legal fraternity, and can be studied and researched on legal databases. However, at times, courts are faced with the problem that there are no similar cases to assist them in their decision-making. This is particularly true when considering the constantly changing nature of civil law, due to rapidly changing technology, for example, the electronic signing of contracts, or attempts to serve court documents on a person through social media platforms.

Statute law

Laws are also made by parliament, and these are referred to as statute law. Parliaments have the power to make new laws, replace existing common law, amend existing laws and even repeal existing statute law, for example, the *Fair Trading Act 1989* (Qld).

Statute law is the main way that laws are now changed in Australia. However, as is the case with common law, parliaments struggle to keep up with changes in society due to the time lag in passing new legislation.

Statute law is written in clear and concise documents with the aim of the legislation stated within the document. For example, the aim of the *Competition and Consumer Act 2010* (Cth) is to enhance the welfare of Australians through the promotion of competition and fair trading, and by providing consumer protection.

Relationship between common law and statute law

There is an increasing trend of seeing statute law replacing common law across all states and territories. However, this does not mean that the role of the courts is diminishing. The courts still have a major role to play as they are required to interpret the legislation made by the parliament. Laws are written in general terms, intended to apply to many cases; interpretation is the process of applying a specific law to a specific dispute or situation. Because interpretation can be a difficult task, given the intricacies of the case being heard, the *Acts Interpretation Act 1954* (Qld) was legislated to outline a set of rules or procedures for judges to follow.

It may be helpful to look at the relationship between common law and statute law by examining a few specific areas of law.

Negligence

Donoghue v Stevenson established the principle of negligence, that everyone owes a duty of care to protect their neighbour from reasonably foreseeable harm. The tests set up in this and subsequent cases still apply in Queensland common law today. Queensland legislation (statute law) has subsequently been introduced to qualify certain aspects of the law of negligence. The *Civil Liability Act 2003* (Qld) tightened up certain provisions on 'assumption of risk' (especially while undertaking dangerous activities), proportionate liability, contributory negligence and damages provisions. In this instance, the common law principles still apply but work in conjunction with statute law in certain circumstances.

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Contract law

Famous cases such as *Carlill v Carbolic Smoke Ball Co Court of Appeal* [1893] and *Hadley v Baxendale* (1854) 9 Ex 341 (English Cases) still apply in Queensland. They set up the principles and tests for valid offer, acceptance, consideration, intent and capacity – the necessary elements of any legally binding contract. They also established certain damages provisions. These common law principles now work in conjunction with provisions contained within the *Competition and Consumer Law Act 2010* (Cth). After such cases as *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, the government saw reason to implement legislation (statute law) to ensure that consumers had protections from unfair conduct such as unfair contract terms, misrepresentation and misleading or deceptive conduct. These incidents were not being protected well enough under the common law, and insurance companies were taking advantage of the *ad hoc* common law provisions. The government also wanted to send a strong message to companies that they needed to act appropriately when conducting business. In this instance, the common law principles still apply but work in conjunction with statute law in certain circumstances.

Criminal law

For a long time, the government has taken it upon themselves to ensure the safety of the citizens. Criminal law has been legislated on since Australian Federation. This also meant less confusion as to the expectations of citizens to act appropriately in public. Queensland criminal law has been 'codified' within the *Criminal Code Act 1899* (Qld). This means that the Act 'supersedes' (replaces) all other statutes that common law and criminal law previously recognised. Common law still plays a part in criminal law because the courts are still required to interpret the Criminal Code when rare circumstances arise. To adjudicate on these cases, the courts still use precedent from previous cases.

Research 5.1

Research the following Acts:
- *Civil Proceedings Act 2011* (Qld)
- *Succession Act 1981* (Qld)
- *Civil Liability Act 2003* (Qld)
- *Fair Trading Act 1989* (Qld).

Create a table that:
1. States the main purpose/aim of each Act
2. Lists and briefly explains four of the most important sections included in each Act.

Figure 5.4 There is an increasing trend of seeing statute law replacing common law across all states and territories.

Types of civil law

Civil law is divided into two main areas: contract law and **tort** law.

Contract law differs from tort law in that there is a clear relationship between the parties that is legally binding. An example of a contract is where you offer a person a certain sum of money for their land, they accept the offer and you pay them the prescribed amount. It would be a

tort a legal wrong that is not a criminal offence, or stemming from a contract, that may result in payment of damages for the loss or injury suffered

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legally binding agreement and if either party to the contract breached their promise, there would be legal consequences under contract law.

With tort law, there is no such established, clear relationship between the parties, so the courts generally have to decide on individual roles and responsibilities in any relationship. Certain relationships, such as teacher–student and doctor–patient, are easier for the courts to interpret due to principles established from previous court decisions. Other areas of tort law include trespass to person, trespass to land, private and public nuisance, and defamation. One of the most significant torts today is the tort of negligence (see Chapter 7).

Research 5.2

Research the differences between the torts of public nuisance and private nuisance. **Create** a list of examples of nuisance situations that occur in daily life.

Figure 5.5 A potential civil dispute may occur if a job is not carried out with due care.

5.3 Resolving a civil dispute

Due to the very nature and behaviour of humans, there will be disputes in the area of civil law. It could be that the contractor hired to fix a leaking tap did not do their job properly. It could be a much more serious and costly matter involving millions of dollars because financial advice given was found to be defective, or what might be deemed 'negligent'. Civil law involves a wide range of issues and disputes.

Regardless of whether you are the victim or the perpetrator, the process of finding a resolution to a civil dispute can be both lengthy and expensive. One option is to take the matter to court, but this is a long and costly process. If you can settle the matter without starting proceedings, you will save yourself a lot of time, energy and possibly money. We will examine the court process in a civil matter later in this chapter but there are a variety of ways a civil dispute may be resolved before involving the courts.

There are a number of steps you can take to resolve a civil dispute. Often the first step is a letter of demand. This is a letter that is sent once a dispute has arisen and other means have failed to resolve it.

The recipient of a letter of demand from a creditor (one requesting payment) or debt-collection agency should not ignore the letter. Any ambiguities should be cleared up in a reply letter and legal advice sought if the claim is false. If the claims are valid, the debtor can either pay the full amount or attempt to negotiate settlement terms to resolve the matter.

Letters of demand often signal to a party that the dispute is becoming more formal in some ways, as the substance of the issue is now set out in writing with a direct request for payment within a certain time or legal action may follow.

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Review 5.2

1 Work in pairs to carry out the following writing tasks.
   a Student A writes a letter of demand to student B for $1000 that they owe you for cementing their driveway. To assist with writing the letter you can consult Letter of demand: A letter to recover debt owed at https://cambridge.edu.au/redirect/10464.
   b Student B responds in writing to student A stating that they are unwilling to pay the balance of debt due to small cracks in one section and because there was rubbish left behind by the workers.
2 These letters can then be analysed by other pairs in the class, or the class as a whole, to **consider** the appropriateness of their wording.
3 **Discuss** whether the letters will help or hinder the progress of an amicable settlement.

Alternative dispute resolution

As we have seen with the letter of demand, the court system is not the only way of settling a dispute between two parties. In some cases, **alternative dispute resolution** (ADR) may be a better option.

alternative dispute resolution settling a dispute without having to go through a more formal process such as a court hearing; methods include mediation, conciliation, arbitration, case appraisal and settlement

While ADR has been used in Australia for many years, it has not been used extensively in all jurisdictions. The relationship between courts and ADR is now a dynamic one. ADR works hand in hand with litigation for resolving conflicts in a timely, cost-efficient and equitable manner.

ADR is commonly used today by government agencies, tribunals and courts. There are a number of different ADR methods that can be used to solve a legal problem, including those shown in Table 5.2.

ADR can be either court or tribunal based (the Queensland Civil and Administrative Tribunal regularly refers cases for mediation) or individuals may voluntarily opt to conduct their own mediation. The Queensland Government has free Dispute Resolution Centres spread across the state, which can assist in mediation services. In areas with no resolution centre, staff at local a Magistrates Court act as mediators. Additionally, there are private mediators in practice, usually lawyers or social workers, many of whom are members of the Resolution Institute of Australia.

Assistance is also available from Legal Aid, the Legal Services Commission, the Caxton Street Legal Service in Brisbane, the Queensland Law Society and other community-based services.

Mediation is normally carried out on a voluntary basis and the mediator attempts to get the parties to reach an agreement based upon their individual needs. The mediator is not always legally trained and avoids giving advice on the strengths or weakness of each party's case. The agreement, if reached, is not enforceable by the courts unless the agreement is written in the form of a *deed*, a type of legal document that serves as evidence of an agreement or contract between parties. It is a written, signed and usually sealed instrument (e.g. a seal is a wax imprint or pressed imprint into the paper) that transfers or confirms a right, interest or ownership of property. Deeds do not need the exchange of anything of value (called consideration in contract law – see Chapter 6) to be legally binding. Mediation is known as a facilitative process as the mediator attempts to facilitate (help) the resolution of the dispute but cannot force a decision by the parties or impose a decision on the parties.

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Table 5.2 A variety of ADR methods

Type of ADR	Description
Assisted negotiation	• You and your solicitor meet with the other parties and their solicitors to discuss the issues.
Mediation	• This form of ADR involves the disputing parties coming together with an independent and neutral third person (known as the mediator) to work towards a mutually agreeable solution. • The mediator encourages the parties to come up with potential solutions. • Unless the court/tribunal orders you to try mediation, the process is usually voluntary. • The parties own the outcome. • An informal atmosphere encourages cooperation. • It is inappropriate for one party to show total dominance as the resolution may not be just.
Conciliation	• Similar to mediation but the conciliator (mediator) also often offers advice. Sometimes called an 'advisory process'. • May assist in drafting the settlement agreement. • Usually the conciliator is an expert on the subject of the dispute but may not be a trained lawyer. • Conciliators are more active in finding a solution and help you and the other parties to look at the strengths and weaknesses of your arguments. • You retain control of the outcome. • Unless the courts/tribunals order you to try conciliation, the process is usually voluntary. • The conciliator can influence the process by suggesting possible resolutions.
Case appraisal	• An independent person (the case appraiser) assesses the merits of the case and makes a decision. • The decision is put in writing. • The case appraiser files a certificate with the Registrar with a copy of the decision. • If either party disagrees with the case appraiser's decision, they may elect to go to trial in the usual way.
Arbitration	• The parties to the dispute choose an independent person (the arbitrator) to act as a judge. The arbitrator makes a decision after listening to both sides and comes up with a decision that can be final and legally binding on both parties. This is called a 'determinative process'. • By listening to the parties, but still imposing a legally binding decision, arbitration can achieve a mutually acceptable decision that courts often cannot. • The decision is not 'owned by the parties', as the arbitrator makes the decision.

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Figure 5.6 Mediation is usually a voluntary process and can occur in a number of different settings such as in divorce proceedings, custody agreements and office disagreements.

Legislation and ADR

Both the Commonwealth and a number of state governments have introduced laws relating to the use of ADR in court procedures.

The *Civil Dispute Resolution Act 2011* (Cth) applies to the Federal Court and the Federal Circuit and Family Court, and aims 'to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted'. For the purposes of this Act, 'genuine steps' constitute a sincere attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute. Examples of such steps are notifying the other person of the issues that are in dispute and offering to discuss them or initiate an ADR process. The Act provides courts with the discretion to determine if those steps taken are 'genuine' and the power to impose sanctions, such as costs penalties, if a party fails to comply with the requirement.

Not long after the *Civil Dispute Resolution Act 2011* (Cth) was legislated, the *Civil Proceedings Act 2011* (Qld) was introduced to replace the *Supreme Court Act 1995* (Qld). The focus of the Act was to make new provisions for civil proceedings in the Supreme Court, District Court and Magistrates Court. Part 6 of the Act covers the ADR processes in Queensland courts and contains some of the following aims:

- to provide an opportunity for litigants to participate in ADR processes to achieve negotiated settlements and satisfactory resolution of disputes
- to improve access to justice for litigants and to reduce cost and delay
- to provide a legislative framework allowing ADR processes to be conducted as quickly, and with as little formality and technicality, as possible.

If both parties in a dispute consent to a mediation process, they can apply for a consent order through the Queensland court system. The meeting could be a mediation process or even a case appraisal.

In Queensland, all state courts can order parties to attend mediation or a case appraisal process under the *Uniform Civil Procedure Rules 1999* (Qld). Even if parties do not agree to attend ADR, the court may order the parties to do so by filing a referring order to make the attendance compulsory.

Figure 5.7 A meditator can help solve disputes between conflicting parties.

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Advantages and limitations of ADR

There are a number of advantages of using ADR methods to resolve disputes, including the following:

- Litigation is expensive and ADR is seen as a cheaper alternative.
- ADR can reach outcomes outside of the court's traditional court approach or jurisdiction.
- Court proceedings are often a lengthy process.
- As parties work through issues, there is the chance of an amicable solution in a win–win situation.

There are also the following limitations:

- the relative commitment of the parties to the resolution process
- the degree to which the parties can define the issues and relevance of matters in the dispute
- a possible power imbalance between the parties, due to factors such as personality, education and wealth
- the skills and qualifications of the mediator
- the degree of intervention by the mediator
- the legal status and enforceability of any agreement reached.

Restorative justice programs

Restorative justice programs are another means of dispute and conflict resolution. Restorative justice is used mainly in juvenile criminal matters, but can also be used in a number of civil issues, such as neighbourhood and workplace disputes.

Restorative justice is a practice designed to make the wrongdoer take responsibility for their actions by directly participating in a discussion with the people affected by their actions. Victims have the opportunity to discuss how the offending issue will be resolved while the perpetrators contemplate the harm their actions have caused.

The ombudsman

An ombudsman is a role that exists at both the federal and state levels of government. An ombudsman is an independent and impartial official or office responsible for investigating and addressing complaints from the public regarding government actions, decisions or administrative processes. Members of the public can direct complaints against government departmental decisions to the ombudsman, ensuring that the accountability of these departments is maintained.

Queensland Ombudsman

The *Ombudsman Act 2001* (Qld) continues to ensure that Queensland's public agencies act appropriately within their authority, as set out by the laws that control them. The Queensland Ombudsman also acts as the agency for the *Public Interest Disclosure Act 2010* (Qld), which aims to facilitate the disclosure of information about public wrongdoing and protect those who make the disclosures.

The ombudsman often investigates complaints about the actions and decisions of state government departments, state schools, TAFE colleges and local councils. The complaints and investigation service is free and independent. Some people refer to the role of the ombudsman as a 'watchdog' for government departments.

Figure 5.8 A university is an example of one of the common agencies referred to by the ombudsman.

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However, the Queensland Ombudsman website also allows the public to make complaints seeking a resolution to disputes in a number of other areas apart from government departments. If the complaint is not directly related to a government department, the ombudsman will provide links to address a variety of other issues, including toll charges, and gas and electricity bills.

Common agencies referred to by the ombudsman include:

- a Queensland government organisation (including state schools and TAFE)
- a Queensland local council
- a Queensland public university
- a Commonwealth Government department (e.g. Centrelink, Child Support Agency, ATO)
- a consumer matter – something you bought or rented from a business
- banking, finance, insurance or superannuation
- telephone or internet (e.g. NBN)
- a private education or training provider
- private health care, private hospital, aged care or health insurance.

There is a direct link between the ombudsman and the Queensland Civil and Administrative Tribunal, as both entities can refer complaints to each other for referrals and action.

An example of the Queensland Ombudsman looking into a local council was found in a matter involving the Sunshine Coast Council and the response it made to complaints from residents about power boat noise in 2019. The Queensland Ombudsman found the council did not gather sufficient evidence to determine whether any provisions in the *Environmental Protection Act 1994* (Qld), concerning environmental nuisance had been violated. Moreover, it found that the council's decision to dismiss the complaint was flawed. The council had cited its Compliance and Enforcement Policy 2018 as the basis for taking no action, even though this policy did not cover the specific circumstances of this case. Consequently, the council did not adhere to its own policy. Regulatory authorities cannot exempt themselves from fulfilling their regulatory duties.

Figure 5.9 Speeding powerboat noise was the subject of resident complaints and a legal dispute.

In this instance, the council should have conducted an investigation to ascertain if there was a violation of the relevant legislation and, if so, taken appropriate measures. Even under the council's policy, situations exist where no action may be warranted, but in such cases, transparency and accountability necessitate providing clear reasons to the complainant.

Such investigations by the Queensland Ombudsman help hold bodies responsible and accountable for actions taken, and recommendations are often made to ensure issues do not arise in the future.

There are also other ombudsmen in Queensland. These include the Health Ombudsman (for matters relating to private health services provided by registered and unregistered health practitioners) and the Public Interest Monitor who is not strictly speaking an ombudsman but fills a similar role to review and monitor certain legal proceedings, such as those involving covert surveillance and searches, to ensure that they are in the public interest and comply with the law.

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Commonwealth Ombudsman

At a federal level, the Commonwealth Ombudsman was created by the *Ombudsman Act 1976* (Cth). The Commonwealth Ombudsman investigates the administrative actions of Australian Government departments, agencies and other prescribed private sector organisations.

The Commonwealth Ombudsman also has the following specialist roles:

- Private Health Insurance
- Overseas Students
- VET Student Loans
- Postal Industry
- Defence Force
- Immigration
- Law Enforcement
- Australian Capital Territory Ombudsman.

After receiving a complaint that is within its jurisdiction and warrants investigation, the Commonwealth Ombudsman will conduct a thorough and impartial examination of the issues raised. This may involve contacting the relevant government agency for information and documentation.

After conducting their investigation, the Commonwealth Ombudsman may make recommendations to the government agency involved on how to address the issues identified. These recommendations are designed to resolve the complaint and may include suggestions for corrective actions or improvements.

The Commonwealth Ombudsman's office will inform you of the outcome of their investigation and provide details of any recommendations made to the government agency. They will also explain the reasons for their findings. Depending on the nature of the complaint and the government agency's response, the Commonwealth Ombudsman may follow up to ensure that the recommended actions are implemented.

If you are not satisfied with the Commonwealth Ombudsman's decision or believe that the recommended actions are not being taken, you may have the option to provide feedback or request a review of the decision. One issue that sometimes arises with the Commonwealth Ombudsman is that you are only able to make a complaint if you have exhausted all internal processes of review available in relation to the agency dealing with your issue. The agency will have complaints processes that will need to be complied with before the Commonwealth Ombudsman will step in. In that sense, the Commonwealth Ombudsman may be considered a 'last resort'.

Figure 5.10 The Australian Defence Force is one of the areas in which the Commonwealth Ombudsman has a specialist role.

Tribunals

Recently, there has been a move towards tribunals as another alternative to the court system. Tribunals are less formal and expensive than courts. In many tribunals, there is no legal representation and, even where this is permitted, it is not common. Tribunals are not restricted by the rules of evidence.

Tribunals can be either administrative or civil. Administrative tribunals are concerned with executive actions of government, while civil tribunals deal with resolving private disputes.

Persons who preside over and make decisions in tribunals may be legally trained or may be persons with other specialist expertise relating to the area of operation of the particular tribunal. They are responsible for ensuring that principles such as natural justice are applied – that persons appearing before the tribunal are not disadvantaged and are given the opportunity of presenting their requests.

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One of the most significant tribunals in Australia has been the Administrative Appeals Tribunal (AAT). At the time of publication of this textbook, the AAT was in the process of being replaced by a new tribunal, the Administrative Review Tribunal (ART), which is to have the same jurisdiction as the AAT.

The AAT conducted independent merits reviews of administrative decisions made under Commonwealth laws. It also reviewed decisions made by Australian Government ministers, departments and agencies and, in limited circumstances, decisions made by state government and non-government bodies. The AAT was established by the *Administrative Appeals Tribunal Act 1975* (Cth) and in 2015 the Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal were amalgamated with the AAT.

The AAT could review decisions made under more than 400 Commonwealth Acts and legislative instruments. The most common types of decisions reviewed related to:

- child support
- Commonwealth workers' compensation
- family assistance, paid parental leave, social security and student assistance
- migration and refugee visas and visa-related decisions
- taxation
- veterans' entitlements.

The AAT could also review decisions relating to:

- Australian citizenship
- bankruptcy
- civil aviation
- corporations and financial services regulation
- customs
- freedom of information
- the National Disability Insurance Scheme
- passports
- security assessments by the Australian Security Intelligence Organisation.

If a person did not agree with an AAT decision, they could in some circumstances appeal to the Federal Court or the Federal Circuit and Family Court, although this could be quite technical and would normally involve lawyers to assist, so cost would usually be a factor.

Off the record

Look up the Administrative Review Tribunal website and search for factsheets about what they do.
Select one of the areas that the ART has prepared information about. What types of decisions can be reviewed in this area? What information does the ART require from people asking for reviews?

In 2022, Attorney-General Mark Dreyfus announced the AAT would be abolished, to be replaced with 'an administrative review body that serves the interests of the Australian community'. The abolition of the AAT has come about due to concerns it had been compromised by appointments from the Liberal Party ranks and as a result was not properly assessing matters in an impartial way. The new body, the Administrative Review Tribunal, was due to commence by the end of 2024.

Examples of other tribunals include:

- Queensland Civil and Administrative Tribunal
- Residential Tenancies Authority (RTA)
- Mental Health Review Tribunal
- Australian Financial Complaints Authority
- Australian Financial Securities Authority.

Figure 5.11 The Residential Tenancies Authority tribunal adjudicates on disputes relating to tenancy.

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Queensland Civil and Administrative Tribunal (QCAT)

In 2009, QCAT came into existence, amalgamating 19 different tribunals – the main one being the Small Claims Tribunal. This tribunal is an inexpensive and easily accessible method of resolving a dispute that involves amounts of money up to $25 000. Disputes range across a number of different areas such as:

- money owed for the removal of minor over-hanging branches
- debt disputes, for example, an unpaid invoice or money lent and not repaid
- rent arrears, other than arrears of rent for a residential tenancy
- work done and/or goods supplied with the cost having been agreed beforehand
- wages owing
- dishonoured cheques
- some anti-discrimination matters.

People who attend QCAT are generally self-represented and do not have a lawyer acting on their behalf. QCAT is not bound by the same rules of evidence and procedure as the Queensland courts. The disputes are normally resolved through a hearing and they may have to go through some form of mediation with a member of QCAT in the first instance.

Tribunal orders are legally binding and enforceable. If QCAT finds in favour of an applicant, the respondent is legally obliged to meet the debt. If these obligations are not met, a magistrate may issue an enforcement warrant to possess the debtor's property.

One of the main areas of civil disputes lodged with QCAT involves disputes over property rentals. The landlord/tenant relationship has been brought into the spotlight recently due to increased cost of living pressures resulting in high rental costs and concerns around housing availability generally. The law has evolved recently to try to deal with issues that have arisen, particularly with protecting tenants from unscrupulous landlord practices.

The flowchart in Figure 5.13 illustrates the dispute-resolution process and the role of QCAT and the Residential Tenancy Authority (RTA) in trying to resolve disputes arising from tenancies.

Figure 5.12 One of the main areas of civil disputes lodged with QCAT involves disputes over property rentals.

Research **5.3**

Read the following article 'How 5 key tenancy reforms are affecting renters and landlords around Australia', *The Conversation* at https://cambridge.edu.au/redirect/10466.

1 **Identify** the main issues in relation to the rights of tenants in this article.
2 **Explain** whether the proposed legal reforms strike a fair balance between the rights of tenants and landlords. **Justify** your response using information from the article.

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Table 5.3 Lodgement and clearance rates of matters before QCAT

	Lodgements			Clearance rates			Pending at period end		
	2020–21	2021–22	% Diff.	2020–21	2021–22	% Diff.	2020–21	2021–22	% Diff.
Human rights									
Children – child protection	197	215	9%	90%	94%	4%	132	135	2%
Guardianship	14 376	11 594	–19%	88%	112%	24%	5680	4144	–27%
Civil									
Anti-discrimination	64	104	63%	98%	66%	–32%	69	108	57%
Building	297	377	27%	78%	75%	–3%	326	442	36%
Children – Blue Card	310	188	–39%	77%	112%	34%	348	315	–9%
Retail shop leases	172	166	–3%	80%	99%	19%	162	135	–17%
Minor civil disputes	13 185	12 299	–7%	103%	108%	5%	1688	675	–60%
Motor vehicles	249	267	7%	91%	97%	6%	145	154	6%
Other civil disputes	98	95	–3%	98%	77%	–21%	192	103	–46%
Neighbourhood disputes	233	233	0%	56%	70%	14%	259	336	30%
Administrative and disciplinary									
General administrative review	665	563	–15%	64%	94%	30%	682	721	6%
Occupational regulation	392	324	–17%	103%	103%	0%	294	317	8%
Appeals									
Appeal tribunal	381	380	0%	101%	93%	–8%	329	343	4%
Re-openings and renewals									
Re-openings	11	15	36%	82%	87%	5%	7	9	29%
Renewals	1	0	–100%	100%	0%	–100%	0	0	0%

Source: Queensland Civil and Administrative Tribunal website, '2021–22 Annual Report', 27 September 2022.

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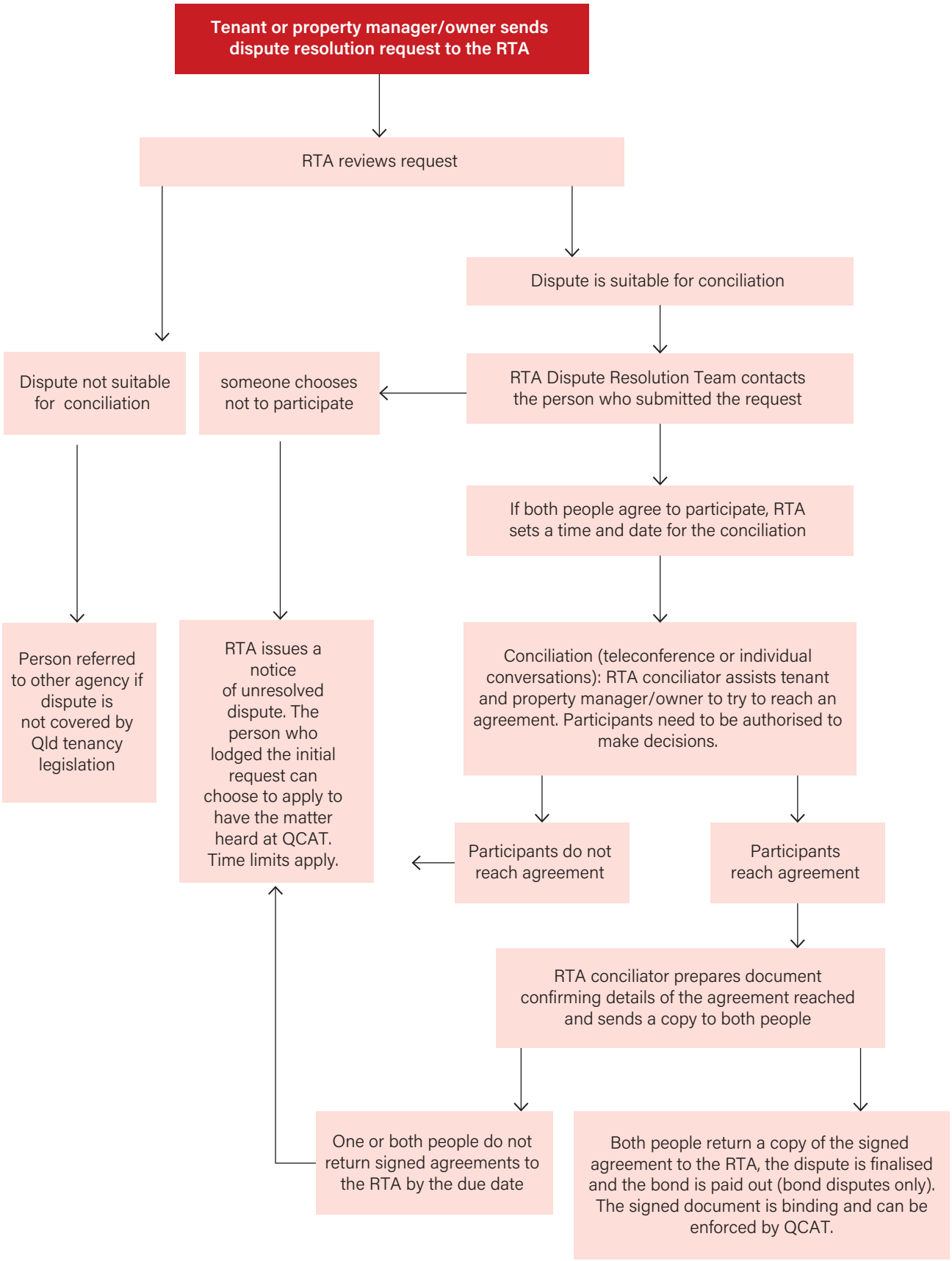

Figure 5.13 Steps for dispute resolution involving the RTA and QCAT

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Taking the matter to court

Sometimes, parties will be unable to resolve disputes through forms of ADR, or have exhausted other avenues of complaint such as the ombudsman or tribunals. When other options have been exhausted, adjudicative processes such as litigation or arbitration – in which a judge, jury or arbitrator determines the outcome – may be needed. These are formally known as the judicial process. Judicial processes are a last resort for parties when all other dispute-resolution attempts have failed.

Starting proceedings in court to claim damages is a serious step. There may be significant cost consequences if the claim is not successful. There is also the issue of the defendant's finances – that is, whether they have enough to pay the plaintiff.

Judicial determination is when parties, and their legal representation, present arguments to an impartial third party – a judge or magistrate – who then imposes a legally binding decision. The process is significantly more formal than mediation, conciliation, and even arbitration.

Possible problems with taking a civil matter to court include the following:

- It can be very expensive
- The outcome is difficult to predict
- It is time-consuming
- It can cause emotional and physical suffering
- It is confrontational by its very nature.

5.4 Civil trial procedures

If parties in dispute are unable to resolve the issue by negotiation, then legal action will commence and the matter will eventually be subject to a variety of civil trial processes. These processes are quite technical and must be followed by parties to litigation and involve dealing with the courts in compliance with specific procedures.

Role of courts

Courts have two very important roles to play. First, courts are a place to resolve disputes. Disputes can range from an argument between neighbours to seeking compensation from someone who has not fulfilled their responsibilities in a contract. Second, courts are a place to determine whether or not someone has broken the law and to uphold the laws that apply to society and protect the rights of individuals.

Many courts have both a civil jurisdiction (the authority to hear a civil case) and a criminal jurisdiction (the authority to hear a criminal case). Courts have been given their power by way of an Act of Parliament. For example, the Magistrates Court in Queensland was established and given powers by the *Magistrates Court Act 1921* (Qld) and the *Justices Act 1886* (Qld).

Courts also have a very important role in creating law. As mentioned earlier, common law is based on judges making decisions about issues that arise in court. In determining these issues, certain rules need to be followed. These 'rules' form the doctrine of precedent (see p. 13).

Figure 5.14 Brisbane Magistrates Court

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Court personnel

The court personnel used in civil and criminal courts are largely the same, in that there are judges, magistrates, lawyers, judges' associates, bailiffs, court reporters, Legal Aid officers and the clerk of the court (see Figure 3.7 in Chapter 3). However, only a criminal trial has prosecutors.

In a civil matter, it is usually the role of judges and magistrates to hear evidence and to decide the outcome of the matter. They decide on questions of law and questions of fact (in the absence of a jury). It is their responsibility to decide whether sufficient evidence exists to meet the required standard of proof – the balance of probabilities.

The role of lawyers in Queensland civil cases finds them increasingly taking on a role as cooperative problem-solvers rather than acting in an adversarial role. Lawyers now have a duty to inform their clients about possible alternatives to litigation (rule 12.3 of Solicitor's Rules 1997 (Qld)). In Commonwealth civil cases, the lawyers must sign a 'Genuine Steps Statement' certifying to the court that the parties have attempted to resolve the dispute without bringing it before the court.

In civil trials, a jury consists of four jurors. The jury's role is to listen to the evidence and unanimously decide on which version of events is more likely to be true. Jury trials are not permitted in personal injury proceedings, such as those regarding motor vehicle accidents. Jury trials in civil matters are now quite rare and there is an ever-growing call from law reformists to see the jury abolished in all civil suits as they consider the role obsolete.

Types of courts and jurisdiction

A number of Australian and Queensland courts have jurisdiction to hear both civil and criminal cases (see Table 5.4).

Figure 5.15 Retiring High Court Chief Justice Michael Kirby in his farewell sitting, February 2009. The High Court of Australia has seven Justices.

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Table 5.4 Types of courts and jurisdiction

<table>
<tr><td colspan="2">High Court of Australia
The High Court of Australia has two main roles as the highest decision-making court in the country.
It hears cases on constitutional matters and operates as the highest court of appeal. It has the authority to hear appeals not only from the federal court system, but also from state and territory courts. To be granted leave to appeal, there needs to be a significant error in either fact or law. The issue also needs to be of public importance and enhance the interests of justice.</td></tr>
<tr><td colspan="2">The Supreme Court
Appellate and trial jurisdiction
The Supreme Court is the highest court within the Queensland court hierarchy. It is made up of two parts: the appellate jurisdiction (the Court of Appeal) and the trial jurisdiction.</td></tr>
<tr><td rowspan="2">Appellate jurisdiction
The Court of Appeal consists of either three or five judges who hear appeals from the District or Supreme Courts. The Court of Appeal can hear appeals from or review decisions of a lower court from both criminal and civil cases.</td><td>Original jurisdiction
Criminal jurisdiction: The Supreme Court has the jurisdiction to hear indictable offences, which usually carry penalties greater than 14 years' imprisonment.
Matters are heard before a judge and jury.</td></tr>
<tr><td>Civil jurisdiction: Civil cases in the Supreme Court relate to matters involving disputes of more than $750 000. There is no maximum limit. There are a few other matters, such as probate, the law of associations and applications for admissions as a solicitor, where the Supreme Court hears all applications regardless of financial value.</td></tr>
<tr><td colspan="2">District Court
Original and appellate jurisdiction</td></tr>
<tr><td>Criminal jurisdiction
The District Court has the jurisdiction to hear criminal matters that carry a maximum penalty of less than 14 years' imprisonment.</td><td>Civil jurisdiction
Civil cases in the District Court relate to matters involving disputes over amounts between $150 000 and $750 000.</td></tr>
<tr><td>Criminal matters are heard before a judge, or a judge and a jury.</td><td>Civil cases are normally heard by a judge, but there is the option of a jury trial.</td></tr>
<tr><td colspan="2">Magistrates Court
Original jurisdiction
The Magistrates Court is the lowest court in the state court hierarchy. It has both criminal and civil jurisdictions.</td></tr>
<tr><td>Criminal jurisdiction
The Magistrates Court has the authority to hear and determine minor criminal offences, and conduct committal hearings.</td><td>Civil jurisdiction
The Magistrates Court hears civil disputes involving amounts up to $150 000. If the claim requires a judgment that is not based on a monetary amount (e.g. an injunction), it must be made in the District or Supreme Courts.</td></tr>
<tr><td colspan="2">Usually a single magistrate presides over the court. There is no jury in a Magistrates Court.</td></tr>
<tr><td colspan="2">Specialist Children's Court
The Children's Court of Queensland is presided over by a judge at District Court level and a magistrate at the lower level. It can hear both criminal and civil matters (e.g. child protection).</td></tr>
</table>

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Court processes and procedures

Once the decision to take the matter to court is finalised, there are a number of procedural requirements and pre-court proceedings that have to be met in accordance with the *Uniform Civil Procedure Rules 1999* (Qld). There is no strict requirement to have legal representation in any of Queensland's courts, although it is recommended given the complexity of the law and the rules for appearing in court and presenting evidence.

The jurisdiction (or legal institution) in which the case is heard will depend on the type of civil matter and the amount of damages claimed.

In order for the plaintiff to take part in a civil proceeding, the person must have standing. In general terms, this means that the person needs to show that their rights or interests have been or will be affected by the dispute in question. This is normally an easy criterion to meet.

The plaintiff must also prove that they have been legally wronged by providing factual proof that the claim can be heard in court. Without a justifiable case being put forward, the matter may not progress. This procedure stops unjustifiable cases clogging up the courts.

The plaintiff also needs to make sure their claim has been made within the time limitation outlined in the *Limitation of Actions Act 1974* (Qld). Time limitations are imposed to ensure that evidence is not lost, parties recall all facts and the dispute is settled as quickly as possible.

If the time limits are not prescribed in the *Limitation of Actions Act 1974* (Qld), other specific legislation may need to be researched.

Examples of time limitations are:

- Six years from the date the action arose for a contract issue without personal injury (such as economic loss) (*Limitation of Actions Act 1974* (Qld), s. 10)
- 21 days from the date of termination of employment for unfair dismissal (*Industrial Relations Act 2016* (Qld), s. 310)
- One year from the date of the publication of the matter complained of for defamation action (*Limitation of Actions Act 1974* (Qld), s. 10AA).

The flowchart in Figure 5.16 illustrates the proceedings used to commence a civil action.

If the claim is ignored by the defendant(s) within the specified time, the plaintiff may request that the court enter a **default judgment** against the defendant, including that the defendant pay the plaintiff's legal costs plus interest and expenses.

After the commencing proceedings, **pleadings** take place. Pleadings are simply the documents where the plaintiff and defendant set out what they hope to prove at the trial. These include the statement of claim, the notice of defence and the plaintiff's reply to the defence.

Sometimes, a defendant in a civil matter may allege the plaintiff has actually committed a tort or a breach of contract and therefore the defendant also has a claim against the plaintiff. This is called a **counter-claim** and will also now form part of the legal proceedings. The court will be required to decide both claims – for example, the plaintiff's claim and the defendant's counter-claim – at trial. Any judgment against a party may take into account the counter-claim amount and might reduce any damages payable to the plaintiff or, in some cases, may require the plaintiff to pay a sum to the defendant if the counter-claim is successful and exceeds any amount the plaintiff may have been entitled to.

default judgment given in favour of the plaintiff because the defendant has failed to file a notice of intention to defend

pleadings the documents in which the plaintiff and defendant set out what they hope to prove at the trial

counter-claim a legal response filed by a defendant in a lawsuit against the plaintiff, in which the defendant asserts their own claims or demands against the plaintiff

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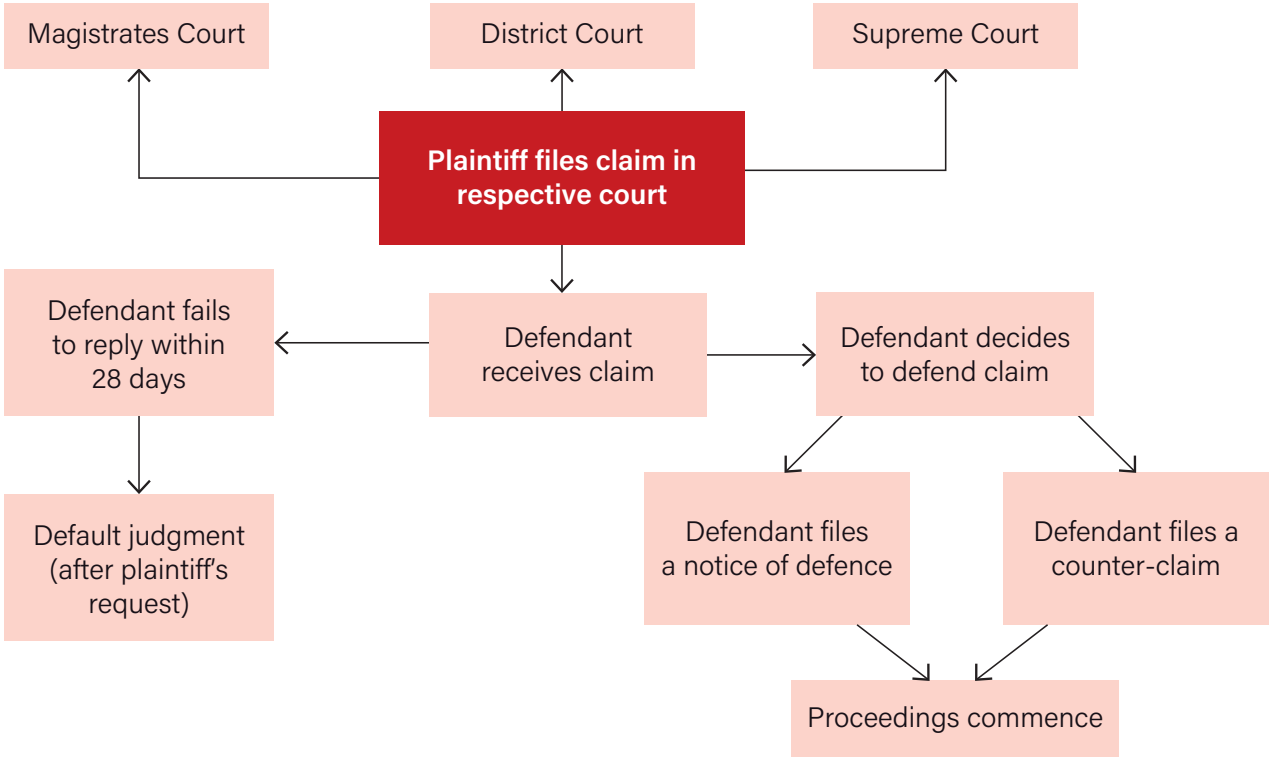

Figure 5.16 Commencement of proceedings

The next phase in the court process is to take **interlocutory steps**, where a disclosure of documents (sometimes called 'discovery') and **interrogatories** (requests for further information in the form of specific questions that must be answered) are made. Disclosure is the procedure that ensures each party is aware of and can access all documentary evidence. The plaintiff may now request that the court set the matter for a hearing. At any time before the trial, corrections to documents can be made (with court approval) and parties are encouraged (and in some matters are required) to make settlement offers in an effort to resolve the case by agreement before the hearing.

During the hearing, both sides present their case to the judge or magistrate. The court may also order both parties to attend mediation in an effort to resolve the dispute and work out a settlement before judgment. Quite often, settlements are made before a final decision is handed down by the court. In fact, it is estimated around 99 per cent of cases will actually settle before a judgment in court is made.

interlocutory steps judgments being given on specific issues or points during the course of a legal action

interrogatories a formal set of written questions that one party may ask another party to clarify before a hearing

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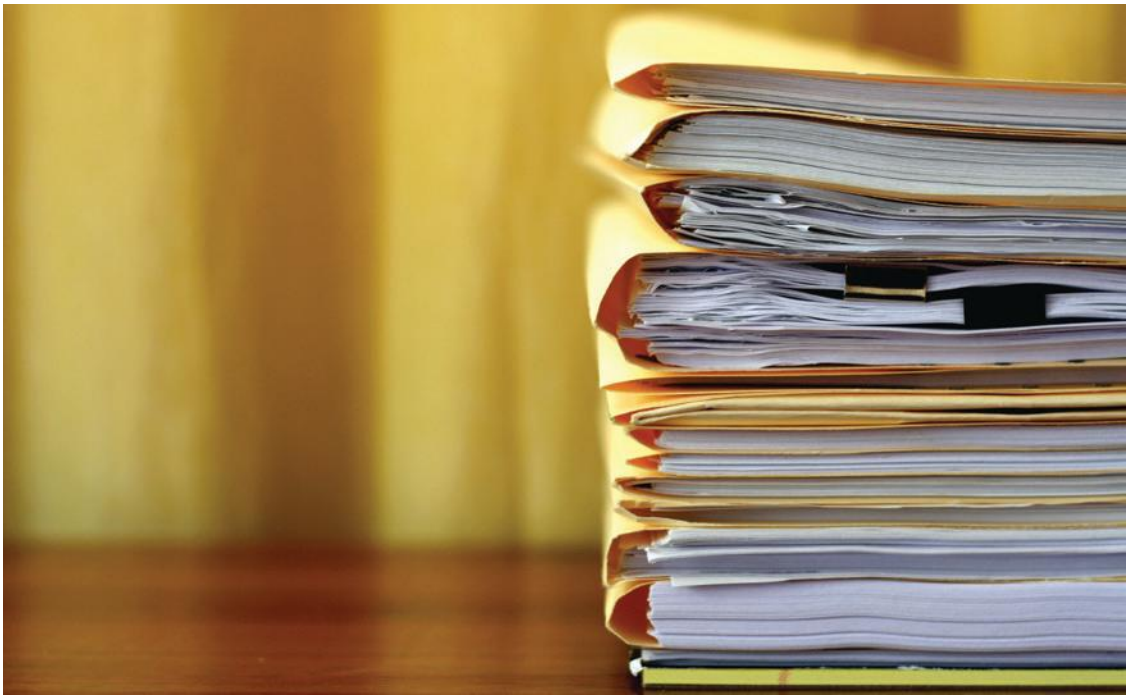

Figure 5.17 'Disclosure' is the procedure that ensures each party is aware of and can access all documentary evidence and is sometimes called 'discovery.'

At any stage during the hearing, the plaintiff or defendant may apply for **summary judgment**. This would only be given if the plaintiff had either failed to make out a case against the defendant on the evidence produced or that no proper defence has actually been made by the defendant to the matters in dispute. The court may accept or reject an application for summary judgment. If there is a case to answer – even what seems to be a weak one – then summary judgment will not be given.

If the court finds that one party did not adhere to their part of the agreement, an **injunction** may be ordered, for example, stopping the construction of a building due to breach of contract. The courts may also order the offending party to pay damages to the other party. The aim of damages is to place the innocent party in the same position that they would have been in if the contract had been carried out, for example. In torts, the damages payable are to compensate the party as if the tort had never occurred.

summary judgment the court makes a judgment due to the weakness of the case presented by the other party

injunction a court order that prohibits an action that may cause injury, or compels an action to stop the risk of injury

In contract law, the damages are often capable of being calculated and are called liquidated damages. Quite often in cases of torts, the damages can only be estimated, as they are impossible to calculate exactly. These damages are unliquidated damages. To assess unliquidated damages, the court adopts a compensatory approach. This means the court will try to restore the innocent party to the position it would have been in but for the breach that caused the damage. This is done by considering damages that have occurred according to:

- costs outlaid by a wronged party
- compensation equal to the benefit the wronged party was supposed to receive
- compensation for the value of a 'chance' that was lost.

In order to be awarded damages, the plaintiff must prove that they have suffered loss or damage as a direct result of the breach of contract by the other party.

Once a decision has been made, the unsuccessful party has the option of appealing the case to either the Court of Appeal or the District Court. Costs in proceedings usually follow the case and are normally awarded to the successful party.

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5.5 Equitable access to the civil law system

The aim of the civil law justice system is to provide an equitable justice system to all individuals and groups within society.

However, there is a general consensus that the justice system is not perfect, and some disadvantaged members of the community are more vulnerable to becoming victims because they do not possess the knowledge or the skills to uphold their individual rights. The demographic groups most likely to be in this position include:

- people living in remote communities
- people of Aboriginal and Torres Strait Islander descent
- people whose first language is not English
- people with low levels of education
- people with a disability
- single parents
- people on social security payments
- the unemployed
- people living in disadvantaged housing
- the aged.

The government, the courts and community organisations have tried to implement systems to help those in need of assistance to understand the civil justice system and their individual rights. There is access to ombudsmen, tribunals, Legal Aid, the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, community legal centres, Queensland Public Interest Law Clearing House, Caxton Legal Centre, Qld Law Society, Women's Legal Service, LawRight and, of course, private lawyers. There are also other government bodies, trade unions, financial advisers, health advisers and educational institutions that can assist members of the community. Legal brochures are often written in a number of languages. The legal profession as a whole has a tradition of performing some work *pro bono publico*, or free of charge in the public interest. Firms are required to report to the Law Society every year how much work they do for free in needy cases.

Figure 5.18 Some disadvantaged members of the community are more vulnerable.

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However, even with all this assistance, information and free legal advice available, there are still problems. What does an individual do when confronted by a letter of demand or a threatening letter from a debt-collection agency? Many people in the community are not aware of their legal rights and do not know where to go for advice.

Some people will just pay up because they fear getting into trouble with the law.

Some members of society feel threatened, and the issue of civil litigation is often the cause of a great deal of hardship that affects their daily lives. Others may ask family and friends for advice or look up self-help sites on the internet. A threatened monetary claim may result in a great deal of financial strain on their income, which can result in stress-related illness, anxiety, lack of sleep, arguments in the family, relationship breakdowns and other adverse negative outcomes.

Figure 5.19 Many people in the community are not aware of their legal rights and do not know where to go for advice.

Many people do not realise that the issue could be resolved without the need for a court appearance if they ask for professional advice in a formal capacity from the professionals and organisations outlined earlier. The widespread introduction of ADR for civil disputes in Queensland is a positive way forward with regard to alleviating fears of expensive court costs and lawyers' fees. Furthermore, having an Australia-wide, uniform approach to consumer law via the Australian Competition and Consumer Commission will further increase society's understanding.

An overriding problem is dissemination of the information to all members of the community – especially the disadvantaged and vulnerable people who experience challenges accessing the legal system. These people need to be aware of their rights and know how to avoid the need to appear before a court or tribunal.

In 2017, the Law Council of Australia conducted a wide-ranging review of issues around access to justice in Australia, with a focus on identifying and addressing barriers that individuals and communities face in accessing the legal system and obtaining justice. They conducted extensive research, consultations and data analysis to gather information and insights for what became known as 'The Justice Project'. The final report and recommendations were intended to inform policymakers, legal practitioners and the broader community about the challenges and opportunities for improving access to justice in Australia.

Check this out

View the Law Council of Australia's 'The Justice Project Final Report' at https://cambridge.edu.au/redirect/10467.

1 Identify two groups facing significant social and economic disadvantage.
2 Examine the infographics for the two groups you identified. What are the issues these groups face? What priorities were identified to assist these groups?

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5.6 Class action

Class actions are one of Australia's fastest-growing types of litigation. It has been possible to bring a class action in the Supreme Court of Queensland since legislation was passed by the parliament on 24 February 2017. The *Civil Proceedings Act 2011* (Qld) Part 13A, includes the following provisions:

- There must be at least seven members of the 'group' for a proceeding to be commenced.
- There needs to be a single representative on behalf of all members of the group.
- The claim must arise out of similar circumstances and raise a substantial common issue of law or fact.
- Consent of a person to be a group member is not required; however, all members of the group must be notified of the action and their right to opt out of the group (by a set date) should they not wish to be bound by the judgment or settlement.

class action a lawsuit initiated by a single person on behalf of members of a group of people who are seeking financial compensation for wrongdoing

Some members of society fear that the introduction of class actions will bring about a litigation explosion, especially when the actions are funded and the members of the class action face no expenses if they are unsuccessful in their action. Unfunded class actions will, however, leave the members of the class action with large legal costs if unsuccessful.

Class actions can be commenced in many areas of civil law. One of Australia's largest class actions (commenced before the legislation was passed in Queensland and being heard in New South Wales) involves 7000 people in a civil litigation against the Queensland Government for the 2011 Brisbane and Lockyer Valley floods. This is a worrying factor for the Queensland Government, given the frequency of large-scale natural disasters.

A former President of the Queensland Law Society has stated that 'class actions are often the only way that poorly resourced victims of disasters and other tragedies can uphold their rights'.

Figure 5.20 The 2011 floods in Brisbane

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Review **5.3**

A class action involved members of QSuper, a superannuation fund which looks after the state's public servants and became part of the Australian Retirement Trust after merging with Sunsuper in 2022. Shine Lawyers allege that QSuper breached their obligations by failing to notify members of important changes to life insurance policy premiums.

The changes related to Occupational Rates and members' entitlements to elect Standard Rates, White Collar Rates and Professional Rates. As a result of the alleged failure to sufficiently communicate these changes, thousands of QSuper members:

- were charged significantly more for their life insurance than they should have been
- suffered superannuation investment losses.

If a person had a QSuper superannuation account from May 2016 or received a payment after 1 July 2016 from a deceased fund member, then they may have been eligible to join this class action.
The class action was funded by Woodsford and run as a managed investment scheme named the Woodsford – QSuper – Litigation Funding Scheme (ARSN 657 154 508) (Scheme), which had been registered with ASIC.

Charlie Morris, Chief Investment Officer for Woodsford, said the 'class action provided an efficient means of delivering justice to those who may have been impacted by QSuper's conduct.' Running a case like this as a class action, with the backing of Woodsford, means that the everyday Australians affected by the defendant's misconduct may hold the defendant to account and access justice without any upfront cost.

Figure 5.21 QSuper

1 Research the meanings of 'open class' and 'closed class' actions and **explain** the differences between them.
2 **Analyse** the statement that there could be a conflict of interest between the litigant, the lawyers and the financial 'funders' of a class action when a settlement offer is made.

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5.7 Civil issue taken to an independent authority

A common transaction like buying furniture can end up being a complicated civil dispute.

Case study 5.1

The case: *Matthews v Inspirations Furniture Design & Ors* [2016] QCAT 525

Citation

This decision was made in the Queensland Civil and Administrative Tribunal in 2016, page 525.

Facts

The applicant (A) purchased five pieces of furniture from the respondent (R). A claimed the furniture was not of an acceptable quality and believed that there was misrepresentation concerning the materials used, the warranty and country of manufacture. After numerous attempts by phone and email to rectify the problem and obtaining an independent inspection, A commenced action with QCAT. R rejected the claims and obtained an independent inspection. A asked for a refund of $14 300, reimbursement of $1222 for inspection and testing, $1560 to dispose of the furniture and $294.60 QCAT filing fee.

Legal issues

A summary of the more important issues:

- *Quality of merchandise.* Black spots on leather, leather of poor quality, leather peeling off and recliner mechanisms not working.
- *Misrepresentation.* A claimed she was told the goods were German made and had a 10-year unlimited warranty. A claimed she told R that she had chronic fatigue syndrome and allergies and could not tolerate harsh chemicals. An independent report by the University of NSW found excessive levels of chromium in the leather. The manufacturer of the furniture and R disclaimed responsibility but did offer to provide replacement covers.

Law

- Australian Consumer Law, sections 29, 33, 54, 55, 102, 136, 192, 236, 259, 260
- *Queensland Civil and Administrative Tribunal Act (2009)*, sections 11, 12, 102
- Queensland Civil and Administrative Tribunal Rules 2009, rule 83

Arguments

- R denied saying the goods were German made.
- R denied saying there was a 10-year unlimited warranty.
- R claimed the problem with the leather was due to inadequate cleaning and maintenance, and perspiration residue – a result of medications taken by A's family.
- R stated that the furniture would normally last for 10 to 12 years if looked after correctly.

Decisions

Refund of the purchase price of $7600 on two pieces of furniture with major faults, $100 for the inspection fee and QCAT filing fee of $294.60. Other items with minor faults to be repaired and refunded items collected.

Ratio decidendi (reason for the decision)

Adjudicator Mewing found that there were major faults with the quality of two pieces of furniture and that A had rejected the goods within a reasonable time and was entitled to a refund (ACL, ss. 54(1) and 29(1)(a)). The case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* was one of the precedents she used to arrive at her decision. The other claims were dismissed due to lack of substantiation or were outside the jurisdiction of QCAT.

Obiter dicta (something to think about)

This case involved quite complex evidence from experts in leather and manufacturing even though it was heard in QCAT which many would assume dealt with more simple matters.

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Review **5.4**

1. Is the decision made by Adjudicator Mewing legally binding? Can the applicant appeal the decision?
2. Do you think the applicant should have consulted a legal practitioner to obtain legal advice before commencing legal action? **Explain** your reasoning.
3. Research *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and **explain** why it was used as a precedent case in the hearing.
4. **Analyse** the nature and scope of the applicant's claims in the previous case.
5. **Discuss** the point of view that a hearing of a dispute must adequately cover the viewpoints of both parties in an equitable manner.
6. Do you think this dispute was solved in a fair, just, accessible, quick and inexpensive way? (These words are part of QCAT's vision statement.) **Explain** why or why not.

Figure 5.22 Independent authorities such as QCAT are an option in civil disputes and keep the already overloaded court system from becoming further overburdened.

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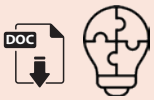

5.8 Topic review

Topic summary

- Civil law attempts to protect the rights and responsibilities of individuals in their behaviour and interactions with others.
- The standard of proof in a civil case is on the balance of probabilities.
- The burden of proof in a civil case is with the plaintiff/applicant.
- Common law is the body of laws made through the decisions of the courts.
- Statute law is law passed by parliament and takes precedence over common law.
- Jurisdiction is the legal authority of a court to hear and pass judgments on cases.
- The *Civil Dispute Resolution Act 2001* (Cth) aims to ensure that people take genuine steps to resolve disputes before civil proceedings commence.
- The Queensland Civil and Administrative Tribunal (QCAT) is an inexpensive and easily accessible method of resolving certain disputes.
- A letter of demand is often one of the first steps taken to resolve a civil dispute.
- Alternative dispute resolution (ADR) is a way of settling a civil dispute without having to go to court.
- ADR includes mediation, conciliation, case appraisal and arbitration.
- There is a strong relationship between the courts and ADR processes.
- Restorative justice programs are used in a number of civil disputes, such as neighbourhood and workplace conflicts.
- The Queensland Ombudsman can help to solve disputes in areas that relate to government departments.
- There are various types of tribunals available to help resolve issues and conflicts.
- The civil justice system aims to provide an equitable justice system to all groups within our society.
- It is now possible to bring a class action in the Queensland Supreme Court.

Short-response questions

1 **Explain** the difference between mediation and conciliation.
2 With regard to court procedures, **outline** the major differences between criminal and civil law.
3 **Explain** the role of an ombudsman in the resolution of civil disputes.
4 **List** the matters or conflicts covered by QCAT.

Extended-response questions

1 **Evaluate** the strengths and weaknesses of the various forms of ADR in solving civil disputes.
2 General members of the public with a civil law problem are faced with far too many options. There are mediators, arbitrators, conciliators, ombudsmen, lawyers, community resolution centres, the courts, tribunals and so on. **Evaluate** the idea that the current laws are too complicated.

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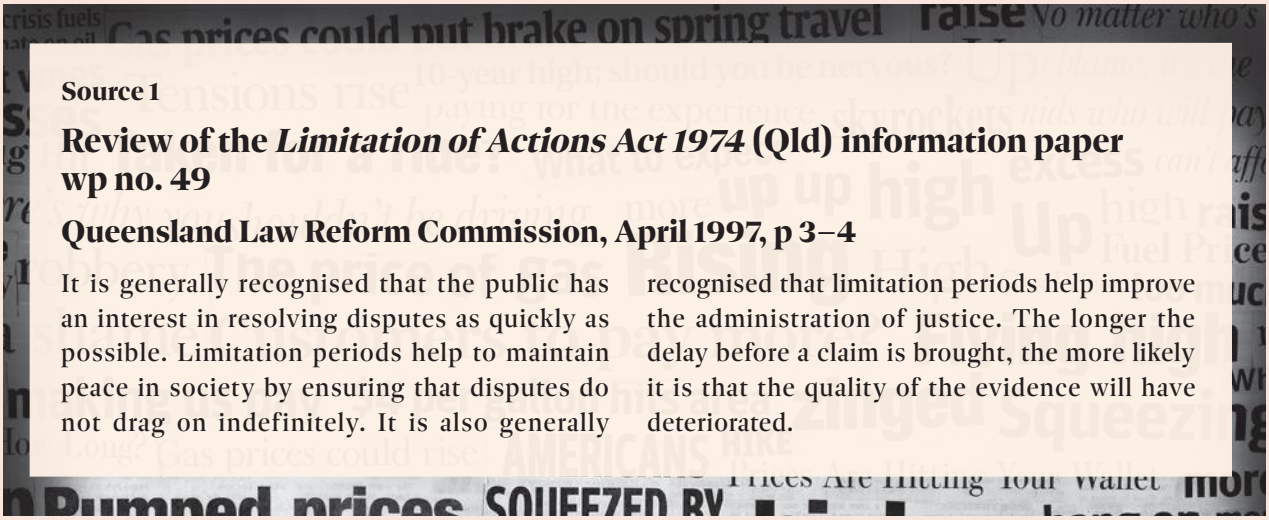
Response-to-stimulus questions

1 A research study carried out by the Australia Institute in 2009 (Institute Paper no. 8, March 2012) found that 88 per cent of survey respondents agreed that the legal system was too complicated to understand properly and 83 per cent thought that only the very wealthy could afford to protect their legal rights. In light of the introduction of the *Civil Dispute Resolution Act 2011* (Cth), the *Civil Proceedings Act 2011* (Qld) and the widespread use of ADR, **analyse** the statement that 'the current civil law justice system in Queensland provides equitable justice to all groups within society.'

2 **Analyse** Sources 1–2 to determine the nature and scope of the legal issue and examine two viewpoints. **Evaluate** the purpose of the *Limitations of Actions Act 1974* (Qld) and make a decision regarding the effectiveness of time limitations imposed on civil matters.

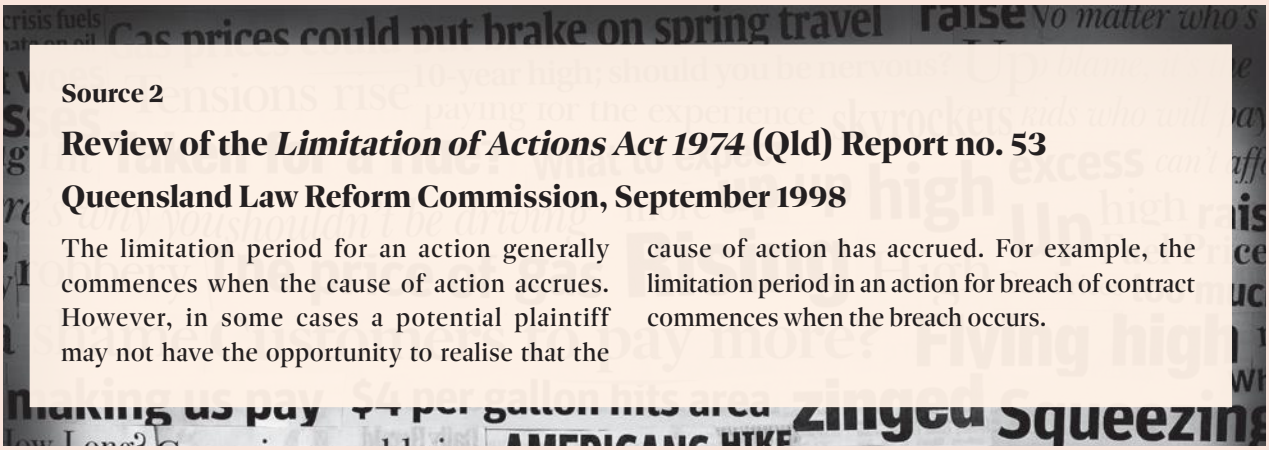


Source 1

Review of the *Limitation of Actions Act 1974* (Qld) information paper wp no. 49

Queensland Law Reform Commission, April 1997, p 3–4

It is generally recognised that the public has an interest in resolving disputes as quickly as possible. Limitation periods help to maintain peace in society by ensuring that disputes do not drag on indefinitely. It is also generally recognised that limitation periods help improve the administration of justice. The longer the delay before a claim is brought, the more likely it is that the quality of the evidence will have deteriorated.



Source 2

Review of the *Limitation of Actions Act 1974* (Qld) Report no. 53

Queensland Law Reform Commission, September 1998

The limitation period for an action generally commences when the cause of action accrues. However, in some cases a potential plaintiff may not have the opportunity to realise that the cause of action has accrued. For example, the limitation period in an action for breach of contract commences when the breach occurs.

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3 Read Source 3 and write a report outlining the alternatives offered to Binh by our present justice system in Queensland. **Compare** and **contrast** the differing solutions (based on the law and Binh's willingness to participate) and make **recommendations** regarding the best way for the stakeholders to arrive at a just and equitable outcome to the dispute.

Source 3

Binh owns a unit in Newstead, Queensland, and has recently signed a lease agreement to rent it out to a quiet university student called Max for $300 per week. Both parties signed the lease and Binh paid the bond of $1200 to the Residential Tenancies Authority.

Binh thought everything was going well when Max moved in on 1 October 2023. However, Binh did not know that Max was unhappy that the dishwasher was not working properly and he had to wash his dishes by hand. On 14 October, Max lodged a Notice to Remedy Breach with Binh about the dishwasher. Binh arranged for the dishwasher to be fixed on 19 October, but Max would not let the tradesperson into the unit until 23 October, at which time the dishwasher was fixed.

Three days later, Max lodged a Notice to Leave to Binh, giving 14 days' notice for the reasons of an unactioned Notice to Remedy Breach. When Binh called Max to ask why he had given the notice, he said that the dishwasher was not repaired within seven days. Binh responded that if Max had allowed the tradesperson on site on 19 October, it would have been fixed within the seven days. Max refused to listen and hung up the phone.

Binh tried to call Max numerous times by phone and he did not answer. Max moved out of the unit on 6 November.

It took Binh three months to rent out the unit and he had to reduce the rent to $250 per week. Max made no attempt to pay Binh for the readvertising costs or the payment of rent for those three months, as required by the termination of lease obligations. Max also left the unit in a very messy state, with rubbish strewn all over the floor. Binh had to spend $1000 in cleaning fees just to get it looking like it did before Max moved in.

Figure 5.23 The dishwasher was ultimately fixed but outside of the timeline because of the lack of cooperation from the tenant.

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4 The article in Source 4 talks about restorative justice conferencing (RJC) being used for environmental crimes in New Zealand. Imagine that a company has polluted a local river. **Describe** how an RJC could help the environment, the company and the people affected by the pollution.

5 There are limitations on RJC. **Discuss** why restorative justice conferencing might take more time and resources than traditional court cases for environmental crimes.

6 Australia currently uses punishment as the main response to environmental crimes. The article in Source 4 argues restorative justice conferencing could be a better approach. **Discuss** why you think restorative justice conferencing could be 'more environmentally friendly' than punishment alone.

Source 4

Australia should give victims a voice in tackling environmental crime

Dr Al-Alosi and Mark Hamilton, The Conversation, 5 June 2019

Contrary to popular belief, crimes against the environment are not "victimless". They affect many people, animals, plants and landscapes. Crimes against the environment should not be taken lightly.

Broadly defined, environmental crimes are those that harm the environment. This includes acts such as polluting water or air, illegal fishing or trade in wildlife, and water theft. The international Environmental Investigation Agency reports environmental offending is "one of the most profitable forms of criminal activity".

Australia is currently missing out on a hugely useful tool in the fight against environmental crime: restorative justice. This approach, which has been used successfully in New Zealand, deserves a nationwide commitment.

Restorative justice conferencing

Australia is a world leader in using restorative justice to deal with both adult and young offenders.

Simply defined, restorative justice is a process in which the victim, offender, and other parties affected by a crime come together to discuss the aftermath of the offence and its impact. Each party plays a role in resolving the dispute with the help of an impartial facilitator.

Restorative justice is all about restoring harm, preventing the crime from reoccurring, and fixing (or building) relationships.

Research has found that, compared with the traditional criminal court process, restorative justice can reduce the chances of reoffending, increase victim satisfaction, and prompt offenders to feel more responsibility for their actions.

During a conference, victims can explain the effect a crime had on them, and ask questions – giving them a voice in traditional proceedings. Offenders can give reasons why the crime happened, and apologise. A range of other outcomes may be agreed to in a conference, including compensation and community work.

However, our research reveals that conferencing is underused when it comes to environmental crimes in Australia.

New Zealand leads the way

New Zealand is leading the world in using restorative justice to deal with environmental crimes. This is largely a result of two pieces of legislation passed in 2002. First, the ***Victims' Rights Act 2002*** says that, if possible, the court (or other representative) must arrange a restorative justice conference at a victim's request. Second, the ***Sentencing Act 2002*** makes it mandatory for a judge to take into account any outcomes reached in a conference.

While more research focusing on the precise benefits is needed, anecdotal evidence shows New Zealand's approach is effective. Several judges, prosecutors and facilitators have praised environmental justice in addressing environmental crime.

Australia is failing to reap the benefits

Unlike New Zealand, Australian courts have not embraced restorative justice for environmental

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offending. In fact, Australia has only used restorative justice conferencing in two cases of environmental crime: Williams (2007) and Clarence Valley Council (2018).

Both Williams and Clarence Valley Council involved offending against Aboriginal cultural heritage, in breach of New South Wales's ***National Parks and Wildlife Act***. The outcomes reached in the conferences went well beyond what a court could have imposed on the offenders.

For example, in Williams, where a mining company built exploratory pits and a private railway siding across areas of Indigenous significance, the maximum penalty at the time was a fine of A$5,500 and 6 months' imprisonment. The judge suggested the parties engage in a restorative justice conference, during which Craig Williams donated A$32,200 worth of items to the local Aboriginal people.

In Clarence Valley Council, which concerned the council cutting down a protected tree, the council agreed in the conference to donate A$300,000 to the local Aboriginal community to fund research into cultural heritage. The council also agreed to create employment opportunities and youth initiatives for Aboriginal people.

These outcomes are far better in repairing the damage done than a mere fine or prison term.

Complementary to traditional prosecution

Despite these significant benefits, restorative justice conferencing is not a replacement for prosecution. It should be used only after the offender has been assessed as suitable, as in the cases of Williams and Clarence Valley Council.

Restorative justice conferencing can be suitable for all sorts of environmental crime, from water pollution to breaches of planning laws. In the case of offending against Aboriginal cultural heritage, conferencing may be appropriate given its ability to give a voice to members of the Aboriginal community who would otherwise be unable to participate in the formal court process.

The ideal time to integrate conferencing is after conviction but before sentencing, which we refer to as a "back-end model" of conferencing (the method most commonly used in New Zealand).

Typically, a back-end model involves the prosecution bringing charges before the court. The court then considers holding a restorative justice conference and, if appropriate, the proceedings are postponed to allow the conference to occur. The matter is later referred back to the court for sentencing.

This creates an opportunity for the sentencing judge to consider any results from the conference, but maintains a court's essential oversight role by ensuring the outcomes reached are adequate, achievable and legally binding.

A more environmentally friendly response

Restorative justice conferencing can provide a more effective way of dealing with environmental harms because, according to Trevor Chandler, a facilitator in Canada, "punishment makes people bitter, whereas restorative solutions make people better".

Of course, conferencing is not without limits. Just as restorative justice may not work for all young people, it may not work for all environmental offenders. Conferencing can require more time, money and energy than traditional court processes. However, this may be an investment well worth making for the environment.

It is time for Australia to follow New Zealand's example by embracing a back-end model of restorative justice.

This would give victims a much-needed voice in the process, and create a better chance to heal ruptured relationships and restore the harm done to the environment as far as possible.

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Chapter **6** Topic **2**

Contractual obligations

Chapter overview

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.
Legal Studies 2025 v1.1 General Senior Syllabus, Page 18. © Queensland Curriculum & Assessment Authority.

Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including warranties, conditions, terms, clause, exemption clauses, valid, void, illegal, ratification, repudiation, necessaries, and caveat emptor.
- Describe the elements of a legal contract using examples or cases and legal terminology, including agreement (certainty), offer and acceptance, intention, consideration, mutuality, capacity and breach of contract.
- Explain
  - the need for contract law, and why consumer protection provisions are needed in addition to the general law of contract
  - the role of the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) in providing consumer protection
  - legal defences available to the defendant (and consumers), and remedies available to the plaintiff, including statutory protection.
- Analyse and apply
  - the elements of a valid contract and precedents to determine legal outcomes of contractual disagreements
  - situations where contracts may be terminated through performance, agreement, breach, frustration, and/or illegality, e.g. employment contract, a housing purchase or rental agreement, and consumer contract.
- Analyse the role of the Australian Competition & Consumer Commission (ACCC) in consumer contractual arrangements.
- Analyse and evaluate the mechanisms and avenues of dispute resolution using case studies, e.g. the housing industry (rental agreements) or the consumer industry (mobile phone contracts).
- Analyse the ability of contract law to find acceptable balances between competing interests by
  - determining the nature and scope of the legal issue
  - examining different relevant viewpoints and their consequences.

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- Evaluate the above legal situations by
  - presenting legal alternatives to make a recommendation/s
  - justifying using legal criteria and
  - discussing implications.
- Select legal information, then analyse and evaluate to resolve a contract law issue, e.g.
  - sporting contracts and obligations
  - financial agreements and consumer protection, e.g. Australian consumer law and mobile phones
  - vulnerable groups and capacity to enter into contractual arrangements, e.g. minors
  - employment agreements
  - online contracts and transactions.
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

Legal Studies 2025 v1.1 General Senior Syllabus, Page 18. © Queensland Curriculum & Assessment Authority.

Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following law:

- Australian Consumer Law (Schedule 2 to the *Competition and Consumer Act 2010* (Cth))

Significant cases

This topic will include the following cases:

- *ACCC v Dell Computers* [2002] FCAFC 434
- *Amadio v Commercial Bank of Australia* (1983) 151 CLR 447
- *Balfour v Balfour* [1919] 2 KB 571
- *Bellgrove v Eldridge* (1954) 90 CLR 613
- *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA)
- *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87
- *Curtis v Chemical Cleaning* [1951] 1 KB 805
- *Cutter v Powell* (1795) 101 ER 573
- *Derry v Peek* (1889) LR 14 App Cas 337
- *Director of Consumer Affairs (Vic) v Trainstation Health Club* [2008] VCAT 2092
- *Everett v Williams* (1725) 9 LQR 197
- *Felthouse v Bindley* (1862) 142 ER 1037
- *Hadley v Baxendale* (1854) 156 ER 145

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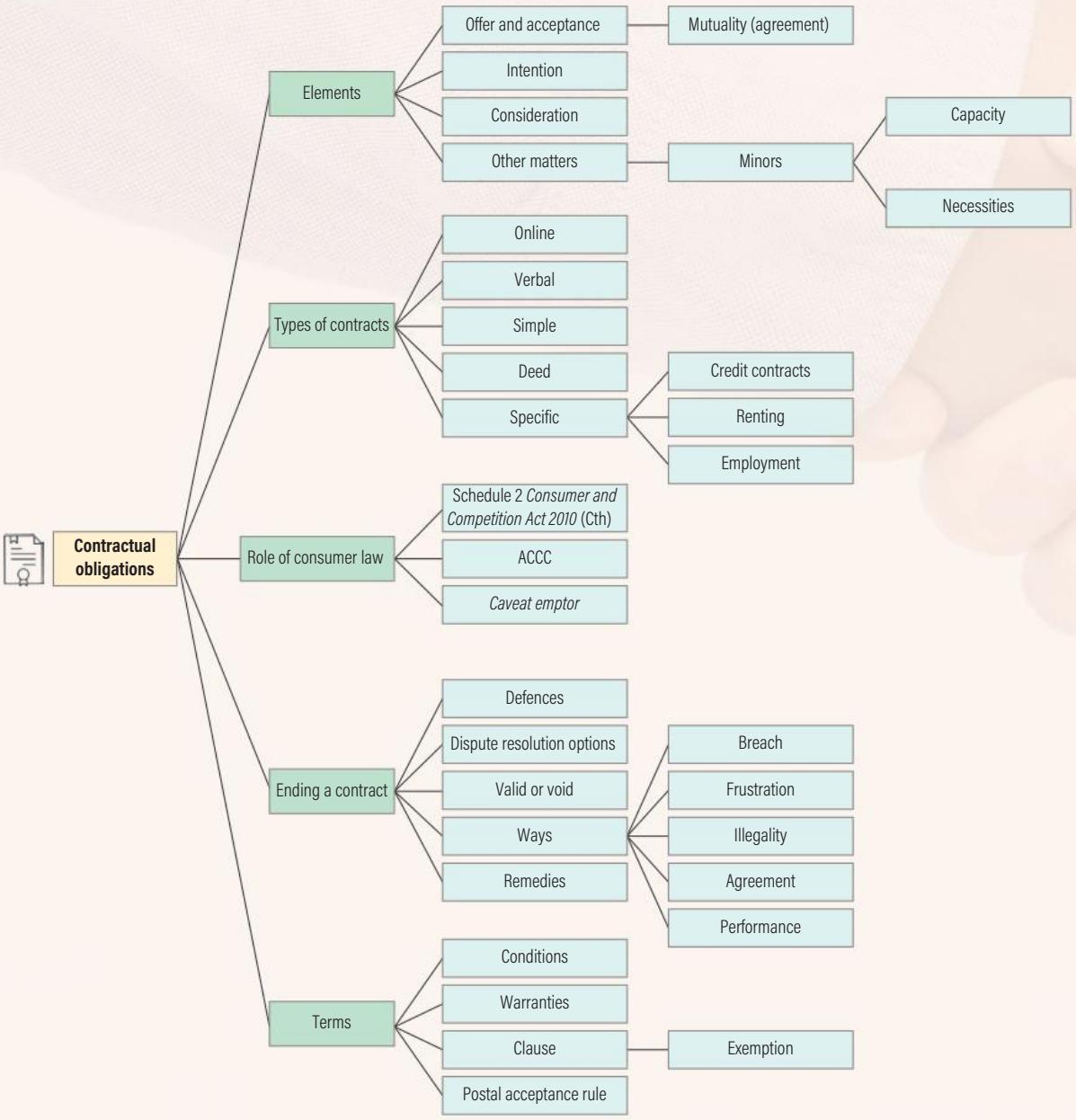
- *Hammer & Barrow v Coca Cola & Others* [1962] NZLR 723
- *Hawthorn v Harding* [1988] VR 89
- *Hochster v De La Tour* [1843–1860] All ER Rep 12
- *Nash v Inman* [1908] 2 KB 1
- *Olley v Marlborough Court* [1949] 1 KB 532
- *Oscar Chess v Williams* [1957] 1 WLR 370
- *The Moorcock* (1889) 14 PD 64

Concept map

In Topic 2 of Unit 2 of the QCAA Legal Studies course, we will cover the following content:



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6.1 The need for contract law

Introduction: Let's make a deal: contract law in Australia

You have probably been involved in *agreements* since your early childhood. Even as a child, you might have said to your brother or sister, 'If you let me get on the swings first, then I will push you when it's your turn.' Your parents might have said, 'I'm feeling awful. If you can just play quietly for an hour or so, we can get fast food for dinner.'

Most of these agreements are just part of the normal social interactions of any family, or any community. However, there comes a point where we begin making agreements with people outside our family and friends.

For example, you might still have been quite young when you first marched into a shop, your allowance burning a hole in your pocket, wanting to buy an ice-cream, a comic book or whatever else it was that took your fancy. That purchase is a contract. It's an agreement and an exchange.

In many ways, contracts are the basis of the entire modern world. They let people exchange money for goods and services. They let people cooperate on large ventures. Everything from purchasing a can of soft drink to launching a spaceship is the subject of contracts.

Let's find out more about what contracts are and how they work.

The essence of contract law

At its simplest, a contract is an *exchange* that is enforceable by the courts.

So, there are two aspects to this. First, a contract is an exchange. Two or more *parties* (which can be individual people, governments or companies) make an agreement to exchange one or more of five things:

- money (or other things that work the same as money, like cheques or gold)
- things (including land, but also other items, which we call *chattels*)
- services (everything from washing your car to brain surgery)
- promises (which is an undertaking to provide one of the other things on this list at some point in the future)
- rights (that is, a freedom to choose to do something).

Any exchange of these five things can be a contract. For example, if Alicia and Tran agree that she can have the right to use his camera whenever she wants in return for her paying $50, that's a contract (exchanging money for a right). If Cameron promises to wash Farah's car if she will give him a baseball cap that he loves, that's a contract (exchanging a promise of service for a promise of goods). You could literally come up with millions more. If people agree to exchange any of those five things, then they might be in a contract.

Second, a contract is **enforceable**. Underlying every contract is the fact that both parties know that if they fail or refuse to complete their side of the bargain, the innocent party could take them to court and seek a **remedy**. The fact that courts are willing to enforce contracts means that people are not forced to rely on one another's honesty or decency. Once a promise has been made in a contract, the promise can be enforced.

So, when a person enters a contract, they are saying, 'I agree to give you x if you promise to give me y, and I accept that you can take me to court if I don't follow through.'

Most contract law in Australia has developed through the *common law*. This means there is no

enforceable (relating to a contract) where the court has the power to rule in relation to disputes under the contract and to provide a remedy, which usually means all five elements of contract formation must be present, and no invalid factor may be present

remedy (relating to a contract law proceeding or any civil proceeding) the order made by the court to restore or compensate the winning party, which is usually in the form of money (damages) but may also be in the form of orders compelling people to do, or not do, something

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Figure 6.1 A remedy can include damages for an injury caused by negligent use of a vehicle.

specific Commonwealth or Queensland piece of legislation that tells us all about contracts. There is no *Contracts Act*. Instead, contract law has built up bit by bit, as judges over hundreds of years – literally hundreds – have made decision after decision, gradually setting out the rules which tell us how contracts are made, how they are understood and how the courts will compensate the innocent party if someone does not follow through on a contractual promise.

While it is true to say that most contract law in Australia has come to us through the common law, that is not entirely true. While neither the Queensland Parliament nor the Commonwealth Parliament have passed a Contracts Act, they *have* both passed pieces of legislation which set out specific rules for specific types of contracts. For example, there are rules preventing young people from purchasing alcohol or obtaining credit cards.

One of the most important of these areas is **consumer protection law**. The Commonwealth has passed the Australian Consumer Law, which provides specific protections for consumers.

For example, let's imagine that you are a keen cyclist, and you're going into the store to purchase a helmet to wear while riding. You want to know for sure that the helmet you're purchasing has been properly designed and is made of proper materials, so that it will protect your skull and brain if you come off your bike. You want the helmet to be **fit for purpose**.

Or imagine that you were purchasing a new charger for your phone. You want the charger to work for a long time; you certainly don't want it to stop working within the first week. You want it to be *durable*.

Or imagine that your parents hire a mechanic to fix their car – or that you hire a mechanic to fix your car! You want to know that the person fixing that car has the proper *skill* to do the job.

It's hard, though, for a normal person to know these things. Not many people have the skills to test a bicycle helmet before using it. Not many people know enough about electronics to test a charger's durability. Most people cannot deduce whether a mechanic has completed their apprenticeship.

Instead, the Australian Consumer Law takes care of these things. It sets rules that must be followed about the characteristics of goods and services – we call these **consumer guarantees**. It ensures that if those consumer guarantees are not met, the consumer can obtain a repair, a refund or a replacement. The Australian Consumer Law has also established the Australian Competition and Consumer Commission with the power to fight widespread breaches of consumer law.

In this chapter, we are going to focus on the basic rules of contract law, as handed down by the common law. Later in this chapter, we will go on to look at the consumer law and other written laws – *statutory* laws – that affect the contracts we meet in daily life.

consumer protection law any legislation which ensures that consumers of goods and services are treated fairly during the transaction; the principal legislation in Australia (but not the only legislation) is the Australian Consumer Law

fit for purpose when goods or services are suitable for the usual purposes that most people would expect of those goods and services, and if they are suitable for any specific purpose which was made known by one of the parties

consumer guarantee Australian Consumer Law contains a number of guarantees in relation to goods and services, which bind the supplier of goods or services and protect the purchaser (consumer); these are implied into every consumer contract and cannot be set aside (not even by agreement)

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6.2 Forming a contract

We have already learned that a contract is a promise that is enforceable by the courts. This suggests that there are also promises, or agreements, that the courts will *not* enforce.

This makes sense. If you agree with your best friend that you will help them with their homework if they let you choose what music you stream while studying, well, this is an agreement, but we would hardly expect the courts to get involved in enforcing it.

So, if some agreements are enforceable contracts, and others are not, how do we tell the difference?

The courts look for five elements, the *elements of formation of contract*. They are:

- whether each party has the **capacity** to enter into the contract
- whether the parties have reached **agreement**, which usually means one party making an **offer**, and the other party **accepting** that offer
- whether the contract was an exchange, where each party gave something to the other; lawyers call this **consideration**
- whether the parties intended to create **legal relations** (so, whether the parties would have expected to be able to take one another to court over their agreement)
- whether the agreement is sufficiently **certain** and **complete** for the court to be able to clearly understand each party's obligations under the contract.

An agreement which has *all five* of these elements is a contract and is enforceable in the courts. An agreement which lacks even one of these elements is not regarded as a contract and is not enforceable in the courts.

capacity a person is fully able to enter into a contract if they have reached 18 years of age, and if they are not affected by any condition (such as mental illness or intoxication) which removes their ability to understand the nature of the contract they are entering into

agreement when one party makes an offer, and the other accepts it, the two parties are said to have reached agreement; if all of the other elements of formation are present, the agreement becomes a contract

offer where a party puts forward a deal, or a set of obligations, which it is prepared to be bound by; if the deal is accepted by one of its recipients, then a contract is formed. An offer can either be made to someone specific (a bilateral offer) or to the world at large (a unilateral offer).

acceptance (in contract law) when a party who has received an offer agrees to that offer unconditionally; once an offer has been accepted, a contract is in place

consideration something that each side gives in a contract such as money, an item, services, promises or rights

legal relations when parties make an agreement which they intend to be enforceable by a court; on the other hand, if family and friends make an agreement among themselves with no thought of getting a court involved, they will have no intention to create legal relations

certainty when the court is able to read the words of a contract and attach a meaning to them; if the court cannot identify any clear meaning at all, the term is uncertain

completeness for a contract to be valid, it must be sufficiently complete, meaning that all of the key, central terms of the contract must be present; for example, a contract to sell an item would be incomplete if the contract did not include a price

Let's look at those elements one by one.

Capacity

Not everyone in our community has the capacity to make a contract. If someone is unable to understand the nature of what they are agreeing to, then they should be protected by the law; the law should not be a tool to be used against them.

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So, for example, a person who has an intellectual disability or a mental illness might (depending on their precise circumstances) be unable to enter into a contract if they are unable to understand the nature of the contract or if they are unable to genuinely look after their own interests.

Young people present a very interesting challenge for capacity. On the one hand, young people clearly cannot be allowed to enter into contracts in the same way that an adult might. Imagine, for example, a situation where a telecommunications provider has offered a phone contract to an eight-year-old without any involvement by their parents. It would not be a fair contract.

Figure 6.2 Young people agreeing to serious or extensive contracts risk invalidating the contract due to insufficient legal capacity.

At the same time though it *also* would not be fair to exclude young people from contracts altogether. If that were so, then a young person would not be able to do things as simple as buying a magazine or a can of soft drink.

Similarly, not all young people have the same level of capacity. Everyone starts as a newborn, with essentially no understanding of the world; and most people end up as adults with full legal capacity – but everyone develops slowly along the way, and no two people develop at precisely the same pace. Our childhoods are unique.

In order to get around this, the law says that young people can enter into contracts for **necessaries**.

In this context, 'necessaries' are those things which someone of the young person's specific age might be expected to acquire for themselves in their normal life. This obviously changes as the young person develops. A young person of five years of age might have virtually no capacity at all, whereas a young person of 17 years of age, living in university accommodation, might have virtually the same capacity as an adult.

The emphasis is on ensuring that the young person is not taken advantage of. For example, in a famous case called *Nash v Inman*, a case from 1908, a tailor sold a young university student 11 fancy waistcoats. The court found that it would have been perfectly fine for the tailor to enter into a contract for, say, one or two waistcoats – but selling 11 waistcoats was a bit ridiculous. The court refused to enforce the contract.

So, when asking if an agreement is enforceable, the first thing we ask is whether both parties have *capacity*.

Finally, it is worth knowing that sometimes a person who lacks capacity might obtain capacity: for example, a young person might turn 18. At that time, they can *ratify* or *repudiate* any agreements they entered into during their incapacity. If they ratify the agreement, they accept that it is now binding. If they repudiate the agreement, they refuse to be bound.

necessaries a minor (a person under 18 years of age) can be bound by a contract if it is a contract for things of a normal type for any young person of that age to require; these are not limited to things that are necessary

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Case study 6.1

The case: *Nash v Inman* [1908] 2 KB 1

Figure 6.3 In this case, a tailor sued a customer and his father for refusal of payment of an order of waistcoats.

Citation

[1908] 2 KB 1 means that this matter was heard by the Court of King's Bench in England in 1908 and is published in the second volume of 1908 reports from that year starting on page 1.

Facts

A young man, not yet 21 years of age (the age of adulthood back then), was a student at Cambridge University and made an order for 11 expensive waistcoats. The young student's father refused to pay for the waistcoats, and the tailor sued.

Legal issues

Were the waistcoats a 'necessary' within the meaning of contract law? That is, could the contract be in forced against a minor because it was a contract for him to purchase necessaries?

Decision

While a moderate quantity of waistcoats might be considered necessary for a student keeping up fashionable appearances at Cambridge University, 11 waistcoats went well beyond a normal supply and could no longer be considered necessary.

Ratio decidendi (reason for the decision)

An excessive supply of anything at all can hardly be regarded as a 'necessary.'

Obiter dicta (something to think about)

If someone is supplying goods to a young person, how are they supposed to know whether the young person already has an adequate supply? Is it even their business?

Video 6.1 *Nash v Inman* [1908]

Agreement (offer and acceptance)

Next, we must work out whether the parties have reached agreement at all. If the parties have not reached agreement, then there is nothing to enforce.

For example, imagine that Veronica was selling a formal dress and had advertised it online for $125. Allys was interested in buying the dress, but she only had $100 to spend. They have not yet reached agreement as Veronica wants to receive $125, but Allys only wants to pay $100. Nobody, as yet, has any obligations to anybody!

To work out whether there is a contract, the law first considers three steps:

1. **Is there an invitation to treat?** This is an old-fashioned form of words. Despite what it sounds like, an 'invitation to treat' is not an offer of ice-cream!

   An **invitation to treat** occurs when someone announces that they want to enter into a contract, and so they invite other people to

invitation to treat a prelude to a contractual negotiation, which essentially says that a party is open to offers in relation to some matter; these can be difficult to distinguish from offers

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come along and start negotiating with them. The most common example of an invitation to treat is an advertisement. In the previous example, Veronica issued an invitation to treat when she advertised the dress on social media. Her advertisement was really saying, 'Hey everyone, I have a dress that I want to sell. I'm happy to sell it to anyone who wants to buy it! I would like to get $125 for it, but let's have a discussion. Contact me!'

The idea of an invitation to treat is to provoke *offers*.

2. **Is there an offer?** An *offer* occurs when one party says to another, essentially, 'Here are the **conditions** that I am prepared to agree to, and here is what I want in return.' So, matters have progressed beyond merely inviting discussions: one party has decided they mean business.

   So, in the example above, let's say Allys had seen Veronica's dress, and she messaged Veronica, saying:

   Hi Veronica, I think that dress looks amazing! And I'm also a size 12, so it should fit me fine. I would really like to buy it, but I only have $100 to spend. Is there any chance you can sell it to me for $100?

   You can see, there, that Allys is saying, 'I am prepared to buy your dress, and in return I am willing to pay you $100.'

   When an offer comes in, the person receiving the offer has quite a few options. They might reject the offer, of course. They might ask for more information. They might accept the offer (we'll look at that situation in a moment). And they might respond with a **counteroffer**.

   So, imagine that Veronica has received the offer, and she responds:

   Hi there Allys, thanks for contacting me about my dress! I think, as we are the same size, that it would look terrific on you, and I'd love to sell it to you. I really can't sell it for $100 though. $120 is as low as I could possibly go.

   You can see that Veronica is now the one making an offer. She is saying, 'I am prepared to sell you my dress, and in return I want $120.'

   Counteroffers can bounce back and forth like this for as long as the parties wish. Eventually, though, the deal will fall apart, or an offer will be accepted.

3. **Has an offer been accepted?** An offer is accepted when one party agrees with the other party unconditionally. So, they have agreed on every single point, and they are not still negotiating about anything. Most often, this is done by words.

   So, for example, imagine that Allys has received Veronica's counteroffer, and she then writes back:

   $120 will really be a stretch for me, but I have to admit, I really do love that dress. OK, $120 it is. Let me know when I can come by and pick it up. Thanks so much!

   They now have a contract: an offer has been made, and the offer has been accepted. This constitutes agreement.

While most offers are accepted by the use of words (either verbally or in writing), you can also accept an offer in other ways, particularly by *conduct*. So, for example, you could accept an offer by:

- shaking hands
- paying money
- clicking 'accept' on an app or browser
- actually doing whatever it is you've promised to do in the offer.

condition (in contract law) a term of the contract which is so important that a breach of the term would entitle the innocent party to terminate the contract and seek damages

counteroffer when a party receives an offer which they do not accept, one option open to them is to negotiate by making an offer in response; it is important to understand that this new offer extinguishes the original offer, so the original offer can no longer be accepted

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Case study 6.2

The case: *Felthouse v Bindley* (1862) 142 ER 1037

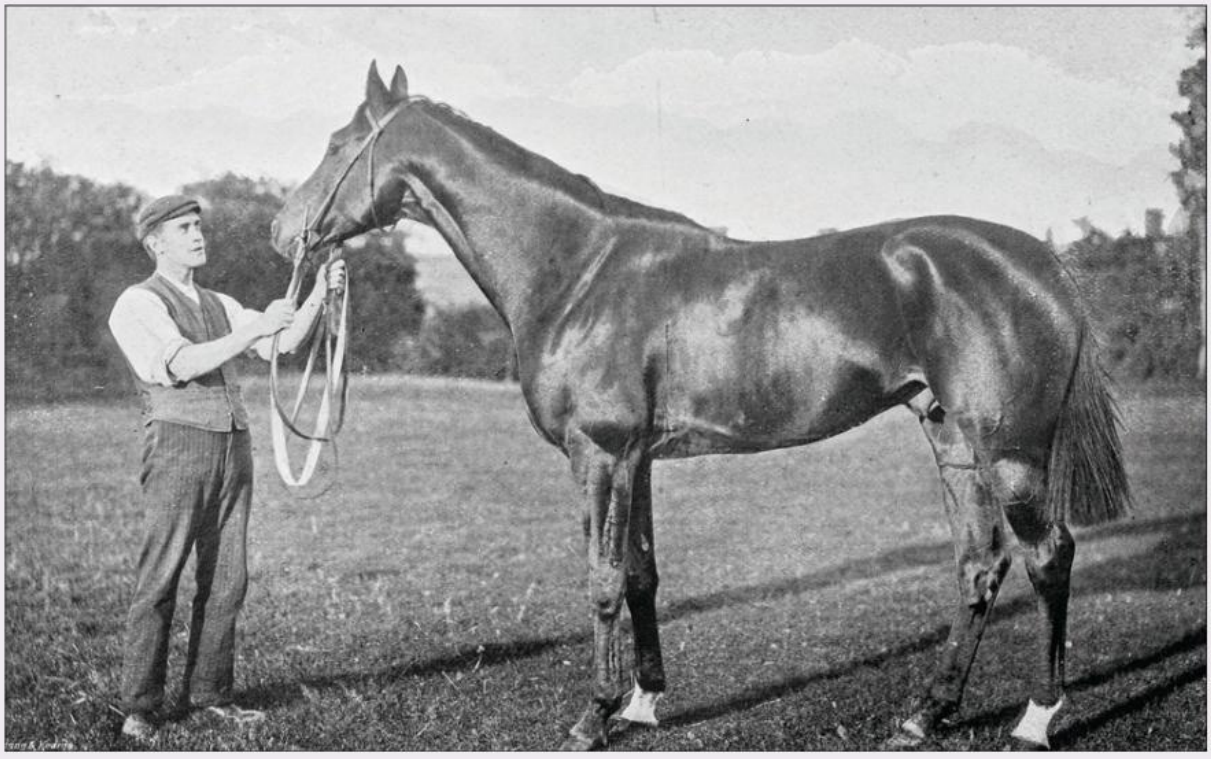

Figure 6.4 In this case, a family dispute broke out over the sale of a horse.

Citation

(1862) 142 ER 1037 means this is an old English case heard in 1862 and reported in volume 142 of a series called the English Reports starting on page 1037.

Facts

Two family members were negotiating the sale of a horse. The purchaser eventually gave his best price and said that if he heard no more from the seller, he would assume that the seller had agreed to this final price. The seller did not respond, and the buyer wanted to enforce the contract.

Legal issues

Did the seller's silence amount to an acceptance of the contract?

Decision

The seller's silence did not amount to acceptance of the contract.

Ratio decidendi (reason for the decision)

Acceptance requires some type of unambiguous conduct. A person who is silent might not yet have made up their mind.

Obiter dicta (something to think about)

Why shouldn't silence be established as a method for accepting a contract offer? What would be the implications if this became a widespread method of contract acceptance?

In a very famous case called *Carlill v Carbolic Smoke Ball Company*, the company marketed a very dubious product which promised to ward off influenza – by inhaling fumes from carbolic acid! They made an offer to the whole world, that if anyone purchased their product, and used it as directed, and still got the flu, then they would pay the customer a large sum of money. In that case, Mrs Carlill accepted their offer by purchasing and using the smoke ball. So, when she still contracted the flu, she was entitled to the money.

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Once an offer can be made, it remains in place until it is either accepted or *terminated*. Some offers have an expiry date, and they cannot be accepted after then; however, offers can be withdrawn, by notifying anyone who has received an offer, that the offer is no longer available for acceptance.

Case study **6.3**

The case: *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256

Figure 6.5 Advertisement for the Carbolic Smoke Ball Company in *The Illustrated London News*, 1893

Citation

[1893] 1 QB 256 means this case was heard in the court of Queen's Bench in the United Kingdom and was reported in the 1893 volume for that court, in the first volume for that year starting on page 256.

Facts

During an influenza pandemic, people were ready to do whatever they could to try to avoid being infected. The Carbolic Smoke Ball Company created a device which allowed people to inhale the fumes from carbolic acid, which was said to clear out the sinuses and prevent the flu. The company claimed in its advertising that anyone who used the smoke ball as directed and still got the flu, would be paid £100. Mrs Carlill used the smoke ball and still got the flu. She claimed the £100, but the company refused to pay.

Legal issues

Was there a contract between Mrs Carlill and the company which would allow her to enforce the promise to pay her £100?

Decision

It is possible to make a contract by making an offer to the whole world, which is to be accepted by performing some act (such as by buying and using the carbolic smoke ball)? As a result, there was a contract between Mrs Carlill and the company, so she was entitled to the £100.

Ratio decidendi (reason for the decision)

By following the instructions in the advertisement, in reliance on the advertisement, Mrs Carlill had accepted the offer and given good consideration.

Obiter dicta (something to think about)

Are there rules in Australia which would stop a non-genuine medical product like the carbolic smoke ball from being sold? Australia has recently been through a pandemic similar to the one Mrs Carlill faced. Is it difficult to see why she was misled into using the product?

Video 6.2 *Carlill v the Carbolic Smoke Ball Company* [1893]

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Consideration

'Consideration' is one of those weird words which has a completely different meaning in the law from its meaning in normal life. In normal life, consideration refers to being considerate. In contract law, it does not mean that at all. What does it mean?

The essence of a contract is *exchange*. If I give something to you, or make a promise to you, and expect nothing in return, that's not a contract; it is merely a gift. But if I give something to you *in return for* you giving something to me, then we have a contract. Whatever each of us gives, is our *consideration*.

This makes sense. Imagine that James and Xavier are both keen artists. James agrees to lend Xavier his new easel, but then changes his mind. Xavier might be disappointed, but he really hasn't actually *lost* anything, has he? So how could he claim any sort of remedy?

Imagine, though, if James agreed to lend the easel to Xavier for $10, and Xavier paid him. If James changed his mind, can you see that Xavier would be in a completely different position? Xavier would want the easel or his money back!

There are a range of different types of consideration. The most common ones are:

- the payment of money
- the transfer of ownership or possession of property
- the performance of a service
- the transfer of a legal right
- a promise to do one of the above in the future.

So, for example, let's say Farid has a ticket to a great concert, but has had a change of plans and cannot go. Jacob wants to buy the ticket. Jacob's consideration is the payment of money, and Farid's consideration is transferring the right to attend the concert.

Unless everyone provides a benefit to pay for whatever they are receiving, then you do not have a contract. This concept is called *mutuality*: the provision of consideration must be mutual.

There are a couple of other important things to know about consideration.

First, *consideration must be bargained for*. We just learned about the concept of offer and acceptance. Can you see that when someone makes an offer, what they are really doing is saying, 'Here is the consideration that I have to offer, and here is the consideration that I want from you in return!'

So, if I am trying to sell a pair of jeans for $80, then I'm really saying, 'I want to enter into a contract where I give you consideration in the form of a pair of jeans, and you give me consideration in the form of $80.' If consideration is not bargained for, then it is not consideration at all.

Imagine, for example, if instead of offering the jeans for sale, I simply offered them to you. And you really like them, so you accept them. They're yours. But now you feel bad for taking them and not giving me anything in return, so you send me $50. Can you see that what we really have here is just two gifts? It's not really an exchange. I was not obligated to give you the jeans, and you were not obligated to give me the money. Because we didn't *bargain* for the consideration.

Second, *past consideration is no consideration*. Consideration almost always has to be provided *after* the contract is formed. So, for example, let's say Erica had an awesome car, and Vito really wanted to borrow it. Without asking, he just goes ahead and washed her car. Erica is very impressed: the car is gleaming. She thanks him, and he says, 'So, can I borrow the car now?'

Let's say Erica agrees that he can borrow the car for $20 plus fuel money. Vito thinks that is unfair, because he just washed the car! But in fact, his washing the car is *past consideration*. It was done prior to the contract's formation, and so it cannot be part of the contract's consideration.

Third, once there is some amount of consideration, contract law doesn't much care whether the amount makes any sense. Somewhat confusingly, the law phrases it this way: *consideration must be sufficient but need not be adequate*.

For example, imagine that Luca and Amalita are both selling identical guitars. Luca is very knowledgeable about guitars and knows that this particular guitar is worth about $800. He has

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it for sale for $600. Amalita doesn't know and doesn't care about guitars. She is cleaning out her house, and she just wants the guitar gone, so she has put it for sale for $20. The law doesn't care whether the guitar gets sold for $600 or for $20. As long as the buyer pays *some* consideration and the parties agree, then the sale contract will be enforceable.

In a famous case called *Chappell & Co Ltd v Nestle Co Ltd* [1960], the court found that something as valueless as a single peppercorn could be sufficient consideration for a contract should the parties agree – even if the person receiving the peppercorn doesn't like pepper and will throw the peppercorn away! This is today known as a **peppercorn consideration**.

Finally, there is a special type of contract called a **formal contract** or a *contract under deed*.

Figure 6.6 The peppercorn consideration means even the token amount of a single peppercorn is adequate for contractual consideration.

These contracts are an exception to the rule that consideration is required. They are established by a particularly formal type of document called a deed. They are unusual, even in the world of contract law, and we need not worry more about them here.

Video 6.3 *Chappell & Co Ltd v Nestle Co Ltd* [1960]

peppercorn consideration when two people make a contract, each side must provide consideration; however, the law is silent as to the amount each side must provide, so a token amount, even one single peppercorn, is enough to be considered good consideration

formal contract a special type of contract which must be in writing, and which does not necessarily require consideration

Intention to create legal relations

We have already learned that a contract is an agreement which is intended to be enforceable by the courts. Clearly, not every agreement that you make in life is intended to be resolved in the courts! People make agreements within their friendship groups and within their families all the time, never imagining for a moment that those agreement would ever end up in court. The courts are not interested in resolving squabbles among family and friends.

As a result, to be a contract, there must be **intention** by the parties to create legal relations. In other words, the court will stop to ask whether the agreement it is being asked to enforce is really an agreement where the parties could ever have expected the court to be involved.

When asking this question, the court will usually be guided by two principles. The first, established in a famous case called *Balfour v Balfour* [1919], is that agreements between family members and close friends will be *presumed* not to create legal relations. However this rule is not hard and fast. Sometimes family

intention (in contract law) a party's actual intent to enter into a contract

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members do get involved in business activities with one another, and sometimes family members might make substantial sales to one another, for example, the sale of a house or a car. In those cases, the court will have no difficulty in recognising that the agreement *was* intended to create legal relations.

On the other hand, the court's starting expectation will be that agreements created in a *commercial* context are likely to create legal relations. Again, though, it is not entirely unheard of for two commercial parties to make an agreement, and for them to agree that their agreement is *in honour only* and not enforceable in the courts. In those cases, the courts will not enforce the agreement.

Video 6.4
Balfour v Balfour [1919]

Certainty and completeness

Imagine if you were a keen Scuba diver, and you were on the lookout for a new regulator, which is the bit of the Scuba apparatus that lets you breathe underwater. You see an ad online, posted by an individual, which says:

Brand new regulator for sale. Unfortunately I have become unwell and can no longer dive. This regulator has never been used, but I am selling it cheap.

Now imagine that you write to them:

I really want to buy your regulator!

And they respond:

Great! Done! I will send it tomorrow!

Do you notice anything that's missing? The price! The two parties have not agreed on a price. As a result, there is not yet a contract, because the contract is *incomplete*. If there is not enough detail for the court to understand just what the obligations are on each side of the contract, then the court cannot enforce the contract.

Sometimes, in some contracts, it is impossible to know all the details beforehand. In those cases, the court will be perfectly satisfied if there is a *mechanism* for establishing important features such as price. For example, if you hire an electric scooter using an app, it is usually impossible to know what the final price will be. But that's fine because there is a mechanism: usually a start-up price and then a price-per-minute. This enables the court to understand your obligations, so the contract is sufficiently certain and complete.

If you have those five elements present: a contract made by two people with capacity, who have reached agreement, who have each given consideration, who intend to create legal relations, and whose agreement is sufficiently certain and complete, then you have a contract, and your interests under that contract are protected by the law.

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Case study **6.4**

The case: *Hawthorn v Harding* [1988] VR 89

Figure 6.7 This case concerned the contract of AFL footballer Paul Harding.

Citation

[1988] VR 89 means this case was heard in the Supreme Court of Victoria and was reported in the 1988 volume of the Victorian reports starting on page 89.

Facts

Harding was a footballer who had signed a contract to play for the Hawthorn football club after first playing three years at a lower level in Perth. The contract required the parties to negotiate regarding his pay and conditions after those first three years, and to submit the question to an independent decision-maker if they were unable to agree. After the three years in Perth, Harding decided that he preferred to play for the new West Coast Eagles football team, but Hawthorn would not release him.

Legal issues

Was the contract invalid because it did not contain all of the necessary terms, instead relying on the parties to negotiate playing conditions after the first three years?

Decision

The contract was not invalid, because even though it did not contain all of the necessary provisions, it did contain a mechanism to establish those conditions: the parties were to negotiate, and if their negotiations were unsuccessful, then the independent decision-maker was to decide for them.

Ratio decidendi (reason for the decision)

If parties do not make a final decision about some aspect of the contract, but they agree to a method for making that provision, the contract will be regarded as complete.

Obiter dicta (something to think about)

Is any contract ever likely to be truly complete? How big would such a contract have to be, to capture all possible concerns?

Video 6.5 *Hawthorn v Harding* [1988]

Review **6.1**

1 **Define** the term 'contract' using legal terminology.
2 **Describe** the elements of contract formation.
3 **Identify** the circumstances which would restrict a person's capacity to enter into a contract.
4 **Define** 'necessaries' in the context of contract law.
5 **Explain** how an advertisement would be considered an invitation to treat.
6 **Describe** the various forms of conduct that could be regarded as expressing acceptance of an offer.
7 **Discuss** the role of consideration as a requirement for contract formation.
8 **Identify** at least three acceptable types of consideration for the purpose of forming a contract.
9 **Evaluate** the following statement: 'Consideration must be sufficient but need not be adequate.'
10 **Explain** why a contract between a brother and sister might raise concerns about the intention to create legal relations.
11 **Determine** why a contract that appears to be uncertain or incomplete cannot be valid.

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6.3 Terms of a contract

So, we have a contract! Next, we need to be able to understand just what our contract says. There are a few different types of *terms* in a contract, and a few things that are not terms at all. A 'term' is simply an element of the contract; an individual idea which the parties have agreed to or a promise they have made. Many terms, together, make up the contract.

Mere puffs

A '**mere puff**' or 'puff' is a statement made by a party *before* the formation of a contract and which is not meant to be taken seriously, or at face value. So, if you are walking past a shop, and the shop has a sign out the front saying 'Best hot chocolate in Queensland', they are not literally claiming to have commissioned an independent survey of every hot chocolate in Queensland and scientifically determined that their hot chocolate is the best. Similarly, a cosmetic product that says you will look 'ten years younger' is not literally claiming that to be so. Nobody is expected to genuinely believe those things.

Figure 6.8 A 'mere puff': This competition in New York was not required to legally defend its choice of nomination of the world's best restaurant!

Puffs are not terms in a contract. If you walk in and buy the hot chocolate, you are not entitled to sue in contract if it turns out that a random café in Mt Isa happens to sell a better hot chocolate.

mere puff a statement, for example, in advertising, which talks about a product or service but in a way that nobody could be expected to believe literally

Representations

A representation is something that one party says in order to persuade the other party to enter into the contract, but without intending that statement to actually become part of the contract. So, let's imagine Eric is trying on a new pair of board shorts at the beach store, and the sales assistant says, 'Those look great, you'll be wearing those for years!' The sales assistant's statement is a representation, not a term. It is not a term of the sales contract that Eric can wear the board shorts for years.

Sometimes, however, some people (particularly salespeople) might make promises about a product, where those promises turn out to be completely untrue. Contract law does not just stand by and accept this behaviour. In those circumstances, a representation might become a *misrepresentation* or even **misleading and deceptive conduct**. We'll explore these concepts more below.

misleading and deceptive conduct under the Australian Consumer Law, people must not, in trade or commerce, behave in a way that gives the wrong idea or is dishonest, or is likely to mislead or deceive; essentially, this is a legislated version of misrepresentation

Express written terms

Ideally, two people who enter into a contract will write down their agreement. A written contract doesn't have to be on any specific form; it doesn't have to be written by lawyers; and it doesn't have

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to be signed (although it's obviously safest for everyone if the contract *is* signed).

Written contractual terms are known as *express* written terms – because the parties have expressed those terms in writing.

Don't, however, fall for the trap of thinking that everything in writing must be a written term. There are a few rules which exclude some 'terms', even if they are written down.

For example, written terms are only part of the contract if they are provided to the other party *before* the contract is formed. In a famous case called *Olley v Marlborough Court* [1949] 1 KB 532, Mrs Olley's expensive fur coat was stolen from her hotel room. When she asked to be compensated for its loss, the hotel pointed to a sign on the back of the door which said they would not be liable for any losses. The problem is, Mrs Olley had no chance to see the sign on the back of the door until after she had already entered into a contract to take the room. As a result, the sign could not be part of the contract.

Next, written terms might still not count if they are written on a document which you wouldn't normally expect to contain contract terms. In a case called *Curtis v Chemical Cleaning* [1951] 1 KB 805, Mrs Curtis took a wedding dress to be dry cleaned, and she was handed a document headed 'receipt'. It turned out that the document was in fact a contract, under which she agreed that the dry cleaners would not be liable for any damage to the dress. The court found that the contents of the 'receipt' were not part of the contract, because most people would not expect a receipt to contain contractual terms.

Have you noticed that in both examples above, *Olley v Marlborough Court* and *Curtis v Chemical Cleaning*, the purpose of the clause was to exclude liability? That is, to allow one party to avoid paying damages even if they caused harm to the other party. We call these clauses *exclusion or exemption clauses*. They are a special type of express written clause.

Exclusion clauses will only be effective if proper notice is given. If they are hidden away in a contractual document then they are unlikely to be effective.

Furthermore, exclusion clauses are read ***contra proferentum***. This is a Latin clause meaning 'against the party which brings the clause forward'. So, if there is any doubt or ambiguity about the meaning of the exclusion clause or if there is doubt about whether the exclusion clause applies, then the court will give the benefit of the doubt to the party *not* relying on the exclusion clause. In the above cases, therefore, Mrs Olley and Mrs Curtis would have received the benefit of the doubt.

exclusion clause a clause designed to limit or remove the liability that one party might have if they fail to deliver on their obligations under the contract; fair notice must be given to the other side and notice must be given before the contract is formed

contra proferentum some provisions, such as exclusion clauses, will be read by the court under the expectation that if there is any ambiguity or doubt about the meaning of the clause, the party not relying on that clause will be given the benefit of that doubt

Express oral terms

There is no absolute need for two parties to record their contract in writing. For example, if you go into a convenience store and buy a can of drink, you are entering into a contract, but there will be no written contract.

When a contract is not in writing, but the parties have reached an agreement through discussion, the terms of the contract are often said to be *express oral terms*.

This, of course, leads to complications. If two people are engaged in discussions about a contract, how do we tell whether their statements are express oral terms or representations? In other words, how do we tell whether a statement is intended to create obligations or it is just part of the discussion about whether to enter into a contract at all?

There is no clear rule, but there are a few indicators.

First, the closer a statement is made to the *time* of formation, the more likely it is to be an oral term. Similarly, if a statement was made well before the time of formation, then it is much more likely to merely be a representation.

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Figure 6.9 Oral contracts are more likely to be ambiguous about representations or terms of the agreement.

Second, statements made by the person with the greater *knowledge* are much more likely to be considered to be express oral terms. So, in a case called *Oscar Chess v Williams* [1957] 1 WLR 370, Mr Williams sold a second-hand car to Oscar Chess, which was a car dealership. It turned out that he gave them the wrong year for the make of the car, but this was not considered to be a term of the contract, because the car dealers would have known far more about cars than Mr Williams.

Third, the *importance* of oral statements will affect whether they are considered terms or representations. Some minor statement regarding an inconsequential aspect of the deal is less likely to be considered a term of the contract. However, an important statement, for example, about an essential quality of the goods being sold, is much more likely to be considered a term of the contract.

Finally, if the parties have an oral discussion and then they create a written document, the court will assume that anything which was *not included in the written document* is not intended to be part of the contract. This presumption is based on a very old rule called the **parol evidence rule**. This is not a hard-and-fast rule (e.g. the parties might have quite deliberately decided to have a contract which included both written and oral terms), but the starting position for the court is that if the parties have chosen to put their agreement in writing, they will have included all the matters they agreed upon.

parol evidence rule when parties have written down the terms of their contract, neither party may (at trial) rely on oral evidence to suggest that there were in fact other terms agreed to by the parties; therefore, the written contract will be considered to be the whole contract

Terms implied by fact

Virtually no contract includes literally *everything* that the parties have agreed to. If the parties wanted to include every time detail, then even the simplest contract would be hundreds of pages long. For example, imagine a contract for the sale of a car. It might say something like this:

The buyer agrees to buy, and the seller agrees to sell, the seller's red 1996 Nissan Pulsar for $850.

But where, in that description, does it say that the car has to have wheels? Or an engine? Or a steering wheel? Or a bumper bar? Where does it say that it has to be an actual car, and not a miniature toy car?

Of course, the contract does not say any of these things, and it really doesn't need to. It is *implied* that a car will have wheels, an engine, a steering wheel and so on.

The difficulty is, however, that two parties might well disagree about what should be implied into a contract this way. It's clear that a car will have a steering wheel: but what about a radio or Bluetooth? Or air conditioning? You could make an argument either way for these.

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The law will imply terms into a contract if the proposed **implied term**:

- *Is reasonable and equitable*, so 'tricky' implied terms will not be recognised
- *necessary to give business efficacy* to the contract; in other words, a term will not be implied into the contract if the contract would still make sense without it
- *Is so obvious that 'it goes without saying'*, so the court will ask whether the parties, had they been asked at the time of contract formation, would have said, 'Well of course that is part of the contract!'
- *Is capable of clear expression*, so you must be able to say what the term would have been, if it had been written down as an **express term**
- *Must not contradict any express term* of the contract, so if the contract says the car is red, you cannot imply a term that the car must be green.

implied term (in a contract) the term which is not actually written into the contract but will be part of the contract anyway, which may be understood from the facts surrounding the contract or from the law itself

How would our earlier examples fare against these rules? If we were selling a car, would the court imply a term that the car must have wheels? What about air conditioning?

Both of these seem *reasonable and equitable*, particularly if most Nissan Pulsars in 1996 had air conditioning. Both of them are *capable of clear expression* and neither of them seem to *contradict an express term* of the contract. However, let's think about business efficacy. A car without wheels makes no sense at all. But a car without air conditioning, while uncomfortable, is still a perfectly good car. In the same way, you would think it is 'so obvious that it goes without saying' that a car should have wheels, but you could not really say this for air conditioning.

So, you can see that the requirement for wheels would probably be an implied term, but the requirement for air conditioning probably would not.

express term (in a contract) the term which is actually and clearly stated whether in writing or orally

Case study **6.5**

The case: *The Moorcock* (1889) 14 PD 64

Figure 6.10 This case from 1889 was about the owners of the ship *The Moorcock*.

Note

One of the peculiarities of English and Australian law is that often if a matter involves a ship, the ship's name becomes the title of the legal matter.

Citation

(1889) 14 PD 64 means the case was heard in 1889 and was reported in volume 14 of the Probate, Divorce, and Admiralty reports starting on page 64.

Facts

The owners of *The Moorcock* used a wharf to load and unload the vessel. They were not told that at low tide, the water alongside the wharf was very shallow. When the tide went out, the bottom of the vessel struck rocks on the bottom of the river and the vessel was damaged. The contract between the parties did not say anything specific about guaranteeing the depth of the water.

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Legal issues

Did the contract contain an implied term that the wharf would be sufficiently deep that the vessel could load and unload its cargo safely, even at low tide?

Decision

The contract did contain the implied term because without such a term the contract would not have been capable of giving effect to the intentions of the parties.

Ratio decidendi (reason for the decision)

No contract is fully comprehensive, and in cases such as this, there may be facts which clearly and obviously must have been intended to be part of the contract, even if they were never written down.

Obiter dicta (something to think about)

Is there a danger that the court might imply into a contract terms which the parties would never have agreed to (which is why those terms were not in the contract in the first place)? How can we make sure this does not happen?

Video 6.6
The Moorcock (1889)

Terms implied by law

Terms can also be implied into a contract by the operation of law. We're going to look at this in more detail later in the chapter, but for now, you should know that sometimes the parliament will simply say 'in all contracts of a certain type, there is now going to be a term that says *x*'. Once that law has been passed, then all contracts of that type will be treated as though they contain that term, whether they do or not.

For example, if someone signs up to a new mobile phone contract, it will be *implied by law* that they will have a ten-day cooling off period, during which they can choose to back out of the contract. So it does not matter what the written contract says – as far as the law is concerned, there is a ten-day cooling off period.

Perhaps the most important implied terms are the *consumer guarantees*. We will meet those later in this chapter.

Warranties and conditions

Not all terms of a contract are created equal! Some terms of a contract really do describe the heart of the contract, for example, the consideration that each side it going to give. Other terms of the contract might still be important enough to need to be in the contract, but they are not on the same level.

The law described the more important terms as *conditions* and the slightly less important terms as **warranties**.

Before going on, it's important to pause here and talk about language. This is another one of those situations where the language used by lawyers is quite different to the language used by people in the real world. There are two things to know:

- First, you have all heard of *terms and conditions*, or just '*tees and cees*'. In fact, while this is a common way to describe contractual terms, it makes no sense from a legal perspective. A condition is a *type* of term.
- Second, it's generally understood that a *warranty* is a promise made by the seller to repair or replace an item if it breaks within a certain period of time. If you buy an electrical item, you are sure to be offered the *extended warranty*. To lawyers, though, a warranty is quite different – it is a slightly less important term.

How do we tell the difference between conditions and warranties, and why would we bother?

Well, a condition is a term so important in the case of a breach, that without the condition being met, the innocent party might as well not have a contract at all. And so, it gives them the right to terminate the contract and to seek damages.

warranty (in contract law) a term of the contract which is not so significant that it goes to the heart of the contract; a breach of a warranty entitles the innocent party to damages, but does not entitle them to terminate the contract

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A warranty, on the other hand, is not so central to the contract. If a warranty is breached, this is not something so bad that it would let you terminate the contract – but is still a breach, so you would be entitled to damages.

For example, let's say you purchased two protective phone cases online. Neither of them turned out to be exactly what you wanted.

The first phone case looks exactly the way you hoped. It looks great! However, when you are in the process of putting it on your phone you drop it, and it cracks in half. It would have offered your phone no protection at all. In this case, the vendor has breached a *condition* – that the case would protect your phone. If you had known the case would not protect your phone, you would never have bought it in the first place. So you are entitled to terminate the contract and recover your money.

The second phone case is super protective, but the colour is a slightly different shade to the way it appeared in the online ad. It still does everything you need it to do, it just doesn't look quite as good. This is likely to be the breach of a *warranty*. The phone case is still useful to you, but you would not have paid as much for it if you'd known the actual colour. So you would be entitled to *damages* for the reduced value of the case, but you would not be entitled to terminate the contract.

In reality, as we will learn in later in the chapter, these are consumer contracts, so you do have other rights. Our purpose here is just to learn the difference between conditions and warranties.

One of the most complicated provisions is *time*, which sometimes acts like a condition and sometimes acts like a warranty. For example, imagine two driving contracts. The first one is for furniture delivery and the second one is for a minivan driver.

The furniture delivery is supposed to happen at 1 pm on Wednesday. However they are three hours late, and the furniture is delivered at 4 pm. Is that irritating? Absolutely. But they have really only breached a warranty, haven't they? There is no real harm done, and at best you might hope for a refund of some part of the delivery fee.

Imagine, however, that the minivan driver is supposed to collect you, your family, and all of your luggage to take you to the wharf for a 10-day cruise on a luxury liner. Your boarding time is midday, and the ship sails at 1 pm. You book the van for 10 am, thinking this is plenty of time, and they don't arrive until 1 pm. You've missed the boat. Can you see how in this case, time is a *condition*? If the minivan driver was going to turn up so late, they might as well not turn up at all. You've missed the boat.

Parties often clarify whether time is a condition or a warranty by including, in their contract, a statement that **time is of the essence** of the contract. This is a formal way of stating that the parties agree that time is a condition and not a warranty, so any timeframes in the contract will be applied strictly.

time is of the essence (in a contract) the timing of steps taken under the contract is so crucial that if things are done late – even a tiny bit late – this will be a breach allowing the other party to terminate the whole contract

Review 6.2

1 **Analyse** the difference between representation and mere puff.
2 **Examine** the requirements for a signature in relation to a contract.
3 **Assess** the role of an exclusion clause in relation to the Latin phrase *contra proferentum*.
4 **Distinguish** how an oral statement can be intended as a 'representation' or a 'term' of the contract.
5 **Explain** 'implied terms' and identify their unspoken criteria in a contract.
6 **Contrast** the difference between a condition and a warranty.
7 **Extrapolate** the meaning of the term 'time is of the essence' in a contract.

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6.4 Performance of a contract

The easiest way for a contract to be completed is for each party to perform their obligations under the contract. That way, everyone gives the consideration they are supposed to give, and in return they receive the consideration they were expecting to receive, and everyone walks away happy.

The starting position for the law is that in order to demand your payments, you must complete the entire contract. This comes from an old case called *Cutter v Powell*, where a sailor died in the middle of the voyage, and the court said that his widow was not entitled to any payment at all, because he had not completed the job.

Since then, the court has developed a range of ways around this law, so that partial performance will often still entitle a party to partial payment. However, the starting position is that if you want to receive the whole consideration promised by the other party, you must give the whole consideration that you have promised.

Case study 6.6

The case: *Cutter v Powell* (1795) 101 ER 573

Citation

(1795) 101 ER 573 means this is an old English case which was heard in 1795 and is reported in volume 101 of the English reports starting on page 573.

Facts

Mr Cutter was a seafarer who was engaged by Captain Powell as one of the officers aboard a sailing vessel carrying cargo from Jamaica to Liverpool in England. The contract required Cutter to perform his duties 'to the port of Liverpool.' Cutter died aboard the vessel two weeks before arrival and therefore did not fully complete his obligations under the contract.

Legal issues

Was Cutter's widow entitled to his wages or to any portion of his wages?

Decision

For a person to be entitled to receive their payment under a contract, they must complete their own side of the contract absolutely. As a result, Cutter's widow was not entitled to be paid. It should be noted that since this case, a range of exceptions have developed to reduce the unfairness associated with this rule.

***Ratio decidendi* (reason for the decision)**

Parties have the right to choose the words of their contract, which means they are choosing when and how the promises of the contract will be delivered. If they wanted, say, a per-day rate, that is what the contract should have said.

***Obiter dicta* (something to think about)**

While it clearly seems unfair that Cutter's widow was paid nothing for his work, do you support the rule in *Cutter v Powell* as a general principle? Is it not reasonable that people should have to fully complete the work under their contract before they expect to get paid under the contract? What exceptions would you apply?

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Off the record

Until the late nineteenth century, married women in Australia were not allowed to enter into contracts and basically had no legal existence. When discussing the laws of coverture, Sir William Blackstone stated that a 'husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage.' An earlier English judge, Sir Thomas Smith, commented in court that it is 'assumed that the man should be the dominant party because his superior physical strength.' 'Dominance was a man's natural right.'

'God hath given the man greater wit, better strength, better courage, to compel the women to obey, by reason or force; and to woman, beauty, fair countenance, and sweet words, to make the man obey her again for love.' However, this all came to an end in 1884 with the *Married Women's Property Act*, which entitled married women to own property in their own right. South Australia and Victoria passed legislation in 1884, New South Wales in 1879, and the remaining states passed similar legislation between 1890-97.

Figure 6.11 A political cartoon from the nineteenth century lamenting the legal restrictions of becoming a wife

Figure 6.12 Married women could not enter into a contract to purchase property in Australia until the late 1800s.

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6.5 Vitiated contracts

Some contracts, however, cannot be performed for one reason or another – or they shouldn't be performed! The law describes these contracts as **vitiated**. This is pronounced 'vish-ee-ay-ted'.

A number of different things can vitiate a contract.

vitiation when some factor of a contract is identified which means that the contract has become, or has always been, unenforceable

Misrepresentation

We have already learned about the difference between a representation and a term. Representations are statements made by one side or the other before the formation of the contract, with the intention of persuading the other party to enter the contract. 'You will look amazing in that skirt!' would be a representation.

If a party makes a *false* representation, we call this *misrepresentation*. A misrepresentation might possibly result in the party who made the misrepresentation being unable to enforce the contract, but only if:

- there is a false representation of an existing or past fact (so representations about future facts cannot be misrepresentation)
- it was made to the other party, before contract formation, with the intention of persuading them to enter into the contract (so, for example, statements made to someone else entirely, but overheard by the other party to the contract, cannot be misrepresentations)
- it had the effect of inducing the other party into the contract
- it is a statement of fact, not just a statement of opinion.

Misrepresentation comes in three types:

- *Innocent misrepresentation* occurs when the person who makes the misrepresentation genuinely believes what they are saying. They just turn out to be wrong. In these cases, the other party might be able to **rescind** (back out of) the contract, but that's all the remedy they have.
- *Negligent misrepresentation* occurs if a person has a duty to be accurate, but they fail to be accurate. This most often occurs when a person is being paid for their advice. So, for example, if an accountant provides their client with advice about an investment product, they have a duty to ensure that their advice is accurate. If a person enters into a contract due to negligent misrepresentation, they are likely to be able to rescind the contract, and they may also be able to claim *damages* for any loss they have suffered.
- *Fraudulent misrepresentation* occurs if someone is being deceitful, to trick or con someone else into a contract. If a person enters into a contract due to fraudulent misrepresentation, then they can rescind the contract and claim damages. This happened in an important old case called *Derry v Peek* (1889) LR 14 App Cas 337, where a company made false claims to investors in its investment *prospectus*, and so an investor was able to obtain their money back plus damages.

As we will see later in this chapter, in many cases the common law rules of misrepresentation have now been overtaken by a modern statutory equivalent, called *misleading and deceptive conduct*, which is found in the Australian Consumer Law.

rescind/rescission when the court cancels a contract; the court then makes orders which seek to place each party in the same position as they were prior to the contract being made – to return the parties to a situation as though the contract had never been

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Mistake

Sometimes, **parties to a contract** might well make a mistake about some aspect of the subject matter. For example, let's say Gretel agreed to a contract to mow Anna's lawns once a fortnight, for $50 each time. When Gretel made this agreement, she did so in the understanding that Gretel's block was a small suburban block. It turned out, though, that it was much bigger and would take a lot longer. If Gretel had known this, she would have asked for a lot more money!

The real distinction when it comes to mistakes is whether one part has made a mistake, or both parties have made a mistake.

Where only one party has made a mistake, we call this a **unilateral mistake**. Most of the time, if a party makes a unilateral mistake, then unfortunately, that's just bad luck! Otherwise, no contract would ever be enforceable: the party wanting to get out of the contract would just claim to have made a mistake, and that would be that. Generally speaking, if a party enters into a contract, they will be bound by the contract, even if they have made a mistake. So, in the example above, Gretel would be bound by the contract.

Sometimes, however, both parties make a mistake. We call this a **common mistake**. So, let's imagine that Oliver is selling a full set of Legal Studies Exam notes. He doesn't have the notes with him, they're in a storage unit. Ella is very keen to purchase the notes, and so they form a contract. Little do they know, in the interim, there has been a flood event, and the box including the Legal Studies notes has been completely saturated. They have both made a common mistake – the mistake that the notes still exist! In that situation, the contract would be *rescinded* (that is, the court will assume that the contract was never a contract in the first place and will try to return each party to their starting position).

parties to a contract the natural persons or legal persons (usually corporations) who have agreed to the terms of the contract, who have accepted obligations under the contract and who have given consideration for the contract

unilateral mistake occurs when two parties make a contract and one of them (but only one) is mistaken about some key fact relating to the contract

common mistake when two parties make a contract and both of them are mistaken about some crucial fact regarding the contract – both of them make the same mistake – then there is a common mistake; a contract entered into under a common mistake may be rescinded

Frustration

A contract is **frustrated** if some event happens which completely changes the nature of the contract, in a way that makes completion of the original contract impossible, and where neither party was at fault.

If Gabriella's favourite singer was touring Australia for the first time in years, and Gabriella paid $200 for an awesome seat, but then the night of the concert there was a city-wide electricity shutdown, so the concert could not go ahead, then the concert would have been frustrated. Nobody is at fault, but the contract clearly cannot go ahead.

frustration if some unforeseen event occurs, not the fault of either party, and it fundamentally changes the nature of the contract

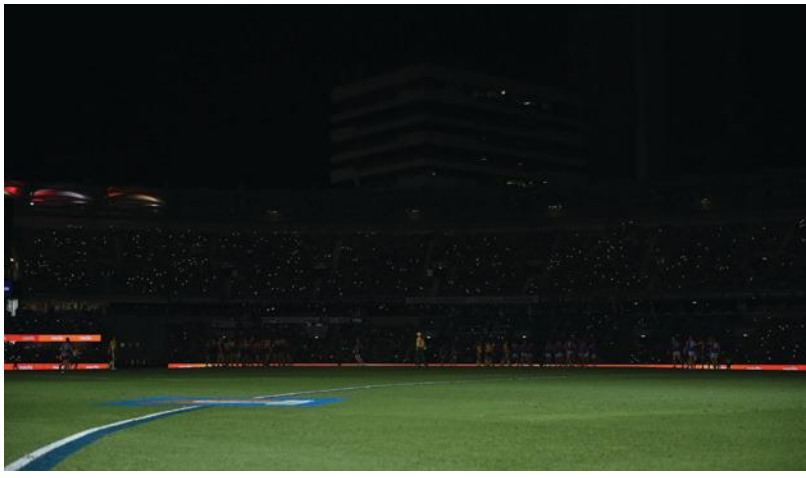

Figure 6.13 A power outage during an AFL match between Brisbane and Melbourne at The Gabba Stadium in Brisbane on 24 March 2023 saw play stop for several minutes before the lights were restored. If the lights had not been able to be restored, this could have been an example of the attendees' contract to see the game being frustrated.

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Illegality

You cannot make a contract to do something unlawful, and you cannot make a contract achieve a lawful outcome in an unlawful way. Some of the examples here are obvious. If Angus wanted to buy a Lamborghini, so he made a contract with a gang to steal one for him we can hardly imagine him going to court to sue them if they don't follow through!

Sometimes, however, **illegality** can be more subtle. For example, if you paid an Uber driver for a trip, and in the course of the trip they exceeded the speed limit, then strictly speaking they have accomplished a legal objective (getting you to your destination) in an illegal way (by speeding). In these cases, the court is much less likely to refuse to enforce the contract.

illegality in contract law the courts will not enforce a contract to commit a crime or a contract to do something which is forbidden by the law; similarly, if a contract is lawful but a party performs the contract in an unlawful way, the court will not allow that party to enforce the contract

Case study 6.7

The case: *Everett v Williams (also commonly called 'The Highwayman's Case')* (1725) 9 LQR 197

Figure 6.14 *Everett v Williams* featured two highway robbers who sought legal advice about splitting their plunder.

Citation

(1725) 9 LQR 197 means this case was not actually reported in an official law reports series, but it was described in a journal called the law quarterly reports in volume nine on page 197.

Facts

Everett and Williams were robbers, or highwaymen, operating in partnership. As partners, they would normally expect to split their profits evenly. Everett, however, formed the view that Williams was taking more than his fair share. Incredibly, he went to court and asked the court to enforce their partnership agreement.

Legal issues

Would the court enforce a contract where the very purpose of the contract was to commit crimes?

Decision

The court refused to give its aid to an agreement of this type. A contract to commit a crime is not an enforceable contract.

Ratio decidendi (reason for the decision)

A contract, by its nature, relies on the law to enforce it. Someone who is acting outside the law can hardly expect the assistance of the law.

Obiter dicta (something to think about)

Can you imagine any circumstances in which it might be considered appropriate for a court to enforce a contract to commit a criminal offence?

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Undue influence and duress

The law's whole approach to contracts assumes that when people make agreements, they do so freely. They might not do it enthusiastically – nobody likes making a contract to have dental work done, right? – but at the end of the day, people are free to make contracts or not to make contracts. If there's no free agreement, then there's no contract.

It makes sense, then, that if someone agrees to a contract, but not of their own free will, the contract should not be enforceable. This usually happens in one of three ways.

The first, called *actual* **undue influence**, happens when one person is in a position of power over another person, and they use that power to persuade or force the more vulnerable person into the contract. Imagine, for example, if you had a rare vinyl record, and your sports team captain made it clear to you that if you didn't sell the record to them, and cheaply, then you would never play on the team again. Even if you agreed to the contract, you wouldn't really be agreeing to the contract, right?

The second, called *presumed* undue influence, recognises that there are certain relationships in society which automatically include differences in power and trust. Examples are parent and child, teacher and student, doctor and patient, solicitor and client, and religious minister and parishioner. If there is a contract between any two people in these circumstances, the law will *automatically presume* that there has been undue influence, and so if the stronger party wants to enforce the contract, they will need to show that they did *not* use undue influence. For example, they might show that they encouraged the vulnerable party to obtain independent advice.

The third situation is called duress. Duress occurs where someone uses improper threats (such as blackmail) to force the other party into a contract. The only complicated aspect of duress is that some types of threats are *normal commercial threats*, and these do not amount to duress.

For example, if you go to a restaurant and the food is terrible, you might say, 'If you don't reduce the bill, I will never eat here again!' This is a threat, but it is not duress, because it is a normal commercial threat.

undue influence when a party in a position of strength or authority uses (or might be seen to be using) their position to force or coerce a vulnerable party to agree to a contract

Unconscionability

The final reason why a court might not enforce a contract is if the contract is **unconscionable**. Conduct is unconscionable if it is so harsh, oppressive or awful, that it is *contrary to good conscience*.

In contract law, unconscionability usually occurs when one party has a particular vulnerability which reduces their ability to look after their own interests when making a contract, and the other party knows about the vulnerability and takes advantage of it. A contract made under those circumstances is unlikely to be enforceable.

The best way to explain unconscionability is by looking at the most famous example, a case called *Amadio v Commercial Bank of Australia* (1983) 151 CLR 447. In this case, Mr and Mrs Amadio were from Italy, but living in Australia. Their son needed a business loan, and he took his parents along to the bank for them to put their house up as security for the loan. Mr and Mrs Amadio spoke very little English, and they did not understand what they were signing. The bank officers knew that they had limited English, but went ahead with the contract anyway, using the son as a translator.

Later, the son's business went bust, and the bank tried to take the parents' house. The court refused to enforce the guarantee contract, because the conduct of the bank had been unconscionable.

unconscionability if one person takes advantage of another person's vulnerability or disability in a way that is contrary to good conscience; the court is likely to not enforce an unconscionable contract

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Figure 6.15 Purposely taking advantage of someone's lack of understanding, including language comprehension or technical skills, can be a form of legal unconscionability.

Review 6.3

1 **Describe** the different types of misrepresentation in contract law.
2 **Identify** the statutory version of misrepresentation.
3 **Determine** the term in a contract law situation where both parties make a mistake.
4 **Explain** what it means to say that a contract is frustrated.
5 Consider a situation where a teacher was to make a contract with a student. **Justify** which rule of contract law would apply.

6.6 Breach of a contract

Let's say, however, that we have a contract, and none of the conditions outlined earlier are present. There is no reason the contract should not be performed – but one party, for whatever reason, does not perform their obligations. If someone does not deliver on their obligations under the contract, they have *breached* the contract. There are three types of **breach of contract** that need to know: actual breach, anticipatory breach and repudiation.

Actual breach

An actual breach occurs when one party is supposed to have performed their obligation under the contract, but they have not. So, for example, if Zhang agrees to tutor Emma in legal studies for $30 an hour, and after the lesson is complete, Emma refuses to pay, then Emma has committed an actual breach.

Anticipatory breach

Anticipatory breach occurs when one party to the contract identifies that the other party to the contract is not going to be *ready, willing and able* to perform their obligations under the contract. If the obligation being breached is sufficiently serious, then rather than waiting for the breach to become an actual breach, the innocent party can terminate the contract.

Let's imagine Chelsea had made a contract with a dressmaker for her formal dress. The contract said the dress had to be ready the day before the formal. A week before the formal, when the dress was only half made, she learned that the dressmaker had flown interstate for a sudden family emergency. Strictly speaking, the dressmaker has not breached the contract until she fails to produce a dress on the day before the formal – however by then, it may be too late to find another dress! Chelsea would be entitled to terminate the contract for anticipatory breach, and to go looking for another dress instead.

breach of contract if one party has failed to complete their obligations under the contract

anticipatory breach if it becomes clear that a contract is going to be breached, the innocent party need not wait for the breach to actually occur, they can anticipate the breach and take steps to terminate the contract and seek damages

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Case study **6.8**

The case: *Hammer & Barrow v Coca Cola & Others* [1962] NZLR 723

Citation

[1962] NZLR 723 means this is a New Zealand case printed in the 1962 volume of the New Zealand law reports starting on page 723.

Facts

Hammer and Barrow were contracted to manufacture many thousands of yo-yos featuring the Coca Cola logo. The first batch of about 85 000 yo-yos was mostly defective, and the yo-yos could not be sold. Rather than waiting to see if the later batches would be better, Coca Cola terminated the contract.

Legal issues

Did Coca Cola have the right to terminate the contract halfway through, even though the remaining yo-yos could potentially have been satisfactory?

Decision

Under the doctrine of anticipatory breach, if it appears that a party is not ready, willing and able to complete its obligations under the contract, the innocent party is not obliged to wait until the time comes for final performance. The innocent party can terminate immediately.

Ratio decidendi (reason for the decision)

If a party is clearly not going to deliver their obligations under the contract, there is no point in the other party waiting and incurring further harm when they could act quickly and avoid it.

Obiter dicta (something to think about)

If a party terminates a contract due to anticipatory breach, do they take the risk that, if a court finds that the other party was ready, willing and able to complete the contract, the terminating party might themselves be in breach? What practical steps might a party take in order to avoid this risk?

Video 6.7 *Hammer & Barrow v Coca Cola & Others* [1962]

Figure 6.16 *Hammer & Barrow v Coca Cola & Others* saw a court battle between Coca Cola and a yo-yo manufacturer.

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Repudiation

Repudiation is similar to anticipatory breach. Repudiation occurs when one party states, or otherwise demonstrates, that they are no longer willing to be bound by the contract. In other words, they *repudiate* the contract. In a nineteenth century case called *Hochster v De La Tour* [1843–1860] All ER Rep 12, in April, Mr De La Tour hired Mr Hochster as his personal servant for a three-month tour of Europe commencing in June. A month later, though, De La Tour wrote to Hochster to say that his services would not be required. Hochster successfully sued on the basis that De La Tour had repudiated the contract by plainly stating that he no longer intended to be bound by it.

If a contract has been breached – whether by an actual breach, an anticipatory breach or by repudiation – then the innocent party will be entitled to a remedy.

repudiation if a party makes it clear, by words or conduct, that they are no longer ready, willing or able to complete their obligations under a contract

Review 6.4

1 **Identify** the term for when a party has failed to complete their obligations under a contract, and their obligations have fallen due.
2 **Determine** a situation between parties for when an anticipatory breach of a contract is said to occur.

6.7 Remedies

If one party breaches a *condition* of the contract, then we have already learned that the innocent party will have the right to terminate the contract. In addition, the primary form of remedy if a contract has been breached is called 'damages'.

Damages

Damages quite simply refer to the payment of an amount of money in compensation for the harm caused by the breach. When calculating the amount of damages, the court will try to calculate an amount of money which will put the innocent party in the same position they would have been in if the contract had properly been completed. So, the innocent party will not only be compensated for the value of the consideration they gave, they will *also* be compensated for any harm that was caused to them and any profits or benefits they expected to receive under the contract.

Sometimes the contract itself will set out the damages to be paid in the event of a breach. These are called *liquidated damages*. As long as the liquidated damages represent a fair attempt to value the harm caused by the breach, the court will enforce the liquidated damages term of the contract.

The Rule in Hadley v Baxendale

Sometimes, a breach of contract might cause quite unexpected types of harm. For example, if Emily ordered an Uber to take her to an audition for a film role, but it turned up late, and she missed out on the part, she might also have missed out on the chance to impress agents, and she might therefore have missed out on bigger, better parts, and ultimately she might have missed out on the chance to have a glamorous international career as a star actress, all because of a late Uber!

But then again, she might not. It would not really be fair to demand that the Uber driver pay her $25 million in lost future earnings from her career as an actress. The damage is too *remote*.

To work out whether damage is too remote, courts apply the rule established in a case called *Hadley v Baxendale* (1854) 156 ER 145. This rule says that harm should be compensated if it *arises naturally, according to the usual course of things, from the breach itself* or if the form of harm *may reasonably be supposed to have been in the minds of the parties* at the time the contract was formed.

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So, for damage to be compensated, it has to be the normal and expected type of damage from that breach; or alternatively, it has to be something that the parties had discussed when the contract was formed.

On that basis, while Emily might be entitled to *some* damages to make up for the delay, it's hardly normal and expected for a late Uber to prevent someone becoming a famous actress; and there is nothing to suggest she ever told the driver, when making the booking, that if he was late, it would ruin her international acting career.

Video 6.8 *Hadley v Baxendale* (1854)

Mitigation

If a person has suffered some form of harm as a result of a breach of contract, the innocent person is required to do what they can to **mitigate**, or reduce, the harm they suffer.

Let's imagine that Wyatt has a contract with a plumber to renovate his bathroom. Something goes terribly wrong, and suddenly water is beginning to flood into the next room, where all of Wyatt's textbooks are sitting in piles on the floor. If Wyatt didn't pick the textbooks up, then any water damage to them might not be compensated, because he had the chance to mitigate the harm, but he did not do so.

If the innocent party incurs costs to mitigate the damage, then those costs can be recovered as damages. In a case called *Bellgrove v Eldridge* (1954) 90 CLR 613, builders built a house on unstable foundations, and the house was unsafe and uninhabitable. Mrs Eldridge had the original house knocked down, the foundations repaired, and the house rebuilt – all at the cost of the builders.

mitigation if one party breaches the contract and it causes harm, the other party is not allowed to stand still and allow the harm to get worse

Figure 6.17 It is not considered natural and in the usual order of things that arriving on time to a local theatre audition would lead to jet setting off to worldwide riches and fame. Whereas arriving late could mean that they would lose a good chance of getting that specific role and wasting the cost of the trip.

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Specific performance

Sometimes, no amount of money will be adequate to provide compensation. For example, let's imagine you had a contract to purchase a beautiful home block, a short distance from town, with wonderful views of the ocean. If the other side refused to follow through with the agreement, they might well have to pay you damages, but you still wouldn't end up with that beautiful home block, a short distance from town, with wonderful views of the ocean.

In these circumstances, where damages are going to be inadequate to provide compensation, the court may order **specific performance** of the promise. So in the situation above, the court may order the defaulting party to follow through with the contract and to sell you the block of land. In this situation, the sale of the land – the specific performance of the contract – would be the only adequate remedy.

Injunction

The final remedy injunction is the opposite of specific performance. Specific performance is an order by the court to do something; injunction is an order by the court *not* to do something.

So, to use the same example, if the other party didn't sell you the beautiful home block because they had decided, instead, to sell it to someone else for more money, the court might issue an injunction prohibiting them from selling the house.

specific performance an equitable remedy granted in contract law, where the court requires the party in breach of a contract to perform obligations under that contract (rather than merely paying damages)

Review 6.5

1. **Explain** the term 'liquidated damages'.
2. **Create** a hypothetical situation to propose a legal case where the damages to the party are too remote for the court to establish harm.
3. **Explain** what it means to say that a party has a duty to mitigate.
4. **Describe** a situation for when the remedies of a specific performance or injunction should be considered.

6.8 The Australian Consumer Law

When someone goes into a shop and buys some groceries, or try on new clothes or go into a salon to get their nails done, we don't really think about the fact that they are entering into a contract. And yet, now that you know how contracts work, you can see that they really are: the hairdresser gives in consideration their skill and work cutting their hair, and the client gives in consideration the required payment.

In fact, it is probably fair to say that most people engage in far more of these *consumer contracts* than any other type of contract. However, these contracts have a number of very important features:

- There is often a very strong *imbalance of power* between the consumer and the supplier. The supplier might be a major multinational corporation with billions of dollars and a team of fulltime lawyers, whereas the consumer might be an individual student.
- There is often an *imbalance of knowledge* between the parties. Consider, for example, the purchase of a jar of peanut butter. Do you really know what's inside it? Or how it is made? Or whether the more expensive types are any better than the cheaper ones?

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- The transactions are usually not negotiated. They are offered on a 'take-it-or-leave-it' basis. So the consumer cannot protect themselves by asking for favourable contract conditions.
- The transactions are usually for comparatively small values. The purchase of a TV – even a quite expensive one for, say $2000 – is not going to be worth taking legal action over, even if it doesn't work, because the legal action would cost far more than the TV.

In order to provide protection for consumers, state governments in Australia have for a long time had consumer protection legislation. In 2010, the different state governments came together to create the Australian Consumer Law, which applies to all states and territories. The Australian Consumer Law can be found as Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

Consumers and consumer transactions

The Australian Consumer Law mostly applies to *consumer transactions*. Section 3 of the Australian Consumer Law says that a person acquires goods or services as a consumer if any of the following apply:

- the amount paid or payable for the goods or services is no more than $100 000
- the goods or services were of a kind ordinarily acquired for personal, domestic or household consumption
- the goods are a vehicle or trailer for use on public roads.

However, goods and services are *not* acquired as a consumer if they are intended to be re-supplied (that is, sold to someone else) or if they are to be transformed in trade or commerce (so a person who buys items from a hardware store for private use is a consumer; a tradesperson who buys those same items for use in their work is not a consumer).

Consumers who acquire goods and services obtain protections under the Australian Consumer Law. Some of these are discussed below.

Misleading and deceptive conduct

Section 18 of the Australian Consumer Law prohibits 'conduct that is misleading or deceptive or is likely to mislead or deceive'.

This is similar to common law misrepresentation, which we have already discussed, but is more extensive. Specifically, it is not actually necessary for a person to have been *actually misled*. The conduct is unlawful even if it is merely *likely* to mislead or deceive.

Consider the example of *ACCC v Dell Computers* [2002] FCAFC 434.

Case study **6.9**

The case: *Australian Competition and Consumer Commission v Dell Computers* [2002] FCAFC 434

Citation

[2002] FCAFC 434 means this case was heard in the Full Court of the Federal Court of Australia in 2002 and was case 434 for that year.

Facts

Dell Computers sold computers by means of television and newspaper advertisements. The price advertised for their computers was inexpensive, but did not include the delivery fee, which was expensive. That delivery fee was included in the small print of the ad, or not explicitly stated at all.

Legal issues

Was it misleading and deceptive conduct for Dell to hide its delivery fee?

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Decision

This was misleading and deceptive. Even though the delivery fee was included, it would not be expected that most normal people would read all of the fine print of an advertisement.

Ratio decidendi (reason for the decision)

To determine misleading and deceptive conduct, the court should first consider who the intended target or market was, and then consider how they would interpret the conduct.

Obiter dicta (something to think about)

Have you ever been deceived, or felt like you were deceived, by advertising? Would that situation have counted as misleading and deceptive conduct under the Australian Consumer Law?

Video 6.9 *Australian Competition and Consumer Commission v Dell Computers* [2002]

Figure 6.18 *Australian Competition and Consumer Commission (ACCC) v Dell Computers* saw the ACCC take on Dell Computers in the Federal Court of Australia.

Unfair contractual terms in standard form contracts

In many cases, a consumer contract or consumer transaction goes ahead without any need for a written contract at all. Most of the time, for example, a simple retail sale would not require a written contract. However, in other situations, contracts are much more common.

For example, if someone obtains a new phone or internet service or if they put their car in for a service, they are likely to be asked to sign a contractual document. In many cases in online transactions, consumer will be asked to click 'agree' in relation to terms and conditions.

Most of the time, consumers do not read those contractual documents, even when the consumers are also lawyers! The Australian Consumer Law

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understands this, and section 23 of the Australian Consumer Law makes *void* any unfair terms in standard form contracts. In other words, any unfair terms will not be enforceable.

Under section 24 of the Australian Consumer Law, a term is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations
- it is not reasonably necessary to protect the stronger party's legitimate interests
- it would cause detriment to the weaker party.

Case study **6.10**

The case: *Director of Consumer Affairs (Vic) v Trainstation Health Club* [2008] VCAT 2092

Figure 6.19 *Director of Consumer Affairs v Trainstation Health Club* revolved around the use or non-use of a gym towel by a consumer.

Citation

[2008] VCAT 2092 means this case was heard in the Victorian Civil and Administrative Tribunal and was case 2092 for that year.

Facts

Trainstation Health Club signed new members up to a contract which compelled the member to comply with all of the rules of the gym, and which allowed the club to terminate the contract if they did not. A member consistently failed to use a towel on the equipment, and the contract was terminated.

Legal issues

Was this an unfair term in a consumer contract?

Decision

The term was not unfair, because it was reasonably necessary to protect the legitimate interests of the gym, by allowing the gym to be sure equipment was not left wet or sweaty and thus requiring the next user to clean it.

Ratio decidendi (reason for the decision)

Even quite harsh terms may sometimes be necessary and proper in order to protect legitimate interests; otherwise, they are void.

Obiter dicta (something to think about)

In 2023, the Optus network suffered a major service outage, and customers were without phone or internet service for some hours. This affected customers' business and personal activities. Would it be fair if the Optus contract included a provision which said they could not be held responsible for interruptions in this service?

Video 6.10 *Director of Consumer Affairs (Vic) v Trainstation Health Club* [2008]

Consumer guarantees

The prohibition of unfair terms in standard form contracts is all about *removing* certain terms – the unfair ones. However, the Australian Consumer Law also *inserts* certain provisions into consumer contracts for the protection of consumers. We call these the consumer guarantees. These matters are held, as a matter of law, to be part of every consumer transaction, whether the parties like it or not – they cannot even be removed by agreement between the parties!

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The consumer guarantees for consumers obtaining goods are the following:

- A guarantee that the seller has the right to sell the goods they are selling.
- A guarantee that once the consumer buys the goods, they will have outright ownership (undisturbed possession) of the goods.
- A guarantee that the goods will be of acceptable quality; that is, that they will be fit for purpose, acceptable in appearance, free from defects, and safe and durable.
- A guarantee that the goods will be fit for any purpose the consumer has described when buying the goods, even if that would not be the normal purpose of the goods.
- A guarantee that goods bought by description (where the buyer cannot select the item for themselves) will meet the description.
- A guarantee that repairs and spare parts will be reasonably available where appropriate.

You can see that these are powerful guarantees, to help protect consumers when they purchase goods. There is a similar, but slightly shorter, list of guarantees for services. They are the following:

- A guarantee that services will be rendered with due care and skill.
- A guarantee that the services will be fit for their purpose.
- A guarantee that services will be performed within a reasonable time.

Combined, the consumer guarantees provide protection against the *caveat emptor*, or 'buyer beware', approach that prevails in many other countries. However, these guarantees only relate to contracts within Australian law. Many Australian consumers have learned, to their cost, that purchases from cheap websites overseas often result in poor quality products which do not at all match their advertising.

Defences

If a supplier is charged with an offence under the Australian Consumer Law, there are a number of defences available to them. For example, under section 207 of the Australian Consumer Law, a supplier can rely on a defence of *reasonable mistake of fact* if they relied on information provided to them by another party, such as a manufacturer. Under section 208, a supplier is not responsible for defects which resulted from a third party's conduct, beyond the control of the supplier. Under section 209, the defendant has a defence if the prosecution is for the provision of false information (so, false advertising), but all the defendant did was publish the advertisement based on information given to them. Finally, under section 210, the supplier has a defence if all they did was import the goods from an overseas supplier for the purpose of resale.

These defences *do not* relieve the supplier of its obligations towards the consumer; they only assist the supplier if they are also charged with offences under the Australian Consumer Law.

Safety and consumers

We have learned that one of the consumer guarantees is that products will be 'safe and durable'. However, the Australian Consumer Law includes additional provisions related to public safety.

First, the seller of a product can issue, under the Australian Consumer Law, a *voluntary recall* of goods which may cause injury to a person or goods which fail to meet a relevant safety standard. The Australian Competition and Consumer Commission publishes guidelines for suppliers on when and how they should do this. The recall must be widely published, and consumers must be compensated or the goods repaired for free.

Second, the responsible minister (on the advice of the Australian Competition and Consumer Commission) can issue a *compulsory recall* notice, which requires suppliers to repair, refund or replace any goods which are identified as dangerous.

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Product Safety Recall

Bouncealot 3000 Pogo Stick
BA3000
Sold at Barry's Sports Emporium May 2019 – June 2021

Defect: In some circumstances the springs on the pogo stick can collapse causing serious injury to the user, or to those in close proximity to the pogo stick

Hazard: If the defect occurs while in use, the pogo stick can collapse causing serious injury to the user, or to those in close proximity to the pogo stick

What to do: Consumers should immediately stop using the pogo stick and contact their nearest Barry's Sports Emporium store to receive a replacement pogo stick or a full refund of the purchase price

Contact details: You can contact your nearest Barry's Sports Emporium store by phoning 1800-POGO Mon–Fri 11:00 a.m. – 11:30 a.m.
via email at barrysdodgysports@geemail.com
or go to www.barryssportsemporium.com.au

See product.safety.gov.au for Australian product recall information (and for real product recall notices ☺)

Figure 6.20 An example of a public-recall notice

Australian Competition and Consumer Commission

The Australian Consumer Law is implemented by a specialist body we just mentioned, called the Australian Competition and Consumer Commission (ACCC). The ACCC has a number of powers under the Australian Consumer Law. Some of the most significant are as follows:

- Conducting business and consumer education campaigns to ensure that businesses are aware of their responsibilities under the Australian Consumer Law and to ensure that consumers are aware of their rights.
- Working cooperatively with businesses, consumer groups and other stakeholders to address consumers issues in a systemic way. This sometimes results in industry codes or other measures which stop consumers from running into difficulties in the first place.
- Taking enforcement action against suppliers who are not complying with their responsibilities under the Australian Consumer Law, including, for example, by requiring the supplier to make an *enforceable undertaking*. This is a formal agreement between the ACCC and the supplier, which can result in legal action if the supplier breaches it.
- Taking legal action against suppliers, including by acting on behalf of *all* consumers. The ACCC tends to take legal action as a final resort, but it has the power to seek court orders on behalf of the community generally (See Case study 6.9 *ACCC v Dell Computers*).

What the ACCC cannot typically do is take action on behalf of an individual person with a grievance. A person who believes that a supplier has breached the Australian Consumer Law in relation to some specific goods or services must still take legal action on their own, but at least they will have the consumer guarantees on their side.

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Review 6.6

1 **Explain** why consumers require special protection when making contracts to acquire goods or services.
2 **Explain** why honey bought by a chef at a wholefood store (for making a honey glaze at a restaurant) is not classified as goods acquired by a consumer.
3 **Distinguish** the differences between 'misrepresentation' and 'misleading and deceptive conduct.'
4 **Determine** the status of an unfair term in a standard form consumer contract.
5 **Justify** the purpose of consumer guarantees for the acquisition of goods.
6 **Devise** the steps a manufacturer can take when they realise their products have a dangerous fault.
7 **Document** the powers and limitations of the ACCC.
8 **Define** industry codes and comment on their role using at least one real-life example.

6.9 Industry codes

The ACCC is also responsible for regulating mandatory and voluntary *industry codes*. An industry code is a set of rules developed either within an industry or between an industry and other stakeholders, setting out specific actions which operators in that industry will take in order to implement the Australian Consumer Law. The Australian Consumer Law itself is written to apply across the entire economy, and industry codes apply the provisions more specifically.

Some areas of economic activity, such as franchising, electricity and horticulture, have mandatory codes of conduct. Perhaps the most visible of these is called the *Unit Pricing Code*. Have you ever noticed that when you are in a supermarket, the price tags will not only give the price for each item, but also the price for standard units of the item? For example, the price tags for soft drinks will give different prices for cans and bottles of different sizes, but then they will all show a price per 100 mL of each soft drink. This enables consumers to compare the pricing of the separate items without needing to perform complicated mathematics.

Grocery retailers subject to the unit pricing code must display those labels. If they do not, the ACCC can take enforcement action against them.

It is also possible for industries to develop an industry-led voluntary code of practice. This is seen as an attractive option, because if there is a voluntary code in place, governments might be less inclined to impose a mandatory code. The ACCC cannot enforce a voluntary code, but it can provide assistance and support to industries attempting to create their own code. The result of these codes – mandatory and voluntary – is a fairer and more transparent consumer market for goods and services.

Remedies under the Australian Consumer Law

The aim of the Australian Consumer Law is to prevent consumers from needing to take court action against suppliers, by ensuring that suppliers behave properly in the first place.

However, when this does not happen and court action is necessary, the Australian Consumer Law includes a number of remedies which the court can order. Some are very similar to the common law remedies we have discussed previously, but they are broader in extent and operate more favourably towards the consumer.

The type of remedy depends very much on whether the problem with the product or service is *major* or *minor*.

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If the problem with the product or service is minor, the supplier must be given the opportunity to repair the product or remedy the service. In other words, the supplier must be given the chance to put things right. If they cannot do so, or do not do so, the consumer is entitled to reject the goods and obtain a refund.

If the problem with the product or service is major – that is, if they would not have purchased the item if they knew of the failure – then the consumer is entitled to a refund or replacement of the item. Repairing the item is still a possibility here if the parties agree.

These rights are available whether or not the item is in its original packaging.

In addition, in the case of a major failure, the consumer is entitled to commence legal action against the supplier or *the manufacturer* of the goods, in order to obtain damages for any loss that was 'reasonably foreseeable' at the time of the purchase.

Reflection questions on punishment and sentencing trends

Common law vs. legislation in contract law

In this chapter, you learned that there is no single document which sets out all of contract law in Australia. There is no 'Contracts Act'. Rather, contract law is built up from the judgments of the court in many different cases over a period of centuries. The only way to properly understand contract law is to take the time to learn about all those cases and the points of law for which they stand.

This is not the case in many other countries. In the United States, for example, there is a document called the '2nd Restatement of Contract', which sets out essentially all contract law for the United States. Even in Australia, some pieces of legislation such as the Australian

Figure 6.21 Even if you do not buy an additional warranty for an electrical appliance, like a blender, from a store, there is an implied consumer right that it should work as expected for a reasonable amount of time. So if the blender didn't blend, even if you bought it on sale and threw out its packaging, you would be entitled to return it to swap for a blender that did work or to get your money back.

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Consumer Law set out rules for contracts, but this simply makes matters even more confused, because now some contract law comes from the cases and some of it comes from statute.

Research 6.1

As a class, or in small groups, **consider** whether contract law in Australia should be codified; that is, where the contract law handed down through cases should be consolidated into a single piece of legislation.

1 Can you see any risks that would follow from making such a substantial change after hundreds of years?
2 What would you see as being the key benefits?
3 Overall, would this be a worthwhile process?

Young people and capacity to contract

During the discussion of formation of contract in this chapter, you learned that one of the five elements of contract formation is capacity, and that any person who has not reached the age of 18 years does not have full capacity to enter into contracts.

On the one hand, it might be argued that this rule provides protection for young people who are relatively inexperienced in the world so that they cannot be taken advantage of. On the other hand, many people now regard young people aged 16 or even 14 as having essentially full adult capability. There are arguments, for example, that 16-year-olds should have the right to vote. At what age do you consider a young person should have the full capacity to enter into contracts?

Under the present system of law, young people can intervene to binding contracts for 'necessaries', which are suitable to that person's age and station in life. Do you think the concept of necessaries is helpful? If you do consider that this is a helpful concept, do you think that in modern Australia it makes sense to talk about a young person's 'station in life'? What do you think necessaries should mean in modern Australia (that is, what types of contracts do you believe a young person should be held to in modern Australia)?

Research 6.2

As a class, or in small groups, **develop** a briefing note for the Minister for Youth or Young People outlining any law reforms you believe necessary to enable young people to participate in contracts or commerce while also providing them with necessary protection.

Should contracts be in writing and signed?

There is a common misconception that agreements are somehow not contracts if they are not in writing and if they have not been signed. This is, perhaps, because most people would consider entering into a contract to be an important thing, creating rights and obligations, and that a decision of significance ought to be recorded in writing.

On the other hand, there are millions of everyday transactions such as retail purchases, where the contract is formed and then executed in an instant, and the requirement for writing would merely create delay and additional expense.

At the same time, a great number of contract disputes which result in people needing legal assistance arise from contracts which were not in writing, and where the parties are now in dispute as to the actual content of the contract.

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Research **6.3**

1 As a class, or in small groups, **consider** whether there are any contracts which in your view must be recorded in writing.
   - **a** How should the law distinguish between contracts which must be in writing and contracts where the law recognises that the requirement for writing would be an unnecessary imposition?
   - **b** Is there a middle ground where it ought to be left to the discretion of individuals as to whether they wish to record their contract in writing?

2 Having done this, move on to **consider** the question of signature.
   - **a** Should it be the case that any contract which is recorded in writing should require a signature?
   - **b** Recent years have seen an increase in online or electronic contracts and the development of various electronic means of recording a signature. Do you feel confident that electronic signatures are sufficiently secure?
   - **c** Are electronic signatures vulnerable to hacking or simply misuse by people such as family and friends using one another's devices?
   - **d** If conducting an electronic transaction, can we ever truly be sure who we are dealing with on the other side?
   - **e** Are there any improvements that you can suggest to the process of recording electronic signatures?

Figure 6.22 Electronic signatures help avoid the need for printing and scanning contracts, but at what other potential security costs?

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Warranties and conditions

The words 'warranty' and 'condition' are both likely to create confusion when it comes to contract law, because both words are used by people talking about contracts, but they are used to convey entirely different meanings to their technical meaning in contract law.

Most people understand a warranty to be a guarantee provided by the manufacturer of an item that it will be repaired or replaced in the event that it ceases to function within a period of time (often 12 months). In fact, as you have learned, in contract law warranty is used to refer to a term of the contract which should be complied with, but where non-compliance is somewhat less concerning and is unlikely to result in the innocent party having the right to terminate the contract.

Similarly, the word condition is used by most people in everyday life when they refer to the 'terms and conditions' of a contract. In that sense, the phrase terms and conditions simply refers to all the detailed provisions of the contract, which most people do not read. In reality, the word condition refers to a term of the contract which is so significant that a failure to comply with that term would allow the innocent party to terminate the contract and seek damages.

Research 6.4

Do you think the distinction between warranties and conditions makes sense? **Determine** whether there are other ways in which this issue could be handled. For example, by allowing any breach of a contract to form the basis for **termination** or by considering all of the circumstances of the breach when determining whether it would be appropriate for the innocent party to terminate the contract.

termination of an offer if an offer has not yet been accepted, the person making an offer can withdraw the offer by communicating the withdrawal of the offer to the party who has received the offer; once withdrawn, an offer cannot be accepted

Misrepresentation and puffs

One of the most unusual aspects of contract law is that being untruthful is acceptable, but only if you are so outrageously untruthful that nobody should believe you in the first place. You have learned that outrageous statements, which nobody could be expected to believe are known as 'puffs'.

What this means is that if two salespeople are describing a car which is known to have engine issues, the salesperson who says 'this car is the best and fastest car on the streets' is doing nothing wrong at law, while the salesperson who says 'this car is reliable and can be expected to take you where you need to go' might well be making a misrepresentation and exposing themselves to be sued. Does this seem reasonable to you?

It can also sometimes be complicated to determine whether a statement is in fact a puff or whether it is a misrepresentation. For example, a person describing a specialised product (even something as simple as a golf club) might well describe it in a way that any person familiar with golf would recognise as a joke, but which might be taken seriously by somebody who was a complete novice.

Finally, as you can imagine, the existence of the concept of a puff provides an excuse for parties who wish to engage in misrepresentation in order to entice an unwary party into a contract, but who then immediately claim that their statement was a puff when the other party realises it was untrue.

Research 6.5

1 As a class, or in small groups, **consider** whether it is realistic to ask commercial operators to ensure that they only ever say things that are absolutely true in their commercial communications.
2 On the other hand, **consider** what measures could be put in place to prevent the existence of puffs from being abused.

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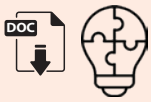

6.10 Topic review

Topic summary

- Contracts form the basis of the modern commercial world as they allow people to exchange money for goods and services and cooperate on large ventures.
- A contract is an exchange that is enforceable by the courts where two or more parties make an agreement to exchange either money, things, services, promises or rights.
- Under the Commonwealth, the Australian Consumer Law protects consumers with consumer guarantees to ensure they are treated fairly and the products and services they purchase are safe and fit for purpose.
- For a contract to be enforceable by the court, the following five elements are essential for contract formation: the capacity of each party, whether an agreement has been made, an exchange took place (consideration), there was the intention to create legal relations, and the agreement was certain and complete.
- An invitation to treat occurs before a contract has been formed, and functions as an announcement that someone wants to enter into a contract, like an advertisement, to provoke an offer (or counteroffer).
- Contracts can be accepted through various forms of conduct, including a verbal agreement, written agreement, shaking hands, paying money, clicking 'accept' on a browser or app, or just doing what was promised in the offer.
- Representation is a statement that one party says about their goods or services to persuade the other party to enter into a contract; however, it falls under strict guidelines to avoid misrepresentation or misleading and deceptive conduct. Mere puff does not fall under the same scrutiny as it is not meant to be believed literally.
- It is not feasible or appropriate to include every term in a contract, and while some terms are necessary, called express terms, there are many implied terms as well. The law will imply a term into contract if it is reasonable and equitable, necessary to give business efficacy to the contract, so obvious that 'it goes without saying' capable of clear expression, and must not contradict any express term of the contract.
- In contract law, a warranty refers to a term of the contract which should be complied with but is less important, and if breached will not likely terminate the contract, while a condition is a term of the contract which is so significant that if breached, the innocent party would be entitled terminate the contract and seek damages.
- A number of things can affect the performance and completion of a contract, where the court might not enforce it, including vitiated contracts (with misrepresentation, whether innocent, negligent or fraudulent), unilateral mistakes, common mistakes, frustration, illegality, under influence, under duress and unconscionability.
- When a contract cannot be performed or completed, a breach occurs, which will fall under the category of either an actual breach, an anticipatory breach or repudiation.
- If one party breaches the conditions of a contract, the innocent party may seek remedies through the court for the value of the contract and for any harm caused to them in the form of damages (usually a payment of money in compensation), specific performance (enforcing the other party to complete their obligations in contract) or injunction (prohibit the other party from doing something or order them to do something).

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- The Australian Competition and Consumer Commission has a number of powers under the Australian Consumer Law to ensure consumers are aware of their rights through education and that businesses act responsibly by enforcing industry codes and taking legal action when supplier breaches occur.

Short-response questions

1 **Identify** the reasons why the law has evolved through judicial precedent and the introduction of statutes since the concept of *caveat emptor*. Provide examples.
2 **Explain** the role of sales talk and the implications on a contract.
3 **Identify** the difference between fraudulent misrepresentation and negligent misrepresentation.
4 Within a contract there are expressed terms and implied terms. **Define** each and provide an example to demonstrate your understanding.
5 Exclusion clauses are often used to waive liability. **Explain** the impact on a contract and in what circumstances exclusion clauses can be considered invalid.
6 **Compare** and **contrast** the concepts of invitation to treat and offer. **Explain** the impact on a contract.
7 A condition has a significant impact in comparison to a warranty when determining the remedy for a breach. **Explain** the terms and provide an example scenario to demonstrate your understanding.
8 **Analyse** Sources 1 and 2 following to determine the nature and scope of the legal issue and **examine** two viewpoints. **Evaluate** the purpose of contract law and consumer protection.

Source 1

Consumers don't understand smartphone contracts

Paul Harrison, *The Conversation*, 3 October 2016, [excerpt]

Consumers are confident they understand the contract they sign when buying a smartphone, but our research shows they don't comprehend these documents very much at all. In fact the more information they are provided with the worse their understanding. [...]

And at a policy level, it's unrealistic to expect consumers to have anything more than a moderate understanding of even the easiest contractual elements of a legal agreement, and highly unrealistic to expect that people can respond to difficult or complex issues that might arise from the operation of that agreement. [...]

Figure 6.23 Research has shown that many consumers don't understand their smartphone contract.

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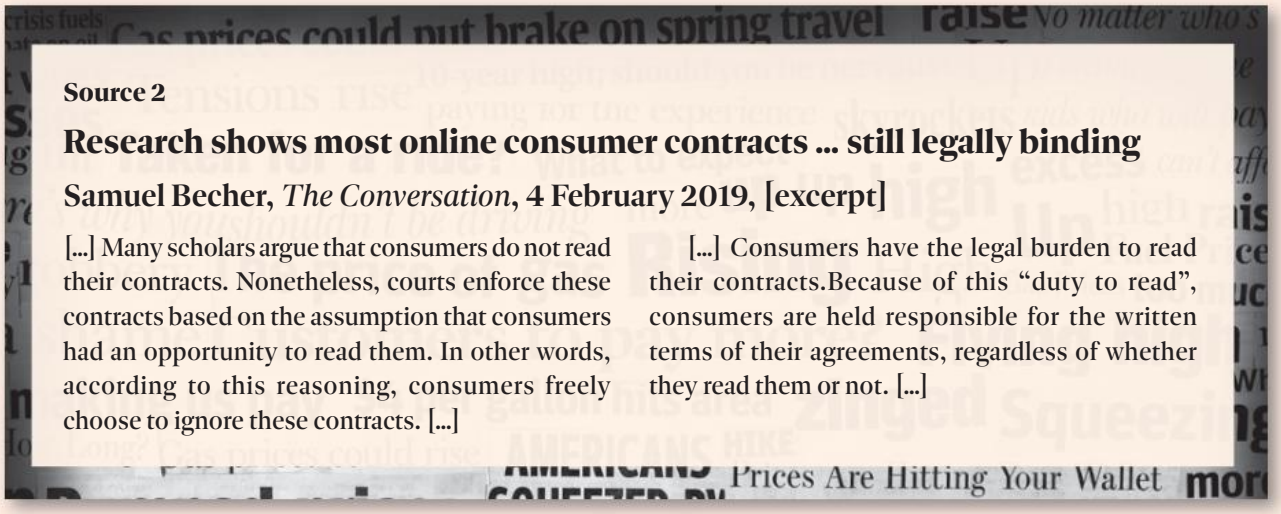

Source 2

Research shows most online consumer contracts ... still legally binding

Samuel Becher, *The Conversation*, 4 February 2019, [excerpt]

[...] Many scholars argue that consumers do not read their contracts. Nonetheless, courts enforce these contracts based on the assumption that consumers had an opportunity to read them. In other words, according to this reasoning, consumers freely choose to ignore these contracts. [...]

[...] Consumers have the legal burden to read their contracts.Because of this "duty to read", consumers are held responsible for the written terms of their agreements, regardless of whether they read them or not. [...]

Extended-response questions

1 **Create** an argumentative essay in response to the statement:

'Contracts should be void if the offering party does not provide assistance (i.e. an interpreter or the contract in the accepting parties chosen language) where a language barrier is evident.'

Discuss one recommendation to further improve equity under the law.

You could consider:

- **a** the role of each party in formulating a contract – rights and responsibilities
- **b** the stakeholder viewpoint and opposing arguments
- **c** the effect on a contract
- **d** further implications for other language barriers.

2 **Create** an argumentative essay in response to the statement:

'Online service providers, particularly in the gaming industry and/or social media platforms, make contracts difficult to understand with terms and conditions often ambiguous in nature. Unfortunately, consumers have often no choice but to agree to all terms in order to access the service.'

Provide one recommendation to further improve the online contract process.

You could consider:

- **a** the difference between online contracts and traditional paper contracts
- **b** the role of the consumer in making a choice to continue with the service by clicking agree
- **c** the avenues of redress and the complications that could occur.

Response-to-stimulus questions

1 **Create** an inquiry report analysing the nature and scope of the legal issue in regard to credit providers, focusing on the concept of 'buy now and pay later'. Using this analysis, **evaluate** two legal alternatives and make one recommendation to reform existing laws in Queensland.

You could consider:

- **a** the aim of the *Consumer Credit Code (Queensland) Act 1994*
- **b** the changes in the type of credit being provided and the growth of smaller borrowing amounts
- **c** stakeholder perspectives and the role of financial providers
- **d** implications of these types of contracts and the obligation regarding credit checks.

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2 **Create** an inquiry report examining the nature and scope of access to justice in relation to minors entering contracts. Using this analysis, **evaluate** the legal alternatives to determine a recommendation for reform.

You could consider:

- **a** the legal protection for minors in comparison to adults
- **b** the variable types of contracts that minors are entering into
- **c** stakeholder perspectives
- **d** analyse the changes in society and whether the law is 'overprotective' or provides an 'easy way out.'

The following questions refer to the contract law video scenarios in Sources 1-3, created by co-author Anthony Marinac. Watch the videos and answer the questions that accompany them.

Source 1

Video 6.11 Contract law scenario: Sounds like a You problem

3 Using Source 1, complete the following questions:

- **a** **Describe** the elements that constitute an agreement in contract law. How is it different to an invitation to treat?
- **b** **Analyse** the scenario and **explain** whether an agreement exists in this scenario. **Justify** your answer with reference to the law around agreements.

Source 2

Video 6.12 Contract law scenario: Are these contracts?

4 Using Source 2, complete the following questions:

- **a** **Summarise** the law around intention to create a legal relationship.
- **b** **Identify** the six different scenarios that may or may not be contracts based on this law.
- **c** **Explain** and give reasons for your conclusions on whether each of these scenarios could be legally enforceable as contracts.

Source 3

Video 6.13 Contract law scenario: The Great Saylor Twift

5 Using Source 3, complete the following questions:

- a **Explain** whether or not a contract always has to be written down to be enforceable. In the situation between Saylor Twift and the promoter, there might not be a written contract about the minimum attendance. **Decide** whether a verbal agreement about the 75 per cent capacity could still hold weight.
- b Imagine there is a clause in the contract about minimum attendance. List some reasons why this clause exists. Is it to protect the artist from playing to a small crowd or is there another reason?
- c If the contract does say 75 per cent capacity and the venue isn't full, **analyse** what Saylor Twift's options are. Is she able to cancel the show? Does she have to negotiate with the promoter?

Note: to access more animated contract law videos, and hundreds of other videos on legal issues, visit the YouTube of author Anthony Marinac via this link: https://cambridge.edu.au/redirect/10573

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Chapter **7** Topic **3**

Negligence and duty of care

Chapter overview

In Topic 3, students develop an understanding of the key concepts, principles and processes of negligence and the 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.

Legal Studies 2025 v1.1 General Senior Syllabus, Page 19. © Queensland Curriculum & Assessment Authority.

Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including proximity, causation, foreseeability, reasonableness, vicarious liability, assumption of risk, contributory negligence, omission, and remoteness.
- Describe the elements of negligence, including duty of care, breach of duty of care, injury/damage and the effect of the *Civil Liability Act 2003* (Qld) on those elements.
- Explain
  - the legal concept of 'neighbour' through relevant case law, including *Donoghue v Stevenson* [1932] AC 562
  - defences available to the defendant and remedies available to a plaintiff in a civil negligence action.
- Analyse and apply the elements and precedents to evaluate legal outcomes in civil negligence scenarios.
- Select legal information and data to analyse the extent to which Australians seek legal action, including patterns and trends over time and barriers experienced by different groups (e.g. those from lower socio-economic backgrounds) with respect to negligence issues.
- Analyse the ability of the law of negligence to facilitate just and equitable outcomes for parties by
  - determining the nature and scope of the legal issue
  - examining different relevant viewpoints and their consequences.
- Evaluate the above legal situations by
  - presenting legal alternatives to make a recommendation/s
  - justifying using legal criteria and
  - discussing implications.

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- Select legal information, then analyse and evaluate the effectiveness of negligence laws in contemporary contexts, e.g.
  - duty of care to players, officials, spectators and between players in sport
  - duty of care with regards to motorists
  - professional liability, e.g. medical, legal and school
  - workplace in terms of vicarious liability or duty of care.
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

- *Civil Liability Act 2003* (Qld)
- *Law Reform Act 1995* (Qld)
- *Limitations of Actions Act 1974* (Qld)
- *Residential Tenancy and Rooming Accommodation Act 2008* (Qld)

Significant cases

This topic will include the following cases:

- *Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No. 2)* [2016] NSWSC 1123
- *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479
- *Beck v State of NSW* [2001] NSWSC 278
- *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582
- *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649
- *Cook v Cook* (1986) 162 CLR 376
- *Donoghue v Stevenson* [1932] AC 562
- *Geyer v Downs* (1977) 17 ALR 408
- *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614
- *Imbree v Mc Neilly* (2008) HCA 40
- *Jaensch v Coffey* [1984] HCA 52
- *Langham v Connell Point Rovers Soccer Club* (2005) NSWCA 461
- *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506
- *Ramsey v Larsen* (1964) 111 CLR 16
- *Rogers v Whitaker* (1992) HCA 58
- *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] *FCA 560*
- *Wyong Shire Council v Shirt* (1980) 146 CLR 40

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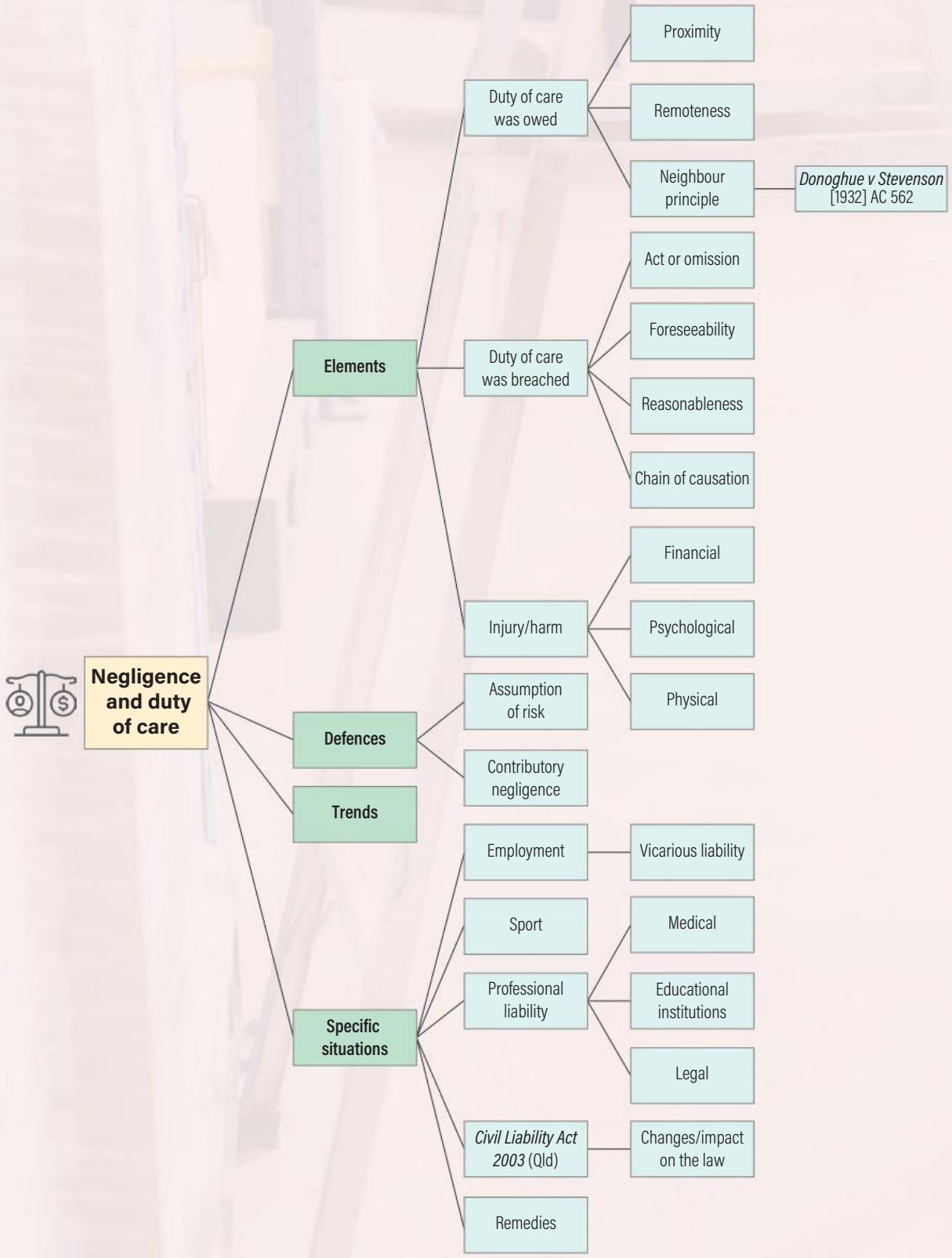
Concept map

In Topic 3 of Unit 2 of the QCAA Legal Studies course, we will cover the following content:



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7.1 The elements of negligence

Someone slips on a grape left on the floor of a supermarket and hurts their back.

Another person is given bad financial advice by their accountant and loses their savings. Somebody else falls out of a chairlift in a theme park because the safety bar malfunctions.

What do these cases all have in common?

In a legal sense they are all examples of potential **negligence**. What is negligence? It is a type of tort (an actionable wrong – see Chapter 5) and is an important, and in many ways expanding, legal principle. Negligence enables a party who has suffered loss or damage resulting from the wrongful actions or inactions (when someone should have acted but did not) of another to claim compensation from the party responsible for their loss. No contractual relationship between the parties is necessary. Negligence is a civil action as opposed to a criminal action brought by the police under the criminal code. This means it is an action brought between two (or more) private parties rather than for the public benefit like criminal law. The main aim of negligence actions is to compensate the party injured for that injury and put them, as much as possible, in the same position they were in before the injury occurred.

negligence an important legal principle that enables a party who has suffered loss or damage resulting from the wrongful actions or inactions of another to claim compensation from the party responsible for their loss; no contractual relationship between the parties is necessary

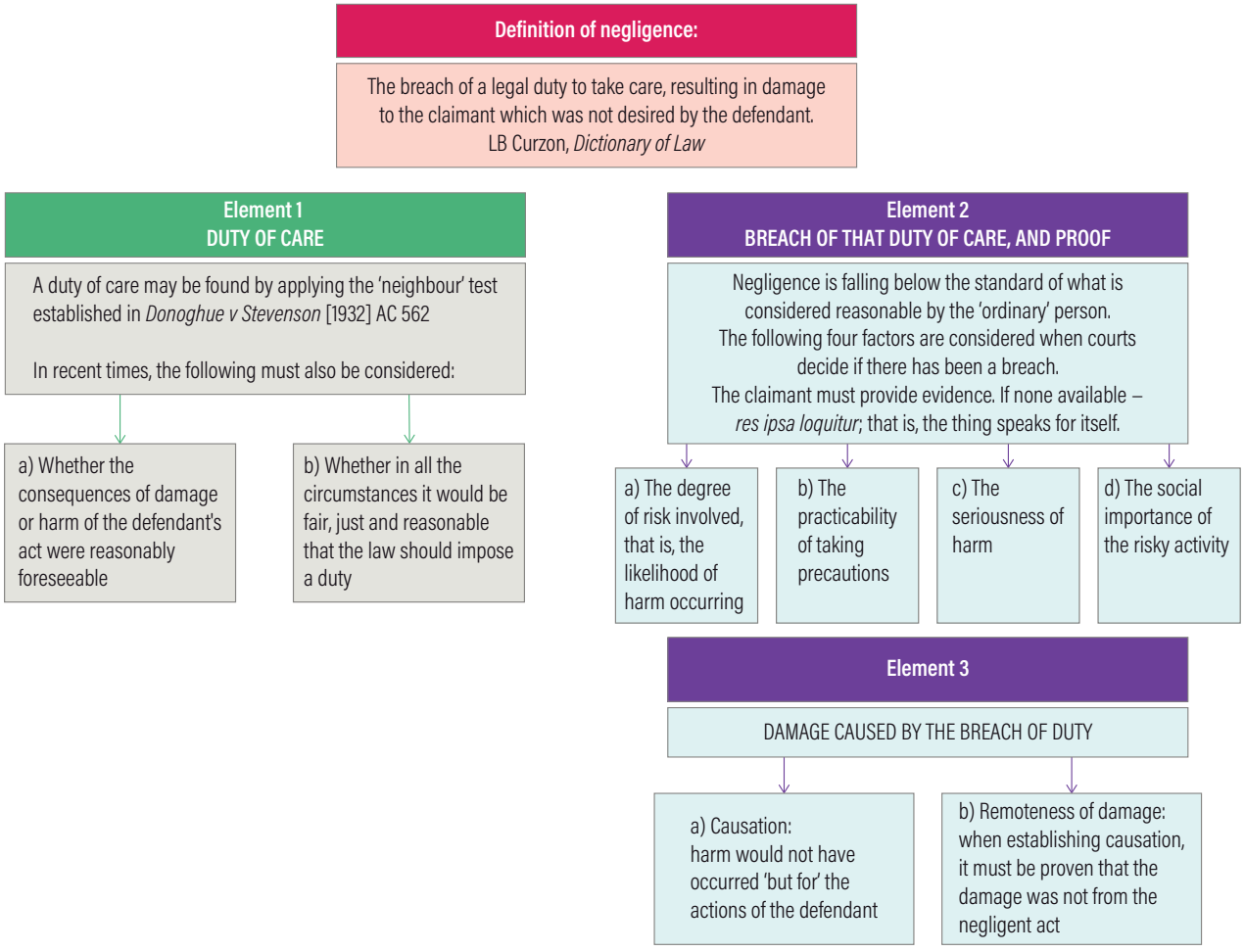

Figure 7.1 Summary of the three elements of negligence

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Negligence consists of three key elements that must be established before an action can proceed:

- the existence of a **duty of care**
- a breach or breaches of that duty
- reasonably **foreseeable damage** as a consequence of the breach of duty.

Source: Concise Australian Legal Dictionary, 2011, p. 395.

duty of care an obligation imposed on a person to take reasonable care to ensure that they do not cause another person to suffer harm

foreseeable damage damage that occurs as a result of an action that a person should reasonably have foreseen would happen if they were negligent

The law of negligence requires that the injured person find someone to blame for the incident. The courts then have the power to order that person to pay **compensation** for the injury, loss or damage to the innocent party. This way of apportioning blame according to the person at fault is still regarded by our legal system as the fairest way of compensating people for their loss and to attempt, as much as possible, to reinstate them to the position they were in prior to receiving the injury. The threat of a lawsuit against anyone who behaves negligently is meant to act as a deterrent against negligent behaviour in the community.

compensation something – typically money – awarded to someone in recognition of loss, suffering or injury

In the tort of negligence, it is necessary for the plaintiff to prove that they or their property or interests have been damaged or harmed by the actions or omissions (inaction or failure to act when they should) of the defendant. Another requirement is that the defendant must be at 'fault'. The onus or burden of proof in a negligence action rests with the plaintiff, the person bringing the action.

Figure 7.2 Employers have a duty of care to their employees to protect them from harm in the workplace.

Negligence actions take a variety of forms:

- personal injury (e.g. physical and in some cases psychological damage caused by another person unlawfully)
- economic loss (e.g. loss of money due to negligent advice or incorrect business dealings)
- damage to reputation (although this is often fought as a defamation claim which is a different tort).

Negligence is one of the most common forms of legal action in society, but it does actually have a relatively brief legal history. For centuries, it was only possible to claim compensation for injury suffered from those with whom you had an existing legal relationship (e.g. in contract law). However, this was about to change. It all started in 1928 in a small café called the Wellmeadow Café in Paisley, Scotland.

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Case study 7.1

The case: *Donoghue v Stevenson* [1932] AC 562

Figure 7.3 *Donoghue v Stevenson* is known as the 'snail in a bottle' precedent case.

Citation

[1932] AC 562 means the case was decided in 1932 as an appeal case in the United Kingdom and is reported in the 1932 volume on page 562.

Facts

The plaintiff and her friend were in a café 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 café 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 gastroenteritis from having consumed the polluted ginger beer.

Legal issues

Because the plaintiff did not buy the ginger beer, she had no contractual relationship with the café owner (seller). She therefore 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 (three to two) 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 the defendant for a tort.

Ratio decidendi (reason for the decision)

There does not need to be a contractual relationship for a legal duty to be established between parties. If one party can be viewed as a 'neighbour' in law, then the necessary legal relationship may be found and a duty to take reasonable care to protect their legal neighbour will be owed. Manufacturers owe a duty to consumers who they intend to use their product.

Obiter dicta (something to think about)

This case played a major role in establishing negligence as a separate tort and outlining the basic principles for the existence of a duty of care in a legal sense.

Video 7.1
Donoghue v Stevenson [1932]

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Donoghue v Stevenson changed the legal landscape significantly. It meant that it was now possible to claim compensation for damage suffered from anyone who could be classified as your 'neighbour' in a legal sense.

The neighbour principle

Lord Atkin was the judge who delivered the important principle established by *Donoghue v Stevenson*.

'Who, then, in law is my neighbour?' The answer seems to be – *persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

This principle means that if a person could be affected by your actions you could consider them in a legal sense to be your 'neighbour', and therefore you may owe them a duty to take care when doing (or choosing not to do) something.

For decades, negligence law expanded its influence in a legal sense until it became one of the most common forms of legal action. It became so common that other torts like nuisance and trespass largely have become absorbed into negligence law and are not often brought in their own right anymore. Negligence law was for the most part 'case' or common law. However, due to the increasing complexity and breadth of the cases and concerns about the rapidly expanding reach of negligence law, and in the increasing compensation amounts being awarded to victims, many jurisdictions in Australia felt it was important to codify the case law and so passed statute law in this area. This was in part also driven by rising insurance premiums having to be paid by ordinary people and community groups, in particular, as a result of insurance companies having to pay larger amounts as compensation for successful negligence claims. This increase in the costs of insurance and concerns from the public resulted in a review of negligence law in Australia. As a result, the states passed legislation to clarify the legal principles around negligence.

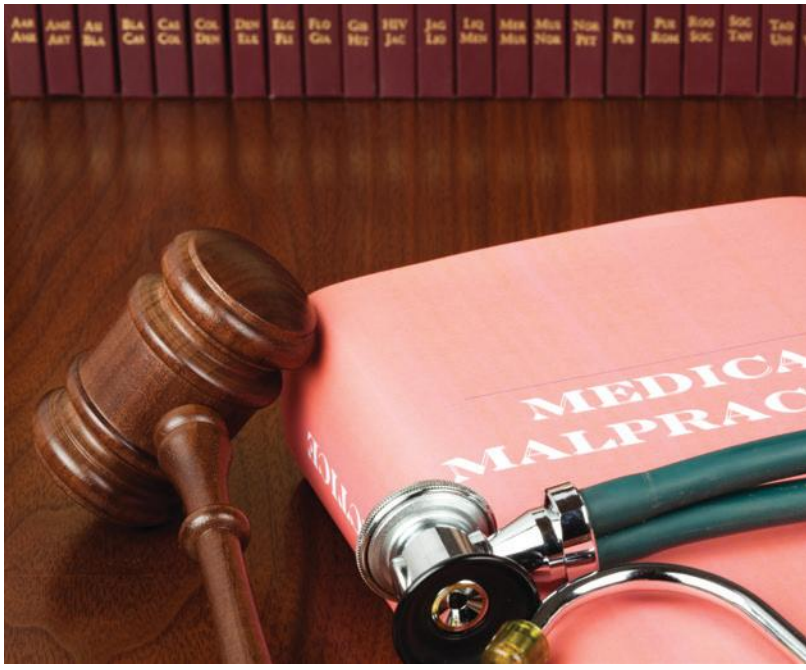

Figure 7.4 Rising insurance payouts led to negligence statute laws.

The Queensland statute that outlines negligence law is called the *Civil Liability Act 2003* (Qld) (CLA). It has taken the important principles of negligence law and enacted them into sections of this Act so as to provide some clarity and set limits around the important legal concepts in this area. As we work though these legal principles, you will see links back to the sections of the CLA.

Element 1: Existence of a duty of care

If you can reasonably foresee that what you are about to do is going to hurt someone, the legal responsibility is on you not to do it. For an action in negligence to be brought, it must first be established that the negligence occurred as a result of a breach of duty owed from one party or parties to another party or parties. If a duty of care does not exist between the parties in the first place, then no negligence claim can arise.

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A duty of care means that there is a legal obligation and responsibility placed on all parties that they accept a reasonable and identifiable standard of care while doing anything (or omitting to do something – an omission) that could foreseeably harm others. The courts apply the 'Neighbour Principle' established in *Donoghue v Stevenson* [1932] AC 562 to help establish whether a duty of care exists (see Case study 7.1).

In certain circumstances, the law has already recognised that certain relationships are presumed to give rise to a duty of care. The following are examples of such relationships:

- doctor/patient
- lawyer/client
- teacher/student
- financial adviser/client
- employer/employee
- manufacturer/consumer
- occupier of land/visitor.

This list is not exhaustive and is being constantly adjusted.

The question of proximity as being useful in deciding whether a duty of care is owed is important. It was previously accepted it was important to consider whether there is a legal relationship or physical, circumstantial or causal 'closeness' (relationship of proximity) between the parties (see Figure 7.1). In recent years, this test has decreased in importance in the view of the High Court. However, it does still play a role, albeit smaller, in the Salient Features Test outlined below.

If the duty of care is one which has not already been recognised in law and is new, or 'novel', or requires deeper consideration, as there seems to be no connection between the parties, then the courts will need to refer to any other important or 'salient' features (called the 'Salient Features Test').

Salient Features Test for deciding new/novel duties of care

These factors were outlined in the case of *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 and set out as follows:

(a) the foreseeability of harm;
(b) the nature of the harm alleged;
(c) the degree and nature of control able to be exercised by the defendant to avoid harm;
(d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
(e) the degree of reliance by the plaintiff upon the defendant;
(f) any assumption of responsibility by the defendant;
(g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
(h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
(i) the nature of the activity undertaken by the defendant;
(j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
(k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
(l) any potential indeterminacy of liability;
(m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
(n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;

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(o) the existence of conflicting duties arising from other principles of law or statute;
(p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
(q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

Not all of these features have to be present and the list is not exhaustive, but if a number of these features are present, it is likely a duty of care will be found to exist. This test was seen in action in an interesting case that considered the potential liability of the Australian Government to Australian children to protect them from climate change. (see Case study 7.2)

Case study **7.2**

The case: *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560

Figure 7.5 Climate change cases may be on the rise.

Citation

[2021] FCA 560 means the matter was decided in the Federal Court of Australia and is reported in the 2021 volume starting on page 560.

Facts

There was an application to the Australian Minister for the Environment (Minister) to approve the extension of a coal mine project near Gunnedah called the Vickery Project. This approval was subject to sections 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*). Eight Australian children (through their litigation representative) filed an application with the court seeking a declaration that the minister owed them a duty of care to exercise her power under the *EPBC Act* in a manner that did not cause them harm arising from the climate impact of the Vickery Project. Evidence was presented that the Vickery Project would contribute to global warming and potentially cause injury to children in Australia through heat stress episodes, premature death from bushfire smoke or heat stress, and make many communities, especially in rural areas, difficult to continue to live in.

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Legal issues

Because this was a potentially new or novel duty of care – between a government minister and children to whom there was no immediate or obvious connection or relationship – the existence of a duty of care needed to be established.

Decision

At the original trial, a duty of care was found to be in existence. The Salient Features Test was used, and a number of factors were found to be significant. One was the clear reasonable foreseeability and nature of the harm that was possible ('reasonable foreseeability') to the plaintiffs as well as the particular vulnerability of children to that harm. Another factor was the degree and nature of control able to be exercised by the minister to avoid harm ('control'). It was also found there was a category of relationship recognised between the minister and the children ('recognised relationship') as being of special importance. The potential exercise of the power of the minister in accordance with the considerations and general intentions required under *EPBC Act* to not approve the extension would be considered coherent with the legislation.

Ratio decidendi (reason for the decision)

The trial judge, Bromberg J, concluded that 'coherence', 'control', 'vulnerability' and 'reliance' all assume especial relevance in an assessment of whether a novel duty of care should be recognised. Overall, Bromberg J viewed that the relations between the minister and the children should give rise to a novel duty of care under the law of negligence.

Obiter dicta (something to think about)

This was not the end of the matter though. The decision was actually successfully appealed by the minister to the full court of the Federal Court. In that decision they found that a number of difficulties existed with the reasoning of Bromberg J in relation to finding a duty of care existed.

However, the decision does not mean that a climate-related duty of care could not be established under different legislation and contexts, although there were significant issues around being able to prove causation that would need to be overcome. At the time of writing, an appeal to the High Court by the children is under consideration.

Foreseeability

The concept of **foreseeability** is an important part of establishing whether a duty of care is owed and whether the chance of injury or damage is reasonably foreseeable. Foreseeability is when a reasonable person can see the potential that harm will take place if due care and attention is not taken in a particular situation. It is also important that the type of damage done to the plaintiff is foreseeable. For the purposes of the law of negligence, whether a person ought to have foreseen a particular event is not a matter of what they knew, but of what the 'reasonable person' in their position would have known. Hence, the law speaks of 'reasonable foreseeability'.

There is one exception in some ways to the 'reasonable foreseeability' of the damage suffered. This is called the 'eggshell skull' rule.

foreseeability the ability to reasonably anticipate the potential results of an action, such as the damage or injury that may happen if one is negligent or acts in a particular way

The 'eggshell skull' rule

Another important consideration in finding someone to blame for a negligence incident is that the defendant must take the person who has suffered the injury as they find them.

This is based on the idea that it is fair for a defendant to compensate an injured person for any harm caused regardless of any unforeseeable medical conditions that exist and as a result the injury suffered might be more severe than would otherwise be the case. This is referred to as the eggshell skull or eggshell plaintiff rule, which states that someone whose negligence

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harms another must pay for whatever damage the injured person suffered, even if it was much worse than anyone would have expected. The eggshell skull rule describes an imaginary person who has an extremely thin skull that is as fragile as an eggshell, even though they look completely 'normal'. If a person is hit in the head by someone else, a 'normal' person would only have been bruised by the hit, but the person with the eggshell skull dies. The eggshell skull rule says that the person who hit the eggshell-skulled person is responsible for the much greater harm caused by the death, not just the amount of harm that a normal person would have suffered. In other words, you must take the victim as you find them.

Figure 7.6 The 'eggshell skull' rule

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Fair, just and reasonable

Even if the harm is reasonably foreseeable, a court may still find that there is no duty of care if it is not fair, just or reasonable to impose a duty on the defendant. This final factor covers a range of issues such as whether the obligations of a duty of care would impede the defendant from doing their job properly or if the injured person was assisting in a criminal act.

Element 2: Breach of duty

Once it is established that the defendant owed the plaintiff a duty of care, it is then necessary to prove that the defendant breached that duty. A plaintiff has the burden or onus of proof to prove, on the balance of probabilities, that the defendant had a duty of care, and that duty has been breached (CLA section 12).

This means in negligence cases it is the responsibility of the plaintiff to prove that the defendant was probably responsible for the damage suffered due to a breach of the defendant's duty of care to the plaintiff.

To decide whether a breach of the duty of care has occurred, the court will ask the question: 'Has the defendant failed to reach the **standard of care** required by the circumstances in this case?' The standard of care is that which a reasonable person would meet.

standard of care the degree of caution required, usually with reference to the 'reasonable person', of an individual who owes a duty of care

The concept of the 'reasonable person' is important here. In law, a 'reasonable person' refers to the average person of the defendant's age, experience and so on. For example, what might be considered as reasonable for a 15-year-old boy in certain circumstances might not be considered reasonable if the defendant was a 40-year-old woman as their age, maturity levels and experience are clearly different. Each case will be decided on its facts. If the court finds that a reasonable person would not have acted as the defendant did, then it is likely that a breach of a duty of care would have occurred.

The *Civil Liability Act 2003* (Qld) outlines the General Principles in section 9 for determining whether a duty of care has been breached.

Section 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.

For a breach of duty to occur it therefore must be something that was a foreseeable risk, that was not insignificant, and a reasonable person would have taken reasonable precautions to avoid the event occurring.

This is demonstrated by the case of *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

Case study **7.3**

The case: *Wyong Shire Council v Shirt* (1980) 146 CLR 40

Citation

(1980) 146 CLR 40 means this case was decided in 1980 and is reported in volume 146 of the Commonwealth Law Reports starting on page 40.

Facts

The plaintiff suffered quadriplegia in a water-skiing accident. That injury happened because the plaintiff interpreted a sign that read 'Deep Water' as indicating that the water beyond the sign was deep. In fact, the sign, which had been placed by the defendant Council, marked a channel that had been dredged for the use of water-skiers. While skiing in what he wrongly believed to be deep water, the plaintiff fell and struck his head on the bottom of the lake in the shallow water.

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Figure 7.7 *Wyong Shire Council v Shirt* (1980) involved a water-skiing accident in which the judge had to decide if the council was in breach of their duty of care towards those who participated in water sports on their land.

Legal issues

The issue was whether the ambiguity of the warning sign in terms of its wording and placement led to a risk of injury that was foreseeable.

Decision

It was held that the risk of injury to the people in the class of the plaintiff (e.g. water skiers) was foreseeable and that the Council had not acted as a reasonable person should have to minimise the risk by posting a sign in a way that was unclear in terms of where the deep water was.

Ratio decidendi (reason for the decision)

The High Court of Australia laid down a test to determine whether a defendant has breached any duty of care. The test requires two questions to be answered:

1. Would a reasonable person in a position of the defendant have foreseen a risk of injury to the plaintiff or the class of persons to which the plaintiff belonged arising from their conduct?
2. What would a reasonable person have done in response to that foreseeable risk?

Obiter dicta (something to think about)

Some of the important considerations of the High Court in this case have been used around Australia in statute laws introduced by the states to decide whether a duty of care has been breached.

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Test to determine breach of duty of care

Some of the most important principles established by this case have now been included as part of the CLA.

Section 9 General principles:

(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;

(d) the social utility of the activity that creates the risk of harm.

In some respects, assessing whether a duty of care has been breached requires weighing section 9 (2) (a) and (b) against (c) and (d). In other words, the probability of harm happening and seriousness of the harm are compared to how hard it would be to take precautions to avoid the risk of harm and how important to society is the activity that creates the risk.

In general, the court asks what the reasonable person in the position of the defendant would have done or not done in order to avoid harm to the plaintiff. If the actions taken fall short of that, then a breach of the duty of care is generally found to have occurred.

Case study **7.4**

The case: *Beck v State of NSW* [2001] NSWSC 278

Figure 7.8 Toboggan crashes can have serious consequences.

Citation

[2001] NSWSC 278 means this case was decided in 2001 and is reported in the 2001 volume of the New South Wales Supreme Court reports starting on page 278.

Facts

Beck was a trainee teacher who accompanied a school trip to the ski resort Perisher Blue in New South Wales. On the way there, they had stopped and taken some real estate signs to use as makeshift toboggans. The group went to Blue Cow (part of Perisher Blue) and walked about a kilometre from the Blue Cow train terminal to slide down a nearby slope on the signs. Blue Cow had posted signs warning of the dangers of tobogganing and forbidding it at the resort at one of the exits from the train station but not the other.

Beck slid out of control and hit a rock head first. He suffered serious injuries and became a quadriplegic and sued the education department as well as the ski resort for his injuries.

Legal issues

Were the actions of the school and ski resort reasonable in mitigating the risk to the plaintiff from participating in the activity approved by the school?

Decision

It was found that both the Education Department (the school) and the ski resort had breached their

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duty of care to Beck. Interestingly, the court found that Beck had contributed to his own injury, so the damages he was awarded were reduced from $8.8 million to $7 million as he was held 20 per cent responsible for his own injury. This is called contributory negligence and will be discussed later.

Ratio decidendi (reason for the decision)

The judge found the burden of taking better precautions by both the school and the resort was not difficult and a 'reasonable person' in the position of the school and resort would have done so.

Obiter dicta (something to think about)

To determine a breach of duty, a number of factors that have since been incorporated into statute law can be considered.

In this case, there existed a great risk of injury occurring using signs unable to be steered as toboggans down an icy slope with rocks on it, meaning *the probability of harm* was high. The *seriousness of that harm* was clear in that it would not be hard to foresee a serious injury happening as a result.

Balanced against this was the *burden of precaution to avoid the risk of harm*. In this case it would not have been difficult to ensure signage was posted in all relevant areas making clear to all that tobogganing was a potentially dangerous activity and not allowed at the resort. Additionally, it would have been easy for school staff to check with Blue Cow staff as to the safety or otherwise of what the school was planning to do, either in person or by telephone.

Finally, the *social utility* of tobogganing in that location had to be considered. The activity was for the fun of the staff and students including Beck but did not serve a purpose that could have been found to have been of sufficient benefit to justify the dangerous activity.

Tobogganing, which was once quite a common activity in many ski resorts, is now either completely banned or heavily regulated.

Element 3: Foreseeable damage

Once a breach of duty of care has been proved, it is necessary to show that the breach resulted in damage to the plaintiff. In most cases, proving that damage occurred as a result of the breach is relatively simple. However, if something happens between the time of the breach of duty of care and the damage or loss suffered, then that **intervening act** breaks the **causal relationship** between the defendant and the plaintiff.

intervening act (sometimes called *novus actus interveniens*) an act that breaks the chain of causation and, if proven, means that the defendant may not be liable for the damages caused to the plaintiff

causal relationship the direct relationship between the harm and damage caused by the original action

Causation

Causation relates to harm, damage or injury that was directly caused by the defendant. The courts are concerned with establishing whether a particular act or omission is connected to the result that has occurred and, if so, whether a legal responsibility is owed. Causation is the link between the behaviour of the defendant

causation the harm, damage or injury that was directly caused by the defendant

Figure 7.9 A break in the chain of causation.

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and the result; that is, the defendant acted in a way that caused damage to the plaintiff. Causation is a complex legal concept and can be used as a defence if the causal relationship between the act or omission has been broken. It can limit the plaintiff's ability to recover damages to only those that were actually caused by the negligent act.

Causation is outlined in section 11 of the CLA which states that for a breach of duty to have caused a particular harm:

(a) the breach of duty must be a necessary condition of the occurrence of the harm (factual causation);
(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (scope of liability).

Essentially this means that the harm was caused by the actions/inactions of the defendant and not someone or something else. The defendant will then be liable for the extent of the harm caused.

A plaintiff must establish that the defendant's negligence caused the damage they seek to recover. When determining causation, the courts apply the **but-for test**: would the harm have occurred but for (if not for) the actions of the defendant? However, the courts have come to accept that the test for causation is more comprehensive than the but-for test. The case that challenged that legal thinking was *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506.

but-for test determining whether the harm or damage would have occurred if the defendant had taken the action or not taken the action

Case study 7.5

The case: *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506

Figure 7.10 *March v Stramare* involved the plaintiff driving under the influence of alcohol.

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Citation

(1991) 171 CLR 506 means this case was decided in 1991 and is reported in volume 171 of the Commonwealth Law Reports starting on page 506.

Facts

The defendant (Stramare, through its driver) parked a truck in the middle of the road while unloading items into a shop in the early hours of the morning. The truck had its hazard and parking lights on. The plaintiff (March) was driving a vehicle speeding while intoxicated and smashed into the truck, suffering physical injuries as a result of the collision.

Legal issues

The defendant alleged that it was the negligent driving of the plaintiff that was the cause of the collision occasioning him harm, and not the defendant's negligence in the way the truck had been parked. Therefore, the matter for the court was to determine whether a causal relationship existed such that the damage caused was the result of the plaintiff's action and, if so, whether that causal relationship was broken in any way.

Decision

In this case, it was considered that Stramare's truck parked along the centre line of the road was also a cause of March's injuries as well as the intoxicated state of March himself. The High Court therefore found as a matter of common sense that both parties were responsible for the accident. It was decided that March was 70 per cent responsible for his injuries and Stramere (by the negligent acts of its driver in parking where they did) was 30 per cent responsible.

Ratio decidendi (reason for the decision)

The but-for test was sought to be applied in this case. It was found that but-for test was not to be solely relied upon in cases where there are multiple causes or parties responsible for the harm and/or where the chain of events which occurred had been broken by an intervening act or acts.

Thus the but-for test is not the only test for causation – consideration of common sense as well as public policy considerations need to supplement the but-for test.

Obiter dicta (something to think about)

Justice McHugh held a different perspective to the other judges regarding the but-for test, advocating that it should serve as the sole criterion for establishing causation. He argued that incorporating supplementary rules like common sense principles would introduce further inconsistency into verdicts. Furthermore, he asserted that such rules should primarily address matters of damage remoteness rather than causation.

Nevertheless, all five judges agreed on the fact that Stramare's truck parked along the centre line of the road was also a cause of March's injuries as well as the intoxicated state of March himself, rendering both parties responsible for the accident.

Intervening act

An intervening act, or *novus actus interveniens*, is an act that breaks the chain of causation and, if proven, means that the defendant may not be liable for the damages caused to the plaintiff. However, it is usually hard to establish that an action of another party was an intervening act unless it resulted from a voluntary human act by either party that was free, deliberate and informed; the act was not the result of or influenced by the original negligence; or the act was the result of an extraordinary coincidental event.

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7.2 Limitations to negligence

Off the record

There are limits to the period between when an action allegedly occurred occasioning damage or harm and the commencement of an action to recover damages. The limitation periods for negligence actions are set out for Queensland in the *Limitations of Actions Act 1974* (Qld). The periods are:

- six years from the date that the cause of the action or omission occurred in relation to recovery for property damage (s. 10)
- three years from the date that the cause of action or omission arose in relation to recovery for personal injuries (s. 11).

Explain why the law places these time limits on negligence actions.

Unlike a criminal action, where penalties can range from fines, good behaviour bonds and restitution (community service) to imprisonment, the remedy in a negligence action generally is **compensatory damages**. However, even when a defendant has caused damage to the plaintiff, it does not necessarily mean that an action in negligence will be successful. For example, a negligence action involves a number of different issues (questions) of law and facts that need thorough legal evaluation to determine whether a breach should be compensated (see Table 7.1).

compensatory damages damages that are awarded in order to compensate a plaintiff for personal injury or injury to property caused by the defendant's wrongful act

Table 7.1 Questions of law or fact in negligence

Question of law	Question of fact
Duty of care – does or did a duty of care exist? (See test to determine breach duty of care on page 243.)	Duty of care – who owed the duty of care?
Breach of duty – what was or is the relevant standard of care?	Breach of duty – was the standard breached?
Damage – is the damage recognised by law? Damage – was the damage too 'remote'?	Damage – was the damage caused by the defendant?

Remoteness

For a negligence action to be successful and for the plaintiff to obtain compensation, the damage caused must not be too remote from its cause, and the damage or harm must have been reasonably foreseeable by the defendant. The courts apply the '**reasonable foreseeability test**' formulated in

reasonable foreseeability test if the damage that results from a negligent act could be foreseen by a reasonable person, then the injured party is entitled to those damages

Figure 7.11 Would an injury to a chef while preparing food pass a reasonable foreseeability test?

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Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, commonly known as *Wagon Mound (No. 1)* [1961] AC 388. The court held that to find a party liable for damages in negligence, the damage must be reasonably foreseeable. In other words, could the damage that resulted from the negligent act be foreseen by a reasonable person? If it could be, then it would not be too remote.

It used to be the case that mental harm was considered too remote and therefore damages could not be recovered for such injury. However, the case of *Jaensch v Coffey* changed this approach.

Case study **7.6**

The case: *Jaensch v Coffey* [1984] HCA 52

Citation

[1984] HCA 52 means this case was decided in 1984 and is reported in the High Court of Australia reports starting on page 52.

Facts

Mr Coffey was a police officer who was seriously injured when he was struck by a vehicle driven negligently by Mr Jaensch. He was taken to hospital and was in intensive care. His wife (the Plaintiff) was told of his accident and his serious condition and saw him in hospital with 'all these tubes coming out of him.' When she left the hospital, she thought he was going to die. He did in fact survive, but she did not believe he would until three to four weeks after the accident. She gave evidence that she was 'scared that he was going to die and that all my security had been washed down the drain and I was just so scared and so resentful to the other person that caused the accident.' The judge accepted this evidence. She suffered from severe anxiety and depression and other medical issues following the experience.

Legal issues

The court had to consider whether the damage suffered by Mrs Coffey was too remote and uncertain (being purely mental injury) from the negligent act (the original accident) of Jaensch.

Decision

The High Court dismissed the appeal by Jaensch against the original decision to award damages in negligence. The court found he was liable to her for damages suffered for nervous shock.

Ratio decidendi (reason for the decision)

The judge found that 'the wrong-doer could foresee that a wife, hearing of the accident, would go to hospital, wait at the end of the telephone and suffer mental shock at what she saw and heard.'

Such damage was not found to be too remote and therefore her damages claim was successful against the driver of the car that struck and injured her husband.

Obiter dicta (something to consider)

This case was significant in that damages were for what was then termed 'mere psychiatric injury.' This was unusual at the time and had not been the subject of detailed consideration in this way by the High Court. However, it has now become accepted that purely psychological injury is clearly possible and potentially substantial, and so such claims should be allowed as long as evidence can establish the nature and seriousness of the injury.

This case was a widening of the scope of negligence in that psychological injury was recognised by the court as a possible claim in and of itself, rather than being related to some other physical injury or damage suffered.

Video 7.2
Jaensch v Coffey [1984]

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Remoteness of damage

The defendant in a negligence suit must have been able to reasonably foresee that someone could be hurt by their actions. If they could not have seen this, it would be held that the possibility of damage was too remote. This concept is referred to as 'remoteness of damage.'

Review 7.1

1 **Describe** the purpose of a tort of negligence.
2 List the three key elements of negligence. **Analyse** why they are important.
3 **Analyse** the significance of the but-for test in determining causation.
4 **Evaluate** how the chain of causation, if broken, limits the liability of the plaintiff.
5 **Describe** the eggshell skull rule and evaluate how the courts apply it.
6 **Analyse** remoteness of damage and **explain** how it applies to negligence actions.
7 **Define** the reasonable foreseeability test and **explain** how it is applied by the courts.

7.3 Categories of duty of care

The recognition of a duty of care is one aspect used in the courts to control the limits of negligence. Certain relationships have been recognised by the courts that give rise to a duty of care owed by one party to another. These relationships are referred to as established or select duties and are established in common law (case law).

The duty of care owed by one party to another will most often be determined by reference to categories of duty already recognised at law. However, these categories are not closed, as new duties of care may be recognised by the courts in subsequent cases. Some of the more common categories are described in the following pages.

Category 1: Third party

Prior to the precedent case *Donoghue v Stevenson* [1932] AC 562, no legal relationship was recognised as existing between the manufacturer of a product and the consumer of that product unless a contract existed between them.

As a result of this case, duty of care was extended to include a relationship between a third party and the consumer. Consequently, a tort action for such a breach could now be brought against the manufacturer of the ginger beer. The judgment resulted in the introduction of the neighbour principle as a test to establish whether one party owed a duty of care to another.

Figure 7.12 Carers must actively supervise.

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Common law now required that a party ought reasonably to take others into their contemplation who are so closely and directly affected by an act that they might be harmed by it. Therefore, this case established an obligation to take reasonable care of your legal neighbour as a legal duty owed to them. The judgment established that a legal duty and a contract could exist at the same time or independently of each other, changing the scope of the tort of negligence. Duty of care could now arise, causing injury, damage or loss that, prior to this case, was not recognised by the courts.

Category 2: Premises

An occupier of premises owes a duty of care to a person or persons entering the premises regarding any risk of personal injury as a result of the condition of the premises: see *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479.

The Queensland Government has extended this duty to include rental properties. The Palaszczuk state government has made changes to the *Residential Tenancy and Rooming Accommodation Act 2008* (RTRAA) so that rental properties will have to meet defined minimum standards before being listed for rent. The amendments to the RTRAA were introduced and passed by parliament in 2017. The changes impose an obligation on lessors who rent properties to ensure that they meet the minimum standards. The changes also provide greater protections for people in retirement homes and enforce minimum standards for issues that could include sanitation, ventilation, insulation, protection from damp, the dimensions of rooms, privacy and security, provision of water supply, laundry and cooking facilities, lighting, freedom from vermin infestation and energy efficiency.

The duty of care owed by a landlord to their tenant with regard to providing and maintaining the minimum standards is therefore legally enforceable and allow tenants a course of redress through the courts if these standards are not met. It may be in cases like this that an action may lie as firstly a breach of a statutory duty under the RTRAA, and an action in negligence may be raised as an alternative. The overarching principles though would remain essentially the same.

Duty of care towards visitors on your property

As the inviter, you owe the highest level of responsibility to those persons with whom you are conducting business. Basically, you owe a higher duty of care to your customers than you do to people who are invited onto your land where no fee is charged, for example, someone who wants to hunt or walk on your land (licensee).

Case study **7.7**

The case: *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479

Citation

(1987) 162 CLR 479 means the case was decided in 1987 and is reported in volume 162 of the Commonwealth Law Reports starting on page 479.

Facts

On 20 January 1979, the respondent entered the 'foyer area' of the appellant's supermarket at Mount Waverley, Victoria, intending to buy some cheese. It was a rainy day, and in consequence the vinyl tiled floor of the foyer had become wet. Unfortunately, before entering the area of the supermarket where the merchandise was displayed, the respondent slipped and fell heavily on the floor. She sustained a personal injury.

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Figure 7.13 Warning of risk of injury

Legal issues

Does an occupier owe a duty of care to take positive steps to protect persons lawfully entering their property, and if they are injured is the occupier liable for damages? The question of duty and failure to prevent foreseeable injuries has also been applied to business premises open to the public, such as supermarkets.

Decision

The court found such a duty of care did exist and that the defendant was in fact liable in negligence for the injuries suffered.

Ratio decidendi (reason for the decision)

The High Court held that the fact that the respondent was a lawful entrant upon the land of the appellant established a *relationship* between them, which of itself suffices to give rise to a duty on the part of the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent. An occupier of premises owes a duty to take reasonable care for the safety of any person who enters.

Obiter dicta (something to think about)

This duty extends to all who enter, including invitees as well as trespassers.

Check this out

The case of *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614 deals with what happens when a trespasser is injured when entering a property.

Read Case judgments: *Hackshaw v Shaw* [1984]: A Case Summary at https://cambridge.edu.au/redirect/10468.

Do you agree with the decision reached by the court? Explain why/why not.

Figure 7.14 Landlords have a duty of care to their tenants.

Category 3: Employers

Employers owe their employees a duty of care to take reasonable care not to expose them to an unnecessary risk of injury. The scope of duty includes providing the employee with a safe system of work, safe plant and equipment, and competent supervisory staff. To that end, employers need to conduct risk assessments of tasks and of the machinery to be used by employees to ascertain the possible risk and to take reasonable steps to minimise it. This may include providing appropriate staff training.

Often actions by employees against employers will involve the use of worker's compensation legislation such as the *Worker's Compensation and Rehabilitation Act 2003* (Qld), but the principles of negligence are still able to be utilised in many cases at the election of the plaintiff.

Off the record

School teachers have a duty to their students to conduct a risk assessment of any activity with the potential to cause injury or harm to their students, for example, when they want to take students on an excursion.

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Vicarious liability

In certain circumstances, a person is regarded by the law as responsible for the acts or omissions of another person; that is, they are said to have **vicarious liability**.

While the party held to be liable or jointly liable may not personally have been at fault, they have a relationship with the person held responsible for the original action occasioning harm, damage or injury. The most common of these relationships is that between an employee and an employer.

vicarious liability a third party such as an employer is regarded as being liable or responsible for the acts or omissions of another person (the employee acting in the course of employment)

Category 4: Road users

A driver of a motor vehicle owes a duty of care to their passengers and to other road users, including pedestrians. The scope of this duty is to use reasonable and proper care not to harm or injure other road users or to damage any premises while in control of a motor vehicle. The lead case used to determine the duty owed by a driver, including a learner driver, was *Cook v Cook* (1986) 162 CLR 376 but this duty was later modified by *Imbree v Mc Neilly* (2008) HCA 40.

In *Cook v Cook*, the court ruled that a person who voluntarily undertakes to instruct a learner driver of a motor vehicle is owed a lower standard of care than that owed to other road users. This was because the court acknowledged the inexperience of the learner driver. A person instructing a learner driver is owed a duty of care of the standard expected of a reasonable driver. This 'special relationship' was said to exist because of the passenger's (instructor's) knowledge of the learner driver's inexperience and lack of driving skill. However, on 28 August 2008, the High Court handed down its decision in *Imbree v Mc Neilly* (2008) HCA 40 overturning the decision in *Cook v Cook* (see box).

Figure 7.15 Drivers have a duty of care to passengers and other road users.

The decision in *Imbree v McNeilly* (2008) HCA 40

Imbree and McNeilly were on a 4WD trip in the Northern Territory with others. Imbree let McNeilly drive his car although McNeilly had no licence and little driving experience. This was known to Imbree. McNeilly swerved to avoid a piece of tyre in the road and rolled the car, leaving Imbree a tetraplegic.

The High Court found that the standard of care owed by McNeilly to Imbree was the standard of care expected of a reasonable driver and was not modified by the experience (or inexperience) of McNeilly or whether they were licenced. Imbree's knowledge of the driver's inexperience was not enough to apply a modified standard of care, although the issue may be, and in this case was, relevant to the issues of contributory negligence. The court's assessment of Imbree's contributory negligence was set at 30 per cent. This decision overruled the High Court's previous decision in *Cook v Cook*, meaning Imbree could recover damages from McNeilly.

Video 7.3 *Imbree v McNeilly* (2008)

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Category 5: Medical practitioners and hospitals

Medical practitioners (doctors and nurses) owe their patients a duty of care in the provision of their healthcare, diagnosis, treatment and advice. Hospitals and other medical institutions such as aged care facilities are included in this aspect of duty of care. Alleged breaches of this duty that have resulted in harm may result in a civil action, usually in the tort of negligence. The lead case in this matter is *Rogers v Whitaker* (1992) HCA 58.

The High Court rejected the notion that the standard of care owed to a patient was subject to medical judgement. Instead, it held that the standard of care to be observed in Australia by a person with special skill or competence is that of an ordinary skilled person exercising and professing to have a special skill and is not determined by reference to practice followed or supported by a reasonable body of medical opinion. Therefore, in regard to non-disclosure of risk and the provision of advice and information, the **Bolam principle** was discarded and replaced with the principle that a person is entitled to make decisions about their own life after full disclosure of the risk involved. With regard to the duty to warn, the court upheld the principle that a doctor has a duty to their patient to warn them of any inherent risk in the proposed medical treatment.

This is contained in section 21 of the *Civil Liability Act 2003* (Qld). It means doctors should give patients information about potential risks of surgery if it is information necessary for a person to make an informed decision about undergoing treatment or following advice, given the circumstances or information a doctor should know the patient wants before deciding on treatment or advice.

Bolam principle a doctor is not negligent if they act in accordance with accepted practice at the time, as deemed proper by a responsible body of medical opinion, even though other doctors adopt a different practice

Off the record

The judgment in *Rogers v Whitaker* (1992) HCA 58 was significant with regard to the duty of care owed by medical practitioners to their patients. The High Court rejected the Bolam principle defence as applied in the United Kingdom in *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582. The principle formulated in *Bolam v Friern* was that a doctor is not negligent if they act in accordance with accepted practice at the time as deemed proper by a responsible body of medical opinion even though other doctors adopt a different practice.

Do you agree or disagree with the High Court decision to reject the Bolam principle? Justify your response.

Video 7.4 *Rogers v Whitaker* (1992)

Figure 7.16 Medical staff owe a duty of care to their patients.

Category 6: Schools

School authorities and teachers owe a duty of care to their students. This includes the school and teacher taking reasonable precautions to ensure the safety of students. The test applied

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by the courts to determine whether any breach of duty has occurred is to establish whether the school and/or teacher acted in the way a reasonable parent would have acted when faced with the same circumstances. School authorities and teachers owe a duty to their students both during school hours and outside of school hours as a result of the judgment in *Geyer v Downs* (1977) 17 ALR 408 (see box).

Vicarious liability has been discussed on page 252 in relation to employer–employee relationships. Applying this principle to a school situation, a teacher has a duty of care to their students and so too does the school that employs them. If a teacher breaches that duty, the teacher and the school can both be held liable for the breach. A school owes a non-delegable (cannot be assigned to someone else or another entity) duty of care to ensure that all reasonable care is taken for its pupils' safety, and this duty of care arises solely from that relationship as the employing authority of the teacher.

Liability is imposed particularly when there is inadequate supervision or when it is clearly foreseeable that the employing authority's acts or omissions are likely to place students at risk of harm. The teacher and defendant school authority would have to show that they had provided adequate supervision (Torts & Personal Injury Law, *Australian Torts Commentary*, 2012).

Figure 7.17 Teachers must actively supervise.

Figure 7.18 Students must be supervised adequately.

The decision in *Geyer v Downs* (1977) 17 ALR 408

The court found that the headmaster owed the student a duty of care and that he should take such measures that were reasonable in the circumstances to prevent physical injury. By virtue of the fact that the headmaster had opened the gates and allowed the children onto the school grounds before school hours, he exercised authority over them and established a duty of care to them. Consequently, by not providing adequate supervision, the headmaster was liable, and the school authority was vicariously liable for the damages to the plaintiff.

The decision in *Ramsey v Larsen* (1964) 111 CLR 16

A student had climbed a tree against his teacher's instructions, but the teacher then took advantage of the student's presence in the tree and asked him to pass a rope over a higher branch. In the process of doing so, the student fell to the ground and was injured. The High Court rejected the view that a teacher who had breached his duty of care towards a student was personally liable. The court held that the school authority, the NSW Government, was vicariously liable for the teacher's negligence when the student suffered injury.

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Figure 7.19 Solicitors owe a duty of care to their clients.

Category 7: Legal profession

Legal practitioners (lawyers) owe a duty of care to their clients to exercise reasonable care in the provision of their professional services as defined in terms of their retainer.

There is an expectation that solicitors in general practice are entitled to rely on advice from the counsel (barristers) who specialise in an area of the law and are engaged by the solicitor to assist in a case. However, it is expected that in order to reasonably discharge their duty of care to their clients, the solicitor will ensure counsel is adequately briefed.

Therefore, a solicitor has a duty to reasonably consider a barrister's advice, and if the advice is obviously or glaringly wrong, the solicitor has a duty to reject it in the best interests of their client. A solicitor is not entitled to shrink from raising doubts on counsel's advice – even from eminent counsel – in order to act in the best interests of the client, and reasonably and professionally discharge their duty of care to the client.

Section 22 of the *Civil Liability Act 2003* (Qld) is also relevant here. It holds that if a professional, like a doctor or a lawyer, is providing a service and follows the accepted practices of their peers (other professionals in the same field), they will not be considered at fault for breaching their duty. In simple terms, if they do what most other respected professionals would do in the same situation, they cannot be held legally responsible if things do not go according to plan. However, if a court thinks their actions go against common sense or written laws, then they can still be held responsible. It also mentions that having different opinions among professionals is acceptable, and it does not have to be agreed upon by everyone to be considered acceptable. This rule does not apply when the professional is giving warnings or advice related to the risk of harm to a person which is specifically important in relation to the duties owed by doctors, for example.

Review 7.2

1 In your opinion, **explain** why the Queensland Government amended the *Residential Tenancy and Rooming Accommodation Act 2008* and **evaluate** the legal implications for landlords.
2 **Evaluate** the significance of the judgment in *Rogers v Whitaker* (1992) HCA 58 with regard to medical negligence.
3 **Define** vicarious liability.
4 With reference to the lead case, **describe** the test used by the courts to determine a breach of duty of care.

Research 7.1

1 Research and **evaluate** the legal significance of the recognition of duty of care in negligence actions.
2 Research the legal significance of the judgment in *Donoghue v Stevenson* [1932] AC 562 and **analyse** its implications on the tort of negligence.
3 Research and **describe** how the legal relationship and responsibilities that were recognised in *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479 have been applied in other negligence actions.

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7.4 Defences to negligence

The principal defences to an action in negligence are:

- contributory negligence
- voluntary assumption of risk (*volenti non fit injuria*)
- illegality of the activity.

Contributory negligence

In common law, **contributory negligence** was a complete defence. No compensation could be recovered where the plaintiff suffered damage partly through their own negligence and partly through the negligence of another. However, the defence of contributory negligence is now governed by legislation that allows for the apportionment of damage (Turner et al., *Concise Australian Commercial Law*, 2017, pp. 379–8). For example, the *Law Reform Act 1995* (Qld) provides that where a person suffers damage partly due to their own fault and partly due to the fault of another party, the damages recoverable shall be reduced with regard to the claimant's share or contribution to the damage, harm or injury. Similar laws apply in all other state jurisdictions.

So, what is contributory negligence? It is when a person has acted or omitted to act in such a way that they have contributed to or partly caused the damage to themselves. To be 'contributory', the plaintiff must have acted in such a way that this negligence partly caused the damage suffered. Contributory negligence is a special defence that can be pleaded by the defendant with the burden of proving any contribution to the damage by the plaintiff on the party alleging it (the defendant). Where the court accepts the existence of contributory negligence, the compensation awarded is reduced by the percentage of the plaintiff's contribution.

contributory negligence when a person has acted or omitted to act in such a way that they have contributed to or partly caused the damage to themselves

If you decide to go skydiving or bungee jumping, and you are made aware of the risks and have signed an acknowledgement of that risk before engaging in the activity, you have assumed the risk of injury. Notwithstanding this acknowledgement, it may not fully indemnify the operator of the service from prosecution if it can be proved that they did not take all reasonable steps to foresee and prevent any risk of injury to their patrons, for example, carrying out regular maintenance of all the equipment to be used, including safety equipment, and providing appropriate training of all staff involved in the activity. Such clauses do not act as a complete indemnity against legal action in negligence.

The *Civil Liability Act 2003* (Qld) also outlines the law around contributory negligence. Section 24 states:

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.

This means it is possible that a person may have contributed so much by their own actions to their injury that they may not recover any damages.

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Case study 7.8

The case: *Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No. 2)* [2016] NSWSC 1123

Figure 7.20 Everyone must take reasonable precaution for their own safety, such as using handrails when provided, paying attention to signs that indicate hazards or keeping an ample lookout on their walkway.

Citation

[2016] NSWSC 1123 means this case was decided in 2016 in the New South Wales Supreme Court and is reported on page 1123 for 2016.

Facts

Carolin Alzawy attended a Bible study group that met in a building on the grounds of a church in Sydney. After the meeting, she descended a flight of stairs as she had done many times before. The staircase consisted of tiled steps with 'nose steps' laid on the outer edge of each tread and a handrail along the entire length. The 'nose' tile on one of the steps had been broken four years earlier but never fixed. Ms Alzawy did not use the handrail as she descended the stairs. Some way down the staircase, she fell forward, hitting her head forcefully on the metal handrail before falling to the bottom of the stairs.

Legal issues

The responsibility of a plaintiff to take reasonable care for their own safety was an important issue to be considered. The contribution a person might make to their own injury needed to be weighed against the original wrongdoing that led to that injury.

Decision

The trial judge was satisfied that the plaintiff had stepped on the broken tile when she slipped. As such, the broken tile itself, and the church's failure to fix it, had caused the damage the plaintiff had suffered. The defendant was therefore held liable for the plaintiff's injuries. However, the judge found a person descending a flight of stairs ought to take reasonable care for their own safety. In this instance, reasonable care included simple precautionary measures such as the use of the handrail and keeping a proper lookout.

The plaintiff was found to have been 50 per cent responsible for the injuries she suffered on account of her contributory negligence.

Ratio decidendi (reason for the decision)

The plaintiff must take reasonable care themselves to minimise the risk of injury. Failure to do this may cause them to be held partially responsible for any injury suffered to the extent of their own failure to take reasonable care.

Obiter dicta (something to think about)

The liability of owners/occupiers of buildings is well-established in law. They are required to take all reasonable steps to ensure the safety of those visiting the premises. The position of the those who insure such premises for public liability is also important. Increases in successful claims places a financial burden on insurance companies that gets passed onto the customers leading to rising insurance premiums.

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An intoxicated person who staggers onto the road and is hit by a passing vehicle may be held by the court to have contributed to their injuries. However, this does not absolve the driver, who is expected to take reasonable precautions to avoid pedestrians on the road and to foresee the possibility of an accident with an intoxicated person who might enter the roadway. In such cases, the court will determine the extent of liability to be apportioned to each party.

Section 47 of the *Civil Liability Act 2003* (Qld) establishes the presumption that a plaintiff who is intoxicated at the time they are injured may have been contributorily negligent. However, this could be rebutted in court by the plaintiff if the intoxication was not a factor in the occurrence of the harm, injury or damage, or the intoxication was not self-induced.

Section 48 of the *Civil Liability Act* states that a person over the age of 16 who relies on the skill and care of a person who is intoxicated and is aware of the intoxication is at least 25 per cent contributorily negligent for harm they may suffer as a result. So, for example, someone who voluntarily gets into a car being driven by a drink driver, will be a contributor to any harm they suffer in the event of an accident caused by the driver's intoxication.

Figure 7.21 If you choose to do something risky, you are said to assume the risk.

Section 48 increases the contributory negligence in the event of harm suffered in a motor accident if the defendant's blood alcohol content was at least 0.15 per cent. In this case, it is presumed that the plaintiff is at least 50 per cent responsible for any harm they may suffer as a passenger in such a vehicle.

Voluntary assumption of risk (*volenti non fit injuria*)

Unlike contributory negligence, a successful plea of voluntary assumption of risk is a complete defence against the allegation of wrongdoing resulting in harm to another. The thought underpinning this aspect is that no wrong can be done to a person or party who has consented to engage in the action and who has accepted the risk involved.

However, the courts have limited the scope of this defence, requiring the defendant to show that the plaintiff knew the risk beforehand and that they fully appreciated the risk involved and accepted that risk freely and willingly. ***Volenti non fit injuria*** translates approximately to 'there can be no injury to the willing'. Nowadays this defence is rarely raised successfully.

volenti non fit injuria (Latin term) meaning 'there can be no injury to the willing'; a person who accepted the risk of injury that may result from their actions

Obvious risks

The *Civil Liability Act 2003* (Qld) outlines the law in relation to 'risky' activities undertaken by people that may give rise to consideration as to whether they have voluntarily assumed a risk. Section 13 of the *Civil Liability Act* defines obvious risk as a risk that was 'obvious to a reasonable person in the position of that person'. It further goes on to such risks are 'patent or a matter of common knowledge' and that something can be an obvious risk even if it has a low probability of occurring. The risk does not need to be 'prominent, conspicuous or physically observable', so overall it does appear to indicate a wide range of activities could be considered as giving rise to

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an 'obvious risk'. However, it does set a limitation on the operation of this section in relation to 'a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk'.

The examples given in *Civil Liability Act* section 13(5) are:

1. A motorised go-kart that appears to be in good condition may create a risk to a user of the go-kart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.
2. A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.

Section 14 of the *Civil Liability Act* states that if 'a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk'. This is an interesting section as it reverses the normal onus of proof in some respects and makes it necessary for the plaintiff to prove they were not aware rather than the defendant having to prove they were aware. It also operates quite broadly in that 'a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk'.

Section 15 states 'a person does not owe a duty to another person to warn of an obvious risk' unless the plaintiff has requested advice or information about the risk from the defendant or the defendant is required by a written law to warn the plaintiff of the risk.

Additionally, the *Civil Liability Act* outlines that there is no liability for personal injury suffered from obvious risks of dangerous recreational activities. In section 19 it says that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm. This applies whether or not the person suffering harm was aware of the risk.

The question does arise what is a dangerous recreational activity? For example, free climbing a rock face without a rope is clearly a dangerous recreational activity but is kayaking in a river also a dangerous recreational activity? Section 18 defines 'dangerous recreational activity' as 'an activity engaged in for enjoyment, relaxation or leisure that

Figure 7.22 Go-karting is potentially an 'obvious risk' if the go-kart is damaged.

Figure 7.23 Free soloing, which is rock climbing without a rope, is clearly a dangerous recreational activity.

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involves a significant degree of risk of physical harm to a person'. However, a determination of what is a significant degree of physical harm is still the subject of much debate. Activities that have been deemed dangerous recreational activities are BMX bike riding, snow skiing, jumping off a 10-metre diving board, kangaroo shooting at night, diving off a wharf, swinging off a rope swing into a river, playing laser tag, learning to fly a plane and white-water rafting. Activities deemed not dangerous recreational activities are playing an Oztag Touch Football game, cruising in calm water, snow skiing for the first time and crashing in a ditch at the end of the slope, and jumping a 'leap of faith' (while wearing a harness, jumping from a platform to a bar seven to eight metres above ground).

Illegality of the activity

If either or both of the parties are involved in illegal activity or a criminal act at the time the injury occurred, illegal enterprise is the common law defence. Involvement in illegal activity can extinguish any duty of care owed by one party to another. This defence is based upon public policy considerations that the law should not recognise that the plaintiff has any rights to recover damages where the plaintiff was involved in an illegal act at the time the harm, injury or damage occurred.

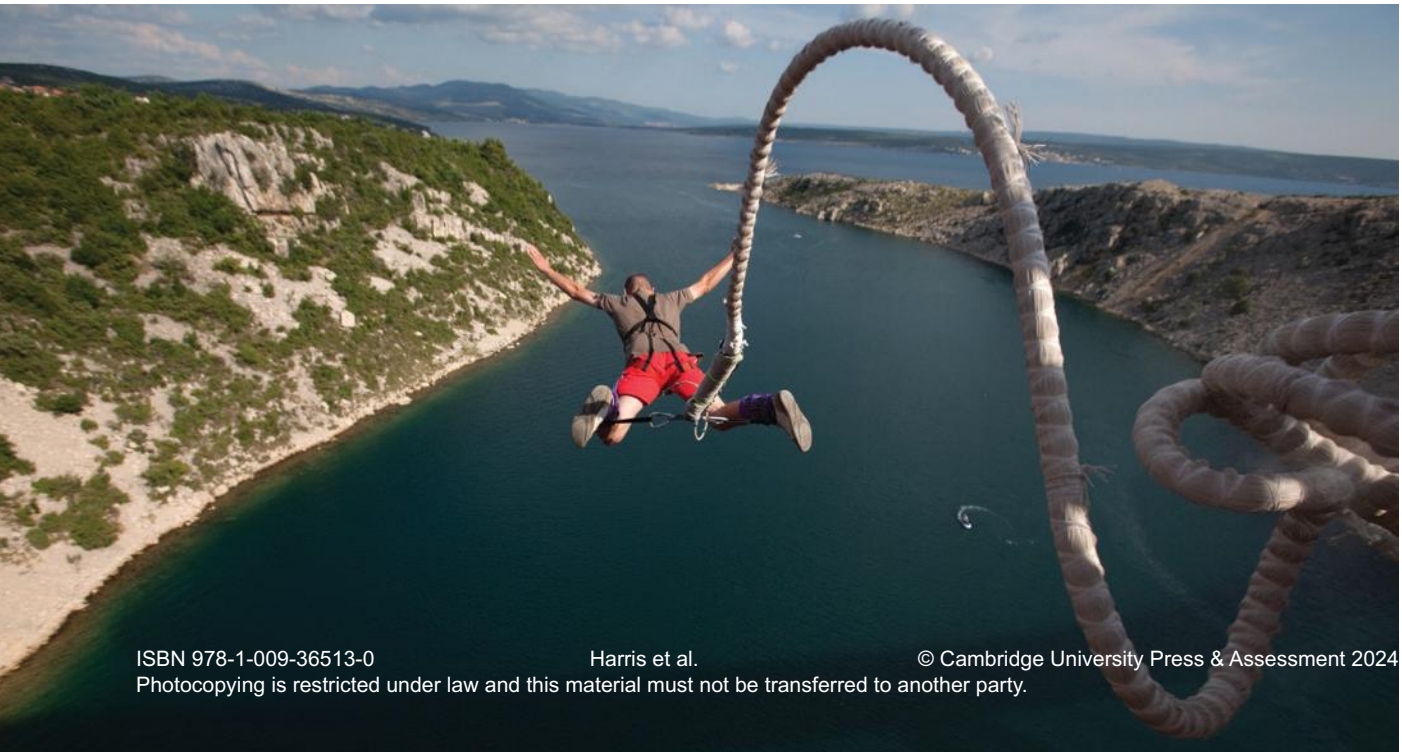
Review 7.3

1 **Define** contributory negligence and **explain** how it is applied by the courts in negligence cases.
2 **Explain** how voluntary assumption of risk works as a defence in Queensland.
3 **Explain** how illegal enterprise is used as a defence. Provide examples.
4 **Explain** the impact of intoxication on negligence claims in Queensland.

Research 7.2

1 Research why a statute was seen as necessary in relation to negligence law in Queensland. **Evaluate** the way the *Civil Liability Act 2003* (Qld) has used case law principles in the tort of negligence.
2 Research the role of precedent cases in the law. **Discuss** at least two examples of important cases to illustrate how they have changed or expanded the tort of negligence.

Figure 7.24 Bungee jumpers must accept the risk involved.



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7.5 Remedies available to a successful plaintiff in negligence

If a plaintiff succeeds in a negligence action, there are two main remedies which could be awarded. These are damages and court orders. By far the most common remedy sought is compensatory damages. The aim of the court in ordering compensatory damages is to put the injured party in the position they would have been had they not been injured.

There are a number of different types of damage and these are outlined under the *Civil Liability Act*.

Section 51 of the *Civil Liability Act* defines general damages which include compensation payable for pain and suffering, loss of amenities of life, loss of expectation of life or disfigurement. Loss of amenities of life means the inability to enjoy life as they once did such as loss of ability to move properly, read books, paint, play sport or have sex.

General damages award amounts are assessed on a somewhat complex scale running from 1 to 100 (100 being the most serious injury of that type) called the Injury Scale Value and a mathematical formula is then applied to that to determine the amount to be awarded. This amount is actually now limited in Queensland to a maximum of $389 900. Before the *Civil Liability Act* was introduced, a much greater flexibility was given to the courts to order greater general damages amounts. In fact, one of the reasons the *Civil Liability Act* was introduced was in relation to concerns from insurers that as damages amounts got higher and higher over time, they would be forced to outlay more in damages as a result and so insurance would become much more expensive or even impossible to afford. General damages are therefore now capped to that amount. Additionally, damages in the form of exemplary, punitive or aggravated damages (types of damages awarded essentially to punish or make an example of the defendant) can now only be awarded if the damage was an unlawful, intentional act done with intent to cause personal injury or resulting from an unlawful sexual assault or sexual misconduct (s. 52 *Civil Liability Act*). The *Civil Liability Act* has again in this way restricted the amounts plaintiffs can claim.

Figure 7.25 The most common remedy is damages paid to a successful plaintiff.

Off the record

Evaluate whether it is fair that section 52 of *Civil Liability Act 2003* (Qld) should reduce the ability of a court to 'punish' a defendant in this way for negligence.

Another form of damages is called **special damages**. Special damages are damages which the plaintiff has suffered and which are capable of precise calculation. This would include things like hospital and medical bills, and other charges such as transport or dental treatment which have a definite value or bill that can be determined.

Finally, a court can order damages payable for **loss of future earnings**. This is to compensate

special damages types of damages capable of precise calculation such as medical bills

loss of future earnings types of damages payable for loss of earnings that would have existed but for the injury suffered

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a plaintiff that might otherwise have continued to receive wages from the job they had prior to the injury to recover the amount which they otherwise would have earned if they were unable to continue in that job or in the same capacity. There is again a restriction on this. Section 54 of the *Civil Liability Act* limits the amount payable to a plaintiff to three times the average weekly earnings. This is appropriate for most people; however, there are a number of occupations that would not receive the amount they might have otherwise earned. For example, if a surgeon is injured and unable to continue to perform surgery, they would be expected to earn more than three times the average weekly wage and so would not be compensated for the full amount of loss of future earnings.

Research 7.3

Research the average weekly wage in Queensland. **Identify** what a number of different occupations earn on average in Queensland. How many of these would not therefore be adequately compensated under section 54 of the *Civil Liability Act*? **Evaluate** whether this is fair.

The other form of remedy usually comes in the form of court orders. The most common type of order in negligence is called an injunction. This is a type of court order that stops a person from carrying out an action that may cause further injury or compels them to do something to carry out a certain act. For example, if a building site is deemed unsafe because scaffolding has not been properly maintained, an injunction would stop work on the site until the problem is fixed. In this case it would both *stop* work and *compel* an act to fix the problem.

Figure 7.26 A special type of court order called an injunction may be a remedy.

7.6 Sport and negligence

One area in which negligence is having an increasing impact is in sport. Negligence applies to sport because the law considers that any party involved in a sport or a sporting organisation has a potential legal relationship with the participants, including the spectators. This relationship means that they must take reasonable measures to prevent the risk of harm.

A duty of care therefore exists between:

- competitors and other competitors
- competitors and spectators
- owners and occupiers and organisers, and spectators
- owners and occupiers and organisers, and competitors
- organisers and strangers
- coaches and players
- umpires and players
- schools, and players, spectators and visitors.

Participation in sporting activities often gives rise to potential liability of the participants. The duty of care owed depends on the circumstances of the individual case.

One issue in this area that has come to prominence recently is around concussion in sport. There have been concerns raised in contact

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sports around the risk to participants for head injuries such as concussions leading to long-term and serious brain diseases like chronic traumatic encephalopathy and Alzheimer's disease. The NFL in the United States settled a claim from former players for $1.2 billion, and there are currently class actions as well as individual lawsuits against the AFL in Australia.

Check this out

The AFL is the subject of two class actions on behalf of former players for the damage allegedly suffered from concussions.

Read SBS News, 'Why the AFL is facing a landmark $1 billion class action from more than 60 players' at https://cambridge.edu.au/redirect/10469.

Do you agree that former players should be able to sue the AFL in this case? Explain why or why not.

Figure 7.27 What do the organisers of a sporting event owe the spectators who come to their venue to view a sporting match?

Review 7.4

1 Conduct an internet search of 'Bradford City Stadium fire.' **Explain** who was found to be legally responsible for the disaster. What actions could they have taken to minimise the risk such a fire could have occurred?
2 In small groups, brainstorm why there has (or has not) been a move towards more litigation by people injured in sport. **Summarise** and present your findings to the class.
3 In your legal opinion, **explain** why a higher standard of care is expected in each of the following situations:
   a from senior sporting officials with more expertise and experience
   b when working with the very young and the very old
   c when coaching or training beginners and inexperienced participants.

Spectator damages

In *Langham v Connell Point Rovers Soccer Club* (2005) NSWCA 461, a spectator was awarded compensatory damages after tripping over a rope in a car park when attending a soccer match. The soccer club was held liable because it had not taken reasonable steps to foresee and reasonably prevent the risk of injury by installing the rope in the car park in a different colour to the dirt in the car park, making the rope hard to see.

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Figure 7.28 Who owes a duty of care?

Figure 7.29 What other elements might organisers need to take into consideration when using an urban playing field? Think about factors relating to traffic, public transport and safety of passers-by.

7.7 Legal actions and negligence issues

There are currently a number of negligence law issues in Australia. For example, in relation to medical negligence, issues have been raised about the potential liability of medical practitioners in using VR (virtual reality) to treat patients.

Figure 7.30 VR headsets in use

Check this out

Conduct a search on 'medical negligence and VR Australia.'

1. Describe the potential issues raised in relation to the use of this technology in a medical setting.
2. Evaluate whether the potential issues outweigh the benefits of its use.

Another issue is in relation to climate change litigation. There has been an increase in recent years in which climate change is cited as a 'central' rather than a 'peripheral' issue in cases. This is represented by increasing concerns that the approaches of government currently in relation to climate change are not aligning with the concerns of the community generally.

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1. New developments, 1 January 2021 to 31 December 2021

There were 46 climate change judgments or new proceedings filed between 1 January 2021 and 31 December 2021, an increase on the number in previous years 2020 (31) and 2019 (27).[i]

This increase suggests a growing presence of climate change issues in the courts.

The Commonwealth had the highest number (15) followed by Vic (14), NSW (11), Qld (3), WA (2) and Int'l (1). There were no new cases in SA, ACT, NT or Tas.

Over the past three years, Commonwealth jurisdictions have seen the greatest annual change in the number of cases field/heard (see graph across). This may suggest growing discontent with the lack of Federal action on climate change in Australia (see e.g. Crowley 2021).

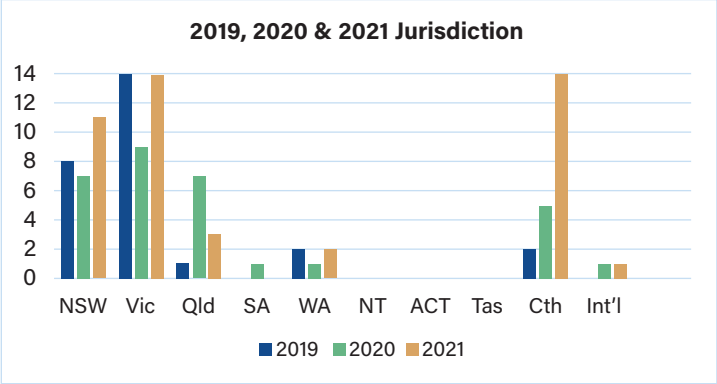

Figure 7.31 An extract from a University of Melbourne report 'Trends in Australian Climate Litigation' from 2021.

Check this out

Conduct a search of 'Australian climate change litigation'. See a suggested page at https://cambridge.edu.au/redirect/10470.

1 Identify the difference between 'strategic' and 'non-strategic' cases. Why is this significant?
2 Analyse and explain how the type of climate change litigation has changed over the last few years with reference to the type of proceedings being brought and against what defendants.

Finally, another major concern is how different groups access justice in Australia. Access to justice under the rule of law is a key principle. However, in Australia, a number of issues have been identified in relation to the way different groups in society face disadvantage in accessing justice.

The Law Council of Australia conducted a review into justice called The Justice Project. This important report identified groups facing difficulties and made a number of important recommendations about how to address these issues.

Check this out

Go to the Law Council of Australia website and The Justice Project – Final Report.

1 Identify the groups the Law Council of Australia has concerns about in terms of accessing justice.
2 Select one of these groups and explain the recommendations made to improve access to justice for this group.
3 Evaluate the effectiveness of these recommendations and the likelihood of them taking place.

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7.8 Topic review

Topic summary

- Negligence is a form of civil law that applies when a person fails to take reasonable care, and injury or damage results.
- The onus of proof in a negligence action rests with the person bringing the action.
- Negligence comprises three key elements: the existence of a duty of care, a breach of that duty, and reasonably foreseeable damages as a result of the breach of duty.
- Negligence can present in several different forms, including accidental harm, all types of accidents, physical or property damage or careless business errors.
- Proximity involves the notion of nearness or closeness between the parties, and includes physical, circumstantial and causal proximity.
- Foreseeability is an important part of establishing whether a duty of care is owed and whether the chance of injury or damage is reasonably foreseeable.
- Causation relates to the harm directly caused and is the link between the behaviour that caused the damage and the damage caused.
- The but-for test is used by the courts to determine whether the defendant's negligence caused the damage or the damage would have occurred anyway regardless of the defendant's action.
- The *Limitations of Actions Act 1974* (Qld) set specific time limits for negligence actions.
- The eggshell skull rule states that you must take your victim as you find them.
- For a negligence action to succeed, the damage caused must not be too remote or removed from the cause of the damage.
- The 2017 amendments to the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) mean that a landlord now has a legal duty to their tenant to provide and maintain minimum standards.
- The three main defences to negligence are contributory negligence, voluntary assumption of risk and illegality of the activity engaged in that resulted in the damage or injury.
- The two main remedies in negligence are compensatory damages and court orders.

Short-response questions

1 **Explain** the 'Salient Features Test' and what it is used for.

2 **Compare** and **contrast** contributory negligence and voluntary assumption of risk. **Explain** how these concepts are applied by the courts using examples to support your response.

3 Briefly **explain** the use of the neighbour principle.

4 **Evaluate** the purpose of:

- **a** negligence laws
- **b** onus of proof in a negligence action
- **c** what must be established for a negligence action to be brought.

Extended-response questions

1 Research *Geyer v Downs* (1977) 17 ALR 408. In small groups, discuss the legal issues the court would have considered in arriving at its judgment. **Summarise** your findings and present them to the class.

2 Research a negligence case of your choice. **Analyse** the facts of the matter and **evaluate** the decision of the court. Do you agree or disagree with the court? **Explain** why or why not.

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Response-to-stimulus questions

Read the following article and answer the questions that follow.

Source 1

In a landmark judgment, the Federal Court found the environment minister has a duty of care to young people

Jacqueline Peel & Rebekkah Markey-Towler, *The Conversation*, March 15, 2022

The federal court today unanimously decided Federal Environment Minister Sussan Ley does not have a duty of care to protect young people from the harms of climate change.

The ruling overturns a previous landmark win by eight high school students, who sought to stop Ley approving a coal mine expansion in New South Wales. While the judge did not prevent the mine expansion, he agreed the minister did indeed have a duty of care to children in the face of the climate crisis.

Ley's successful appeal is disappointing. As legal scholars, we believe the judgment sets back the cause of climate litigation in Australia by two decades, at a time when we urgently need climate action to accelerate.

So why was Ley successful? The federal court's 282-page judgment offers myriad reasons for why no duty should be imposed on the minister. But what emerges most clearly is the court's view that it's not their place to set policies on climate change. Instead, they say, it is the job of our elected representatives in the federal government.

Figure 7.32 Environment Minister Sussan Ley successfully argued she doesn't have a duty of care to protect young people from climate change.

What did the judges say?

In the original class action case filed in 2020, a single federal court judge decided Ley owed Australian children a common law duty of care when considering and approving the coal mine extension, under Australia's *Environment Protection and Biodiversity Conservation (EPBC) Act*.

This required the minister to take reasonable care when exercising her powers to avoid causing Australian children under 18 personal injury or death from carbon dioxide emissions.

Ley appealed this decision in July last year. She also approved the coal mine extension, arguing her decision would not contribute to global warming because even if the mine was refused, other sources would step in to meet the coal demand.

And today, in a live-streamed proceeding, the full bench of the federal court ruled in her favour: the stated duty should not be imposed on the minister. While the outcome was unanimous, the three judges had separate reasoning.

One judge saw climate change as a matter for government, not the courts, to address, saying the duty would be an issue 'involving questions of policy (scientific, economic, social, industrial and political) [...] unsuitable for the Judicial branch to resolve'.

Another said there was insufficient 'closeness' and 'directness' between the minister's power to approve the coal mine and the effect this would have on the children. But he left open the possibility of a future claim if any of the children in the class action suffered damage.

The third judge had three main reasons. First, the *EPBC Act* does not create a duty-of-care relationship between the minister and children. Second, establishing a standard of care is not

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feasible as it would result in 'incoherence' between the duty and the minister's functions. Third, it is not currently foreseeable that approving the coal mine extension would cause the children personal injury, as the law is understood.

The good news: climate science remains undisputed

In the original case, the judge made landmark rulings about the dangers of climate change, marking a significant moment in Australian climate litigation.

He found one million of today's Australian children are expected to be hospitalised due to heat stress, they will experience substantial economic loss, and when they grow up the Great Barrier Reef and most eucalypt forests will not exist.

According to the judge, this harm was 'reasonably foreseeable'. This is important from a legal point of view, as courts have previously considered climate change to be speculative, and a future problem.

As part of her appeal, Sussan Ley argued that these findings, based on presented evidence, were incorrect and went beyond what was submitted to the court. Today, these arguments were unanimously rejected.

The federal court found all the minister's criticisms on the evidence of climate change were unfounded and all of the primary judge's findings were appropriate to be made. As Chief Justice Allsop concluded:

[B]y and large, the nature of the risks and the dangers from global warming, including the possible catastrophe that may engulf the world and humanity was not in dispute.

But while this reaffirms acceptance that climate science is unequivocal, it does nothing to prevent mounting climate change harms, most recently made clear by the devastating floods across New South Wales and Queensland.

Indeed, it only turns this responsibility back to the current federal government, which has policies

Figure 7.33 Luca Saunders, 16, Anjali Sharma, 17, Izzy Raj-Seppings, 15, and Ava Princi, 18, were among eight children behind the landmark court case. (*Source:* AAP Image/Dean Lewins)

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increasingly at odds with what the science and concerned citizens say is needed.

Bucking the trend

This was a test case in Australian law, as it explored a novel legal argument. Its failure will likely put a dampener on innovative climate litigation in Australia.

Today's judgment asserts that the courts are limited in what they can do to address climate change. It goes against the trend of successful climate change court rulings overseas, and the widespread mobilisation across community groups, business and local governments for action.

Just last year, for example, we saw a court in The Hague order oil and gas giant Shell to reduce carbon dioxide emissions by 45 per cent by 2030, relative to 2019 levels, and a German court ruling that the government's climate goals were not strong enough.

Today's federal court finding that dealing with coal mine emissions is for governments alone seemingly reimposes barriers to climate litigation in Australia, carefully dismantled by the previous two decades of climate change cases.

We have seen a number of landmark climate cases in Australia. This includes the Rocky Hill verdict where a judge rejected a new coal mine on climate grounds, and the Bushfire Survivors case where the court found the NSW Government had a legal obligation to take meaningful action on climate change.

These brought the glimmer of hope that where the federal government fails to act, the courts will step in. Today's ruling suggests this is no longer the case.

In the lead up to the Australian federal election, the appeal outcome emphasises the importance of changing government policy if we're going to get better outcomes on climate change in this country. Climate change certainly will not wait – the fight for a safe climate future continues.

1 Using Source 1, **evaluate** the legal issues that the court would have considered in this negligence case. Do you agree or disagree with the court's decision? **Explain** why or why not.

2 Go to the Australian Law Reform Commission website and access the report *Serious Invasions of Privacy in the Digital Era* (Chapter 7: Fault). Research the case for and against the invasion of privacy becoming an actionable offence under the tort of negligence. **Argue** the case for or against. **Justify** your response.

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Unit 3

Law, governance and change

Unit overview

In Unit 3, students examine the complexities of the Australian legal system and its capacity to deal with the diversity of competing needs. They explore the role of legal institutions and law-making bodies in creating laws that reflect the views of society. Students consider the range of forces that create catalysts for change and reform, and how laws are changed or reformed to reflect shifting societal demands. This unit encourages and informs critical thinking about Australian and Queensland laws, and the importance of society and individuals engaging in law-making processes.

Students will study law, governance and change through relevant contemporary issues involving matters of governance and law reform. Examples of issues could arise from a range of areas, for example, family law, technology law, criminal law, counter-terrorism laws, employment law, and corporate law.

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Unit objectives

By the end of this unit, students should be able to:

1. Comprehend legal concepts, principles and processes of Australian and Queensland governance and law reform.
2. Select legal information from sources relevant to law reform issues.
3. Analyse legal issues involving Australian and/or Queensland governance and law reform.
4. Evaluate legal situations relevant to Australian and/or Queensland governance and law reform.
5. Create responses that communicate meaning to suit the intended purpose.

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Concept map

In Unit 3 of the QCAA Legal Studies course, we will cover the following topics and content:

Law, governance and change

Governance in Australia

- The rule of law
- *Terra nullius*
- Democracy
- Constitutional rights
- Referendums
- Representative and responsible governments
- Separation of powers
- Government accountability
- Specialist courts and tribunals
- Just and equitable outcomes
- Legal changes
- *Constitution Act 1901* (Cth)

Law reform within a dynamic society

- Lobby and advocacy groups
- Transnational crimes
- Commissions
- Inquiries
- Inquests
- Patterns of offences
- Sentencing trends
- Current and contemporary issues
- Specialist task forces

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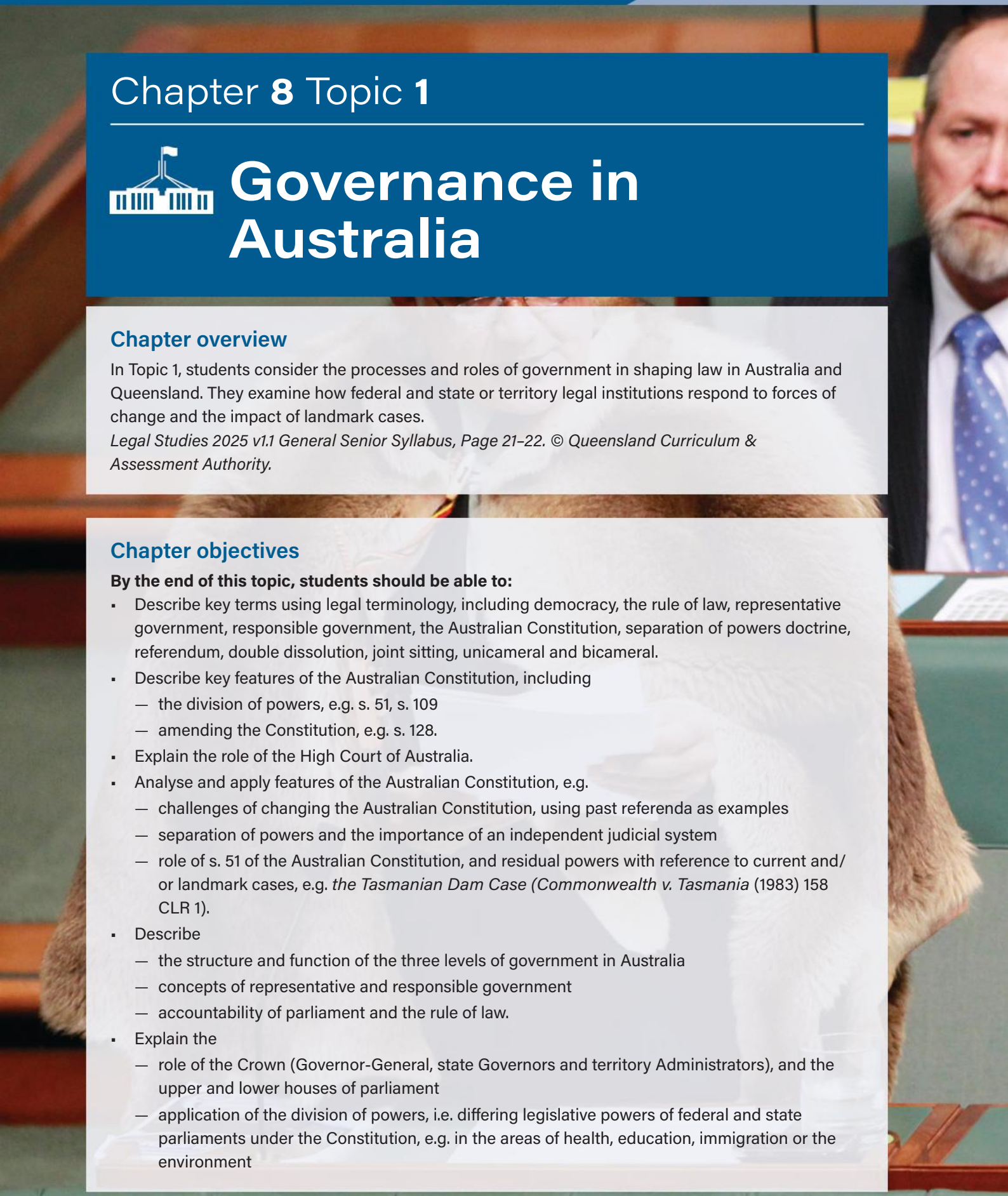

Chapter **8** Topic **1**

Governance in Australia

Chapter overview

In Topic 1, students consider the processes and roles of government in shaping law in Australia and Queensland. They examine how federal and state or territory legal institutions respond to forces of change and the impact of landmark cases.

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Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including democracy, the rule of law, representative government, responsible government, the Australian Constitution, separation of powers doctrine, referendum, double dissolution, joint sitting, unicameral and bicameral.
- Describe key features of the Australian Constitution, including
  - the division of powers, e.g. s. 51, s. 109
  - amending the Constitution, e.g. s. 128.
- Explain the role of the High Court of Australia.
- Analyse and apply features of the Australian Constitution, e.g.
  - challenges of changing the Australian Constitution, using past referenda as examples
  - separation of powers and the importance of an independent judicial system
  - role of s. 51 of the Australian Constitution, and residual powers with reference to current and/or landmark cases, e.g. *the Tasmanian Dam Case (Commonwealth v. Tasmania* (1983) 158 CLR 1).
- Describe
  - the structure and function of the three levels of government in Australia
  - concepts of representative and responsible government
  - accountability of parliament and the rule of law.
- Explain the
  - role of the Crown (Governor-General, state Governors and territory Administrators), and the upper and lower houses of parliament
  - application of the division of powers, i.e. differing legislative powers of federal and state parliaments under the Constitution, e.g. in the areas of health, education, immigration or the environment

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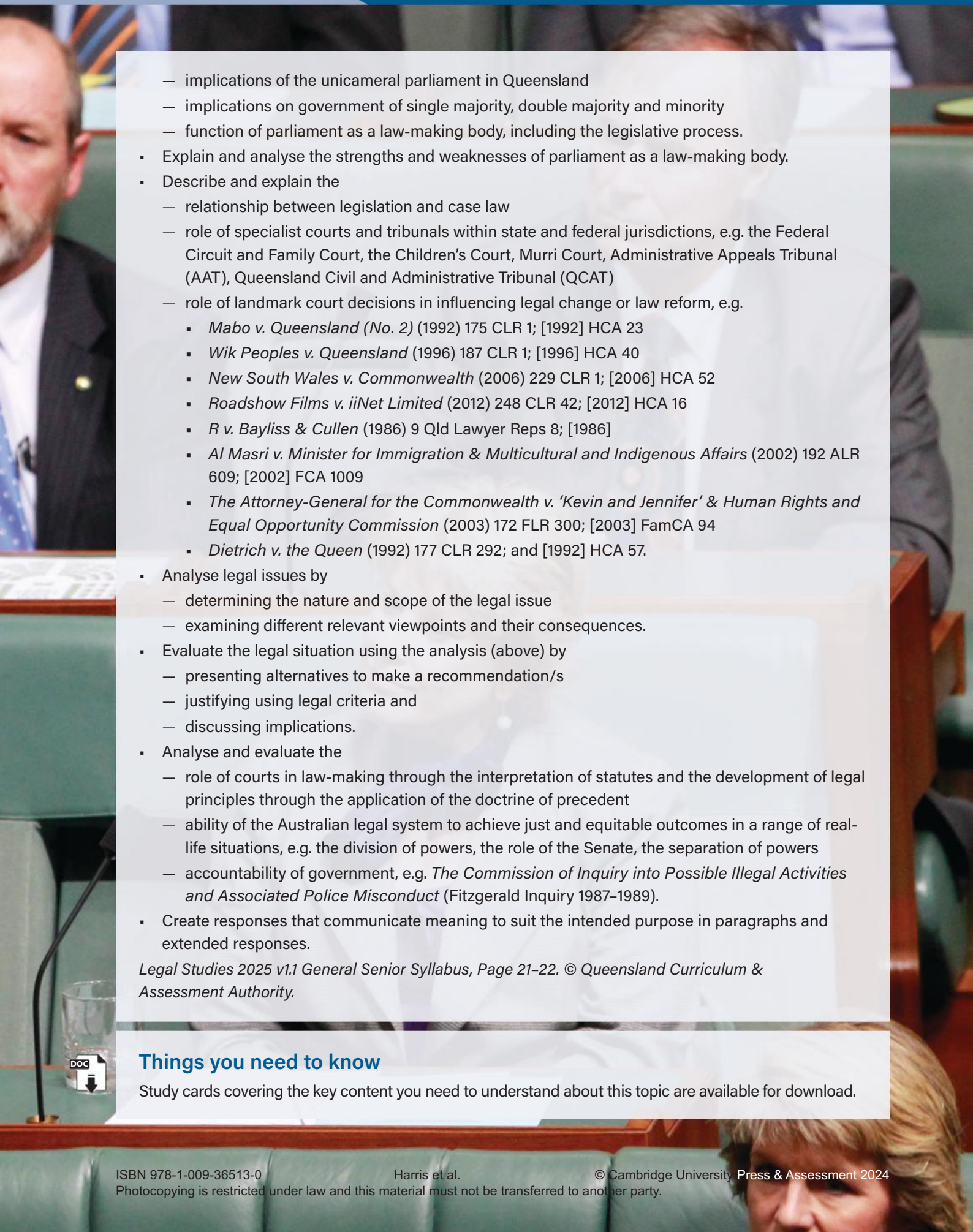

- implications of the unicameral parliament in Queensland
- implications on government of single majority, double majority and minority
- function of parliament as a law-making body, including the legislative process.

- Explain and analyse the strengths and weaknesses of parliament as a law-making body.
- Describe and explain the
  - relationship between legislation and case law
  - role of specialist courts and tribunals within state and federal jurisdictions, e.g. the Federal Circuit and Family Court, the Children's Court, Murri Court, Administrative Appeals Tribunal (AAT), Queensland Civil and Administrative Tribunal (QCAT)
  - role of landmark court decisions in influencing legal change or law reform, e.g.
    - *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1; [1992] HCA 23
    - *Wik Peoples v. Queensland* (1996) 187 CLR 1; [1996] HCA 40
    - *New South Wales v. Commonwealth* (2006) 229 CLR 1; [2006] HCA 52
    - *Roadshow Films v. iiNet Limited* (2012) 248 CLR 42; [2012] HCA 16
    - *R v. Bayliss & Cullen* (1986) 9 Qld Lawyer Reps 8; [1986]
    - *Al Masri v. Minister for Immigration & Multicultural and Indigenous Affairs* (2002) 192 ALR 609; [2002] FCA 1009
    - *The Attorney-General for the Commonwealth v. 'Kevin and Jennifer' & Human Rights and Equal Opportunity Commission* (2003) 172 FLR 300; [2003] FamCA 94
    - *Dietrich v. the Queen* (1992) 177 CLR 292; and [1992] HCA 57.
- Analyse legal issues by
  - determining the nature and scope of the legal issue
  - examining different relevant viewpoints and their consequences.
- Evaluate the legal situation using the analysis (above) by
  - presenting alternatives to make a recommendation/s
  - justifying using legal criteria and
  - discussing implications.
- Analyse and evaluate the
  - role of courts in law-making through the interpretation of statutes and the development of legal principles through the application of the doctrine of precedent
  - ability of the Australian legal system to achieve just and equitable outcomes in a range of real-life situations, e.g. the division of powers, the role of the Senate, the separation of powers
  - accountability of government, e.g. *The Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Fitzgerald Inquiry 1987–1989).
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

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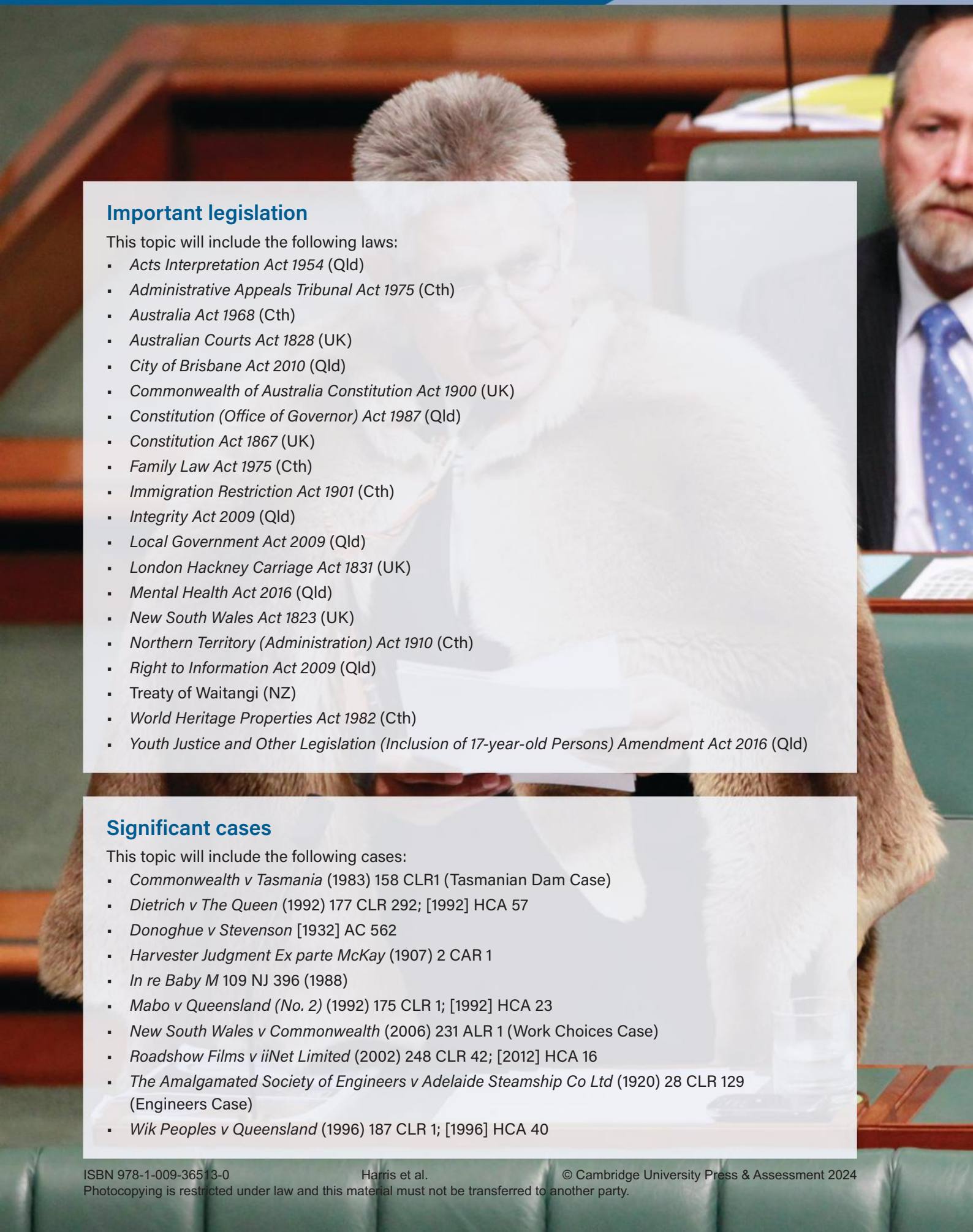

Important legislation

This topic will include the following laws:

- *Acts Interpretation Act 1954* (Qld)
- *Administrative Appeals Tribunal Act 1975* (Cth)
- *Australia Act 1968* (Cth)
- *Australian Courts Act 1828* (UK)
- *City of Brisbane Act 2010* (Qld)
- *Commonwealth of Australia Constitution Act 1900* (UK)
- *Constitution (Office of Governor) Act 1987* (Qld)
- *Constitution Act 1867* (UK)
- *Family Law Act 1975* (Cth)
- *Immigration Restriction Act 1901* (Cth)
- *Integrity Act 2009* (Qld)
- *Local Government Act 2009* (Qld)
- *London Hackney Carriage Act 1831* (UK)
- *Mental Health Act 2016* (Qld)
- *New South Wales Act 1823* (UK)
- *Northern Territory (Administration) Act 1910* (Cth)
- *Right to Information Act 2009* (Qld)
- Treaty of Waitangi (NZ)
- *World Heritage Properties Act 1982* (Cth)
- *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld)

Significant cases

This topic will include the following cases:

- *Commonwealth v Tasmania* (1983) 158 CLR1 (Tasmanian Dam Case)
- *Dietrich v The Queen* (1992) 177 CLR 292; [1992] HCA 57
- *Donoghue v Stevenson* [1932] AC 562
- *Harvester Judgment Ex parte McKay* (1907) 2 CAR 1
- *In re Baby M* 109 NJ 396 (1988)
- *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; [1992] HCA 23
- *New South Wales v Commonwealth* (2006) 231 ALR 1 (Work Choices Case)
- *Roadshow Films v iiNet Limited* (2002) 248 CLR 42; [2012] HCA 16
- *The Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (Engineers Case)
- *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40

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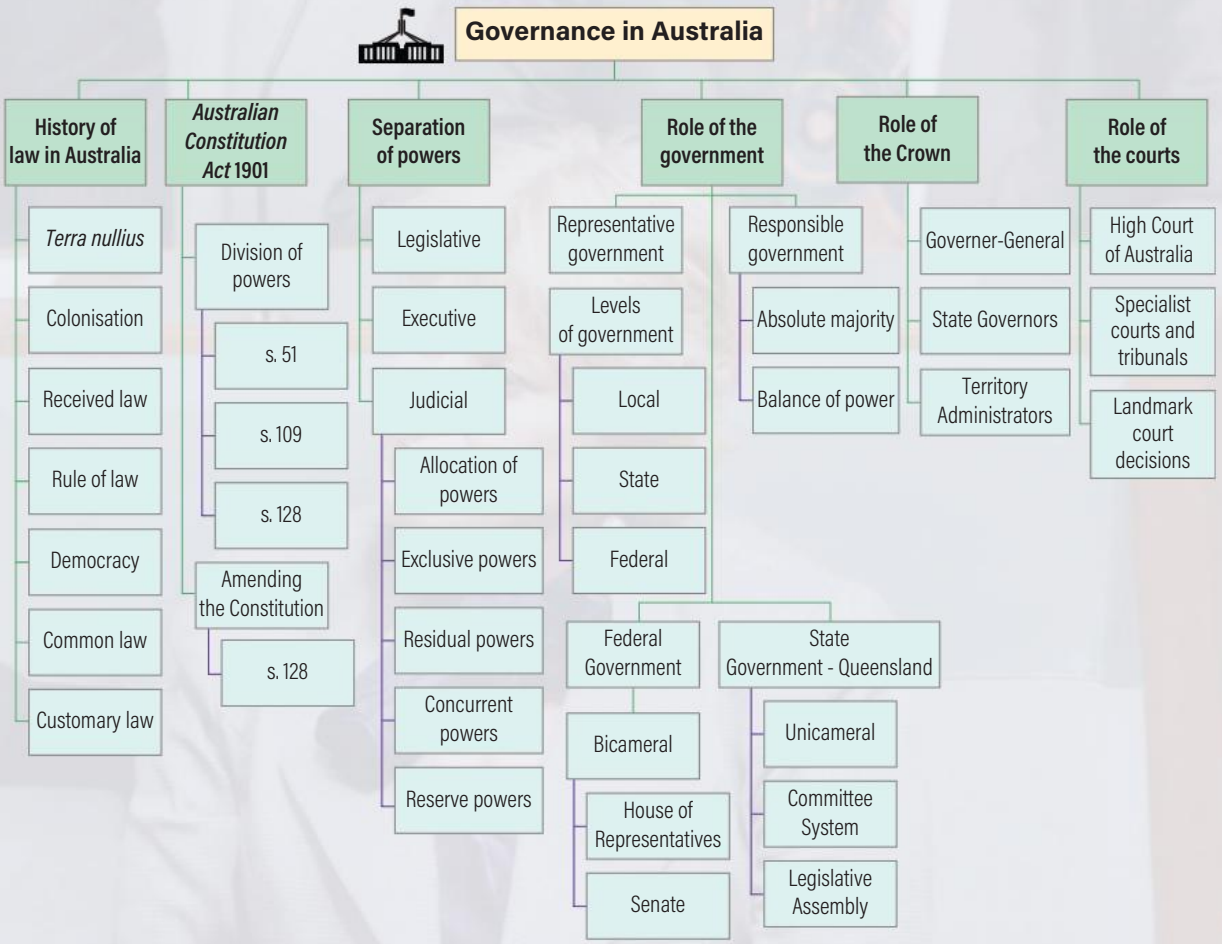
Concept map

In Topic 1 of Unit 3 of the QCAA Legal Studies course, we will cover the following content:



Background image: Ken Wyatt, who would go on to become Australia's first Indigenous federal minister, delivers his first speech to Parliament, 29 September 2010.

Note: Please be aware that this chapter contains images of Aboriginal and Torres Strait Islander peoples now deceased.

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8.1 Legal history of Australia

In Unit 1, you learned about rules and laws and why we regulate how individuals and groups conduct themselves in society. It is the systems of governance and the election of a government to make, amend and organise these rules and laws that is the focus of Unit 3. While you will revisit some of the concepts in Chapter 1 Legal foundations, throughout this topic, you must consider how federal and state governments are both responsible and representative of society to ensure that they respond to the forces of change and the impact of landmark cases.

Aboriginal and Torres Strait Islander peoples occupied the continent now known as Australia for thousands of years before European settlement. Some historians suggest that they have lived on this land for at least 100 000 years.

A key legal issue for European colonial powers was whether the lands they discovered had a legal and governance system in place. This was important because, according to eighteenth-century international law, if a land was uninhabited and without **governance**, it could be occupied and claimed by another nation without the need for negotiations, treaties or the use of force to conquer that land.

In *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, the High Court accepted that native title existed at the time of European settlement and as a result ruled that the doctrine used to claim the land was flawed.

governance a method or system of government, the systems by which entities are directed or controlled

Doctrine of *terra nullius*

The land we now know as Australia was claimed in the name of the British King George III by Captain James Cook on 22 August 1770, when he took possession of the entire eastern half of the continent under the doctrine of ***terra nullius***. King George III had given specific instructions to Cook before he set sail on his first voyage of discovery. These instructions provided Cook with his responsibilities concerning British law should he discover a land that was either occupied or uninhabited – the former required negotiation with the Indigenous peoples encountered.

terra nullius (Latin expression) meaning 'land belonging to no one', which is used in international law to describe territory that has never been subject to the sovereignty of any state

However, Cook did not seek and obtain the consent of the Indigenous people. This act by Cook was followed in 1788 by the settlement of Sydney Cove by Captain Arthur Phillip, with the continent's east coast being declared Crown land. Ninety years later, the British colony of Queensland would also claim the Torres Strait Islands (though this would be challenged over a century later in the High Court of Australia by Eddie Mabo and four other Torres Strait Islanders). This trio of land claims by the British represented significant points in the legal history of Australia – the first Aboriginal peoples dispossessed of their land through the declaration of *terra nullius*. The second act began the British 'settlement' of Australia and imposed the laws of the British Government and the King of Great Britain upon all the inhabitants of the land. The third dispossessed the Torres Strait Islanders of their lands.

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Off the record

In 1768, the Lords of the Admiralty provided Cook with what today might be called a legal brief. The brief provided instructions to Cook that outlined the protocols he was expected to follow when taking possession of a land in the name of the British King George III:

> 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.
>
> *Source:* A quote from James Cook's secret instructions for the *Endeavour* voyage, written by the Lords of the Admiralty, 30 July 1768, National Library of Australia.

Why did the Lords of the Admiralty provide these instructions?

Timeline: critical dates in Australian legal history

Pre-1770
Indigenous land governed by customary laws

1770
James Cook's arrival; first European contact, declaration of *terra nullius* denying Indigenous ownership of Eastern Australia

1788
British colonisation begins

1788
Introduction of *The Law of Nations (1758)* principles

1835
Further declaration of *terra nullius*, denying Indigenous ownership of Australia and Torres Strait Islands

1856
Introduction of responsible government in New South Wales

1900
Introduction of the Australian Constitution

1901
Federation, creation of the Australian Commonwealth

1903
Founding of the High Court of Australia

1967
Referendum grants rights to Indigenous Australians

1986
Australia Act ends UK legislative power

1992
Mabo decision recognises native land rights

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Figure 8.1 The settlement of Sydney Cove in 1788. It was the site chosen in 1788 by Captain Arthur Phillip for the establishment of the first British colony in Australia, which later became the city of Sydney. *Founding of the settlement of Port Jackson at Botany Bay in New South Wales in 1788* by Thomas Gosse, 1799.

Review 8.1

1 **Describe** how Australia came to be regarded as 'settled.'
2 **Explain** why Captain Cook did not follow the King's instructions when he encountered Aboriginal people.

International law and European colonisation

In the late eighteenth century, powerful European countries such as Spain, Portugal, France, Holland and Great Britain were engaged in extensive voyages of discovery and the **colonisation** of new land in a quest to maintain their influence and expand their empires. They developed rules of international law that would be recognised and applied to their colonising activities. As a result, the doctrine of *terra nullius* emerged as the rule these nations could apply to claim territory that they discovered was uninhabited, a desert or uncultivated land that had no sovereign system of governance or laws.

colonisation the action of establishing control over the indigenous people of an area; the action of appropriating a place for one's own use

These rules were founded on the views of historians of the day, such as Emmerich de Vattel, who wrote *The Law of Nations* (1758), and Hugo Grotius, who was regarded as the father of international law. Three key questions were at issue:

1 How much of a country could be claimed on discovery?
2 What was required to convert a claim of a country into a right?
3 What were the consequences of settling or conquering another land?

Views of the early European historians

De Vattel's view was that a country could take possession of another country that was 'vacant' and claim both its 'empire' and sovereignty, and its 'domain' or use of land. The Europeans therefore developed the rule that a discovered land could be claimed if it was uninhabited. However, even if it was inhabited, it still could be claimed provided the original inhabitants were not cultivating the land. The legal issue here lay in how the cultivation of the land was defined. To the British, cultivation meant clearing the land to make way for farming and towns based upon ownership of property and land (property rights). But to Aboriginal people, cultivation of the land meant that it was not over-used and was maintained in sacred trust for future generations.

De Vattel also argued that the obligation of inhabitants to cultivate the land in order to claim

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sovereignty over it might not apply to a land in a desert state. In this case, a country could claim title to its possession only if this claim was followed by real possession of it. We can assume that what de Vattel meant by this was that the land should be settled. Grotius was of a similar view, believing that 'discovery' was only possible if the land discovered was vacant. It appears that these conditions were developed into a rule of law, resulting in the emergence of the doctrine of *terra nullius*.

The philosopher John Locke was also of the view that cultivation of the land was an important condition of a claim to ownership over it. He argued that cultivation of land was a 'law of nature' and a precondition to sovereignty. He believed that labour was needed to establish ownership of land by the cultivation of that land, presumably by the farming and clearing of it to make way for villages and towns, as the British were used to doing.

> As much land as a man tills, plants, improves, cultivates and can use the product of, so much is his property.
>
> *Source:* John Locke, *Second Treatise*, 1689.

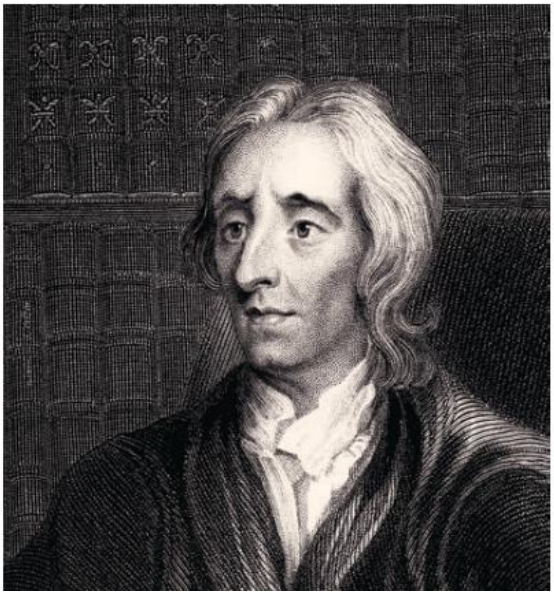

Figure 8.2 English philosopher John Locke

These views were all used by the British to justify their 'lawful' occupation of Australia when they 'discovered' it. Applying the thinking of de Vattel, Grotius and Locke, the British courts justified Britain's claim over Australia by arguing that Aboriginal people were not using their labour to demonstrate that they were cultivating it; therefore, in accordance with eighteenth-century international law, they did not own it. The British ignored the evidence that the nomadic lifestyle of Aboriginal people involved regularly returning to the same locations, that they were managing the land using fire to clear it for small-scale farming and that they had even established substantial villages. Alternatively, they simply did not accept or recognise this use of labour to manage the land as the cultivation of it. Had they done so, the land could not have been settled because Aboriginal people would have had lawful sovereignty over it and the British would have had to negotiate a treaty or conquer the land.

The British now began to push Aboriginal people off their traditional lands, refusing to recognise the various clans' and tribes' ownership of the land. This meant that Aboriginal people were cut off from their traditional food sources. Then, when they took a sheep or cow for food, they were punished under British law. They did not see this as theft, as the livestock were on their traditional lands, there for the taking, but they were nonetheless forced to endure a justice system they did not understand. Clearly, the British notion of property rights was at odds with traditional Aboriginal customary law.

In New Zealand, the Māori very nearly won a war against the British occupiers of their land. Lord Grey had to ask England for reinforcements to prevent a Māori victory, and even then, the British won the battle mainly because of their superior weapons and firepower. However, a significant difference between the British occupation of New Zealand and their occupation of Australia was the making of the Treaty of Waitangi. The doctrine of *terra nullius* was not applied in New Zealand as it was in Australia.

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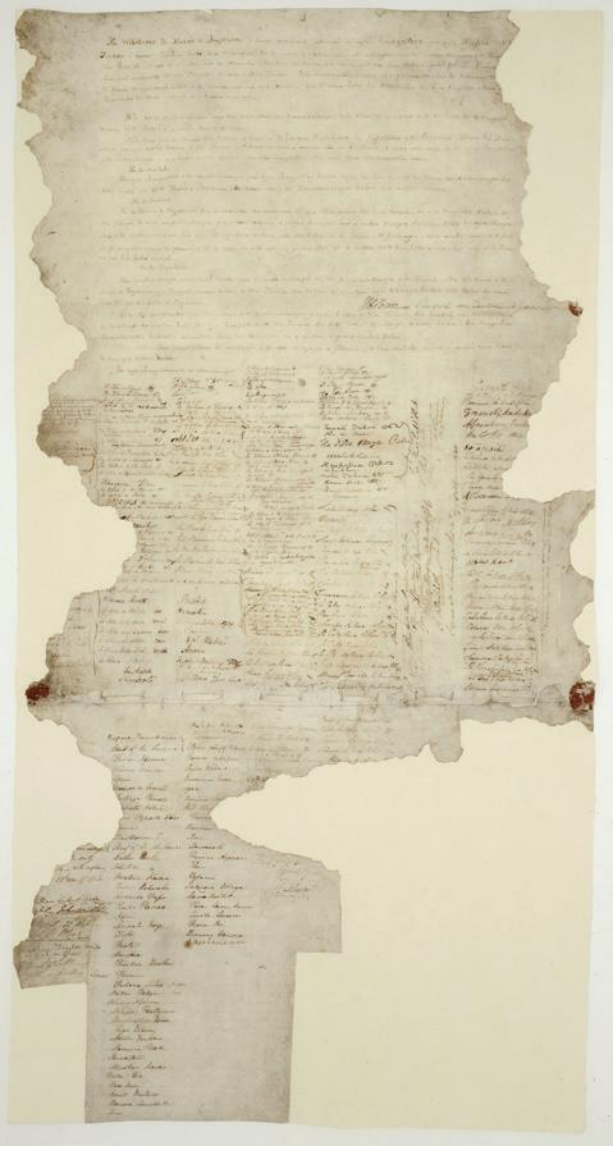

Figure 8.3 The Waitangi Sheet of the *Treaty of Waitangi*, signed between the British Crown and various Māori chiefs in 1840.

Received law

Whilst the doctrine of *terra nullius* paved the way for the settlement of Australia by the British, it was the imposition of English law that gave birth to the Australian legal system of law-making and governance. In the colony of New South Wales, the laws of England – including common law, equity law and statute law – were transplanted to Australia on 26 January 1788, when the colony was proclaimed. So, the laws of England were 'received' as the laws of the colony. This process of acquiring a legal system of justice is referred to as **received law**.

At the time of settlement, eighteenth-century English law provided that where an uninhabited land had been claimed and consequently settled, the laws of England were immediately in force. Sir William Blackstone was an English **jurist** renowned at the time for his commentaries on the doctrines of English law. His commentary and ***proviso*** on received law proved to be beneficial for Australia, as it led to the development of an independent Australian legal system that was based in, rather than dependent upon, English law. The view was that 'colonists carry with them only so much of the English law as is applicable to their new situation and the condition of the infant colony' (Cook et al., *Laying Down the Law*, 2012, p. 39).

received law the reception of English law into the penal colony of New South Wales

jurist (from Medieval Latin) someone who researches and studies jurisprudence (the theory of law)

proviso (Latin expression) meaning provided; a clause, condition, stipulation or limitation

Review 8.2

1 **Analyse** two viewpoints and their consequences in response to the emergence of the concept of *terra nullius*.
2 **Explain** why the British did not recognise the way in which Aboriginal people were cultivating the land.
3 **Explain** why Aboriginal people at the time of the arrival of the British were not seen to conform to any recognisable system of government.

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Sir William Blackstone

Sir William Blackstone was born on 10 July 1723 in London and died on 14 February 1780 in Wallingford, Oxfordshire. He was an English jurist whose four-volume *Commentaries on the Laws of England* (1765–69) provide the best-known description of the doctrines of English law. The work became the basis of university legal education in Great Britain and North America.

Figure 8.4 Sir William Blackstone

8.2 The Australian Constitution

The road to legal independence from England was a long and drawn-out process. In 1823, the British Government passed the *New South Wales Act 1823* (UK), which granted NSW the status of a colony with the legislative power to pass its own laws, with the *proviso* that the laws of the colony did not conflict with English law. The passing of the *Australian Courts Act 1828* (UK) meant that the existing laws of England up to and including 1828 applied in Australia, but after 1828 any law passed by the British Parliament would no longer automatically apply to Australia unless it was passed specifically for the colonies. Therefore, Australian law was able to adapt to local circumstances in the colony, but it wasn't until the passing of the *Commonwealth of Australia Constitution Act 1900* (UK) that a legal document setting out the basic legal and legislative rules for the government of Australia existed.

The **Australian Constitution** was originally passed as part of this English Act of the British Parliament in 1900. On 1 January 1901, when the Constitution took effect, the Australian colonies became an independent nation as the Commonwealth of Australia. Prior to the Australian Constitution, Australia was made up of a number of separate British colonies with no federal government.

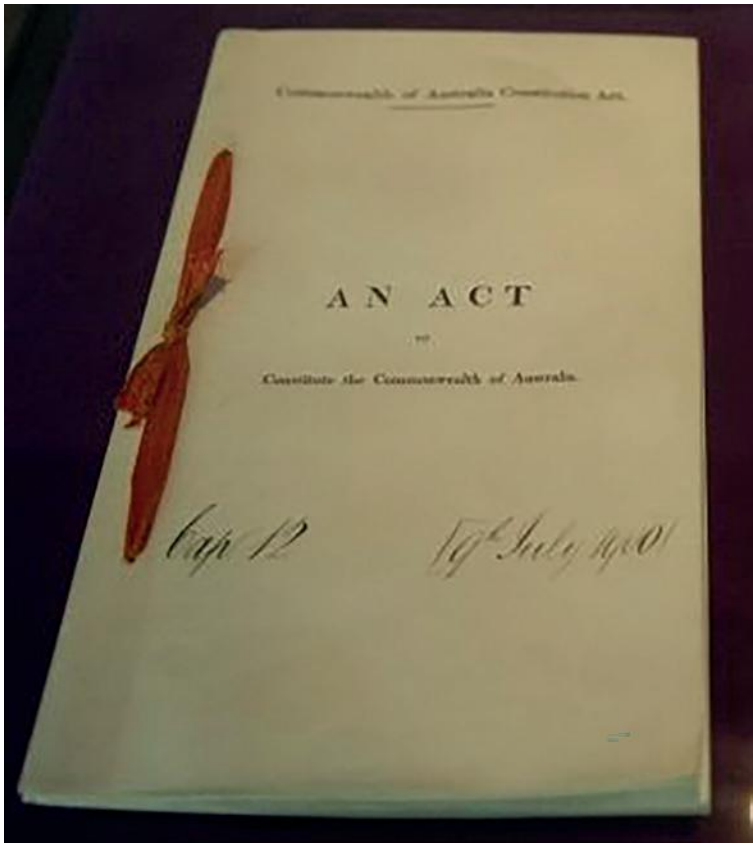

Figure 8.5 The Australian Constitution

Australian Constitution the set of basic rules by which Australia is governed; it is set out in the *Commonwealth of Australia Constitution Act 1900* (UK)

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The Australian Constitution was drafted by forming an agreement with the former British self-governing colonies of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, which agreed to come together and form one nation. They would keep the systems of government that they had developed as separate colonies but would also have a federal government that was responsible for matters concerning the whole nation. When the Australian Constitution came into force, the colonies collectively became states of the Commonwealth of Australia, and a new federal parliament was established.

Key features of the Australian Constitution

The Australian Constitution is made up of eight chapters and 128 sections, which set out the basic principles and aspects of government in Australia, including the structure and powers of the federal, state and local governments, and the establishment of the High Court. It contains a number of key or important features and sections, such as section 128, which provides the legal mechanism to make changes to the Constitution so as to enable it to maintain its relevance to contemporary Australian society. Section 128 requires the approval of a majority of voters nationwide and a majority of voters in at least four states to vote in favour of any change. This vote is referred to as a referendum.

The Australian Constitution is essentially the legal rule book that outlines the legal and political system by which Australia is governed. Within this framework, the Commonwealth Government and the state governments have different responsibilities. The Australian Constitution does not include a bill of rights; however, some human rights are mentioned, including the right to compensation if the government acquires your property (s. 51(xxxi)). In section 80, the right to a trial by jury is guaranteed, and section 116 provides the freedom to practise your own religion (Parliamentary Education Office).

Some of the key features of the Australian Constitution include establishing a **bicameral** parliament, defining the responsibilities of the federal government, which include international and interstate trade, foreign affairs, defence, immigration, taxation, banking, insurance and marriage, and who is eligible to stand for election to the federal parliament (s. 44). The governments of states and territories are responsible for all matters not assigned to the Commonwealth. So, the Constitution established our **legislature** (parliament), **executive government** (Prime Minister and the ministers), referred to as the **executive**, the **judiciary** (courts) and the relationship between them, including the powers of the federal parliament in relation to the states.

bicameral a legislature, assembly or parliament consisting of two houses

legislature parliaments or assemblies, such as the Legislative Assembly in Queensland, with the power to make, change and amend laws

executive and executive government the prime minister and ministers (also called the ministry) who lead and manage government departments and are responsible for putting into action government policy and the laws made by the parliament

judiciary the High Court and other federal courts that make judgments about the law

Off the record

Australia and the United States have written constitutions but, unlike the United States, Australia does not have a bill of rights.

What were the reasons for not including a bill of rights in the Australian Constitution?

Check this out

Go to the Parliamentary Education Office website and search for key features of the Constitution. Create a two-column table using the headings 'Chapter' and 'Summary.' Summarise the key features of each chapter of the Australian Constitution.

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Key sections of the Constitution

Section 51 is particularly significant because it lists most of the areas in which the Australian Parliament can make laws. The Commonwealth makes laws on a range of issues (such as regulating marriage and divorce), but the Constitution allows other powers, such as providing for roads and transport, health and education, and law enforcement, to remain with the states.

Research 8.1

Find a copy of the Australian Constitution online and go to Chapter 1, Part V. Read 'Powers of the Parliament – Sections 51–60.'

Create a report that **explains** how these sections give the parliament the power to make laws for the peace, order and good government of the Commonwealth.

Section 51: Legislative powers of the parliament

Section 51 of the Australian Constitution sets out the legislative powers of the Commonwealth Parliament, giving it the power to make laws for the peace, order and good government of the Commonwealth. The powers that were given to the federal government in the Australian Constitution are known as exclusive powers. The remaining powers were taken over by the states and are referred to as residual powers. In some instances, both the states and the federal government have the right to pass laws pertaining to certain areas, such as the environment, health and education. These powers are referred to as 'concurrent powers'.

Section 109: Inconsistency of laws

Section 109 deals with any inconsistency that might arise between the laws of the Commonwealth and those of the states. This arises with regard to the residual powers of the Commonwealth, which were assumed as the responsibility of the states, and in areas where both the states and the Commonwealth legislate, for example, health.

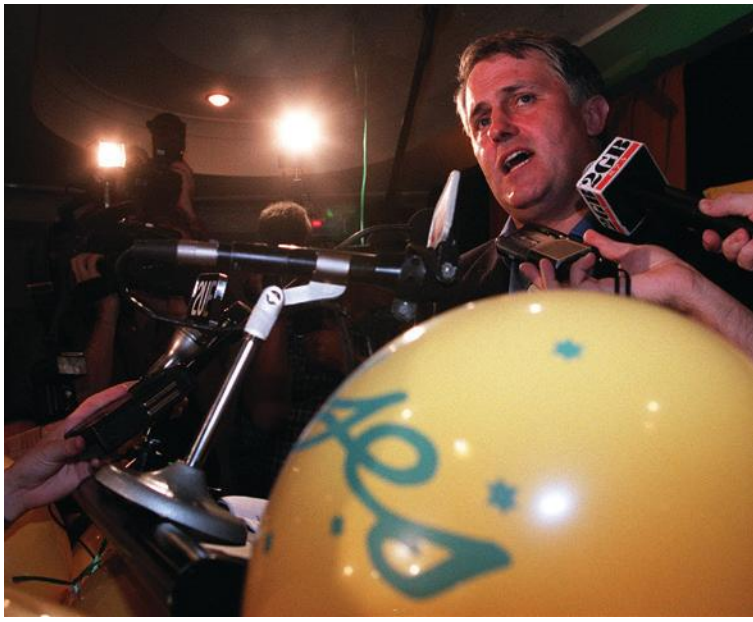

Figure 8.6 In 1999, Australia had a referendum about whether to remain a monarchy or become a republic. Malcolm Turnbull, Australian Prime Minister 2015–2018, was leader of the 'Yes' campaign and president of the Australian Republican Movement. He conceded defeat on 6 November 1999 after 54 per cent of Australia voted 'No.'

If a state was to pass a law different from a law passed by the Commonwealth Parliament, this inconsistency or conflict is resolved by section 109, which states that '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'.

Section 128: Mode of altering the Constitution

Section 128 of the Constitution provides the manner in which the Constitution can be altered, changed or modified, so it reflects the changing needs of an evolving Australian society. The Australian Constitution can be changed by referendum according to the rules set out in section 128 of the Constitution. Any proposed change must first be approved as a Bill by the Commonwealth Parliament. The Bill must be approved by both the House of Representatives and the Senate with an absolute majority. It is then sent to the Governor-General, who will issue a writ so the referendum can occur.

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In a referendum, the parliament asks eligible electors who are on the electoral roll in each state and territory to vote for or against the proposed change. The parliament must submit the referendum to the voting public not less than two and not more than six months after it has passed through both federal houses of parliament.

Section 44: Disqualification

Section 44 of the Constitution shot to prominence in 2017 when a number of sitting federal parliamentarians were referred to the High Court for a determination on their eligibility to sit in the Commonwealth Parliament (both the House of Representatives and the Senate). The Australian Government found that it had to defend itself in the High Court over a recent ruling on the basis of section 44 that a number of members of the Commonwealth Parliament held dual citizenship, which at the time of their election had not been revoked, thus making them ineligible to sit as members of parliament in accordance with section 44. The problem for the government was the literal interpretation of section 44 by the High Court. The origin of the law goes back to the colonial legal system.

Section 44 of the Australian Constitution prohibits people with dual citizenship from serving in the parliament. Things got complicated when the High Court disqualified seven senators and four other members of parliament. While the decision seems legitimate from a constitutional perspective, the Australian Government was arguing for a less literal interpretation of section 44.

Several high-profile politicians were caught by section 44, including the Greens co-deputy leader Larissa Waters, Nationals senators Fiona Nash and Matt Canavan, cross-bencher Nick Xenophon and then Deputy Prime Minister Barnaby Joyce, who were all dual citizens. The defence that these 'natural born' Australians were not aware of their dual citizenship was not sufficient to save them from being ruled ineligible.

Section 44 states that:

> **44.** Any person who –
>
> (i.) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power: or
>
> (ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or
>
> (iii.) Is an undischarged bankrupt or insolvent: or
>
> (iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
>
> (v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
>
> But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Figure 8.7 Section 44 'Disqualification' of the Australian Constitution (*Source:* www.legislation.gov.au)

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Figure 8.8 Section 44 of the Constitution shot to prominence in 2017 when a number of sitting federal parliamentarians were referred to the High Court for a determination on their eligibility. Senator Matthew Canavan (pictured) was not disqualified after the High Court ruled his Italian citizenship was 'potential', not actual.

Referenda

Changing the Australian Constitution does involve several hurdles and legal challenges, which must be overcome before the change can be made. The first challenge relates to any proposed change being approved by both houses of the federal parliament with an absolute majority. At face value, this appears to be relatively simple, but in the cut and thrust of modern Australian politics, it is not. The best chance a government of the day has of achieving this goal is if the proposed Bill has **bipartisan** support from the political parties who have elected representatives sitting in both houses of federal parliament.

bipartisan involving the agreement or cooperation of political parties that usually oppose each other's policies

Research 8.2

Read the news article 'Enough is enough on section 44: it's time for reform?', *The Conversation* at https://cambridge.edu.au/redirect/10471.

Research the inquiry into matters relating to Section 44 of the Constitution. **Explain** and **evaluate** the legal issues and impacts for good governance raised in the article. Provide examples. Your response should be 300–350 words in length.

Review 8.3

1 **Describe** how early Australian law was able to adapt to local circumstances in the colony.
2 **Identify** the three arms of government established in the Australian Constitution.
3 **Explain** the legal importance to Australian law-making of section 51 of the Constitution.
4 **Identify** the source of power to legislate for same-sex marriage in Australia.
5 **Evaluate** the legal significance and relevance to representative government in Australia of section 109 of the Constitution.
6 **Analyse** the legal importance and implications of section 128 of the Constitution.
7 **Explain** the legal intent of section 44 of the Constitution.

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Check this out

The following is a factsheet on referenda from the Australian Electoral Commission.

Since Federation there have been 44 proposals for constitutional change put to Australian electors. Only 8 have been approved.

Constitutional referendums 1901–1999

SUBJECT	DATE OF REFERENDUMS	STATES IN WHICH A MAJORITY OF ELECTORS VOTED IN FAVOUR	PERCENTAGE OF VOTERS IN FAVOUR
Senate Elections	12.12.1906	All	82.65
Finance	13.4.1910	Qld, WA, Tas	49.04
State Debts	13.4.1910	All but NSW	54.95
Legislative Powers	26.4.1911	WA	39.42
Monopolies	26.4.1911	WA	39.89
Trade and Commerce	31.5.1913	Qld, SA, WA	49.38
Corporations	31.5.1913	Qld, SA, WA	49.33
Industrial Matters	31.5.1913	Qld, SA, WA	49.33
Railway Disputes	31.5.1913	Qld, SA, WA	49.13
Trusts	31.5.1913	Qld, SA, WA	49.78
Nationalisation of Monopolies	31.5.1913	Qld, SA, WA	49.33
Legislative Powers	13.12.1919	Vic, Qld, WA	49.65
Nationalisation of Monopolies	13.12.1919	Vic, Qld, WA	48.64
Industry and Commerce	4.9.1926	NSW, Qld	43.50
Essential Services	4.9.1926	NSW, Qld	42.80
State Debts	17.11.1928	All	74.30
Aviation	6.3.1937	Vic, Qld	53.56
Marketing	6.3.1937	None	36.26
Post-War Reconstruction and Democratic Rights	19.8.1944	SA, WA	45.99
Social Services	28.9.1946	All	54.39
Organised Marketing of Primary Products	28.9.1946	NSW, Vic, WA	50.57
Industrial Employment	28.9.1946	NSW, Vic, WA	50.30
Rent and Prices	29.5.1948	None	40.66
Power to deal with Communists and Communism	22.9.1951	Qld, WA, Tas	49.44
Parliament	27.5.1967	NSW	40.25
Aborigines	27.5.1967	All	90.77
Prices	8.12.1973	None	43.81
Incomes	8.12.1973	None	34.42
Simultaneous Elections	18.5.1974	NSW	48.30
Mode of Altering the Constitution	18.5.1974	NSW	47.99
Democratic Elections	18.5.1974	NSW	47.20
Local Government Bodies	18.5.1974	NSW	46.85
Simultaneous Elections	21.5.1977	NSW, Vic, SA	62.20
Senate Casual Vacancies	21.5.1977	All	73.32
Territory Voting in Referendums	21.5.1977	All	77.72
Retirement of Judges	21.5.1977	All	80.10
Terms of Senators	1.12.1984	NSW, Vic	50.64
Interchange of Powers	1.12.1984	None	47.06
Parliamentary Terms	3.9.1988	None	32.91
Fair Elections	3.9.1988	None	37.59
Local Government	3.9.1988	None	33.61
Rights and Freedoms	3.9.1988	None	30.79
Republic	6.11.1999	None	45.13
Preamble	6.11.1999	None	39.34

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Source: 2008 Parliamentary Handbook, Parliamentary Library

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Search for 'Referendum dates and results' on the Australian Electoral Commission's website.

1 Discuss the information about all of the referenda conducted in Australia since Federation.
2 Identify the items for 'Successful Referenda' and 'Unsuccessful Referenda'. Why do you think of the 45 proposals, only eight have been successful?

Figure 8.9 In 1967, Australia voted 'yes' to allow the government to make laws concerning Aboriginal and Torres Strait Islander people. Pictured is a promotional badge worn by supporters at the time.

The second challenge lies in the requirement that a successful referendum must pass with a **double majority**. If a majority of voters in a majority of states and a majority of voters across the whole country as a whole vote 'yes' to the proposed change, then the proposal to alter, change or modify the Constitution has been agreed to and the referendum has been successful. This is referred to as a double majority and requires at least four of the states as well as a majority of voters across the whole country returning a 'yes' vote. This is difficult to achieve – which explains why most referenda in Australia have failed to pass.

double majority a majority of voters in a majority of states, together with a majority of voters across the whole country, voting 'yes' in a referendum

Off the record

Double majorities are important when a constitutional change is being sought to ensure that the proposed changes have widespread support. This means states with larger populations like Victoria and New South Wales do not have the ability to make changes that may not have national support. This system protects minority interests, ensures broad consensus and contributes to the stability and national unity of Australia's constitutional framework, making it challenging to amend the Constitution and requiring careful consideration to do so.

The third challenge may lie in the way that some referenda have been put to voters. For example, the 1974 referendum proposed to synchronise elections for both houses of federal parliament and allow the territories to vote in referenda. At face value, both are reasonable propositions; however, the question of allowing the territories a vote was bundled with another question that would have changed the passing of future referenda from a majority of states to only half of the states. It also linked changes to the composition of the electorates and the power of the Commonwealth to borrow money. These other questions may have been received with some suspicion by the voting public, which might explain why the referendum was unsuccessful.

This bundling of questions into one referendum question was the topic of significant debate in the lead-up to the 2023 referendum for The Voice. This proposal paired the constitutional recognition of Indigenous Australians through a Voice to Parliament. There was significant commentary that the two matters, the recognition

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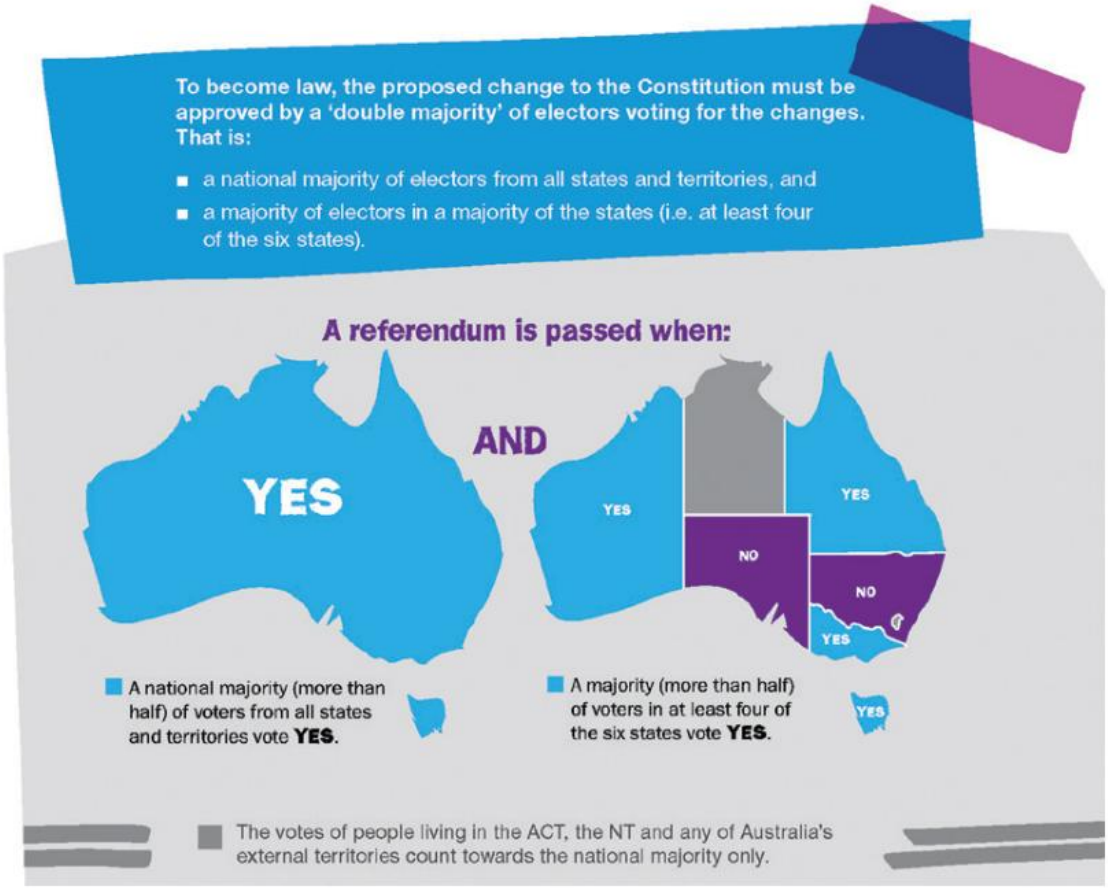

Figure 8.10 To change the Australian Constitution, a double majority is required. (*Source:* Australian Electoral Commission website, 'Double Majority')

On referendum day, voters were be asked to vote 'yes' or 'no' to a single question. The question on the ballot paper will be:

'A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.
Do you approve this proposed alteration?'

Constitutional amendment
The proposed law that Australians were being asked to approve at the referendum would have inserted the following lines into the Constitution:

'Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples
129 Aboriginal and Torres Strait Islander Voice
In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

i *there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;*
ii *the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;*
iii *the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.'*

Figure 8.11 In 2023, Australia voted 'no' to a voice to parliament. (*Source:* Australian Constitution)

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Figure 8.12 (Left) Prominent 'Yes' campaigners Prime Minister Anthony Albanese and Minister for Indigenous Australians Linda Burney during a press conference after the result of the referendum was known, Parliament House in Canberra on 14 October 2023. (Right) Leading 'No' campaigners Opposition Leader Peter Dutton and Shadow minister for Indigenous Australians Jacinta Nampijinpa Price.

of Indigenous Australians and The Voice, should have been separated, which might explain why the referendum was unsuccessful.

Another issue could be how the voting public perceives the motivation underpinning the questions or questions put to them as perhaps being politically motivated rather than in the best interests of the nation. For example, the 1913 referendum was a response to a railways dispute, so the Commonwealth sought power over industrial relations, which would have allowed it to intervene in a matter that was a state responsibility. This combination, together with other questions that sought to also give powers to the Commonwealth over corporations, trusts and monopolies, may have been perceived as politically motivated rather than intended to promote good governance. The referendum failed.

Non-referenda constitutional change

Constitutional change without referenda has occurred through the funding arrangements between the Commonwealth Government and the states, and through the interpretations of the Australian Constitution by the High Court. For example, the Commonwealth's increased power to collect income tax has meant it has a much greater share of revenue than the states. Sometimes the Commonwealth will attach terms and conditions to its state grants, to gain control over areas of responsibility that the states previously controlled, for example, tertiary education. The interpretation by the High Court of the Commonwealth's external affairs powers has meant Commonwealth law implementing international treaties can be applied to the states in areas such as environmental protection, which was another area previously controlled by the states.

Review 8.4

1 **Analyse** the legal issues that our law-makers face in achieving successful referenda.
2 **Evaluate**, using legal criteria, whether the Australian Constitution has changing without referenda has improved outcomes.

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Research **8.3**

Compare and **contrast** two successful referenda with two unsuccessful referenda. **Evaluate** the legal issues involved and make a recommendation for future referenda. Your response should be 300–350 words in length.

Case study **8.1**

The case: *Commonwealth v Tasmania* (The Tasmanian Dam Case) (1983) 158 CLR 1

Figure 8.13 Pictured is a 'No dam' rally at Chifley Square, Sydney, on 14 December 1982. This case saw the Commonwealth Government sue the Tasmanian Government over a proposal to construct dams on the Gordon River.

Citation

(1983) 158 CLR 1 means this case was decided in 1983 in the High Court and reported in volume 158 of the Commonwealth Law Reports (CLR) starting on page 1.

Facts

The south-west of Tasmania is one of the few wilderness areas untouched by human development. In 1970, the Tasmanian Hydro-Electric Commission proposed the

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construction of two dams on the Gordon River. The dams would generate a third of the state's electricity but wipe out 35 per cent of the wilderness areas. The then state Labor government made the area a national park in 1981.

At the state election in 1982, a new Liberal government was elected that supported the construction of the dams. Conservation groups opposed the project. In 1982, UNESCO, a United Nations agency, declared south-west Tasmania's wilderness area a World Heritage site and the federal Hawke Labor government passed the *World Heritage Properties Act 1982* (Cth). This law halted the building of any dams in the Tasmanian wilderness. The Tasmanian Government appealed this new law in the High Court.

Legal issues

Was the *World Heritage Properties Act 1982* (Cth) constitutionally invalid because the Commonwealth Government had exceeded its section 51 powers, specifically its authority to legislate for external affairs (s. 51(xxix)) and to regulate corporations (s. 51(xx))? The federal government argued that under section 51(xxix), the Commonwealth was entitled to pass legislation in order to give force to an international law treaty.

Decision

In July 1983, the High Court ruled that while some sections of the Commonwealth legislation were unconstitutional, the section ordering the suspension of dam construction in Tasmania was valid.

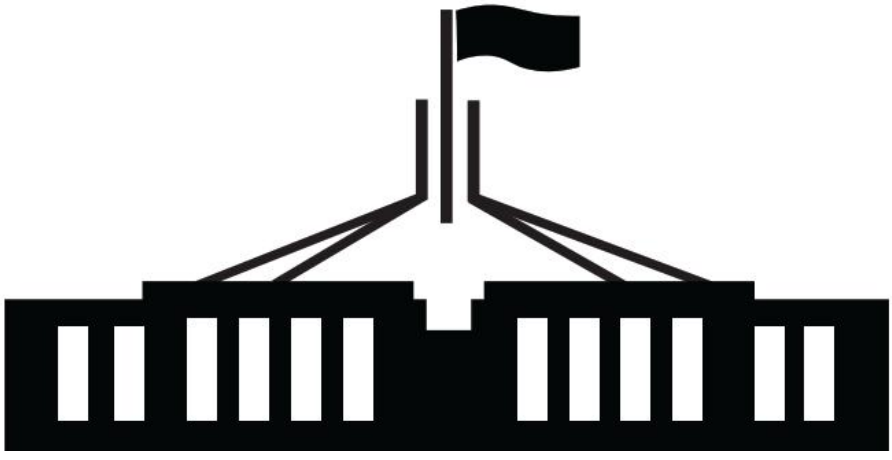
Ratio decidendi (reason for the decision)

Justice Mason delivered the majority judgment and explained that in the decision of the Tasmanian Dam Case, four of the seven judges found that the Commonwealth's use of its external affairs power under the Australian Constitution could validly override conflicting state laws in order to prevent a state from taking actions that would adversely affect areas of significance, such as a World Heritage site.

Obiter dicta (something to think about)

The case highlighted the importance of environmental conservation and protection and recognised the significance of the international agreements that Australia is signatory to. One viewpoint held in this case is that there is a disproportionate imbalance of power between the Commonwealth and the states in Australia's federal system and that decisions like this one encroached on the areas that are traditionally within the jurisdiction of the states. This is believed to erode the ability of state governments to make decisions and enact legislation in their areas of responsibility.

On the contrary, a different viewpoint held is that the Commonwealth does not exercise its powers enough to address conflicts between federal and state laws and must override in other situations where states may not align with Australia's international obligations to improve the international relations of Australia with other countries.



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8.3 Separation of powers

The first three chapters of the Australian Constitution define and set out the powers and responsibilities of the three separate arms of government. Chapter 1 deals with the parliament (ss. 1–60), Chapter 2 with the executive (ss. 61–70) and Chapter 3 with the judicature (ss. 71–80). The Constitution divided the power to make and manage federal law between these three arms of government, and that division of power is based upon the separation of powers doctrine. The idea that the powers of the three arms of government should be separate was to avoid one arm or group having all of the power, which would be counterproductive in a vibrant democracy such as Australia.

In Australia, including Queensland, our system of government is based on the Westminster system of government adopted from England at the time of settlement.

Figure 8.14 King Charles III during the recording of his first Christmas broadcast from Windsor Castle on 13 December 2022, England. The King is Australia's head of state, while the Governor-General is our 'ceremonial' head of state.

Off the record

Westminster is the name given to the system of parliamentary democracy used in countries such as the United Kingdom, Canada, Australia and New Zealand. It is named after the area in central London where the parliament of the United Kingdom is located. All state and territory parliaments in Australia follow the Westminster system.

What is the relevance of the Westminster system to Australia?

The Governor-General's reserve powers

In some matters, the Constitution gives the Governor-General powers to act independently. These include the power to dissolve the House of Representatives and, in certain situations, both houses of parliament. However, the convention is that the Governor-General follows the advice of the Prime Minister of the day, who has the confidence of the house (majority in the house).

The powers of the Governor-General to act without advice are referred to as **prerogative** or **reserve powers**, but these are not clearly defined in the Constitution. Constitutional experts do not agree on their precise extent or on the nature of the exceptional circumstances in which they may be exercised. Should the Governor-General have reserve powers?

The Governor-General has some powers that may be exercised without ministerial

prerogative a right or privilege exclusive to a particular individual or class.

reserve powers rarely used powers that enable the Governor-General to act independently

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advice, or even in contradiction to ministerial advice. However, because of the reliance of the Australian Constitution on convention, not all of the reserve powers are explicitly stated in the Constitution. This means that the exact nature and scope of the reserve powers is open to interpretation, and there is some dispute about their use. The reserve powers of the Governor-General have been used on four occasions in the history of Australia:

- In 1904, Governor-General Lord Northcote refused to dissolve the House of Representatives to allow for a federal election.
- In 1905, Governor-General Lord Northcote allowed Alfred Deakin to replace George Reid as Prime Minister without facing an election.
- In 1909, Governor-General William Humble Ward allowed an unelected coalition of parties to form a government.
- In 1975, Governor-General Sir John Kerr sacked Prime Minister Gough Whitlam and forced a federal election. Whitlam's party, the Australian Labor Party, subsequently lost.

The exercise of the reserve powers of the Governor-General by Sir John Kerr in 1975 was the most famous of these, causing much outrage and controversy in Australia at the time.

On 11 November 1975, the Governor-General, Sir John Kerr, dismissed Gough Whitlam as Prime Minister and appointed Malcolm Fraser as a Caretaker Prime Minister. Malcolm Fraser was the leader of the opposition and became Australia's 22nd Prime Minister, after Gough Whitlam's Labor government was dismissed. The Fraser Coalition government was returned to office following a **double dissolution** general election held on 13 December 1975, which Whitlam lost with the largest landslide of any federal election. Malcolm Fraser remained in office until 1983.

The dismissal of the Whitlam government occurred because a number of events resulted in the refusal by the Senate to pass the government's Budget Bill in October 1975. As a result, the Whitlam government was unable to fund the day-to-day operation of the Commonwealth.

Figure 8.15 Sir John Kerr was the Governor-General who famously dismissed Gough Whitlam as Prime Minister in 1975.

double dissolution the simultaneous termination of the House of Representatives and the Senate by the Governor-General and the calling of new elections for both houses

The dismissal of the Whitlam government and the calling of a double dissolution election of both houses of federal parliament is commonly referred to as the 1975 Constitutional Crisis, and it is one of the most significant domestic constitutional and political events in Australian legal history. It was the first time that an unelected representative of the Crown, using the reserve powers, had removed from office a Prime Minister who still had a majority in the House of Representatives.

The Australian Constitution gives almost identical powers to the House of Representatives and the Senate, and the drafters of the Constitution included a provision that in the event that both houses could not agree on a Bill, the deadlock between the houses could be broken by dissolving both houses and calling a double dissolution election.

Section 57 of the Constitution outlines the conditions that must be met for a double

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Figure 8.16 'Well may we say "God Save the Queen", because nothing will save the Governor-General!' Then Prime Minister Gough Whitlam addresses reporters outside Parliament House in Canberra after his dismissal by Australia's Governor-General Sir John Kerr, 11 November 1975. Kerr named opposition leader Malcolm Fraser to lead a caretaker government until elections in December.

dissolution election. A Bill must be rejected by the Senate at least twice, giving the Prime Minister of the day a 'trigger' for the double dissolution election of both houses of the Commonwealth Parliament. However, a double dissolution election cannot be triggered if the government is in the last six months of its three-year term.

After a double dissolution election, the Bills that caused the election must be presented to both houses of the new federal parliament, sitting separately, and if a deadlock occurs again – as was the case after the 1974 double dissolution election – the Governor-General may order a **joint sitting** of all members of parliament from both houses to meet together and vote on the Bill or Bills in an attempt to resolve the deadlock. Unfortunately for the re-elected Whitlam government, the deadlock that triggered the 1974 double dissolution election was not resolved in the joint sitting. Prime Minister Whitlam did not want to recommend another double dissolution, which eventually resulted in the Governor-General dismissing the government and calling another double dissolution election in 1975.

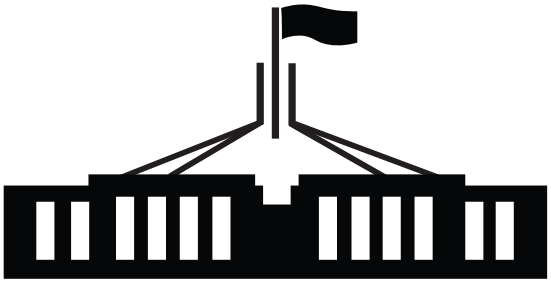
joint sitting a meeting of both houses of parliament together to make a decision on a proposed law on which the two houses, sitting separately, have not been able to agree

Review 8.5

1 **Explain** the legal intent of the first three chapters of the Constitution. Use specific examples to support your response.
2 **Identify** on what legal principle the division of power to make and manage federal law is based on.
3 **Explain** how Australia does not have a complete separation of powers.
4 **Explain** the reserve power of the Governor-General.

Research 8.4

Analyse the constitutional role of a double dissolution of federal parliament. **Explain** the bureaucratic processes involved and comment on their legal purpose and effectiveness. Present possible alternatives.



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8.4 Representative government

In democratic countries such as in Australia, the citizens vote for other citizens to represent them in the parliament. These representatives become members of parliament or senators, and they represent the voters in their electorates or states. As our law-makers, these representatives are expected to act in the best interests of the people and make laws for the good governance of the Commonwealth. Since the government of the day is also made up of these elected representatives, it is referred to as a **representative government**.

representative government a basis for government where the citizens elect representatives to serve in the parliament and make decisions on their behalf

The representatives of the people meet in parliament and perform a number of functions, including deciding who will form the government; making, amending and repealing laws; debating political and legal issues and proposed laws; representing and acting for their constituents to government and the public service; and monitoring the expenditure of public money and the actions of the government. The parliament is the practical expression of a simple reality: it isn't feasible for all of the people to be involved all of the time – even if they were so inclined – in the business of government, so representative government exists, whereby the people delegate the task of government to representatives chosen at regular elections.

Three levels of representative government

In Australia, representative government is reflected in the three levels of government – local, state and federal – and authority is shared between them. Citizens (those people who are eligible to vote and who are on the **electoral roll**) can vote in elections for all three levels of government.

electoral roll list of people who are registered and eligible to vote at federal, state, territory and local government elections and referenda

Each state has its own parliament and government, and it makes laws in relation to areas over which it has control. Local councils are given power by way of the states passing Acts of Parliament (*Local Government Acts*) in each state, which delegate certain authority to local councils.

The state parliaments can pass laws on a wider range of areas than the Commonwealth Parliament because they existed before the Commonwealth and had their own separate constitutions; over time, however, the Commonwealth has assumed more authority over state matters.

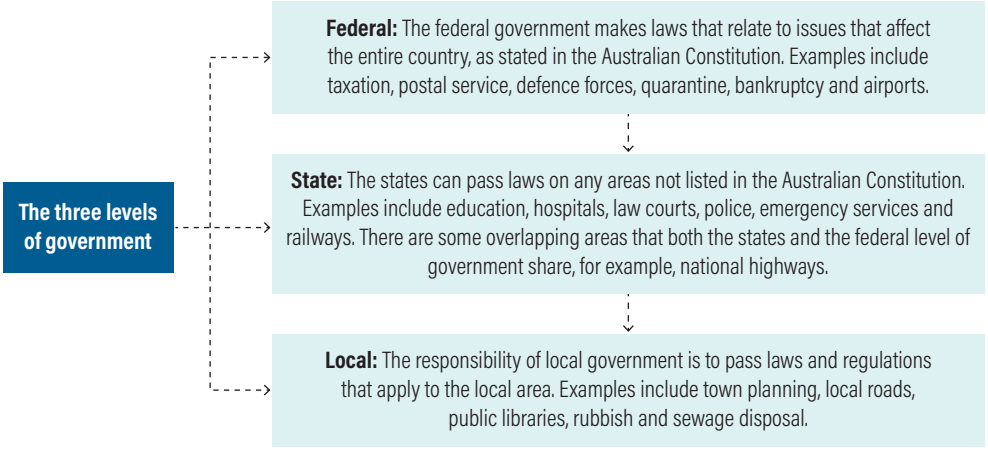

Figure 8.17 The three levels of government

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Local government

Local government is the level of government that is concerned with everyday local community matters such as collecting the garbage and fixing a pothole outside your house. The decision-making body responsible for these local matters is the shire or council. A shire or council is made up of several electorates called divisions or wards, and the citizens who live in these electorates vote for representatives called **councillors**. The head of a local government area or region is the mayor.

councillor person elected as a representative of a division or ward on a local government council

The local shire, regional or city council – for example, the Brisbane City Council or the Noosa Shire Council – makes laws that reflect community needs and ensures they govern their local area. Local laws can differ between local governments, and these laws have to be approved by the state parliament because shires and councils are created by state parliaments. They decide what duties the councils will perform. The duties, powers and responsibilities are laid out in *Local Government Acts*. Currently, local governments in Queensland are governed by the *Local Government Act 2009* (Qld), with Brisbane City Council being governed by the *City of Brisbane Act 2010* (Qld).

Councils pay for their services with state and federal funding, and with revenue that they raise from rates, licences and permit fees, parking tickets, fines, building approvals and the like. Local councils are responsible for the parts of the local community that are public property, such as local roads and parklands, and they decide where new roads and buildings should be placed and which natural areas and historic places should be protected. The plans for all new buildings must be approved by a council in accordance with its **town plan**.

town plan a plan of the physical and social development of a town, including the construction of all new facilities, buildings, roads and parks

The main responsibilities of local governments relate to areas that many might take for granted, such as arranging for garbage and recyclable rubbish collection and providing and maintaining the local dump (tip). Councils are also responsible for some aspects of public health and safety, for example, checking the health standards in shops, clubs, pubs and restaurants, dog registrations and the control and destruction of vermin. Your local council is also responsible for street signs and traffic control, and some operate libraries, museums and theatres, and provide public halls and swimming pools.

Check this out

Do taxis in Queensland have to carry a bale of hay in the boot of their cab? In the 1800s, cabbies drove horse-drawn carriages. The *London Hackney Carriage Act 1831* (UK) made it illegal for drivers to feed their horse unless it was from a bag of corn or hay from their hands. Presumably, this was to prevent traffic jams in the street while they refuelled. Or maybe it was to stop the horse nibbling people's front gardens. Drivers had to have a stack of hay available to use on board at all times to meet their horse's needs. This law also existed in Australia before it was repealed in 1980. Prior to that, it was technically illegal for a taxi to drive around without a hay bale in the boot! It was an odd law that once served its purpose and is no longer relevant in modern Australia.

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Figure 8.18 Queensland Parliament House

State government

Each state and territory has its own government and its own constitution and parliament, which is the decision-making authority for each state and territory, which is located in each capital city. Each state derives its powers from the residual and concurrent powers under the Australian Constitution and is responsible for all of the areas not listed as Commonwealth responsibilities.

Often the states engage in programs that involve a contribution from the other levels of government. That is, sometimes a substantial project might be funded by a contribution from the Commonwealth and local authority.

Each state government is a constitutional monarchy, and their respective Constitution Acts specifically recognise that the parliament consists of the sovereign (known as the Crown), a lower house and an upper house (except in Queensland). Each state has a Governor who is the representative of the Crown in the state. The Governor is appointed by the sovereign, by commission, on the advice tendered by the state Premier. The appointment is for an unlimited term, but the accepted convention is a term of five years. The powers of the Governor are similar to those of the Governor-General except at a state level. For example, in Queensland the Governor in Council is a title used when the Governor is acting by and with the advice of the Executive Council. This Council is constituted under section 6 of the *Constitution (Office of Governor) Act 1987* (Qld) and comprises all members of the ministry. As the representative of the Crown, the Governor must always remain apolitical. The Crown represents the interests of all people. It is incumbent upon the Governor to ensure that the people of Queensland enjoy a continuance of stable government.

State governments receive funding from a number of sources, including revenue from the federal government; this is derived mainly from the goods and services tax and state-based fees, levies and charges. While the states do have some responsibilities that tend to be state based, such as the Queensland Police Service, prisons, public works, and community services and water, many of the other responsibilities overlap with Commonwealth responsibilities, for example, education, health, the environment, transport, primary industries, industrial relations, sport and recreation, and consumer affairs.

Figure 8.19 Governor of Queensland Dr Jeannette Young arrives at her new residence at Government House after being sworn in on 1 November 2021 at the Queensland Parliament, Brisbane.

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Citizens in state government **electorates** vote for representatives who will represent them in the state parliaments. In Queensland, there are 93 electorates and the representatives elected are referred to as **Members of the Legislative Assembly** (or MPs). Unlike the other states, Queensland no longer has an upper house, having abolished the Legislative Council in 1922. The Queensland Parliament is unique among Australian states in that it was the only colonial parliament (pre-1901) to commence with two chambers and is now the only state parliament to have just one chamber or house. The *Constitution Act 1867* (UK) was further amended, providing that the **Legislative Assembly** can only be restored by a state referendum. As a result, Queensland has a **unicameral** legislature, or a parliament with only one house or chamber. Both territory governments also operate under a unicameral legislature. Without an upper house to review legislation and provide the checks and balances afforded by a bicameral system of governance, Queensland relies on the **committee system**.

electorates districts comprising an approximately equal number of voters that each elect a single member to the parliament

Member of the Legislative Assembly a representative elected to represent an electorate in the Queensland Parliament

Legislative Assembly the organisation, or one of the two parts of the organisation, that makes laws in some countries and states

unicameral a system of governance where there is only one legislature or parliament

committee system committees comprising members of parliament that scrutinise government activities, including legislation, and inquire into specified matters

The role of committees is to investigate specific issues and report back to the parliament. Some committees also have continuing roles to monitor and review public-sector organisations or keep areas of the law or activity under review. The committee system is important because a strong, active committee system is an asset in any functioning parliamentary democracy. A comprehensive system of parliamentary committees provides greater accountability by making the policy and administrative functions of government more open and accountable. Committees provide a forum for an investigation into matters of public importance and give the members of the parliament the opportunity to enhance their knowledge of such issues. The committee system allows the parliament to ensure that the right decisions are being made at the right time and for the right reasons. At the same time, they effectively enhance the democratic process by taking the parliament to the people and giving them a role in its operations (Queensland Parliament). The head of government in a state is known as the Premier.

Off the record

The Queensland Police Service is the law-enforcement agency responsible for policing Queensland. In 1990, the Queensland Police Force was officially renamed the Queensland Police Service and the old motto of 'Firmness with Courtesy' was changed to 'With Honour We Serve'. The headquarters of the Queensland Police Service is located at 200 Roma Street, Brisbane.

Figure 8.20 The Queensland Police Service is the law-enforcement agency responsible for policing Queensland.

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Territory government

The Australian Capital Territory and the Northern Territory governments were created by the Commonwealth under section 122 of the Constitution, which allows for the creation of territories that were either surrendered or otherwise acquired by the Commonwealth.

The Northern Territory was originally part of South Australia, but at Federation, South Australia surrendered it to the new Commonwealth Government. The Commonwealth assumed responsibility for the administration of the Territory under the *Northern Territory (Administration) Act 1910* (Cth). From 1911, the laws of the Territory were made by the Commonwealth Government and Parliament until, in 1947, the *Northern Territory (Administration) Act 1910* (Cth) was amended to provide for a Territory legislature. The first Legislative Council for the Northern Territory assembled in Darwin in March 1948 and consisted of seven official members appointed by the Governor-General, six elected members and an Administrator as president of the Council.

The Australian Capital Territory (ACT) was administered by the federal government through the Minister for Territories, and the capital was named Canberra – a name derived from the Aboriginal word 'Kamberra', meaning 'meeting place'. The ACT was granted self-government by the federal parliament in 1989. The head of government in the ACT and the Northern Territory is known as the Chief Minister.

Check this out

Search 'Three levels of government: governing Australia' on the Parliamentary Education Office website at https://cambridge.edu.au/redirect/10517.

- Research the information on the state and territory governments.
- Identify the other territories that are administered by the federal government that have been granted a limited right of self-government.

Federal government

The federal government is our national government, responsible for the governance of the Commonwealth of Australia. The Australian Parliament comprises the Crown (represented by the Governor-General), the Senate and the House of Representatives.

House of Representatives

The House of Representatives consists of 150 members of parliament elected by citizens who are on the electoral rolls in each federal electorate. The Australian Government is formed in this house, usually by the political party or coalition of parties that can command the majority of members on the floor of the parliament. The **Speaker** of the house is in charge of the **bureaucratic procedures** of the house. The Speaker of the House of Representatives and the President of the Senate together are known as the parliament's presiding officers. They jointly have responsibility for the provision of services to the parliament by the Department of Parliamentary Services.

Members of parliament, also known as Members of the House of Representatives, have three key roles:

1 They represent the views of Australians and discuss matters of national and international importance.

Speaker person who makes sure that members of the house obey the rules (standing orders) of the house and follow the correct procedures

bureaucratic procedures rules and often time-consuming methods, procedures and protocols for carrying out the business of a house of parliament or government department

member of parliament a member of a house of parliament, usually used to describe a member of a lower house and, in Australia, referring to Members of the House of Representatives, who may use the initials MP after their names

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2 They make and change federal law by debating and voting on Bills. A Bill must be agreed to in identical form by the House of Representatives and the Senate, and given **Royal Assent** by the Governor-General. It then becomes law.
3 They scrutinise (closely examine) the work of the government, especially in **Question Time** and through parliamentary committees.

Royal Assent the signing of a Bill by the Governor-General, which is the last step in making a Bill into an Act of Parliament or law

Question Time a daily period of time in each house of the parliament in which ministers are asked questions without notice by other members concerning their responsibilities

Senate

The Senate consists of 76 **senators** elected by citizens who are on the electoral roll in each federal electorate. The Senate was established at Federation as the states house, with the intention that it would represent and safeguard the rights of the states who had ceded some of their powers to the federal parliament so that the Commonwealth could be formed. Today, that role is more as a house of review of the legislation being proposed by the government of the day. Twelve senators are elected from each state and two are elected from each territory (ACT and the Northern Territory). The territories that are administrated by the Commonwealth are not represented in the Senate. Members of the Senate have the same three key roles as the House of Representatives, with the primary role of acting as scrutineers on the government and representing state and territory interests in the federal parliament. The **President of the Senate** is in charge of the bureaucratic procedures in the Senate.

senator member of the Australian Senate, the upper house of the federal parliament

President of the Senate the equivalent of the Speaker in the House of Representatives; the presiding officer responsible for the bureaucratic procedures of the Senate

The White Australia policy

One of the first pieces of legislation passed by the federal parliament was the *Immigration Restriction Act 1901* (Cth). It was part of a package of legislation aimed at preventing all non-European migration to Australia. The Act was the basis of the White Australia policy, which defined Australia as white, and influenced Indigenous and immigration policy for the next 70 years.

Concerns about the development of a low-paid underclass of migrant workers, which would depress wages for all, generated support for the policy. The *Immigration Restriction Act 1901* (Cth), although amended frequently, was not repealed until 1958.
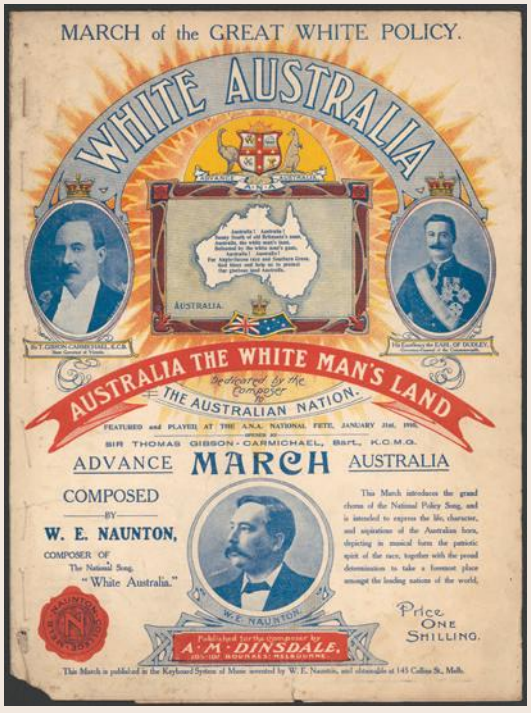
Figure 8.21 March of the Great White Policy poster (*Source:* W.E. Naunton, *White Australia: March of the Great White Policy*, Melbourne: Published for the composer by A.M. Dinsdale, 1910, National Library of Australia, MUS no. 786.21599 N312.)

Research **8.5**

Analyse why the *Immigration Restriction Act 1901* (Cth) was law until 1958 and **evaluate** why it was part of Australian immigration policy until 1966. **Decide** whether this was a good or bad law. **Explain** why or why not.

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8.5 Responsible government

The concept of **responsible government**, as it evolved in Australia between 1855 and 1890, refers to a system of governance in which the government, specifically the executive branch, is accountable to the elected legislature, and it can only remain in power if it maintains the confidence of the legislature. Today, this means that a political party, or **coalition** of parties, must maintain the support of the majority of members of the House of Representatives in order to remain in government. This is not usually a problem if the government of the day has an **absolute majority** on the floor of the parliament. That is, the government has more than 50 per cent of the members – the most members in the parliament – and does not need to rely on the support of other political parties or independents to pass its legislation.

Sometimes, however, parties do rely on the support of other political parties or independents and a **minority government** is formed when no clear majority has been achieved. A minority government occurs when a government that is lacking an outright majority of seats in the parliament depends for its survival on the support of other political parties or independents. When this is the case, these other political parties or independents are said to hold the **balance of power**. In order to govern, the minority government must maintain the confidence or support of these other members of the parliament to remain the government. This provides another check on the executive arm of government, ensuring it remains accountable to the parliament and is not able to abuse its powers.

In Australia, responsible government is a foundational principle of the political system, both at the federal level and within each state and territory. It ensures that the government is answerable to the people's elected representatives, provides a system of checks and balances, and allows for the peaceful transfer of power through democratic elections. Responsible government is a critical aspect of Australia's democratic and constitutional framework, upholding the principles of accountability and transparency in governance.

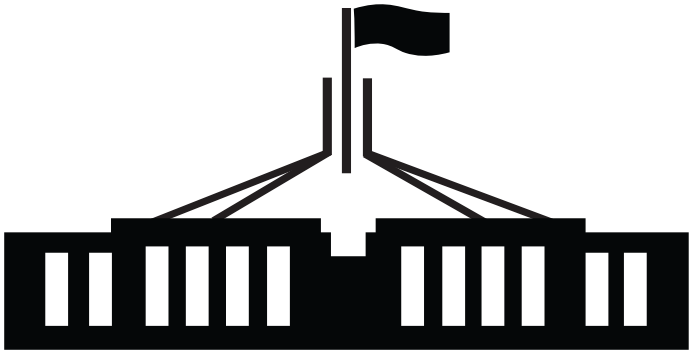
responsible government a system where the government is answerable to elected representatives of the people for its actions, especially a system where the ministry is drawn from within the parliament from members of the political party or parties with the support of a majority of the lower house (in Australia, the House of Representatives), and must maintain the confidence of the majority of that house

coalition a government formed with the support and cooperation of two or more political parties

absolute majority the government has more than half of all members elected to the parliament

minority government a government formed by a party or coalition of parties or independents that do not have a majority in the lower house of parliament on their own

balance of power when another political party or independent members support a minority government, these other members hold the balance of power in the parliament



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Review 8.6

Some argue that minority governments tend to be more responsible governments. **Decide** whether you agree or disagree with this proposition. **Explain** why or why not.

Figure 8.22 Queensland Premier Steven Miles (front left) is seen with his new ministers outside Government House in Brisbane, 18 December 2023, after being sworn into office by Governor Jeannette Young (front centre). Miles is the 40th premier of Queensland. He previously served as deputy premier from 2020 to 2023 and succeeded Annastacia Palaszczuk as ALP leader and premier unopposed following her retirement in December 2023.

Review 8.7

1 **Explain** the difference between a representative and a responsible government.
2 **Explain** the purpose, concept and responsibilities of representative government.
3 **Explain** the meaning of exclusive, residual and concurrent powers.
4 **Explain** the source of power for each level of government.
5 **Describe** the role and function of the state Governors.
6 **Identify** the names given to the heads of local, state, territory and federal governments.
7 **Explain** why Queensland is the only state government without an upper house of parliament.
8 **Explain** unicameral and bicameral parliaments.
9 **Identify** the source of power used by the federal parliament to create the Australian Capital Territory and the Northern Territory.
10 **Describe** the role and constitutional responsibilities of the Governor-General.
11 **Explain** the role of the Speaker of Parliament and the President of the Senate.
12 **Describe** the key three roles of members of parliament.
13 **Explain** how a Bill becomes law.
14 **Explain** Question Time.
15 **Identify** how many senators are in the federal Senate. Who do they represent?
16 **Explain** the principle of responsible government.
17 **Explain** the meaning of coalition, absolute majority, minority government and balance of power.

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Accountability of government

We have learned that Australia's system of government is a representative democracy, but what does this mean regarding accountable government? An accountable government is one that answers to the people who elected it, and that it is open and transparent.

In open and accountable government, the actions and decisions of the government and parliament are open to public scrutiny. An open and accountable government will make information about its activities available to the public in a range of formats and will have an accountability framework in place. For example, the Queensland Government conducted a review of the legislation, policies and institutions that make up Queensland's integrity framework. The Premier convened an Open Government Policy Forum in August 2017, which explored and discussed a range of integrity and accountability matters.

In Queensland, the public can hold their government to account through:

- **Accessing information** – the *Right to Information Act 2009* (Qld) protects personal information and promotes accountability and transparency. Governments and their departments are the custodians of community information, and an open and transparent government will release government-held information to the public unless it is not in the interests of the public or is private.
- **Participating in government decision-making** – by signing a petition, participating in community Cabinet meetings and lobbying local representatives.

The Queensland Government introduced the *Integrity Act 2009* (Qld), which came into effect on 1 January 2010. The Integrity Commissioner is responsible for administering the Register of Lobbyists and other integrity matters regarding government.

Another way to keep government honest, open and accountable is through Commissions of Inquiry. For example, The **Commission of Inquiry** into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry, 1987–89) was triggered by the media and resulted in the establishment of the Electoral and Administrative Review Commission and the Criminal Justice Commission – now the Crime and Corruption Commission – as well as reform of the Queensland Police Force.

Commission of Inquiry a specialist, independent, temporary body created to examine a matter of public importance

The Commission of Inquiry into Queensland Police Service responses to domestic and family violence (A Call for Change, 2022) led to the commitment from the Queensland Government to invest $100 million in a raft of reforms and initiatives to provide enhanced support and protections to those caught up in domestic violence. This includes hundreds of extra Queensland Police service staff to provide specialised support, advocacy and liaison services for the victims of domestic violence.

Figure 8.23 How accountable is our government to Australian citizens and all people that live here?

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Case study **8.2**

The case: Tony Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct

3 July 1989

This inquiry uncovered long-term systemic political corruption and abuse of power in Queensland and changed the policing and political landscape across Australia.

Overview

In May 1987, Acting Queensland Premier Bill Gunn ordered a commission of inquiry after the media reported possible police corruption involving illegal gambling and prostitution. Tony Fitzgerald QC was appointed to lead the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, known as the Fitzgerald Inquiry.

During the inquiry, the terms of reference were extended to look into 'any other matter or thing appertaining to the aforesaid matters', which enabled Fitzgerald to further investigate evidence of political corruption.

Initially expected to last about six weeks, the inquiry spent almost two years conducting a comprehensive investigation of long-term systemic political corruption and abuse of power in Queensland. Public sittings were held on 238 sitting days, hearing testimony from 339 witnesses and focusing public attention in Queensland and throughout Australia on integrity and accountability in public office, including policing.

The inquiry changed the policing and political landscape in Queensland and across Australia. Significant prosecutions followed the inquiry, leading to four ministers being imprisoned and numerous convictions of other police. Former Police Commissioner Sir Terence Lewis was convicted of corruption, jailed and stripped of his knighthood, and former Premier Sir Joh Bjelke-Petersen was charged with perjury for evidence given to the inquiry, although the trial was aborted due to a hung jury.

The 630-page Fitzgerald Report was tabled in parliament in July 1989. It made over 100 recommendations, covering the establishment of the Electoral and Administrative Review Commission and the Criminal Justice Commission and reform of the Queensland Police Force.

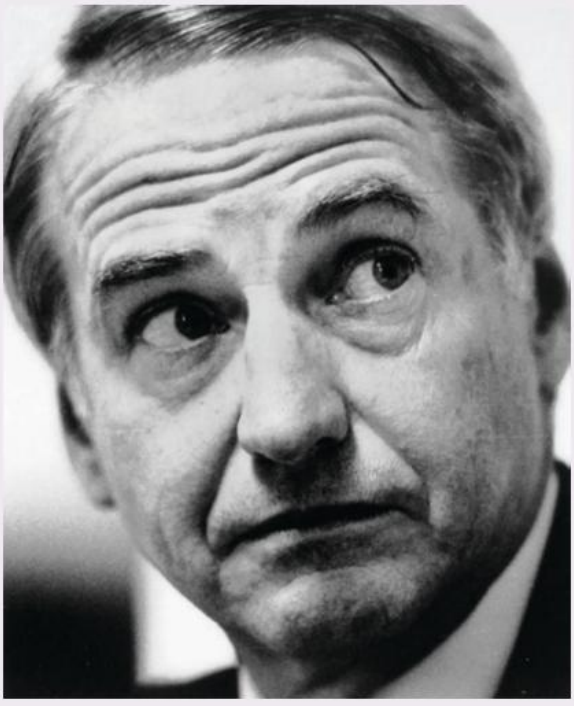

Figure 8.24 Tony Fitzgerald QC, pictured in 1990

Review **8.8**

Analyse the role of the media and evaluate the importance of commissions of inquiry in keeping governments open and honest. **Justify** your response.

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8.6 The relationship between legislation and case law

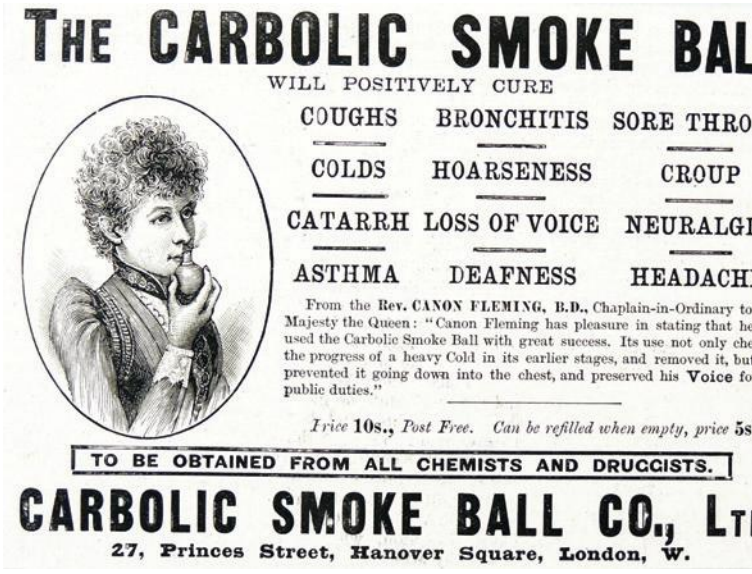
We have already learned that in Unit 1 (refer back to Chapters 1 and 2) in Australia the laws are made in the legislature or parliament and the courts through interpretation and judgments make up a body of law called common law, which is also referred to as case law. The early Australian parliaments were not very active in making laws, so when a case did come before the courts, the judge would publish the decision (*ratio decidendi*) together with the reasons for those decisions in law reports. As a result, a body of case law emerged that other judges could consult and use as precedents when deciding their own cases.

Since the mid-nineteenth century, the laws and Acts made by parliament (legislation) have significantly increased. It is important to note that these statutes and Acts, which are collectively known as legislation, overrule common law if both apply to the same area.

Sometimes the courts will decide a matter that results in a 'law' in the absence of legislation on the matter. Such an instance occurred with the *Harvester Judgment Ex parte McKay* (1907) 2 CAR 1, when the Commonwealth Court of Conciliation and Arbitration ruled that an employee should be paid a living wage that guaranteed them a standard of living reasonable for 'a human being in a civilised community to support a wife and three children in frugal comfort'. At the time of this judgment, no legislation was enacted that would guarantee workers a minimum wage. However, this judgment did set in motion the requirement for a basic wage, which dominated Australian economic life for the next 60 to 80 years.

We have learned that when the courts decide a matter that creates a precedent for other courts to follow, the law can change, or its scope can be extended. This was the case in *Donoghue v Stevenson* [1932] AC 562, discussed in Chapter 7. In this matter, the judgment resulted in the introduction of the 'neighbour principle' as a test to establish whether one party owed a duty of care to another that previously did not exist. Common law (case law) now required that a party ought reasonably to take others into their contemplation who were so closely and directly affected by an act that they might be harmed by it. So, the judgment in *Donoghue v Stevenson* effectively changed the tort of negligence in the absence of legislation on the matter.

Another important precedent case is *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, discussed in Chapter 6. The judgment in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 effectively extended the scope of the law of contract in the absence of legislation, and this later led to laws regarding misleading advertising.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TO BE OBTAINED FROM ALL CHEMISTS AND DRUGGISTS.

CARBOLIC SMOKE BALL CO., LT

27, Princes Street, Hanover Square, London, W.

Figure 8.25 The amazing claims made in the Carbolic Smoke Ball Company advertisement from *The Illustrated London Times*, 1892

Review 8.9

1 **Evaluate** the role of case law and landmark court decisions in influencing legal change or law reform.
2 **Analyse** the significance of the *Harvester Judgment*.
3 **Explain** the legal significance of precedent cases.

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8.7 The role of the courts

The role of the Australian courts is to interpret and decide matters of law that come before the courts. Each court has its own jurisdiction and can only hear matters that fall within that jurisdiction. Each state and territory has its own courts, which deal with matters relating to that state or territory, except for the High Court, which has jurisdiction over all the laws of the Commonwealth of Australia.

We learned earlier in this chapter that the judiciary is a separate arm of government in Australia, for good legal reason. It is important that the courts are able to act independently and without interference from the parliament or the executive when they are interpreting and applying the rule of law within their respective jurisdictions.

High Court of Australia

The High Court of Australia is the highest court in the Australian judicial system. It was established in 1901 under section 71 of the Constitution. The primary function of the High Court was to interpret the Constitution. However, today it also interprets and applies the laws of Australia, decides cases of special federal significance, including challenges to the constitutional validity of laws, and hears appeals, by special leave, from the federal, state and territory courts. In 1986, the High Court of Australia became the highest court of appeal (**appellate court**) in Australia when the *Australia Act 1968* (Cth) abolished appeals from all jurisdictions to the **Privy Council** in England.

appellate court any court that can hear an appeal from another court: when the Supreme Court sits as the Court of Appeal; or the High Court as the final court of appeal

Privy Council the principal council advising the sovereign (King or Queen); the court of final appeal for the UK overseas territories and Crown dependencies and Commonwealth countries that have retained their appeal to the King or Queen in Council

The High Court of Australia is in Canberra in its own building within the parliamentary triangle. The High Court building houses three courtrooms, justices' chambers, and the court's main registry, library and corporate services facilities. In addition, there are offices of the High Court Registry in Sydney and Melbourne, staffed by officers of the High Court. In Adelaide, Brisbane, Darwin and Perth, registry functions are performed on behalf of the High Court by officers of the Federal Court of Australia and in Hobart, they are performed by officers of the Supreme Court of Tasmania. Registries are responsible for the secure custody and safekeeping of court records, including collecting and accounting for all fees received by the court and all aspects of proceedings and appeals.

Off the record

Section 11 (1), *Australia Act 1968* (Cth)
Termination of appeals to Her Majesty in Council

> Section 11 (1): Subject to subsection (4) below, no appeal to Her Majesty in Council lies or shall be brought, whether by leave or special leave of any court or of Her Majesty in Council or otherwise, and whether by virtue of any Act of the Parliament of the United Kingdom, the Royal Prerogative or otherwise, from or in respect of any decision of an Australian court.

What was the legal significance of this change?

The High Court conducts its sittings in Canberra and such other places determined by a rule of court made by the **justices** in the preceding year. Approximately two-thirds of all sitting days are in Canberra. In addition, applications for special leave to appeal to the court are heard

justice judge appointed to the High Court of Australia

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Figure 8.26 The High Court of Australia

regularly in Sydney and Melbourne. The High Court also sits in Brisbane, Adelaide, Perth and Hobart once each year. When sitting in Sydney, Melbourne, Brisbane, Adelaide and Perth, the court uses Commonwealth Law Courts buildings. In Hobart, facilities are provided with the cooperation and assistance of the Tasmanian Supreme Court.

The High Court can invalidate any legislation or parts of legislation that it finds to be unconstitutional. Sometimes the High Court is asked to decide whether the Commonwealth Government or a state government has the authority and responsibility to deal with a matter. At other times, because the Constitution provides specific limits to what the Commonwealth Government is empowered to do, the High Court may be asked to decide whether a law made by the Commonwealth Government is within that power. Evolving interpretations of the Constitution by the High Court have resulted in stronger law-making powers for the Commonwealth, without any changes to the words of the Constitution.

Important court cases have included *The Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129) (Engineers Case), *Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dam Case) and *New South Wales v Commonwealth* (2006) 231 ALR 1 (the Work Choices Case). The Work Choices legislation, which came into effect in March 2006, made substantial changes to the regulation of employment conditions and industrial relations. The legislation used the 'corporations power' granted by section 51(xx) of the Constitution, rather than the conciliation and arbitration power in section 51(xxxv) that historically has been the foundation of Australia's industrial legislation, to make the changes. The Commonwealth's use of the corporations power was challenged by the states and territories in the High Court, along with other aspects of the Work Choices reforms. However, the challenge was rejected by a majority of the court, and the legislation was upheld. The principal function of the High Court of Australia is to interpret the Constitution and to settle disputes about its meaning (Parliamentary Education Office).

Off the record

Australian Constitution – Section 71 – Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and other Justices, not less than two, as the Parliament prescribes.

How have the role, powers and function of the High Court changed?

There are currently seven High Court Justices, including a **Chief Justice** who, depending upon the matter before the court, can sit individually, as a **Full Court** with two or more justices or as a **Full Bench** with all seven justices presiding.

Chief Justice the senior justice of the High Court of Australia

Full Court when two or more justices, or judges, sit to hear a matter before the court

Full Bench when all justices, or judges, of the court (High Court and Supreme Court) sit together to hear a matter, usually in cases of significant legal or constitutional importance

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Justices are appointed by the federal government, on advice to the Governor-General, and as a result of the 1977 referendum are required to retire when they turn 70 years of age.

Cases that involve an interpretation of the Constitution, or where the court may be invited to depart from one of its previous decisions, or where the court considers the principle of law involved to be one of major public importance, are normally determined by a Full Bench of the High Court. Other cases, such as appeals against the decisions of the Supreme Courts of the states and territories, of the Federal Court of Australia and of the Federal Circuit and Family Court of Australia, are dealt with by a Full Court of not less than two justices. In addition, there are certain matters that can be heard and determined by a single justice.

Justices of the High Court

There have been 13 Chief Justices and 42 Justices since the High Court was established in 1903. Under section 72 of the Constitution, Justices of the High Court:

- are appointed by the Governor-General in Council
- cannot be removed except by the Governor-General in Council on an address from both Houses of Parliament in the same session, praying for such removal on the grounds of proved misbehaviour or incapacity
- receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office
- must retire on attaining the age of 70 years.

Three members of the High Court – Sir Isaac Isaacs, Sir Ninian Stephen and Sir William Deane – resigned from the Court to become Governor-General.

Figure 8.27 Chief Justice of the High Court of Australia Stephen Gageler, pictured in October 2023

Table 8.1 High Court Justices (2023)

Justices of the Australian High Court – 2023						
No.	**Name**	**State**	**Date started**	**PM at time of appt**	**Party in govt at time of appt**	**Retires**
1	Stephen Gageler (Chief Justice)	NSW	9 Oct 2012 6 Nov 2023 (CJ)	Gillard Albanese	ALP ALP	2028
2	Michelle Gordon	VIC	9 June 2015	Abbott	Liberal	2034
3	James Edelman	WA	30 Jan 2017	Turnbull	Liberal	2044
4	Simon Steward	VIC	1 Dec 2020	Morrison	Liberal	2039
5	Jacqueline Gleeson	NSW	1 March 2021	Morrison	Liberal	2036
6	Jayne Jagot	NSW	17 Oct 2022	Albanese	ALP	2035
7	Robert Beech-Jones	NSW/TAS	1 Nov 2023	Albanese	ALP	2035

Source: Commonwealth of Australia – High Court of Australia and Australian Politics.

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Off the record

The final abolition of Privy Council Appeals has had a dramatic effect on the High Court's own jurisprudence. Many commentators have observed that the abolition did more than formally make the High Court the final court of appeal for all Australian matters; it also contributed to a new judicial mindset. Liberated from the correction of a higher court and then from competition in relation to appeals from state courts, the High Court became the true apex of the Australian hierarchy and took on a new responsibility for shaping the law for Australia.

Source: Constitution Education Fund Australia.

Do you agree or disagree with this statement? Why or why not?

Case study **8.3**

The case: *New South Wales v Commonwealth* (2006) 229 CLR 1; [2006] HCA 52

Citation

(2006) 229 CLR 1; [2006] HCA 52 means this case was decided before the High Court in 2006 and reported in the Commonwealth Law Reports in volume 229 starting on page 1 and the High Court of Australia reports starting on page 52.

Facts

This case involved a dispute between the Commonwealth and the state of New South Wales over the validity of legislation related to industrial relations. The Commonwealth sought to assert control over certain industrial relations matters.

Legal issue

The primary legal issue was whether the Commonwealth's industrial relations legislation was constitutionally valid under the Australian Constitution.

Decision

The High Court held that the Commonwealth's legislation was valid and that it had the power to legislate in the areas it sought to control.

Ratio decidendi (reason for the decision)

The case affirmed the Commonwealth's power to legislate in areas related to industrial relations under the Australian Constitution.

Obiter dicta (something to think about)

The court's decision had implications for the division of powers between the Commonwealth and the states and the extent of federal authority. The case was significant for federalism in Australia and clarified the scope of the Commonwealth's legislative powers.

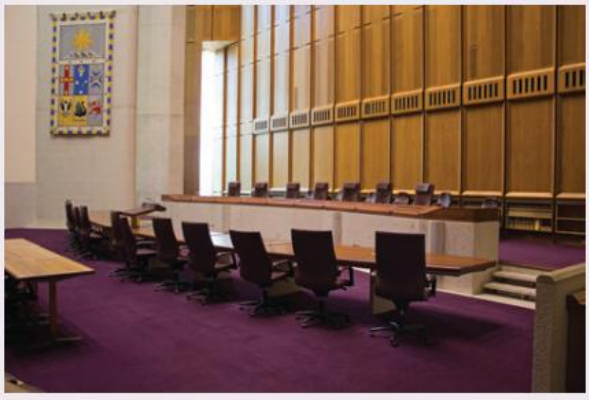

Figure 8.28 *NSW v Commonwealth* was held in the High Court of Australia.

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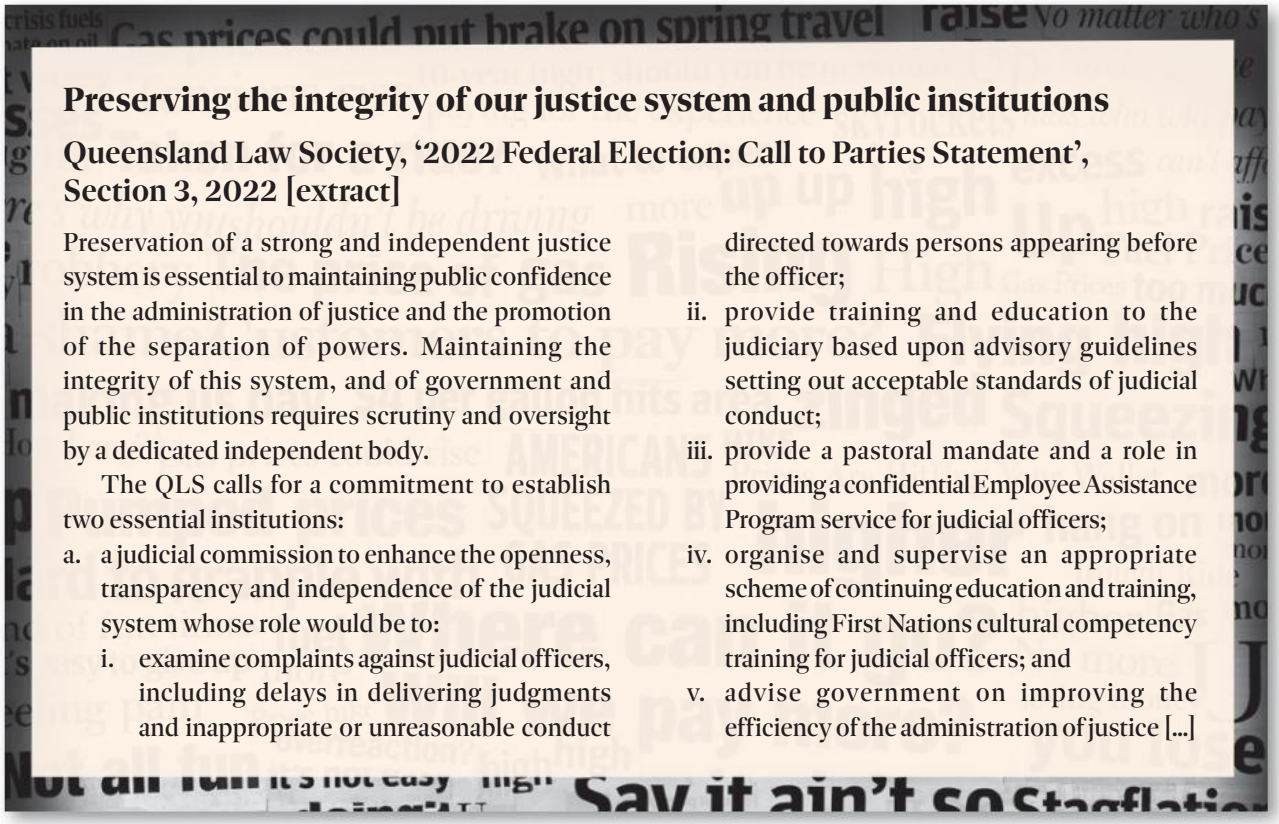
Review **8.10**

1 When was the High Court of Australia established? **Explain** its authority.
2 **Explain** the role and function of the High Court.
3 **Identify** where the High Court is located.
4 **Create** a list of the High Court Registries. **Explain** their function.
5 How many justices (judges) sit on the High Court?
6 Who is the current Chief Justice of the High Court?
7 When must a High Court justice retire?
8 **Identify** on what occasions a Full Court, a Full Bench and a single justice of the High Court sit.



Preserving the integrity of our justice system and public institutions

Queensland Law Society, '2022 Federal Election: Call to Parties Statement', Section 3, 2022 [extract]

Preservation of a strong and independent justice system is essential to maintaining public confidence in the administration of justice and the promotion of the separation of powers. Maintaining the integrity of this system, and of government and public institutions requires scrutiny and oversight by a dedicated independent body.

The QLS calls for a commitment to establish two essential institutions:

a. a judicial commission to enhance the openness, transparency and independence of the judicial system whose role would be to:
   i. examine complaints against judicial officers, including delays in delivering judgments and inappropriate or unreasonable conduct directed towards persons appearing before the officer;
   ii. provide training and education to the judiciary based upon advisory guidelines setting out acceptable standards of judicial conduct;
   iii. provide a pastoral mandate and a role in providing a confidential Employee Assistance Program service for judicial officers;
   iv. organise and supervise an appropriate scheme of continuing education and training, including First Nations cultural competency training for judicial officers; and
   v. advise government on improving the efficiency of the administration of justice [...]

Review **8.11**

Read the extract above 'Preserving the integrity of our justice system and public institutions.' **Decide** whether you agree or disagree with the Queensland Law Society that the introduction of a Judicial Commission would 'enhance a strong and independent judiciary.' **Justify** your response.

Australia's federal courts

Chapter 3 of the Australian Constitution established the High Court of Australia and empowered the Commonwealth Government to create other federal courts and to vest federal judicial power in state and territory courts. Apart from the High Court of Australia, there are two other principal federal courts: the Federal Court

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of Australia, and the Federal Circuit and Family Court of Australia.

Federal Court of Australia

The Federal Court of Australia was created by the *Federal Court of Australia Act 1976* (Cth) and began to exercise its jurisdiction on 1 February 1977.

The Court is a superior court of record and a court of law and equity. It sits in all capital cities of Australia.

The Federal Court of Australia hears matters on a range of different subject-matter, including bankruptcy, corporations, industrial relations, native title, taxation, maritime claims and trade practices laws, and hears appeals from decisions (except family law decisions) of the Federal Magistrates Court.

The Federal Circuit and Family Court of Australia

The Federal Circuit and Family Court of Australia brings together the Family Court of Australia and the Federal Circuit Court of Australia.

Figure 8.29 Native title recognises the traditional rights and interests to land and water of Aboriginal and Torres Strait Islander peoples. Under the *Native Title Act 1993* (Cth), claimants can make an application to the Federal Court to have their native title recognised by Australian law. A Saibai Island drummer in 1999 celebrates the formal recognition of the people of Saibai for native title rights from the Federal Court of Australia.

This joint federal court commenced on 1 September 2021 and aims to allow Australian families the opportunity to resolve their disputes faster through simplified procedures.

The Federal Circuit and Family Court of Australia is now a single point of entry for all family law matters.

Family law jurisdiction includes:

- applications for divorce
- applications for spousal maintenance
- property and financial disputes
- parenting orders
- enforcement of orders
- location and recovery orders
- warrants for the apprehension
- warrants for detention of a child
- determination of parentage.

Judges can review migration law rulings including some decisions of:

- the Minister for Immigration
- citizenship
- migrant services and multicultural affairs
- the Administrative Appeals Tribunal
- the Immigration Assessment Authority.

The Court's general federal law jurisdiction includes:

- administrative law
- admiralty law
- bankruptcy
- consumer law
- human rights
- industrial (e.g. the Fair Work jurisdiction)
- intellectual property
- privacy.

Figure 1.14 will also help you to understand the Australian court structure.

Parliament and the courts

Table 8.2 contains a comparison of the two important bodies that make up our legal system – our parliament and our courts.

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Table 8.2 Comparing the role of parliament and the courts

Parliament	Courts
• Can change or amend any laws • Bound by Constitution	• All courts are bound by the decisions of higher courts, with the exception of the High Court
• Can change laws to suit future needs	• Required to apply existing laws
• Can change or pass legislation on any issue within its jurisdiction under the Constitution	• Can only decide on issues presented in the case before them
• Politicians are elected by the electorate	• The judiciary is not elected by the public, but appointed by the government
• The government is responsible to, and influenced by, the electorate • Can be influenced by public concern or certain groups	• The courts are independent, and are deemed to be above influence or interference
• Politicians can be removed from parliament at an election	• Judges cannot be removed (except under exceptional circumstances) until they retire
• Parliament has the role to make laws to allow for peace and order	• Courts have the responsibility to adjudicate disputes that arise within our society
• Laws passed by parliament – statute law overrides common law	• If there is a conflict between the courts and parliament, statute law overrides common law

Figure 8.30 Queen Elizabeth II Courts of Law, Brisbane Supreme Court, Queensland (left) and inside the building (right)

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Delegated legislation

When legislation is passed, it is not always possible for it to adequately cover the entire desired scope of the new law or to deal with the day-to-day implementation of the Act. To deal with this, the legislation may delegate to the Governor in Council or local government the power to make regulations, by-laws, rules and the like. Delegated legislation cannot be made unless the power to do so is given by the legislation. If laws are made that are outside the boundaries, they are deemed to be ***ultra vires*** and are invalid.

ultra vires (Latin term) meaning 'beyond power', acting outside the scope of a granted power

Figure 8.31 Legislation and case law regulate society

Review **8.12**

Carefully read Table 8.2. In your opinion, do the differences in the roles reinforce or distract from the rule of law? **Justify** your response.

Figure 8.32 The Great Barrier Reef (left) and the Daintree Rainforest (right) are just two of Queensland's great natural wonders that are protected by certain laws.

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Specialist courts and tribunals

Domestic and Family Violence Court

The Queensland Government created a specialist domestic and family violence (DFV) court to deal exclusively with all civil and criminal domestic and family violence matters.

The specialist DFV Court at Southport became Queensland's first permanent specialist DFV court after a trial period of almost two years, commencing on 1 September 2015. The outcomes of the trial informed the establishment of future work in developing a specialist approach to the way DFV proceedings are dealt with in courts across Queensland.

Beenleigh and Townsville specialist DFV courts commenced handling civil DFV matters in 2017–18, with Townsville, Mount Isa and Palm Island offering a culturally responsive approach to Aboriginal and Torres Strait Islander court users. A specialist DFV magistrate from Townsville will circuit to Mount Isa and Palm Island.

Specialist DFV courts operate in Southport, Beenleigh, Mount Isa, Townsville, Palm Island (as a circuit of the Townsville specialist DFV court), Brisbane and Cairns.

Mental Health Court

The Mental Health Court was originally established under the *Mental Health Act 2000* (Qld) and has been operating as a specialist court since 28 February 2002. The Act was updated in 2016. The Mental Health Court decides whether a person charged with a criminal offence has a 'mental health defence'. The court has two key roles:

1 To decide whether the person was of unsound mind at the time of the offence (suffering mental illness or intellectual disability to such a degree as to not be able to be held responsible for their actions)
2 To decide whether the person is fit for trial (unable to stand trial because of mental illness or intellectual disability). A person may be found not fit for trial either permanently or not permanently.

According to the *Mental Health Act 2016* (Qld):

> The Court may make a forensic order requiring the involuntary treatment for the patient and also hears appeals against decisions of the *Mental Health Review Tribunal* (MHRT). In addition, the Court may investigate the detention of patients in authorised mental health services.
>
> The Mental Health Court is presided over by a Supreme Court judge who may seek advice from two assisting psychiatrists. The Mental Health Court has replaced the Mental Health Tribunal (MHT) which performed much the same role under the previous legislation.

Figure 8.33 Extract from the *Mental Health Act 2016* (Qld)

Research **8.6**

Use the QR code to watch the video *Southport Domestic and Family Violence Specialist Court*. Also view the Queensland Department of Justice and Attorney-General website and read the factsheet 'Domestic and Family Violence Specialist Court' before completing these questions via this link https://cambridge.edu.au/redirect/10472.

1 **Describe** the legal reasons for the introduction of the Domestic and Family Violence Court by the Queensland Government.
2 **Evaluate** whether this is evidence of the government responding to the needs of a changing society. **Justify** your response.

Video 8.1 *Southport Domestic and Family Violence Specialist Court*

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Children's Court

In Queensland, matters involving children are dealt with in either a special court at Magistrates Court or District Court level, depending on the type of matter. In the Magistrates Court, any matter involving **juveniles** (persons under the age of 18) are dealt with in a special court known as the Children's Court. The court is a special form of District Court that deals with serious criminal offences committed by juveniles.

juvenile a person who is not old enough to be held responsible for criminal acts; in most states and on the federal level, this age threshold is set at 18 years

Queensland was the only state or territory that tried juveniles as adults once they turned 17. However, the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) which commenced on 12 February 2018 corrected this situation. Now in Queensland young offenders aged 17 will be dealt with in the youth justice system. The commencement of the legislation brought Queensland into line with the United Nations Convention on the Rights of the Child, and the law in all other Australian jurisdictions.

The legislation supports the wide-sweeping reforms being implemented across Youth Justice in Queensland to ensure the rehabilitation of young offenders. Under the Act, children aged 17 years old can access the same support and services that children aged 16 and under can access. This includes:

- access to a support person when interviewed by police
- legal advice and separate conditions for watch houses
- age and developmentally-appropriate interventions.

Source: Department of Communities, Disability Services and Seniors, 2018.

Children's Court proceedings

All Children's Court proceedings at the Magistrates Court level are heard in a closed court, which means that only people directly involved in the case may be present and no information identifying a juvenile defendant can be published. The court can hear and determine matters involving juveniles with regard to a range of issues, including:

- youth justice proceedings involving juveniles who commit, or are alleged to have committed, offences
- child protection proceedings relating to applications by the Department of Child Safety or the Director of Child Protection Litigation regarding protecting children from harm
- adoption proceedings to provide for a child's long-term care, wellbeing and development by creating a permanent parent–child relationship between the child and their adoptive parents.

Children's (District) Court matters

Certain serious indictable criminal offences allegedly committed by juveniles are heard in the District Court, sitting as the Children's Court of Queensland. However, the most serious offences such as murder must be heard in the Supreme Court. The court also determines parentage orders and discharge of parentage orders. A parentage order is a court order that transfers parentage from the birth parent or parents to the intended parent or parents as part of a surrogacy arrangement. This means the birth mother and her partner (if she has one) will no longer have a legal parental relationship with the child and the intended parents become the child's legal parents. A surrogacy arrangement is an arrangement between a woman (the birth mother) and another person or couple (the intended parents) where the birth mother agrees to become pregnant with a child for the intended parents. After the baby's birth, the birth mother gives the baby to the intended parents.

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Case study **8.4**

The case: *Matter of Baby M* 109 N.J. 396, 537 A.2d 1227, 77 A.L.R.4th 1 (N.J. Feb. 3, 1988)

Figure 8.34 In *Matter of Baby M*, a surrogate mother decided to keep her baby.

Citation

109 N.J. 396, 537 A.2d 1227, 77 A.L.R.4th 1 (N.J. Feb. 3, 1988) means this case was heard in The Supreme Court of New Jersey on the 14 September 1987 and was decided 3 February 1988.

Facts

Mary Beth Whitehead entered into a surrogacy agreement with Bill Stern. The agreement was for Whitehead to be artificially inseminated with Stern's sperm and to give the child to Stern and his wife after birth. Whitehead agreed to allow the Sterns to adopt the baby and renounce parental rights. She would receive $10 000 in return. However, after the birth, Whitehead did not want to give 'Baby M' to the Sterns.

Legal issue

This case was a seminal case in family law because it was first court ruling in the United States involving surrogacy and a surrogate-parenting agreement.

The primary issue to be determined by this litigation is what are the best interests of a child until now called 'Baby M.' All other concerns raised by counsel constitute commentary.

Decision

The Supreme Court of the United States held that the surrogacy contract was not enforceable because it contravened state laws outlining the sale of babies. The contract was deemed illegal.

Ratio decidendi (reason for the decision)

The court held that while traditional contract law was not applicable in this case and it would not deem the sale of a child, it made the decision in the best interests of the child. The court determined that the child would have a better quality of life with the Sterns and decided to allow them to keep the baby. Whitehead and her husband had two other children, financial problems and some marital discord, while the Sterns both held doctoral degrees and led quiet, respectable lives.

Obiter dicta (something to think about)

Among other points of contention, this case attracted a lot of attention and discussion around whether a woman's basic human right to make decisions about her own body implied the ability to contract away parental rights to a child born to her, or whether recognising such a right would entail too great a risk of exploitation.

Interestingly, after reaching the age of maturity in March 2004, Melissa Stern, or 'Bay M,' legally terminated Mary Beth Whitehead's parental rights and formalised Elizabeth Stern's maternity as her 'mother' through adoption proceedings.

Review **8.13**

Evaluate the legal issues involved in this case. Do you agree or disagree with the court's decision? **Justify** your answer.

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Murri Court

The Murri Court is the way the criminal justice system links Aboriginal and Torres Strait Islander defendants to cultural and support services. Elders or respected persons from the Aboriginal and Torres Strait Islander community are in the court room to guide and encourage defendants and help magistrates understand more about defendants' personal and cultural circumstances. The Murri Court is less formal than a mainstream court, but it is not a 'soft option'. Defendants are expected to work hard to make better choices. Murri Courts are located in the Magistrates and Children's Courts in Brisbane, Caboolture, Cairns, Cherbourg, Cleveland, Mackay, Maroochydore, Mount Isa, Richlands, Rockhampton, St George, Toowoomba, Townsville and Wynnum, and their main aim is to try to reduce the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system.

Research 8.7

Use the QR code to watch the video *What is Murri Court?* and answer the questions that follow.

Video 8.2 *What is Murri Court?*

1 **Evaluate** the aims and goals of the Murri Court.
2 **Decide** how effective the court has been in reducing Aboriginal and Torres Strait Islander representation in the criminal justice system. **Justify** your answer.

Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) conducts independent merits reviews of administrative decisions made under Commonwealth laws. It reviews decisions made by Australian Government ministers, departments and agencies and, in limited circumstances, decisions made by state government and non-government bodies. It also reviews decisions made under Norfolk Island laws.

In relation to Norfolk Island, the AAT can review decisions made under 39 Norfolk Island laws, including decisions about customs, planning and social services. The AAT was established by the *Administrative Appeals Tribunal Act 1975* (Cth) and commenced operation on 1 July 1976. On 1 July 2015, the Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal were merged with the AAT. The AAT falls within the portfolio of the Attorney-General. In 2022, Attorney-General Mark Dreyfus announced the AAT would be abolished, and replaced with an alternative review body. The new body, the Administrative Review Tribunal, will commence by the end of 2024.

Queensland Civil and Administrative Tribunal

The Queensland Civil and Administrative Tribunal (QCAT) offers dispute resolution without the need to go to court.

Depending on the nature of the dispute, the parties to a dispute can first try to reach agreement through mediation or compulsory conferencing through QCAT. If the disputing parties are unable to come to an agreement, the dispute will go to a hearing for the tribunal to decide on a solution. The tribunal will consider the evidence and arguments of all parties in the dispute before coming to a fair and **legally binding** decision.

legally binding a court or tribunal decision that is binding on the parties; agreement or contract that has the force of law

If the parties do not comply with QCAT's decision, it can be enforced through the courts. QCAT can make decisions about:

- disputes between residential tenants and landlords
- retail shop lease disputes
- debts up to $25 000 (e.g. money lent that has not been repaid)

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Figure 8.35 The Queensland Civil and Administrative Tribunal aims to resolve disputes between parties on a wide range of matters.

- products and services you have bought to a value of $25 000
- damage to property
- disputes between neighbours over dividing fences to the value of $25 000 and over trees
- the building of houses and commercial buildings
- children and young people, including reviewing child protection decisions, adoption applications and blue-card applications
- guardianship and administration for adults
- referrals relating to discrimination, including sexual harassment or racial discrimination
- job regulations, including disciplinary and licensing disputes
- disciplinary and licensing issues, for example, about teachers or health practitioners reviewing previous decisions made by government agencies and statutory authorities, such as restrictions on or breaches of privacy rights.

Review 8.14

1 **Summarise** the main functions of the Federal Circuit and Family Court of Australia.
2 **Evaluate** the role of the Children's Court.
3 The Murri Court is a culturally appropriate environment for dealing with Aboriginal and Torres Strait Islander people in the criminal justice system. **Decide** whether you agree or disagree with this statement. **Explain** why or why not.

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Interpretation of statutes

When laws are drafted by the parliament, important factors need to be considered. The drafter of a new law needs to consider not only the intent of the Act but also the actual wording of the document to ensure that future possibilities that may arise will be covered by the new legislation or law. This can sometimes cause problems where meanings of certain words are ambiguous or unclear, making the interpretation of the new law difficult for the courts. However, it is a role of the courts to interpret the meaning and intent of the wording of an Act and apply that interpretation to the matter it is considering. In this way, the court might depart from the original meaning and interpret the intent of the law through its judgments.

Review 8.15

1 Read the report 'Illicit firearms in Australia' from the Australian Criminal Intelligence Commission below and **evaluate** the main issues raised. **Identify** the legal 'loophole' and its effect on the law.
2 *'These illegal firearm statistics prove that familiarity with legislation can be exploited.'* Do you agree or disagree with this proposition? **Justify** your decision.

Illicit firearms in Australia

Australian Criminal Intelligence Commission report, 2024 [extracts]

Illicit firearms overview

The illicit movement, trafficking and use of firearms is a serious national threat and a significant safety concern for the Australian community.

The demand for and supply of illicit firearms in Australia is driven by a range of entities, from organised crime groups to low-level individual criminals, who continue to seek, procure and use firearms to protect their interests and commit violent acts.

Since 2010, intelligence has indicated that not only are serious and organised crime groups seeking access to firearms for criminal purposes, but an increasing number of groups are trafficking firearms. The illicit firearms market is driven in part by outlaw motorcycle gangs, Middle Eastern organised crime groups, and other groups engaged in trafficking illicit commodities such as drugs.

These groups are known to have direct links to the use of illicit firearms but criminal involvement in the illicit firearm market is not limited to serious and organised crime groups, gangs or particular criminal acts. [...]

Domestic illicit firearms market

Based on available data, the ACIC conservatively estimates there are 260,000 firearms (250,000 longarms and 10,000 handguns) in the domestic illicit market. This estimate is based on a range of intelligence sources, including firearm importation figures and seizure trends over time. [...]

Legislative loopholes

A substantial number of handguns entered the illicit firearms pool through regulatory loopholes in the legislation around deactivated firearms, some of which still exist. It is estimated more than 5,000 handguns have entered the illicit market in this way.

Issues around deactivation are not limited to a single jurisdiction. The ACIC's FTP has identified a number of previously deactivated firearms that have been reactivated. The most significant loophole relating to deactivation was in Queensland's firearms legislation, which was subsequently changed in 2000. [...]

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Figure 8.36 Australia has held two national gun amnesties, which allow anyone with unwanted or unregistered firearms to legally register or drop them off without fear of being arrested or prosecuted. The first was after the 1996 Port Arthur massacre; the other was held from July to September 2017.

A number of rules are used to aid understanding of the intent of an Act and to help the judiciary interpret the meaning of the law. Some of these rules stated in the *Acts Interpretation Act 1954* (Qld), include:

- **Literal rules** – meaning that the actual words used are given their ordinary meaning
- **Purposive rules** – ask the reader to look at the intention of parliament; this can be achieved by reading through speeches from parliamentary debates to help provide interpretation of meanings or the intent of the Act
- **Specific rules** – refers to reading a particular section in the context of the entire Act to understand the Act's intention.

When an Act is drafted, it is divided into parts, which makes it easy to quickly find what you are looking for. Often a definitions section is included at the beginning of the Act, or a dictionary section is included in a Schedule at the end of the Act. Refer to Figure 1.7 in Chapter 1 for more detail on the parts of an Act.

Review 8.16

1 **Explain** the differences between the three rules used to aid an understanding of an Act of Parliament.
2 **Explain** the extent and purpose of delegated legislation.

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8.8 The role of landmark cases

Apart from commissions of inquiry, legal change and law reform can also occur through landmark or precedent case court decisions.

One of the most significant cases that led to new legislation and reforms was *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; HCA 23.

Case study 8.5

The case: *Mabo v Queensland (No. 2)* (1992) 175 CLR 1

Figure 8.37 Eddie Koiki Mabo (1936–92)

Citation

(1992) 175 CLR 1 means this case was decided by the High Court of Australia in 1992 and is reported in the Commonwealth Law Reports in volume 175 starting on page 1.

Facts

Eddie Koiki Mabo was a Torres Strait Islander man. He and four other Torres Strait Islanders, who lived on the Murray Islands, took the state of Queensland to court seeking a declaration on whether they had native title over the Murray Islands. The case was first heard in the Supreme Court of Queensland and then in the High Court of Australia, where a decision was brought down in 1992.

Legal issues

At the time of the arrival of the British, did Aboriginal and Torres Strait Islander peoples have sovereign power over their lands? If so, was the doctrine of *terra nullius*, which had been used to settle the continent, incorrectly applied? Specifically, was there a form of Indigenous ownership of the land such that the Torres Strait Islanders of the Murray Islands had lawful **native title**? If so, should that title be legally recognised by the Australian courts?

native title a form of land title that recognises the unique ties Aboriginal and Torres Strait Islander peoples have to land

Decision

Ten years after Eddie Mabo and the four other Torres Strait Islanders commenced legal proceedings against the state of Queensland, the High Court of Australia brought down its judgment. The full court of seven High Court justices had heard the case. Six justices ruled that the Murray Islanders did have a legally recognisable native title over their lands and that the land was not uninhabited on settlement. They also ruled that the use of the doctrine of *terra nullius* by the British to claim sovereignty over Australia was flawed and that it did not extinguish the ownership of the land by the Murray Islanders. One High Court justice did not agree. However, because a majority was achieved and no appeal now exists for a decision of the High Court, the case was won by Eddie Mabo.

Ratio decidendi (reason for the decision)

The following comment was made by Justice Brennan regarding the doctrine of *terra nullius*:

> The common law of this country would perpetuate an injustice if we 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

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of social organisation to be acknowledged as possessing rights and interests in land.

Source: Justice Gerard Brennan quoted in Julie Cassidy, 'Observations on Mabo & Ors. Queensland', *Deakin Law Review*, 1994, 1(1), p.37.

Obiter dicta (something to think about)

The following comment regarding social justice and equality was made by 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 an 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 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 of the particular areas of land on which they lived or which they used for traditional purposes.

Source: Justices Deane and Gaudron quoted in George Barrie, 'Chapter 2 The Mabo-Decision and the "Discovery" of Native Title in Australia and Beyond', *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts*, 2021.

Case study **8.6**

The case: *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40

Figure 8.38 Gladys Tybingoompa, a Wik Elder from Cape York, dances outside the High Court in Canberra following the court decision in which the Wik people won native title over their land on 23 December 1996.

Citation

(1996) 187 CLR 1; [1996] HCA 40 means this case was decided before the High Court in 1996 and reported in the Commonwealth Law Reports in volume 187 on page 1 and the High Court of Australia reports on page 40.

Facts

The case involved the Wik and Thayorre Indigenous peoples' claims to land in Queensland, Australia. The Queensland Government granted pastoral leases to cattle ranchers, which the Indigenous groups claimed interfered with their native title rights.

Legal issues

The central legal issue was whether native title rights could coexist with pastoral leases and whether the leases extinguished native title.

Decision

The High Court of Australia held that native title and pastoral leases could coexist, except when there was an irreconcilable inconsistency between the rights claimed by both parties. The leases did not necessarily extinguish native title.

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Ratio decidendi (reason for the decision)

The case established that native title rights could coexist with other rights, such as pastoral leases, unless there was a clear and irreconcilable inconsistency.

Obiter dicta (something to think about)

The court also discussed the need for statutory recognition of native title and the importance of reconciliation between Indigenous and non-Indigenous interests.

Off the record

Queensland Premier Joh Bjelke-Petersen made the land of the Wik peoples a National Park, so the land would not have to be handed over in accordance with the judgment. The Bligh and Newman governments gave the land in question back to the Wik peoples as freehold in 2010 and 2012, respectively.

Research 8.8

Carefully read the decision of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 and the judgment extracts in Case study 8.5.

1 Conduct more research into the decisions the individual High Court justices handed down, then briefly **summarise** your responses to the following questions. Share your viewpoint with other members of your class.
   - **a** Why was this case heard by the Full Bench of the High Court of Australia?
   - **b** Which justice did not agree with the other six justices? **Explain** why.
   - **c** How did this landmark decision of the High Court of Australia impact all Aboriginal and Torres Strait Islander people? What was its impact on Australian law?
   - **d** What did Justice Brennan mean by his comment that 'common law of this country would perpetuate an injustice if it were to continue to embrace the enlarged notion of *terra nullius*'? Was Justice Brennan trying to redress the wrongs of the past? **Explain** why or why not.

Figure 8.39 *Mabo v Queensland* led to significant law reform. Justice Gerard Brennan (right, in 2002) was the Chief Justice of Australia (1928–2022) during the Mabo case.

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Case study **8.7**

The case: *Roadshow Films v iiNet Limited* (2002) 248 CLR 42; [2012] HCA 16

Citation

(2002) 248 CLR 42; [2012] HCA 16 means this case was decided before the High Court in 2012 and reported in the Commonwealth Law Reports in volume 248 on page 42 and the High Court of Australia reports on page 16.

Facts

This case involved a copyright infringement dispute between film studios (Roadshow Films and others) and an internet service provider (iiNet). The film studios alleged that iiNet was liable for its users' illegal downloads of copyrighted material.

Legal issues

The central legal issue was whether iiNet could be held liable for its users' copyright infringements.

Decision

The High Court held that iiNet was not liable for its users' copyright infringements because it did not authorise or sanction those activities.

Ratio decidendi (reason for the decision)

The case clarified the principles of authorising copyright infringement and the extent of internet service providers' liability for their users' actions.

Obiter dicta (something to think about)

The court discussed the role of intermediaries (a person who acts as a link or mediator) in copyright enforcement and the need for clear legislation in this area.

Figure 8.40 Roadshow Films alleged that iiNet was liable for users' illegal downloads of copyrighted materials.

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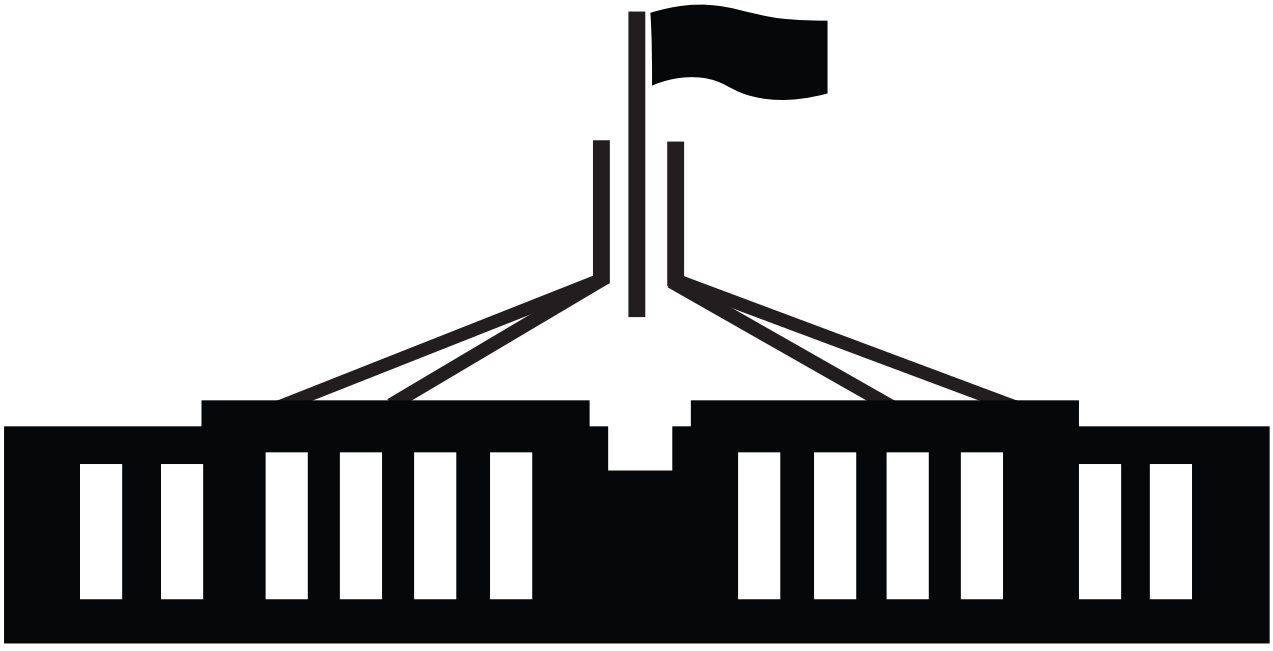
Research 8.9

Read the Case study 8.7. Research one of the following cases and follow the outline used in Case study 8.7 to write your own case notes:

- *R v Bayliss & Cullen* (1986) 9 Qld Lawyer Reps 8; [1986]
- *Al Masri v Minister for Immigration & Multicultural and Indigenous Affairs* (2002) 192 ALR 609; [2002] FCA 1009
- *The Attorney-General for the Commonwealth & 'Kevin & Jennifer' & Human Rights and Equal Opportunity Commission* (2003) 172 FLR 300; [2003] FamCA 94
- *Dietrich v the Queen* (1992) 177 CLR 292; and [1992] HCA 57.



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8.9 Topic review

Topic summary

- Captain James Cook claimed British ownership of Australia in 1770 under the doctrine of *terra nullius*.
- The concept of *terra nullius* was developed to assist colonising nations to claim sovereignty over a new land.
- *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 overturned the belief that Australia was uninhabited in 1770, as was claimed by Captain Cook under the doctrine of *terra nullius*.
- The laws of Australia were received from England.
- The Australian Constitution established our legal and governance framework.
- The Australian Constitution can be changed by referenda.
- In Australia, the three arms of government – local, state and federal – are separate.
- Governance in Australia is based on a bicameral legislature, except for Queensland and the territories, which have a unicameral legislature.
- Section 51 of the Constitution sets out the exclusive powers of the Commonwealth.
- If a state law is inconsistent with federal law on the same matter, federal law prevails.
- A person's eligibility to stand for federal parliament is dealt with in section 44 of the Australian Constitution.
- Australian parliamentary democracy is based on the Westminster system of governance, including representative and responsible government.
- The Governor-General, who is our head of state, and state Governors, are representatives of the Crown (King).
- Each Australian state has its own constitution.
- The heads of government are the Prime Minister, Premiers, Chief Ministers or mayors at each level of government.
- A Bill becomes a law when it is signed by the Governor-General or state Governor.
- The Senate represents the states but today is more commonly a house of review.
- The Speaker of Parliament and the President of the Senate control proceedings in the houses of parliament.
- The High Court of Australia is Australia's highest appellate court.
- Australian courts can only decide matters within their jurisdictions.
- Federal courts decide matters regarding federal laws.
- State courts decide matters regarding state laws.
- Precedent or landmark cases change and extend the scope of common law in the absence of legislation on the matter decided.
- Specialist courts and tribunals free up the traditional courts and make the law more responsive and accessible to the people.
- Just and equitable outcomes are achieved through the application of what is fair and reasonable.
- In Australia, all citizens are equal before the law.
- Accountable governments are open and transparent.

Short-response questions

1 **Explain** how eighteenth-century international law was used to dispossess Aboriginal people of their land.

2 **Explain** how section 44 of the Australian Constitution has been problematic for some elected representatives in both houses of the federal parliament.

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3 **Evaluate** the role and responsibility of each arm of government.
4 **Summarise** the role of each level of government.
5 **Explain** how the High Court became Australia's highest appellate court.
6 'Courts in Australia are not completely free to disregard the "seriously considered dicta" uttered by the majority of the High Court.' **Explain** this statement.
7 **Summarise** the role and functions of the Queensland Civil and Administrative Tribunal (QCAT).
8 **Describe** the role of the Privy Council.

Extended-response questions

1 Research the decision that the High Court of Australia brought down in *New South Wales v Commonwealth* (2006) 231 ALR (the *Work Choices Case*). **Analyse** the legal issues involved and **evaluate** the use of section 51(xx) rather than section 51(xxxv) of the Australian Constitution. Do you agree or disagree with the decision? **Explain** why or why not.
2 Conduct an inquiry into the 1974 Constitutional crisis that resulted in the dismissal of the Whitlam government by the Governor-General. **Evaluate** the constitutional issues involved and the role of the Governor-General. **Evaluate** alternative causes of action that might have been considered.
3 **Analyse** Sir William Blackstone's *proviso* that the reception of English law should be applied in situations applicable in a colony. **Evaluate** how the adoption of this proviso helped to shape the legal and governance system that eventually emerged in Australia.

Response-to-stimulus questions

1 Locate the *Review of the Queensland Parliamentary Committee System* report to the Queensland parliament online. Critically **evaluate** the recommendations proposed. Recommend two legal alternatives that could reinforce responsible government in Queensland.
2 Locate the Magna Carta fact sheet on the Parliamentary Education Office website. **Evaluate** the legal legacy of this document and analyse how it influenced the development of Australian democracy. **Decide** whether this document was significant for the way our democracy developed.
3 Use the QR code to watch the video *A short documentary on the High Court of Australia* and answer the following question. **Explain** how the High Court upholds the rule of law in Australia.
4 **Evaluate** the statement that the High Court has a significant role in our democracy with regard to resolving complex legal issues.

Video 8.3
A short documentary on the High Court of Australia

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Chapter **9** Topic **2**

Law reform within a dynamic society

Chapter overview

In Topic 2, students explore issues and situations where Australian society's changing values, needs, morality, ethics, technology and significant events have acted as an impetus for legal change and reform. The focus is on identifying changing Australian values and pressures on legal freedoms, and how the application of law creates a balance between competing interests. This topic offers scope to examine current and emerging legal issues in Australia and Queensland that create authentic discussions of viewpoints regarding the need for change.

Legal Studies 2025 v1.1 General Senior Syllabus, Page 23. © Queensland Curriculum & Assessment Authority.

Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including commissions, inquiries, law reform, lobby, advocacy, terms of reference, consultations, issues papers, and submissions.
- Describe why laws and related processes require change because of a range of impetuses, e.g.
  - society's changing values, needs, morality and ethics
  - the influence of lobby and advocacy groups and the media, e.g. in relation to double jeopardy and same-sex marriage
  - patterns of crimes and civil offences, e.g. domestic and family violence, medical negligence, privacy, restraining orders and alcohol-fuelled violence
  - technological advances, both to assist in the investigative process such as developments in forensic science and to facilitate criminal activity, e.g. online fraud, cyberstalking and digital piracy (s 115A of the *Copyright Act 1968* (Cth))
  - increased transnational and organised crime
  - the change impetus of significant events, e.g. the Port Arthur massacre (1996) and September 11 terrorist attacks (2001)
  - a current issue.
- Explain the role of
  - the law reform commissions (e.g. Australian Law Reform Commission; Queensland Law Reform Commission) and royal commissions, e.g.
    - Royal Commission into Institutional Responses to Child Sexual Abuse
    - Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory
  - parliamentary inquiries

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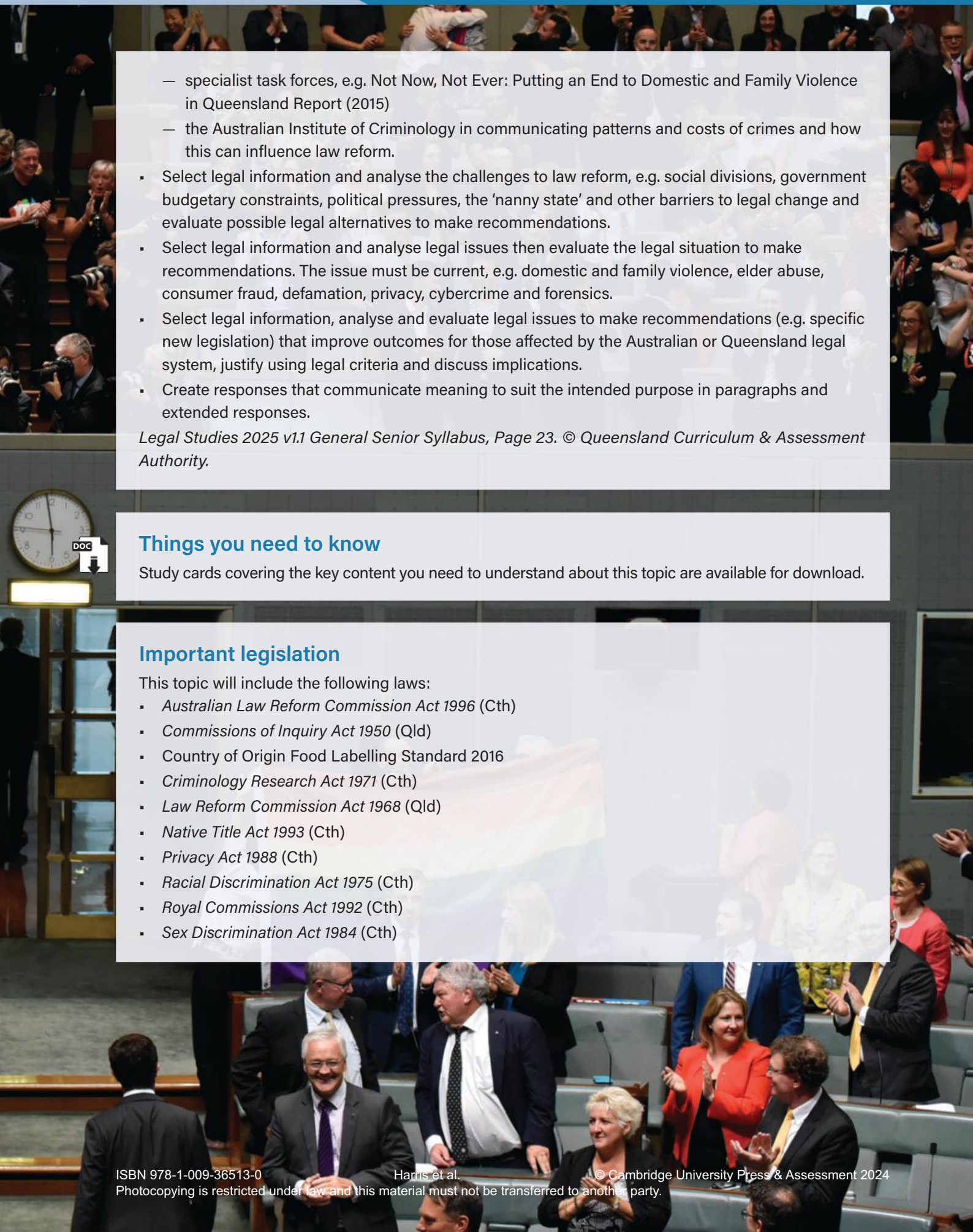

  - specialist task forces, e.g. Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland Report (2015)
  - the Australian Institute of Criminology in communicating patterns and costs of crimes and how this can influence law reform.
- Select legal information and analyse the challenges to law reform, e.g. social divisions, government budgetary constraints, political pressures, the 'nanny state' and other barriers to legal change and evaluate possible legal alternatives to make recommendations.
- Select legal information and analyse legal issues then evaluate the legal situation to make recommendations. The issue must be current, e.g. domestic and family violence, elder abuse, consumer fraud, defamation, privacy, cybercrime and forensics.
- Select legal information, analyse and evaluate legal issues to make recommendations (e.g. specific new legislation) that improve outcomes for those affected by the Australian or Queensland legal system, justify using legal criteria and discuss implications.
- Create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

- *Australian Law Reform Commission Act 1996* (Cth)
- *Commissions of Inquiry Act 1950* (Qld)
- Country of Origin Food Labelling Standard 2016
- *Criminology Research Act 1971* (Cth)
- *Law Reform Commission Act 1968* (Qld)
- *Native Title Act 1993* (Cth)
- *Privacy Act 1988* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Royal Commissions Act 1992* (Cth)
- *Sex Discrimination Act 1984* (Cth)

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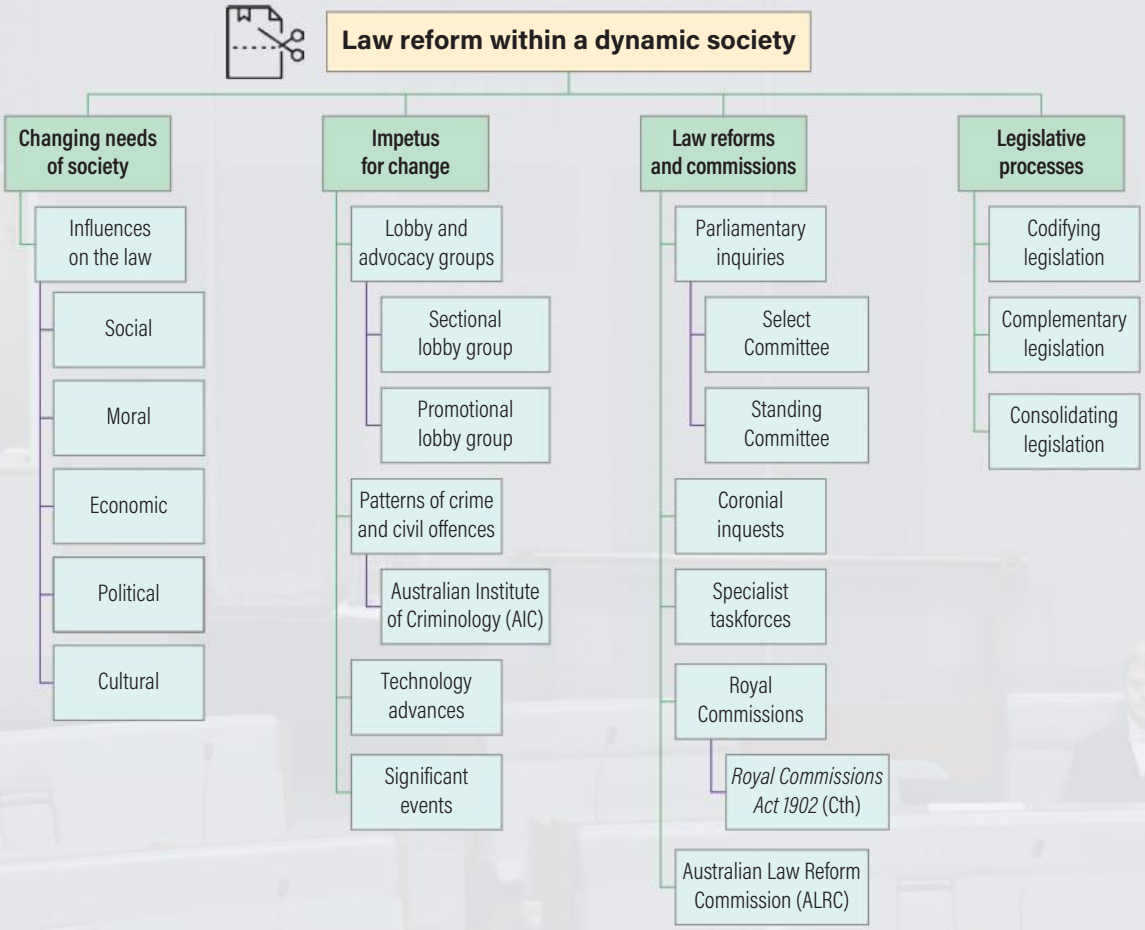
Significant cases

This topic will include the following cases:

- *Barilaro v Google, a limited liability company* [2022] FCA 650
- *Clough v Leahy* (1905) 11 Argus LR 32
- *Entyce Food Ingredients Pty Ltd v CGU Insurance Limited* [2020] VSC 757
- *Lacey v Director of Public Prosecutions* [2007] QCA 413 (Queensland)
- *Minister for the Environment v Sharma* [2022] FCAFC 35
- Question Of Law Reserved On Acquittal Pursuant To s. 350(1A) *Criminal Law Consolidation Act* (No.1 OF 1993)
- *R v Carroll* (2002) 213 CLR 635
- *Rumble v The Partnership Trading as HWL Ebsworth Lawyers* [2020] FCAFC 37

Concept map

In Topic 2 of Unit 3 of the QCAA Legal Studies course, we will cover the following content:



Background image: Members of Parliament celebrate the legalising of same-sex marriage in Australia at Parliament House on 7 December 2017 in Canberra.

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9.1 The law and the changing needs of society

As a society, there are few things that we can truly predict with complete confidence: but one of those things is that society will *continue to evolve and change*.

This happens for a number of reasons. For one thing, the composition of our society changes. Today's youth will become older and will take their place as the generational leaders of our society. The generations in charge today will move into retirement. New young people are born every day. People leave our society for places interstate and overseas; and other people come into our society, bringing their own beliefs and experiences.

In addition, the external circumstances in which our society exists, also constantly change. Our physical environment changes – for example, it is now clear that we, as a society, face more extreme weather events than previously as a result of climate change. Our economic environment changes as our society experiences times of growth and prosperity, but also economic downturns and difficulty. From time to time, we as a society have faced very substantial external shocks – involvement in a war, for example, or the sudden emergence of a global pandemic such as COVID-19. Technology, too, leaves its mark – the rise of the internet in the late 1990s changed everything about how people communicate, how they do business, how they seek entertainment, even how they fall in love. The law had to cope.

Within our society, different subgroups may experience those environments in different ways. It is clear, for example, that Aboriginal and Torres Strait Islander communities often experience our society differently to those of other cultures. It is also clear that sometimes younger people experience the community differently to working-age adults. Older, retired people may have yet another experience. People living in small, struggling rural communities are having a different experience to those in larger centres. And all of those smaller communities are *also* constantly changing. As you can imagine, it is inevitable that as or society changes, the law must change too.

Figure 9.1 As our needs change as a society for a range of reasons, so must our laws.

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Legal systems which were perfectly adequate twenty years ago, or forty years ago, may be completely inappropriate now, and perhaps even harmful in our modern communities.

Off the record

Utilitarianism is an old philosophy underpinning much of our approach to law. It is most commonly associated with eighteenth-century philosopher Jeremy Bentham. Utilitarianism is the idea that the best laws are those which produce the greatest good for the greatest number; and the worst laws are those which produce the most misery.

This chapter is all about how the law responds, or tries to respond, to our changing society. We're going to look at five different processes which sometimes result in changes to the law:

- **Patterns of wrongdoing** that lead to legal reforms and changes. We will look both at criminal wrongdoing and other forms of wrongdoing that do not fall within the criminal law:
  - On the criminal side, we will look at how an increase in the number of crimes committed by people on bail (released while awaiting trial for another, previous offence) has led to pressure to make bail more difficult to obtain; we will look at how changing patterns of domestic and family violence have affected the law; and we will compare the Australian and the American responses to gun violence.
  - On the civil, non-criminal side, we will look at the campaign to introduce country-of-origin food labelling laws after an outbreak of hepatitis A from imported frozen berries.
- **Lobbying** and **advocacy** **for law reform** by groups within society who see a need for something to change, and who make it their mission to bring those arguments to the parliament and to the broader community.
- **Law reform** responses to a changing legal environment including decisions from higher courts, the impact of technology and the impact of external legal factors such as agreements that Australia makes with other nations.
- **Inquiries and inquests**, which are related but somewhat different:
  - Inquiries (including parliamentary inquiries and Royal Commissions) occur when the government or the parliament decides that it needs to know more about some aspect of society, and so it appoints a committee, or a commissioner, to consult with the community, perform research and make law reform recommendations.
  - Inquests are where a *coroner* examines the circumstances of a person's death, partly in an effort to find ways to avoid similar deaths in the future (often including law reform).
- **Specialist taskforces**, which are often combined government and private sector groupings, created to focus on very specific questions of law reform. In this context, we will also look at dedicated government law reform agencies, which exist specifically to consider proposals for law reform.

lobbying the process whereby a person or group attempts to influence the decisions of parliamentarians or members of the executive government; it comes from the United Kingdom, where lobbyists would literally wait in the lobbies around the House of Commons seeking to speak to and influence the members of parliament

advocacy describes people bringing forward arguments to advance the interests of some person or group in society by such means as writing to a local member seeking to change a law or a major group meeting directly with government to influence policy and law

law reform the continuous process of examining current laws to see if they need to be changed to meet changes in our society and of examining areas where they might need to be entirely new laws

inquest a special type of court proceeding held to determine the circumstances of a person's death and what can be learned from that death to prevent similar deaths in future

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Of course, these are not the only ways in which law reform occurs. Every piece of legislation, and every amendment, has its own separate origin story. However, if you understand these most common drivers for legislative change, you will easily be able to adapt that knowledge to other laws.

Sometimes, complementary legislation is needed. This refers to laws that work together from differing jurisdictions or in relation to what may seem to be slightly different subject matter to achieve a common goal. They often supplement each other, providing a comprehensive legal framework for a specific area. For example, we sometimes have federal and state laws that work together to regulate certain behaviour. One example of this is the Australian Consumer Law (a commonwealth act) that tries to protect consumers from illegal practice or bad behaviour by sellers/manufacturers of goods. This law works in conjunction with various state and territory Fair Trading Acts to protect consumer rights. Other examples include environmental protection laws, taxation and workplace health and safety. Where these state and federal laws conflict, the federal law will be the one followed.

Figure 9.2 In Queensland, you can basically be fined for lying!

Off the record

Did you know that in Queensland, it is illegal to publish a notice or advertisement that falsely reports, expressly or by implication, that a child has been born, a person has died, a funeral is planned or has occurred, a couple has become engaged or is about to marry, or has been married, or that a job is available (*Summary Offences Act 2005* (Qld), s. 21)? You can be fined up to 10 penalty units ($1219) or be imprisoned for up to six months.

9.2 Wrongdoing leading to reform

One of the basic expectations that most citizens have from government is that the government will maintain law and order. Government is expected to set rules in place which will, for example, protect people from being physically harmed or protect their possessions from being stolen or damaged. Governments are expected to maintain systems of commerce which protect people from being defrauded. They are expected to maintain road networks, including an expectation that they will regulate the conduct of people who are driving unsafely on those roads, for example by speeding or driving while intoxicated.

At the same time, however, it is safe to assume that most people do *not* want a government that imposes such strict rules in the name of law and order, that they cannot go about their normal lives. For example, it would be very easy to reduce the road toll to zero by imposing a law that nobody was permitted to drive motor vehicles – but people want the freedom and mobility that comes along with a car.

As a result, governments must do what they can to strike a balance between, on the one hand, having sufficiently strict laws to maintain law and order and, on the other hand, not making those laws so strict that they prevent people from living their lives. This balance needs to be monitored and maintained, and small changes are routinely made to the law to accomplish this.

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Sometimes, however, circumstances will come along which throw the balance of the law out so badly that urgent, serious law reform is needed. In this section, we're going to look at criminal wrongs and civil wrongs:

- criminal wrongs – crime committed by those on bail and domestic violence issues
- civil wrongs – country-of-origin food labelling laws, and privacy and data breaches
- criminal and civil wrongs – problematic consumption of alcohol
- single significant events – the Port Arthur massacre and September 11 events.

Criminal wrongs

Bail laws

In Chapter 3, you were introduced to the concept of bail. In brief, however, it goes like this:

- A person who has been charged with a criminal offence but not yet convicted is presumed to be innocent.
- A person who is presumed innocent ought not to be in jail, because it may turn out that they did not commit the offence.
- At the same time, sometimes society needs to be protected from people who are dangerous and who may commit serious harm.
- So, we have *bail* laws where the court starts with the presumption that the person should be released back into the community to wait for their trial, but then the court considers any objections the police might have to that person being on bail.

Realistically, every time the court releases a defendant on bail, the court is taking a risk: there is always a *chance* that they are returning the defendant into the community to commit further crimes. The bail process is meant to balance this against the importance of maintaining the presumption of innocence. As a result, bail laws are always controversial to some extent. On the one hand, there are those who argue that people charged with offences should be locked away for the protection of the community – especially if they are repeat offenders. On the other hand, there are those who argue that the harm caused by a period of imprisonment is so severe that we, as a society, should not take the chance of imprisoning a person who turns out to be innocent.

These arguments are even more complicated when the defendant is a young person. A key internationally-recognised principle of human rights is that children should only be imprisoned as a last resort – and this can almost never be the case when they have not yet even been convicted of an offence.

In Queensland, these controversies came to a head on Australia Day in 2021. A man named Matthew Field and his partner Kate Leadbetter, who was pregnant with a boy to be named Miles, were walking their dog. Somewhere not too far away, a 17-year-old youth, who had been consuming alcohol and cannabis, had stolen a car and was joyriding in it. He ran a red light at 90 kilometres per hour, collided with a truck coming across the intersection, and then as his vehicle flipped, it collided with Matthew and Kate. They died immediately, along with Miles. The offender fled the scene but was later arrested nearby, lying on the ground crying after having tried and failed to steal another motor vehicle.

As we might imagine, many people in the community were terribly upset at what had happened to Matthew, Kate and Miles. More so when it later became clear that the offender already had an extensive criminal history. The media focused heavily on the story. There were public calls for the government to 'crack down' on youth offending and to become tougher on crime.

While the deaths of Matthew, Kate and Miles were clearly tragic, the truth is that there really wasn't a youth crime wave in Queensland at the time. In fact, according to official statistics, the rate of youth crime was dropping. It had been 1910 offenders per 100 000 people aged 10–17 in 2020–21, but it was just 1863 offenders per 100 000 people in that age group in 2021–22. Furthermore, the government's own statistics showed that the rate of offences for young people overall was less than the rate of offences for adults. In short, the hard data did not seem to back up public perceptions of a youth crime wave.

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Figure 9.3 People are seen at a vigil for Kate Leadbetter, 31, and Matthew Field, 37, who were killed while walking their dogs after being hit by a stolen car in Alexandra Hills on Australia Day 2021. The offender was 17 years old, and the incident sparked a media storm in Queensland over youth crime.

Just a few days later, though, a young woman named Jennifer Board, aged 22, was riding her motorcycle in Townsville when she was struck and killed by a car which was attempting to chase down another vehicle – which had been stolen by youths. Public outrage was magnified.

Despite this, it remained the case that there was widespread community anger about youth crime, arising primarily from this incident. The Premier, Annastacia Palaszczuk, could not afford to be seen to implement *nothing* in relation to these demands. The government claimed that the majority of youth crime in Queensland was being committed by a core offender group of just 400 young people, so the government introduced plans to deal with that offending. One of those plans was the introduction of a **presumption against bail** for young offenders who were charged with very serious crimes.

presumption against bail reverses the expectation that courts usually have of releasing an accused person on bail unless there is a good reason to hold them on remand (in prison)

So, after the introduction of that measure, the courts would begin with the presumption that the young person should be kept in jail pending trial; and it would be up to the young person to convince the court otherwise.

On Boxing Day in 2022, two 17-year-olds broke into a house in what appears to have been a home invasion gone terribly wrong. They stabbed the couple who resided in the house – Emma and Lee Lovell. Emma died from her wounds. Public outrage was renewed, and the government responded with a further package of measures, including the introduction of a new criminal offence for youths who breach the conditions of their bail – essentially requiring them to be jailed if they do so.

There are strong arguments on both sides of the bail debate. On the one hand, it is impossible not to understand the public outrage at the deaths of innocent people, killed pointlessly and instantly as a result of youth crime. On the other hand, there seems to be very little evidence to suggest that locking young people in detentions centres actually serves to improve their lives or to steer them away from further offending. Besides, if the rates of youth crime were in fact falling, doesn't that suggest that the laws were already effective prior to the crackdown?

Regardless of which side of the debate you might support, we can see here that on repeated occasions, dramatic events in our society caused strong public opinions to emerge. Any democratic government must be sensitive to strong public views, especially if it wishes to keep winning elections. New laws therefore emerged in response to those events and those public opinions.

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Case study **9.1**

The case: *Lacey v Director of Public Prosecutions* [2007] QCA 413 (Queensland)

Figure 9.4 *Lacey v DPP* dealt with the appropriateness of granting bail. Pictured is Jade Michael Lacey (right, in handcuffs). The Lacey brothers turned themselves into police at Chris Nyst Lawyers office in Southport over the murder of Kevin Palmer on 11 May 2007.

Citation

[2007] QCA 413 means this matter was heard in the Queensland Court of Appeal in 2007 and was decision number 413 for that year.

Facts

The applicants were brothers charged jointly with a particularly brutal murder and a similarly brutal attempted murder. They were placed on remand in mid 2007, and it appeared likely at the time of the bail hearing before the Queensland Court of Appeal that the trial might not occur until 2009 or even 2010.

Legal issues

Given that the delay in their trial might mean they spent three years in prison before coming to trial (where they might be acquitted) should they be bailed?

Decision

Delay in bringing a matter to trial is a relevant factor in considering whether an accused person should be remanded or bailed, but it is not the only factor, and there is no automatic rule that a lengthy period of remand entitles an accused person to bail. The defendants were therefore remanded in custody.

Ratio decidendi (reason for the decision)

Bail is always decided on the basis of the judge's discretion, which should include many factors. No single factor will be enough to determine the result.

Obiter dicta (something to think about)

If a person were held in prison on remand for three years, but then acquitted, should they be entitled to compensation? What would this look like?

Review **9.1**

1 **Identify** two things governments must try to balance when making laws to regulate people's behaviour.
2 **Consider** the key risks a court accepts when releasing an accused person on bail.
3 **Discuss** the key principles of human rights law relating to young people.
4 **Explain** the consequences for custody if there is a 'presumption against bail.'

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Domestic and family violence

Throughout the history of Australian society (and indeed most other societies) men, both as individuals and as a group, have held power over women. For generations, particularly in marriages or marriage-like relationships, men have sometimes expressed this power in ways that have been profoundly harmful to women.*

*Great care should be taken with this statement. On the one hand, there have also been many thousands of good, thoroughly decent men who protected and provided, and whose behaviour was never harmful, at least when viewed by the social standards of the day. There is nothing whatsoever negative about being a man, and young men should aspire to become excellent men. At the same time, there is no point turning away from the fact that this is a gendered issue: domestic and family violence is typically (though not universally) inflicted by men upon women.

Unfortunately, until relatively recently, within marriages this conduct was tolerated by some – or even regarded as amusing within popular culture. Perhaps the classic example is an episode of the 1956 TV show *The Honeymooners* where the constant belittling conduct of the character Ralph towards his wife Alice – complete with the threat '*One of these days, Alice, Pow! Right in the kisser*' – was the point of the show, set to a constant laugh track. The 1950s might seem long ago, but the show was popular for many years.

While there had been an undercurrent of objection to domestic and family violence for over a century (Anne Bronte's classic 1848 novel *The Tenant of Wildfell Hall* is a stunning early example), marriage was essentially regarded as private, and there was a social hesitation to set rules for how people should act within their marriages. This social position was challenged by Second Wave Feminism from the 1960s, which confronted traditional understandings of the role of women in society. However, it was not until 1989 – yes, 1989! – that Queensland had legislation specifically directed towards domestic and family violence. That legislation was updated in 2012, but the problem continued to worsen.

Figure 9.5 Stills from the popular 1950s US TV show *The Honeymooners.* Though he never followed through with it, the main character Ralph Kramden (Jackie Gleason) often belittled his wife (Audrey Meadows) with the threat '*One of these days, Alice, Pow! Right in the kisser!*' This was popular mainstream entertainment in countries like Australia for many years.

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Case study **9.2**

The case: The *rougher than usual handling* case: Question Of Law Reserved On Acquittal Pursuant To s. 350(1A) *Criminal Law Consolidation Act* (No.1 OF 1993)

Figure 9.6 This case was heard in the Supreme Court of South Australia.

Citation

(1993) 59 SASR 214 means this case was heard in 1993 and reported in volume 59 of the South Australian State Reports starting on page 214.

Facts

In a criminal case where a husband was accused of raping his wife, the judge summed up the case to the jury by making a number of comments including one which said it might not be unacceptable for a husband, attempting to persuade his wife to engage in sexual activity, to engage in 'rougher than usual handling' by which he meant the use of force.

Legal issues

For centuries, the 'marital rape immunity' had protected men who had nonconsensual sex with their wives. Had society changed to the point where it was considered immoral for a husband to use any amount of force to persuade his wife to engage in sexual activity? Specifically, was the judge's summing up an error of law?

Decision

The judge had indeed made an error of law, because even if the judge had not intended to convey to the jury the suggestion that force was acceptable within a marriage, the words that the judge had used were likely, regardless, to convey that impression.

Ratio decidendi (reason for the decision)

Judges when summing up a case for the jury must do so in a way that is as neutral as possible; it is for the jury to bring the values of the community to the case.

Obiter dicta (something to think about)

The case note itself does not record, but those of us who were old enough can clearly remember, the absolute public outrage which followed the original judge's decision. It is almost certain that the public outrage led to the questions of law being raised before the High Court in this case. How do we feel about courts becoming responsive to public opinion? On the one hand, attention to public opinion might well assist the court to do justice. On the other hand, the reality is that often public opinion can be quick to anger and the opposite of justice. Public opinion was clearly on the side of good in this case, but could there be other cases where the public opinion might in fact be the opposite of justice? Can you think of any such cases?

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Table 9.1 The number of protection orders issued in Queensland, by year, from 2018 to 2023

Number of protection orders issued in Queensland, by year					
	2018–19	2019–20	2020–21	2021–22	2022–23
Protection	25 002	20 975	25 371	24 332	26 237
Temporary	14 420	14 487	14 569	14 801	16 552

In 2014, the Queensland Government established a specialist taskforce headed by former Governor and Governor-General Quentin Bryce to review the laws in this area. The report, entitled *Not Now, Not Ever*, is discussed in more detail below. It was a landmark in the fight against domestic violence, but sadly it appears that the number of reports to police continues unabated, see Table 9.1.

Recent reforms in this area have concentrated on forms of domestic and family violence that do not include *physical violence*, such as coercive control (e.g. stalking, intimidation, harassment and abuse), as types of violence, which when presented as a pattern, can demonstrate domestic and family violence. Sadly, however, it appears that the battle against this awful behaviour is far from won.

Figure 9.7 Former Governor-General Quentin Bryce chaired the *Not Now, Not Ever* report.

Civil wrongs

The 2015 Frozen Berries scare

Nanna's is a well-known food brand in Australian supermarkets. It's actually a brand owned by a company called Patties Foods. One of their products was frozen mixed berries which came in a resealable plastic sachet. The berries included raspberries, blueberries, strawberries and blackberries. Their process was to purchase the berries from farmers in Chile and China, then to pack them in China before importing them into Australia for sale.

Consumers, one imagines, thought they were buying a healthy product. Fruits are, after all, usually a healthy food choice.

In 2015, however, there was an outbreak of hepatitis A, a contagious virus which causes liver damage, in Queensland, Victoria and South Australia. Investigations showed that the primary cause of the outbreak was a batch of Nanna's frozen berries.

Patties Foods, of course, immediately issued a **product recall** notice and issued a notice to supermarkets to stop selling the products. However, much of the damage had already been done, including to a group of school students. In fact, more than thirty schools in Victoria reported that their students had eaten the infected berries.

product recall when a product has been sold to the public, and it emerges that the product is unsafe, the seller (or manufacturer) will initiate to recall (remove) the product from sale and to warn everyone that the product needs to be returned for refund or repair

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Case study **9.3**

The case: *Entyce Food Ingredients Pty Ltd v CGU Insurance Limited* [2020] VSC 757

Figure 9.8 Entyce was the supplier of berries to Patties Foods, the owner of the Nanna's brand.

Citation

[2020] VSC 757 means this was a decision of the Victorian Supreme Court in 2020 and was decision 757 in that year.

Facts

Entyce was the supplier of berries to Patties Foods, the owner of the Nanna's brand. Entyce supplied berries which were infected with hepatitis A, resulting in sickness among consumers, a widespread recall of the products, and commercial harm to Patties Foods. The insurer of Patties Foods had sued Entyce, which was now suing its own insurer to cover its liability.

Legal issues

The issue in the case was whether the relevant insurance policy covered liability for the supply of the infected berries but for our purposes the interesting aspect of this case is that it provides details of the settlement between Patties Foods and Entyce.

Decision

The insurance policy did not protect the supplier of the berries, but in this case, we can see that the settlement with parties was worth $4.5 million.

Ratio decidendi (reason for the decision)

In this case, the *ratio decidendi* is less important than the *obiter dictum*, in which the court explains the settlement arrangements which were reached.

Obiter dicta (something to think about)

Usually when parties settle a case (that is, when they come to a private agreement rather than going to trial), the terms of their agreement are kept private. A case such as this, where we get to see the outcome, is quite unusual. Should this be the case? Or should parties be required to make the terms of their settlements publicly known?

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There was considerable public outrage at these events, and the focus was on **country of origin labelling**. A range of groups, including the Australian Manufacturers Workers Union, the National Farmers Federation and consumer group Choice, called for a labelling scheme. The representative of the National Farmers Federation was quoted as saying that 'Australian consumers were not recognising that when they bought cheap, imported frozen food … it was not grown and made under the same stringent health and hygiene standards as Australian produce'.

The concept was that the same fruit, grown and packaged under Australian regulations, would be unlikely to have ended up on sale or being consumed. As a result, while imported food should not be banned, consumers should have the opportunity to make an informed decision as to whether they wished to purchase the Australian or the overseas product.

Governments responded to these calls by introducing a statutory instrument called the Country of Origin Food Labelling Standard 2016, which requires food sold in a retail setting to be labelled to show where the food was grown and where it was processed or manufactured. If the food includes both Australian and overseas-produced ingredients, then the standard requires the labelling to show visually, with a bar graph, what proportion of the ingredients are Australian.

You can see that this scheme was implemented, just a few months after the hepatitis outbreak, in response to the great public concern about that outbreak.

country of origin labelling a statutory scheme which enables consumers to see whether the products they are purchasing (particularly food) were grown, manufactured, processed and packaged in Australia or another country

Privacy and data breaches

In past times, the right to privacy was somewhat less of an issue for most Australians. Prior to the development of the internet, most records, including government records, were on paper, and this limited the extent to which they could be accessed, shared or used improperly. Nowadays, however, information about individuals – everything from bank account details to school records to web browsing habits – can potentially be copied and transmitted anywhere. Even secure information systems can be broken into or *hacked*!

To complicate matters, Australians do not have a specific right to privacy. While the Universal Declaration of Human Rights includes a protection against 'arbitrary interference with … privacy, family, home or correspondence', Australians receive such protection from statutes: principally the *Privacy Act 1988* (Cth), which has been frequently updated to take account of developing technology. The *Privacy Act* establishes the Australian Privacy Principles, a series of thirteen rules covering how organisations collect, store and use people's private information, and which give people the right to know what information is held about them (and to correct that information if it's wrong).

You should be aware, though, that these Privacy Principles usually don't cover overseas websites. The Office of the e-Safety Commissioner website at https://cambridge.edu.au/redirect/10475 has many resources to help you protect your privacy online.

Problematic consumption of alcohol

Unfortunately, alcohol consumption – at unhealthy levels – has been part of Australian culture since the arrival of the First Fleet in 1788 (which brought three years' worth of rum and beer). Mildly intoxicating drinks were known to Indigenous people prior to the arrival of Europeans, but these were used ceremonially and not for routine consumption. Since European arrival, alcohol has often been at the heart of Australian culture, with tragic results – especially alcohol-fuelled violence and, most especially, alcohol-fuelled domestic violence.

Governments have imposed a range of responses to overconsumption of alcohol from limiting the sale of alcohol to adults to imposing blood alcohol limits while driving motor vehicles and taxing alcohol at punitive levels on the (perhaps incorrect) assumption that making alcohol more expensive will result in people

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Figure 9.9 Alcohol has long been a part of Australian culture.

Figure 9.10 A single red rose lies in honour of the victims of the Port Arthur massacre in Tasmania on 4 April 1997.

drinking less alcohol (whereas in fact, it may simply mean that people who drink experience additional financial stress as they spend more money on alcohol).

At present, the Government response is coordinated under the National Alcohol Strategy 2019–28, which includes legislative and policy approaches to harm caused by excessive alcohol consumption but combines these with education and health programs intended to reduce problem drinking.

Single significant events

Port Arthur Massacre

The matters discussed above relate to changes in *patterns* of civil and criminal behaviour across time. Sometimes, however, a single event may be so shocking that, on its own, it becomes a driver for significant legal change.

In Australia, one of the most dramatic of these was the Port Arthur Massacre on 28 April 1996. The name of the perpetrator, while widely known, will not be used here as one of his motivations for the massacre was to become notorious. In a short period of time, using two semi-automatic weapons, he killed 35 people, including children, and wounded a further 23. He was arrested and sentenced to 35 life sentences. A semi-automatic weapon is one which fires a shot each time the trigger is pulled, without any need to 'cock' the weapon between shots. This allows the shooter to shoot more rapidly, creating many more victims.

Within two weeks of the Port Arthur Massacre, the Australian Government and all state governments had joined together to pass laws which:

- implemented new licensing requirements for firearm owners including restrictions on how they are stored
- severely restricted access to semi-automatic weapons
- implemented a national 'gun buy-back' scheme, whereby taxpayers paid additional tax for a short period of time, and the money was used to compensate firearm owners for handing in their weapons. No less than 650 000 firearms were removed from the Australian community as a result.

September 11 attacks

On the morning of 11 September 2001 in the United States, terrorists from an extremist group called *Al-Qaeda* hijacked four passenger aircraft.

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Two of them were flown into the tallest buildings in New York City, the Twin Towers of the World Trade Center. A third struck the US military headquarters, the Pentagon. The fourth appears to have been directed towards either the White House (the office of the US President) or the Capitol Building (the US Parliament). The Twin Towers dramatically fell, and in total nearly 3000 people were killed. Many more were injured, and still more suffered from dust-based diseases in the years to follow.

The legal consequences of the September 11 attacks were immediate and worldwide. One aspect was dramatically increased aviation security, both at airports around the world and aboard aircraft. The door between the cabin and the flight deck, which was once quite flimsy, was replaced with a bulletproof and shockproof door and kept locked.

Figure 9.11 Newspaper vendor Carlos Mercado selling the 'Extra' edition of the *Chicago Sun-Times* printed 11 September 2001 after the terrorist attacks on the United States. Two hijacked airplanes crashed into the World Trade Center twin towers in New York while one hijacked plane later crashed at the Pentagon in Washington, DC, with another plane crashing 80 miles outside of Pittsburgh, Pennsylvania. The legal ramifications of the attack were significant and quickly enacted.

Within a year, Australia had introduced a raft of new security legislation intended to combat terrorism. This legislation included quite extraordinary powers, allowing terrorism suspects to be held for a prolonged period by police, without any contact with the outside world. Legislation also tightened the movement of money across borders to inhibit the funding of terrorist organisations.

Concern was heightened still further on 12 October 2002, when Indonesian terrorists affiliated with *Al-Qaeda* bombed a nightclub on the popular Indonesian tourist island of Bali.

In all three of these cases – Port Arthur, September 11 and the Bali Bombing – events were so dramatic that laws changed rapidly in response.

Responding to wrongdoing

The conclusion which seems to follow from the examples given above is that when the public becomes outraged at a set of circumstances, they may demand government action on that issue. If the outrage is strong enough, sustained enough or sufficiently widespread, it is quite likely that governments will respond by implementing new laws.

Figure 9.12 People visit the site of the 12 October 2002 bombing as two Australian flags sit among flowers in Kuta, near Denpasar, 20 October 2002. There were 202 people killed including 88 Australians.

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9.3 Lobbying and advocating for reform

Governments know that every three or four years, they have to face elections. They also know that to win those elections, they need to maintain the support of individual voters. Ideally, this would mean that politicians would be open to discussions with every individual that they represent.

In reality, though, individuals with some shared interest or shared cause often form a *lobby group* whose purpose is to advocate their shared interests to politicians. Greenpeace, for example, is an environmental lobby group, and when Greenpeace advocates its views to government, it can claim to be representing the views of its thousands of members and supporters. Any politician, knowing that those thousands of supporters are voting at the next election, would be likely to take notice of Greenpeace's advocacy.

Lobby groups come in all shapes and sizes, in all areas of the community. They include church societies, school associations, conservation groups, trade unions, organisations of First Nations peoples, business organisations and/or political parties. In many ways, groups like this are crucial to the smooth operation of government: governments can, by meeting with various lobby groups, quickly understand the likely opinion of many thousands of people on important issues. Ideally, our political leaders would then take those views into account when creating new laws.

Lobby groups can be classified as either a **sectional lobby group** or a **promotional lobby group**.

A sectional lobby group is one such as a trade union, business or farming association, church group, ethnic association, pensioner group, or veterans organisation, such as the Returned Services League. You can see that sectional lobby groups represent a *sector* of society, whether that is farmers, young people, Muslims or women. Often, sectional groups claim to bring to the decision-making process the unique perspective and needs of their particular sector.

A promotional lobby group promotes particular causes, beliefs or values, for example, a conservation group (Greenpeace), an LGBTQIA+ group, an animal lovers' group, or civil or moral rights group.

It's important to note that there is no clear line of separation between sectional and promotional lobby groups. While there are some that are clearly in one camp or another (e.g. Greenpeace is clearly a promotional lobby group and a local ratepayer's association is clearly a sectional lobby group), many of these groups are arguably both.

For example, a lobby group representing First Nations peoples might take a sectional approach to representing First Nations peoples as an identifiable group; however, they might also take a promotional approach on specific issues, say, native title. It is still useful, however, to understand the distinction between sectional and promotional groups.

sectional lobby group a group which exists to represent the interests of a specific sector of society such as farmers, veterans or students

promotional lobby group a group which focuses on a particular issue, such as environmentalism, tax reform or local heritage, and seeks to influence government decisions in relation to that issue

Social influence

As we mentioned at the outset of this chapter, as our society changes, we would expect there to be (sooner or later) a response from our law-makers and our laws to change. We expect them to respond to society's changing values in an attempt to keep the law relevant and up to date. For example, what we consider 'normal' today may at one time have been considered inappropriate by society's standards. Bullying, divorce, same-sex marriages, drink driving, disciplining children and the minimum driving age are all examples of areas in which changes have occurred because of society's influence. Our law-makers have responded to changing beliefs within society, and laws have changed as a result. For example, during the 1970s, considerable pressure was placed on governments by women who were

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protesting against discrimination. This resulted in the introduction of legislation such as the *Sex Discrimination Act 1984* (Cth). More recently, changing social attitudes towards homosexuality resulted in the 2017 Marriage Equality plebiscite, which led to same-sex couples being allowed to marry.

As our society discusses and questions certain topical issues through the many different avenues available to it – especially through the media including social media – the pressure is put on governments to act to ensure that our laws reflect the current needs of citizens. For example, in 2014, victim lobby groups successfully pressured the Queensland Government to overhaul Queensland's double jeopardy laws in the wake of *R v Carroll* (2002) 213 CLR some 41 years earlier.

Case study 9.4

The case: *Minister for the Environment v Sharma* [2022] FCAFC 35

Figure 9.13 *Minister for the Environment v Sharma* saw a group of young people sue the Minister for the Environment over the effects of climate change.

Citation

[2022] FCAFC 35 means this is a case heard in 2022 by the Full Court of the Australian Federal Court and was the 35th judgment handed down that year.

Facts

A group of young people commenced what is called a representative proceeding or 'class action' against the Minister for the Environment in relation to her decision to approve a coal mining application. The argument was that the Minister owed them a duty of care to ensure that the Minister's decisions did not cause the young people harm, including by depriving them of a safe climate and environment in the future. The young people were successful in the initial trial, and the Commonwealth appealed (see Case study 7.2).

Legal issues

The existence of climate change, and its potential impacts for young people in Australia, were never in doubt. However, the issue was whether negligence law was an appropriate mechanism for the young people to advance their views within government.

Decision

The court found that the Minister did not owe a duty of care to the plaintiffs in relation to climate change. There were a range of reasons for this, none of which had much to do with climate. The key reason was that the judiciary must carefully keep itself to judicial decision-making and should not enter the business of determining the decisions that the elected government should make. Judges, after all, are not elected and are not representative of the broader Australian population.

Ratio decidendi (reason for the decision)

If the duty of care upon governments was this broad, government processes would be paralysed because there would be too many competing interests, each claiming to be owed a duty.

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Obiter dicta (something to think about)

Even though the young people were not successful in establishing the duty of care, their case led to an unprecedented judicial consideration of the causes, nature and effect of climate change. There was intense publicity surrounding the case, which led to public statements by political leaders from all political parties. Overall, could it be suggested that there was value in proceeding with this matter, even though the final judgment went against the young people?

Cultural influence

Law reform can occur through cultural influence. Since Federation, the composition of Australia has significantly changed as a result of immigration. Today, Australia is a multicultural society with a vast range of people from different cultural backgrounds, and the law has changed to cater to their needs. To ensure that fairness exists between different cultural groups in Australia and to ensure that all people are equal before the law certain pieces of legislation have been passed. These include the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth).

Moral influence

If you saw someone stealing your best friend's mobile phone, would you tell anyone? We all make decisions about what we believe is right or wrong. A number of different factors mould our moral beliefs, such as our:

- parents
- religious beliefs
- cultural heritage
- education
- peers.

These and many other factors can have some influence on our moral make-up. The right-to-life debate is an issue that continually rises to the surface, as do the debates about capital punishment, euthanasia and embryonic stem cell research. How the law deals with such complex issues is important, particularly with regard to the moral and religious influences that are evident in areas such as criminal law and family law.

Figure 9.14 The *Voluntary Assisted Dying Act 2021* (the Act) was passed in September 2021. It became available to eligible Queenslanders on 1 January 2023. Voluntary assisted dying is an additional end-of-life choice that gives eligible people who are suffering and dying the option of asking for medical assistance to end their lives. There are strict eligibility criteria for accessing voluntary assisted dying.

Political influence

In Australia, most people elected to parliament are from political parties. At different levels of government (federal, state and local), the governing party of the day influences the types of laws passed. This can be shown by examining the differences between some of the political parties in Australia – we have highlighted just some of the core beliefs of the various parties:

- The Liberal Party states that it believes in equal opportunity for all Australians, and the encouragement and facilitation of wealth so that all may enjoy the highest possible standards of living, health, education and social justice. The Liberal Party also includes

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a *conservative* wing, with members who tend to prefer slow, measured change in society.
- The Australian Labor Party has its origins in the workers (trade union) movements of the nineteenth century and continues a close association with those groups. It states that its focus is on equality and fairness to people in different circumstances.
- The Greens state that they are dedicated to conservation and environmental issues, but also to social outcomes of equality and fairness.

Political influences are often a result of the relationships between these political parties (who operate within the institutions of government) and lobby groups (who operate from outside the institutions of government). It is easy to see, for example, that the Liberal Party might have a closer relationship with business groups or church groups; that the Labor Party might have closer relationships with trade unions or groups with a social welfare focus; or that the Greens might have closer relationships with groups dedicated to the environment.

Economic influence

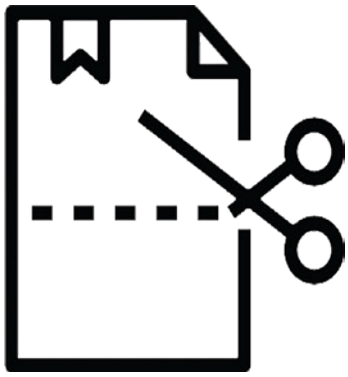
Some laws can either be a response to economic circumstances or an attempt to have some form of economic impact on our society. Certain lobby groups may represent large multinationals such as Meta, Shell, Apple, Microsoft or Coca-Cola. Some of those companies are so large that they can exert economic influence without the need for lobby groups to represent them. Economic influences can take other forms as well. Our law-makers can also be influenced by economic market factors such as inflation, interest rates and the stock market.

Lobbying and advocating for reform

Overall, you can see that law-makers do not just sit on their own in parliament deciding new laws. They are influenced by a range of external groups and factors, and our system hopes that the result will be that they can take all of those varying viewpoints into account to make decisions which are in the interests of all Australians.

Review 9.2

1 **Describe** the incident which led governments to introduce strict country of origin labelling for food.
2 **Justify** the fundamental purpose of a lobby group.
3 **Distinguish** between the two general categories of lobby groups.
4 **Comment** on how we might expect law-makers to respond when social values change.
5 **Analyse** the relationship between law and morality.
6 **Identify** the three major political parties in Australia and apply your understanding of each of their core beliefs.



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9.4 Law reform and technology

Rapid technological changes cause significant challenges for law-makers. Technological change can result in entirely new types of crime or provide criminals with new methodologies for undertaking crimes that already exist. In the future, it might be, for example, that artificial intelligence or augmented reality leads to the creation of new types of criminal conduct.

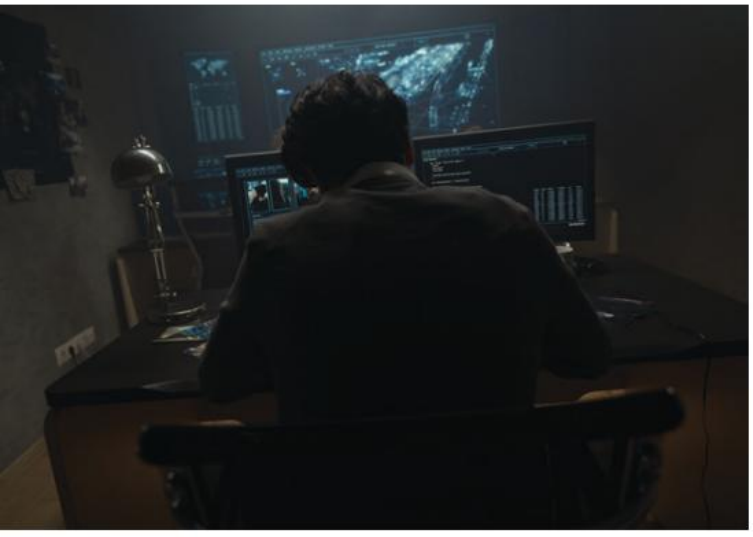

Figure 9.15 Online crime from cyberhackers is on the rise and difficult to prosecute across international borders.

Online crime of this type is difficult to detect and punish – often crossing national borders so that it is not even clear which country has jurisdiction to investigate or to prosecute. As new technologies and medical advances develop and come into common use, they impact the way people live and behave. Sometimes they present ethical issues, strong opposing viewpoints and legal problems for governments that struggle to respond through effective law-making. For example, the rapid expansion of smartphones since their introduction in Australia around 2007 has provided law-makers with new challenges. These technologies have created behaviours that were previously unlikely or even unheard of, such as software piracy, phishing, sexting, **cyberbullying** and e-stalking.

cyberbullying when one person bullies another using electronic processes and telecommunications; especially when this occurs using technological means to remain anonymous

Case study 9.5

The case: *Barilaro v Google, a limited liability company* [2022] FCA 650

Figure 9.16 Former NSW Deputy Premier John Barilaro, who successfully sued Google for defamation.

Citation

[2022] FCA 650 means this matter was heard in the Federal Court of Australia in 2022 and was case 650 for that year.

Facts

A YouTube creator with the screen name 'friendlyjordies' made a series of videos attacking the deputy premier of New South Wales, Mr Barilaro. The videos were defamatory and amounted to a concerted campaign of cyberbullying against Mr Barilaro, who ended up leaving public office prematurely as a result.

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Legal issues

Was YouTube, which is owned by Google, a publisher of the material in such a way as to require Google to accept responsibility for the content? Was it required to take the material down once it knew that its own terms of service had been breached?

Decision

By leaving the material online, Google had contributed to the defamation and cyberbullying of Mr Barilaro.

Ratio decidendi (reason for the decision)

While robust debate is part of the democratic process, hate speech which goes beyond mere debate is not to be tolerated.

Obiter dicta (something to think about)

Do you think the law is an effective weapon against behaviour like cyberbullying? What else might we do? And to what extent are public figures to be regarded as 'fair game' for attack and criticism online?

Advances in forensic technology have required the law – particularly *evidence law*, which determines what evidence may be used in trials – to advance in order to keep up. The most famous example is the discovery of deoxyribonucleic acid (DNA) which allows for the identification of perpetrators with near absolute certainty based on samples of their skin, hair, or body fluid found at the scene of an offence. Since the development of DNA technology, laws have not only been changed to allow for its use in trials, but also to allow the courts to order (under specific circumstances) people to give a sample of their DNA for testing; and for police services to use those samples to build large DNA databases which will assist in the detection of future crimes.

So reliant has criminal law become on DNA sampling that in 2022 when it emerged that Queensland's Forensics laboratory had failed to properly analyse thousands of DNA samples, the legal system was thrown into disarray, with the potential for hundreds of criminal cases to be reopened once the testing was conducted properly.

Similarly, advances in computer technology have enabled both new forms of criminal activity and new methods of detecting and deterring that activity. For example, various types of online fraud have become endemic in Australia, often by overseas criminals, primarily in China and Russia. This has represented an epidemic of transnational, highly skilled and highly organised crime which would have been impossible but for the technological developments which facilitated it.

On a more local level, perpetrators have been able to use computer technology for the purposes of *cyberstalking*, that is, tracking another person's activities online. Both of these forms of activity have been addressed by amendments to the Commonwealth Criminal Code, prohibiting a range of things such as dishonestly obtaining or using a victim's financial information, hacking someone else's computer, or deploying computer viruses or *ransomware*, where the perpetrator threatens to destroy data unless a ransom is paid. Realistically, given that the perpetrators are overseas, the likelihood of criminal action is small, but the offences exist.

Figure 9.17 Criminal law has become very reliant on DNA analysis.

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The misuse of intellectual property (IP) has always been rampant online, starting in the early days of the internet when peer-to-peer programs such as Napster and Limewire allowed for popular music songs to be shared for free. Online IP fraud remains a massive problem, and the Commonwealth has responded by including section 115A of the *Copyright Act 1968* (Cth), which allows the Federal Court to order Australian internet providers to block overseas sites which facilitate online IP fraud.

For young people, the internet is simply another means of communicating with their peers. In some friendship groups, it may even be the primary means of communication. But there are risks involved, including **grooming** and cyberbullying.

grooming the process (usually but not always online) where a malevolent person obtains the trust of a future victim, and builds rapport with that future victim, for the purpose of then using that trust and rapport to commit offences upon that victim

Grooming

Grooming occurs when an individual tries to build a trusting relationship with a child by making regular contact online. This may occur through messenger apps, online gaming, social media sites or by email. The purpose of grooming is to lure the child away from safety and cause physical harm, for example, the abduction of a child for the purpose of sexual assault.

In Australia, legislative amendments have been made to criminalise the online grooming or luring of children for sexual purposes. However, one good example of the legislation responding to advancing technology is that specialist police officers are now permitted to go online and to pose as young people. A person who engages in grooming behaviour with a police officer can be convicted of the same offence as if they had actually groomed a young person.

Cyberbullying

Cyberbullying is simply workplace, school-based or social harassment and teasing. It is the act of harassing a person using technology such as smartphones and email. Considering the complexity and potential anonymity of cyberbullying, it can be very difficult to bring a bully to justice.

There is Commonwealth legislation which makes it unlawful to use a telephone or data service to harass or offend someone. However, the Commonwealth Government has also responded to cyberbullying and similar online behaviour by creating the Office of the e-Safety Commissioner, which provides resources for community members (including young people) to avoid and deal with conduct like cyberbullying. The Commissioner has the power to order online service providers (such as social media sites and apps) to remove material which is bullying or offensive or a breach of privacy.

Figure 9.18 The Office of the e-Safety Commissioner provides resources for community members to avoid and deal with cyberbullying.

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9.5 Law reform and public investigation

Most of the time, government and the parliament rely on external agencies to provide them with an understanding of important issues and important areas for potential law reform. So, for example, each minister in the parliament relies on their public service department to keep them well informed of events, problems and opportunities within their area of responsibility. In addition, they might receive information and submissions from lobby groups, from citizens directly, through the media (including social media) or from sources such as academic experts.

Sometimes, however, issues will emerge where the government, or the parliament, decide to undertake a separate investigative process. These may take any number of forms, but the most common, and the ones we will look at below, are called **Royal Commissions** (these are known as Commissions of Inquiry in Queensland), **Parliamentary Committee Inquiries**, and coronial inquests.

It's important to understand that the roles of these institutions are *information gathering* and *investigation*. They do not, themselves, undertake law reform. Rather, each of them makes recommendations to the parliament or to the government (or both) and these recommendations often become the basis for law reform, because the government, the parliament and the public can be confident of the fact-finding processes which underpin those law reforms.

Royal Commission a specialist, independent, temporary body established by the Commonwealth Government to examine an area of national importance; it is headed by a commissioner, who is a person of great eminence in society, often a former judge

Parliamentary Committee Inquiry when a parliamentary chamber establishes a committee of its members to examine some matter; the most advanced system of parliamentary committees in Australia is in the Australian Senate

Royal Commissions of Inquiry

A Royal Commission of Inquiry occurs when the government identifies a major issue and decides that the issue should be investigated by a senior, independent person appointed under the *Royal Commissions Act 1902* (Cth). Often, the Royal Commissioner will be a former judge,

Figure 9.19 Victorian Bushfires Royal Commission Chair Bernard Teague (centre) and fellow commissioners Ron McLeod (left) and Susan Pascoe (right) listen to submissions at the County Court in Melbourne on 20 April 2009. This Royal Commission was a judicial inquiry into wildfires that killed 173 people in Australia.

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or some other person of equivalent senior and independence.

The Royal Commissioner is then given **terms of reference** which set out exactly what they are required to investigate; but beyond that, they are entitled to conduct their investigations without political influence from the government or the parliament. Royal Commissioners have very broad powers – they can usually compel witnesses to appear and give evidence, and the evidence of witnesses is given on oath, just as in a court of law. Lying to a Royal Commission would be the crime of *perjury*, in the same way that lying in court would be perjury.

terms of reference given to various committees or commissions to set out the matters which they are required to inquire into

Case study **9.6**

The case: *Clough v Leahy* (1905) 11 Argus LR 32

Citation

(1905) 11 Argus LR 32 means the matter was reported in 1905 in the Argus Law Reports. *Argus* was a newspaper in Victoria, and at the time, the High Court sat in Melbourne, because Canberra had not yet been founded.

Facts

A Royal Commission had been appointed to examine a squabble between trade unions. The appellant had been called to give sworn evidence before the Commission but refused to be sworn in and refused to give evidence.

Legal issues

Was a Royal Commission an institution which could be lawfully created? Was it infringing on the role of the courts if its report might suggest that a party was guilty or innocent of a crime?

Decision

The Royal Commission was properly appointed, and the appellant could be compelled to give evidence.

Ratio decidendi (reason for the decision)

The parliament has the power to create Royal Commissions and to give them powers, as long as those powers do not include the ability to actually pass judgment as to a party's rights and obligations.

Obiter dicta (something to think about)

When do you think a court should be able to step in and interfere with a Royal Commission? Should this be allowed at all?

Figure 9.20 *Clough v Leahy* was reported in the Law Reports of the *Argus* newspaper in Melbourne in 1905.

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Royal Commissions typically carry out their investigations in public hearings, so members of the public (including the media) can often attend hearings, although Royal Commissions often also have the power to hear evidence *in camera*, or in private. This power is used sparingly – the default position is that evidence should be taken in public.

Over the decades, nearly 150 different Royal Commissions have been established in Australia. Some of the best known are:

- Royal Commission in 1903 which was established to identify a location for Australia's capital city to be midway between Melbourne and Sydney, which was eventually identified as the modern Australian Capital Territory
- Royal Commissions in 1927 and 1953, respectively, into what were then the new technologies of wireless radio and television
- Royal Commission in 1983 into the use of poisonous chemicals called 'Agent Orange' on Australian troops fighting in the Vietnam War
- Royal Commission in 1987 into Aboriginal deaths in custody (mostly in police custody)*, which is the most significant Royal Commission to have been held, in terms of its enduring relevance
- Royal Commission in 2015 into institutional responses to child sexual abuse (mostly in church-run orphanages and schools).

* This is also often referred to, mostly by Aboriginal and Torres Strait Islander peoples, as the Royal Commission into Black (or Blak) Deaths in Custody. That terminology will not be adopted in this text and is used in this footnote with the greatest of respect.

The recommendations made by Royal Commissions are not always implemented – but even when they are not implemented, they provide a point of reference; a measuring scale against which government performance can be judged.

For example, the Royal Commission into Aboriginal deaths in custody looked well beyond the strict question of Indigenous people in police custody, and looked deeply at why it is that Indigenous people find themselves engaging with police so much more than non-Indigenous people. Many of the Commission's 339 recommendations were for fundamental changes to Australian society and to Australia's relationship with its First Nations peoples, including the central recommendation for a process of *reconciliation* between Indigneous and non-Indigneous Australians.

Many of the 339 recommendations have been implemented in some way; many others have been partially implemented; and some have not. However, as recently as 2018, the Commonwealth Government commissioned an independent review into progress against those recommendations; and the need for the implementation of the recommendations is regularly argued by First Nations advocates – particularly, sadly, after further deaths in custody. You can see that while the implementation of the recommendations would be widely supported, even where those recommendations are not implemented, they promote public debate and with it the prospect of further law reform.

In Queensland, Royal Commissions are simply called Commissions of Inquiry. They are appointed under the *Commissions of Inquiry Act 1950*, and they are essentially identical in nature to Royal Commissions elsewhere. Sometimes other terminology such as 'Independent Commission of Inquiry' or 'Special Taskforce' are used. Some of the most significant historical Commissions of Inquiry include:

- The 1987 *Fitzgerald Inquiry* into police and official corruption in Queensland, which led to widespread and fundamental reform of the Queensland police service, the Queensland public service, the system of administrative law in Queensland, and the conduct of parliamentary elections in Queensland (see https://cambridge.edu.au/redirect/10476)

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Figure 9.21 Protesters march through the Brisbane CBD during a 'Stop black deaths in custody' rally on 10 April 2021. The 'national day of action' marked 30 years since the Royal Commission into Aboriginal deaths in custody handed down its final report. By the time of this particular protest, at least 474 Aboriginal and Torres Strait Islander peoples had died in custody since the Royal Commission had been handed down in 1991.

- The 2011 Commission of Inquiry into the devastating Queensland floods of that year, which particularly looked at whether the water levels in the Wivenhoe Dam (which was intended to prevent such major floods) were properly managed (see https://cambridge.edu.au/redirect/10477)
- The 2014–15 *Not Now, Not Ever* report into domestic and family violence in Queensland, which made wide-ranging recommendations for changes in the way courts, police and other agencies deal with people (mostly women) seeking protection from domestic and family violence (see https://cambridge.edu.au/redirect/10478).

Review 9.3

1 **Examine** how technological change can result in changes to laws.
2 **Explain** how a body such as a Royal Commission results in law reform.
3 **Identify** the name of the criminal offence which occurs if somebody does not tell the truth in their evidence to a Royal Commission.
4 **Identify** which Royal Commission is generally considered to have been the most significant undertaken in Australia, and **reflect on** why you think this to be the case.
5 **Discuss** the consequences if the recommendations of a Royal Commission are not fully implemented by the government.
6 **Describe** the Commission of Inquiry report in Queensland called *Not Now, Not Ever*.

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Parliamentary committee inquiries

Every parliament has the capacity to appoint committees to investigate issues of public concern, and then to report back to the parliament. Most parliaments do this to some extent; however, the federal Senate easily has the most significant parliamentary committee system of any Australian parliament.

The Senate has a range of **standing committees**, which (as their name suggests) have an ongoing existence. Standing committees are also backed by full-time research staff and secretariat staff in parliament house. There are standing committees for the following policy areas:

- community affairs
- education and employment
- finance and public administration
- legal and constitutional affairs
- economics
- environment and communications
- foreign affairs, defence and trade
- rural and regional affairs and transport.

These Senate standing committees include senators from all the major parties, and often also include senators from smaller parties, or senators who are independent (so they are not from a political party at all). This often means that the committee (and its reports) represents a range of perspectives.

In general, Senate standing committee inquiries take two forms: legislation inquiries and references inquiries. Legislation inquiries occur when the committee takes draft legislation currently being debated by parliament and seeks public views. One way that the government seeks public opinion is through the publication of an **issues paper**, in which the government will explain the problem it is trying to solve, various solutions it is considering and will seek views on which of those should be preferred and why. Often an issues paper will contain specific questions asked by the government to which people can respond. Issues papers are often (but not always) released publicly, and when they are, anyone can put in a response.

standing committee the Australian Senate maintains a series of standing committees, which continue in existence through an entire parliament and oversee both legislative inquiries and more general 'references' inquiries in their areas of policy responsibility

issues paper released by government when the government is contemplating a new law on a particular topic; the government will explain the problem it is trying to solve, various solutions it is considering and will seek views on which of those should be preferred and why

Case study 9.7

The case: *Rumble v The Partnership Trading as HWL Ebsworth Lawyers* [2020] FCAFC 37

Figure 9.22 Dr Gary Rumble was found to have been dismissed by the government fairly.

Citation

[2020] FCAFC 37 means the matter was heard in 2020 before the Full Court of the Australian Federal Court and was judgment 37 of that year.

Facts

Dr Rumble was appointed as a commissioner for an investigation into abuse in the Australian Defence Force. The committee handed down its report in 2011. Dr Rumble felt that not enough was being done to implement the recommendations and made public statements

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severely critical of the government. He made these comments in various places, including before a Senate Committee Inquiry. He was ultimately dismissed by the firm, seemingly due to his advocacy on this issue.

Legal issues

Was it permissible to dismiss an employee after that employee had given evidence to the Senate subject to **parliamentary privilege**?

Decision

Dr Rumble could not have been lawfully dismissed for giving evidence to a Senate committee, but his advocacy on this issue had gone well beyond giving evidence before the Senate, and he had refused to comply with the firm's policies about public comment. His dismissal was valid.

Ratio decidendi (reason for the decision)

By communicating outside the Senate Committee Inquiry, Dr Rumble had engaged in conduct which was not protected by parliamentary privilege.

Obiter dicta (something to think about)

If we accept that an advantage of parliamentary privilege is that it allows witnesses to fearlessly give their evidence to the parliament, does this advantage come with any disadvantages? What safeguards should be in place to prevent the abuse of parliamentary privilege?

parliamentary privilege words spoken in the parliament, or by a witness providing information to a parliamentary committee, which cannot be used as evidence in court; the purpose is to ensure that debates in the parliament can be free from outside restrictions

References inquiries, however, are often broader. The committee might consider any matter it chooses within its area of responsibility and initiate an inquiry into that area. For example, at the time of writing, in early 2023:

- the Community Affairs committee was looking into the extent and nature of poverty in Australia
- the Economics committee was looking into the influence of international digital platforms
- the Education and Employment Committee was looking into the issue of school refusal (where students adamantly refuse to attend school despite the harm this causes to their future prospects)
- the Environment Committee was looking at climate-related marine invasive species
- the Rural and Regional Affairs Committee was looking into bank closures in regional Australia

This is just a selected list – there were many more inquiries underway.

In addition to the standing committees, sometimes the Senate (and other parliamentary chambers) will create a special purpose committee, known as a **select committee**, to look into specific issues of public concern. So, in early 2023 there were a range of select committees looking at matters including:

- access to dental services in Australia
- Australia's disaster resilience
- foreign interference through social media
- the cost of living.

select committee the Australian Senate sometimes appoints specific purpose committees of senators (from all parties) to examine a specific issue of public importance

To undertake these inquiries, committees typically publish their terms of reference and invite written submissions in response to those terms of reference. Those submissions are made public; they also attract *parliamentary privilege*, which means that submissions which are accepted by the committee and published, cannot be used

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in legal proceedings against the person making the submission. Once the committee reviews the submissions, public hearings are often held. Sometimes these are held in Parliament House, but very often they are held elsewhere – a committee can hold a meeting anywhere it wishes to do so. At these public hearings, the committee invites various parties who have made submissions, and then asks them further questions in relation to their submission. A transcript or 'hansard' is prepared, and this too is made public.

Finally, having gathered sufficient information, the committee will formulate its report. Committees usually strive to find as much common ground as possible, but if they are unable to agree, then there will often be a majority report and *minority reports* written by senators who do not agree with the main report. The report is then tabled in the Senate and released to the public. These reports are often influential in the development of future legislation.

Coronial inquests

Coroners have a unique role in the Australian legal landscape. Any time that a person dies unexpectedly, violently or in custody, the circumstances of their death must be reported to the coroner (who is usually also a magistrate). The coroner may choose to initiate an investigation into that person's death, in order to identify the circumstances of their death, but also in order to determine whether there are things that may be learned or changed, in order to make the community safer going forwards.

Sometimes this means very small scale (but still significant) changes. For example, in 2014 a man named Malcolm Kamp was cycling on a stretch of highway west of Ipswich in Queensland. The highway had very narrow shoulders, which meant that cyclists would inevitably be very close to fast-moving traffic. Mr Kamp was struck by a semi-trailer driver and died. This led to rules prohibiting cyclists from using that section of the highway, and government **consultation** with cycling groups to establish safer alternative pathways.

On other occasions, however, inquests can have very dramatic and broad law reform impacts.

consultations these occur when the government is contemplating a new law or a new policy, and it seeks opinions and guidance from the community and specific stakeholders, who are most likely to be affected; for example, if a government planned to build a new highway bypass around a regional town, we would expect consultations with the local community and road user groups

Figure 9.23 Inside a Senate Select Committee inquiry: Philip Lowe, the then Governor of the Reserve Bank of Australia (left) and Bradley Jones, assistant governor (right), attend the Senate economics committee hearing at Parliament House in Canberra on 31 May 2023. The Select Committee was made up of a range of senators from different political parties and were charged with inquiring into the cost-of-living crisis in 2023.

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Figure 9.24 The grandmother of 19-year-old Warlpiri man Kumanjayi Walker, who was shot by the Northern Territory police officer, gets emotional as she takes part in a rally against the Indigenous deaths in custody on 18 June 2022, in Sydney. In the Northern Territory in 2023, a coronial inquest was held into Kumanjayi's 2019 death in 2019.

For example, in the Northern Territory in 2023, a coronial inquest was held into the death of Warlpiri man Kumanjayi Walker, who was shot by a police officer during an incident in the town of Yuendumu in late 2019. This inquest did not just look at the immediate circumstances of this death but dug more deeply into policing culture in the Northern Territory and the relations between police and First Nations communities. It is likely that no other type of investigation, other than perhaps a Royal Commission, could dig into an issue quite this deeply.

Typically, if a person dies as a result of a criminal offence, the inquest will not occur until the criminal proceedings are over, in order to preserve the defendant's presumption of innocence and their right to silence (see Chapter 3). Sometimes, however, the criminal offending is revealed during the inquest itself. This famously occurred during the inquest into the disappearance and death of 13-year-old Victorian boy Daniel Morecombe in 2003.

The police investigation into Daniel's death lasted for some years, but nobody was charged. Eventually, in 2010, an inquest commenced. Various people, including a Peter Cowan, were known to have been in the area from which Daniel disappeared. Cowan claimed to have been in the area to purchase drugs. Police investigated this and discovered that the drug dealers named by Cowan were not in fact available on the day in question. As a result, police organised an undercover 'sting' operation, and Cowan was arrested after confessing to an undercover police officer. The inquest was then suspended until after Cowan had been tried and convicted.

Inquests serve a number of important public purposes. They allow for the final story of a deceased person to be told in a way that is comprehensive and successful; but they also, surprisingly often, manage to produce genuine community benefits and law reforms, even from the most tragic circumstances.

Figure 9.25 13-year-old Daniel Morecombe disappeared in 2003. During a coronial inquest which started in 2010, the sad truth of the mystery was revealed.

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9.6 Specialist law reform agencies

In addition to all the other law reform processes set out in this chapter, there are other agencies specifically created to undertake research leading to law reform. In particular, we consider the Australian Law Reform Commission and the Australian Institute of Criminology.

Australian Law Reform Commission

The Australian Law Reform Commission (ALRC) is a Commonwealth Public Service agency which sits within the Attorney-General's portfolio. Its role, generally, is to consider areas of potential law reform, to conduct public inquiries into those matters and to provide reports to the Attorney-General.

While (as we have just indicated) the ALRC sits within the Attorney-General's portfolio, it has its own piece of legislation, the *Australian Law Reform Commission Act 1996* (Cth), and this Act guarantees a high degree of independence for the ALRC. The Commission is *not* simply a mouthpiece for the Attorney-General, and its deliberations are not bound by political considerations.

The ALRC undertakes its inquiries under two circumstances. First, the Attorney-General can issue a reference requiring the ALRC to investigate a specific area of law. Second, the ALRC itself is entitled to decide that a particular area of law requires reform and to undertake inquiries into that area of law.

In fact, in 2019 the ALRC undertook a consultation process to enable members of the public to have input into the ALRC's reform program for 2020 to 2025. During the period 2020–25, the ALRC intends to focus on:

- automated decision-making and administrative law (considering the implications for governments and the community when government decisions are made automatically by an algorithm rather than by an actual person)
- defamation (which was last comprehensively reviewed twenty years ago)
- legal structures for social enterprises (so, for example, how should organisations formed for a social or charitable purpose be administered under the law?)
- press freedom and public sector whistleblowers (and therefore, how to preserve the benefits which arise from a free press and from ethical public servants who expose misconduct in government, while at the same time preserving the government's ability to keep its proper secrets).

When the ALRC undertakes a review, its purpose is to make recommendations that:

- bring the law into line with current conditions and needs
- remove defects in the law
- simplify the law
- adopt new or more effective methods for administering the law and dispensing justice
- provide improved access to justice.

Along the way, the ALRC is required to make every effort to ensure that its proposals and recommendations do not trespass unduly on personal rights and liberties of citizens, specifically considering the requirements of the International Covenant on Civil and Political Rights.

The ALRC claims great success from its work. According to the ALRC's own figures, some 85 per cent of its recommendations are implemented.

Like other states, Queensland has its own equivalent, the Queensland Law Reform Commission, established under the *Law Reform Commission Act 1968* (Qld).

Australian Institute of Criminology

You will likely have noticed, during your studies, that criminal law matters tend to produce very strong emotional reactions from people. When one person commits a crime against another

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person, it is human and normal to react with outrage, or to want consequences that look more like *vengeance* than justice.

It is therefore very helpful to have an agency whose sole purpose is to look at crime statistically and scientifically, without the overlay of emotions. At a Commonwealth level, that agency is the Australian Institute of Criminology (AIC). It could almost be considered like a specialist version of the Australian Law Reform Commission, focused entirely on criminal law.

The AIC, like the ALRC, is an agency which answers to the Attorney-General. However, also like the ALRC, its independence is guaranteed by its own piece of legislation, the *Criminology Research Act 1971* (Cth).

The AIC produces two broad types of products. The first is a series of compilations of crime statistics, looking at rates of criminal offending, trends in those offences, and trying to break down those numbers. If a particular type of criminal offending is becoming more prevalent, or less prevalent, do the statistics tell us why? Are there changes we should be making to the law, not based on emotional responses, but on statistical analysis?

The second type of product produced by the AIC is research reports, quite similar in many ways to the reports produced by the ALRC or by Senate Committees, but obviously with a focus on the criminal law. These reports allow the AIC to make recommendations which go well beyond mere statistical analysis, and look at the policy and social drivers behind changes in criminal offending in Australia, and how the law might be changed as a result.

Oppositions to law reform

You may have noticed during Chapter 9 that the law reform process often involves governments seeking the opinions of the community and various stakeholders. It is not at all unusual for different groups within society to have completely different views about the necessity for law reform. Those differences might reflect a range of things including:

- **Social divisions within society** – Law reforms might impact differently upon various groups in society. To take an obvious example, a tax cut which favours higher income earners will impact those earners differently to those who earn less. Similarly, there might be differences of opinion between, say, farmers and environmentalists about the use of a land area. Such divisions are not problematic: they simply reflect a diverse society. However, it is important that the law reform process take account of them.

- **Attitudes as to the role of government** – On the one hand, many people believe that the role of government is to protect people and keep them safe. On the other hand, some people feel this goes too far, creating a 'nanny state' making decisions for people which they are quite capable of making for themselves. An example is gambling legislation. It could be argued that legislation limiting gambling is a good thing, as it saves gambling addicts from economic ruin; on the other hand, it could also be argued that grown adults should be allowed to spend their money on whatever they please, including gambling.

- **Government budgetary constraints** – While it might seem like governments have an extraordinary amount of money available to them, they also have many responsibilities upon which to spend that money. There may

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simply be funding limitations which prevent governments from carrying out their preferred policy. An example here is the National Disability Insurance Scheme (NDIS). Few people would argue with the basic philosophy that as a society, we should do what we can to support people with disabilities to participate fully in Australian society. However, since the commencement of the scheme there has been regular conflict between disability advocates – who seek additional funding for the NDIS – and governments, who are bound by the constraints of their budgets.

Law reform: An overview

The clearest message from this chapter should be that there is no single or simple process of law reform in Australia. The need for law reform might arise in any number of ways. Society itself may change. The economic, physical or political environment in which we live may change in ways that make old laws obsolete. Groups in society – whether business groups, social groups or community groups – will have their own evolving needs and their own particular advocates seeking law reform to have those needs met.

Those needs are as complex as society itself, and often there are different groups in society which may have different, and even opposing needs and values. In response, governments have created a network of different agencies and processes, all of which share the objective of analysing and reporting on potential law reforms, so that our parliamentarians, who at the end of the day must consider and pass any law reforms, can do so with the best possible knowledge and so that the proposed law reforms can represent the best possible response to the changing needs of society.

The common thread throughout all these processes – Royal Commission, inquests, parliamentary committees, bodies such as the ALRC and AIC – is to provide an opportunity for an many voices as possible to be heard on any law reform.

None of this is to suggest that law reforms are always ideal, well-considered or successful. However, at the very least there is a framework there which gives us the best chance to have a system of laws which is not only sufficiently stable to let people get on with life, but also sufficiently agile to keep pace with an ever-changing world.

Review 9.4

1 **Determine** which parliamentary chamber has the most significant system of parliamentary committees.
2 **Identify** which political parties are involved in a Senate committee inquiry.
3 **Explain** the term 'parliamentary privilege'.
4 **Consider** how the findings of a coroner can lead to changes in the law.
5 While the Australian Law Reform Commission sits within the Department of the Attorney-General, it has one characteristic which increases the respect given to its recommendations. **Communicate** what this characteristic is.
6 **Describe** the typical recommendations by the Australian Law Reform Commission when it undertakes a review.
7 **Identify** the piece of legislation that established the Australian Institute of Criminology.
8 **Discuss** the role and key products of the Australian Institute of Criminology.

Reflection questions on punishment and sentencing trends

The experience of changes to the law

Many of you, studying legal studies at a secondary level, might only really have started thinking about the laws which bind our community since the start of this study. As a result, many of you

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might not yet have had the opportunity to observe or experience substantial changes in the law.

Members of the community may experience changes in the law in a number of ways. Depending on the change, and on the way in which it affects the citizen, it might be experienced with concern, joy, disappointment, grief or outrage. Sometimes those feelings are simply a reaction to change, in the same way that people often find it difficult to experience change in other aspects of their life. However, the nature of the law is that sometimes the impact of changes to the law will be enduring, and perhaps even life changing.

Research 9.1

For this exercise, every student in the group should ask one of the adults in your life to **describe** the most significant legal change that they personally remember occurring in Australia. Try to understand the following:

- What is the person's reaction to the new law: positive, negative or neutral?
- What is it about this legal change that makes them nominate it as being the most significant legal change that they can remember?
- Did the change to the law have any immediate and practical impact on their life circumstances? If so, what was that impact?
- Can they describe why others in the community might potentially have had the opposite reaction to them? So, if they experience the change in the law as a positive change, can they explain why others might have experienced the change as negative?
- Has their reaction to or perception of the change evolved over time? For example, is there a reaction (positive or negative) less strong now that the change to the law is no longer new?

Having learned about these experiences, come together again as a class group for each person to share the results of their interview.

Bail and justice

In this chapter, you have learned that the issue of bail causes many people to have very strong feelings. For some people, bail is given out much too easily and results in people who have almost certainly committed the offences of which they are accused, being put back out on the streets where they pose a further threat to the community.

For other people, the process of going to prison, even temporarily on remand, is seen as so destructive that it should never be imposed on a person unless there are especially good reasons for doing so. A person who is jailed on remand will very likely lose their employment, their housing and often key relationships. They may be unable to continue a course of therapy or medical treatment. Besides, even for those convicted of an offence, jail is meant to be the sentence of last resort.

One key aspect of the dispute regarding bail is whether there should be a presumption in favour of bail (that is, a presumption that they will be granted bail, which the prosecutor must displace) or whether there will be a presumption against bail (that is, a presumption that the person will be placed on remand unless they can demonstrate why that would be inappropriate) or whether there should be no presumption (allowing the prosecutor to bring their best arguments against bail, and allowing the defendant to bring their best arguments in favour of bail).

Research 9.2

As a class or in small groups, **consider** these three options.

1. If there was a presumption against bail, then what sorts of circumstances would justify releasing a person on bail?
2. If there was a presumption in favour of bail, then what sorts of circumstances would justify placing the person on remand?
3. If there was no presumption applied, what sorts of arguments would you expect the prosecutors and the defendants to make?

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Lobby groups and the law

As you have learned in this chapter, there are hundreds of lobby groups representing different sectors and interests within our political system. Some of those, such as Greenpeace and Amnesty International, are household names. Others, such as perhaps the Australian Council of Islamic Federations, are less well known, but still crucial as a voice for the communities which they serve.

The impact of social change

In this chapter, you have learned that the law does not exist in a vacuum. The law exists within a society, and in order to be effective law it must both serve and reflect that society. This means that as society evolves and changes, the law must change with it.

An obvious example of society changing and the law changing to reflect it is the decriminalisation of homosexuality, leading ultimately to the

Research 9.3

For this exercise, each student should choose a lobby group to study further. It should preferably be a lobby group that they were not already familiar with before this exercise. Alternatively, your teacher may wish to select and allocate lobby groups for you to study.

For each lobby group, **identify**:

- when the group was formed
- what the groups aims are
- what sorts of activities the group conduct in order to pursue its aims
- how the group is funded
- what the group would consider to be its greatest success in the past.

Once each student has had an opportunity to complete this research, the class should come together to give students an opportunity to share what they have learned.

Figure 9.26 A member of Greenpeace floats past the *USS Ronald Reagan* while it was docked at the Port of Brisbane on 26 January 2006, Brisbane. The ship is one of the world's largest nuclear-powered ships. Greenpeace activists drive for change across a range of environmental issues.

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legalisation allowing same-sex marriage. However, social change does not need to occur on a grand scale in order to result in changes to the law.

Research 9.4

Your school has school rules which are not precisely law but which have the same effect as laws for those of you who are students at the school.

Consider what social changes might be occurring within your school at present.

- How are you as a group different to students who might have been at the school 10 years ago? How about 20 years ago?
- What new rules might be necessary for your school to operate successfully now, but which might not have even been thought of for those earlier cohorts?
- Are there rules that the earlier cohort might have had to follow, that would make no sense now? (Hint: it may be helpful for you to approach adults in your life, or teachers who have been at your school for a long time, to find out what school rules were like in the past).

A new political party

In this chapter, you have learned about the role that political parties play in the law reform process. You have also learned that each political party tends to advocate on behalf of a particular group or a particular ideological perspective. One criticism often made of Australian democracy is that there are too few political parties and, in consequence, that too few political perspectives are represented in the parliament.

Research 9.5

Imagine for a moment that your class had the opportunity to initiate a new political party. **Discuss** as a class group the purpose of your new political party, how it would differ from the current political parties and what contribution it would make to political life in Australia. Are there things about the way that current political parties operate which you consider should be changed, and how would you change them?

In your discussion, **consider** matters such as:

- ways in which your political party would choose its leaders
- ways in which your political party would choose which policies it supports, which policies it opposes and which of these it would prioritise
- whether your political party would be required to have specific expectations for things such as gender equality or the involvement of people from other traditionally underrepresented groups
- how your political party would communicate with its members and with the public in general
- if your political party was successful in having members elected to office, how would those members relate with the rest of the party and its supporters.

Figure 9.27 What would your class's political party stand for?

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Commencing your own Royal Commission

A Royal Commission is usually appointed by the government in order to look into an especially significant matter of public importance. The Royal Commission is then provided with what are called 'terms of reference', which describe precisely the matters which the Royal Commissioners are required to consider.

The work of the Australian Law Reform Commission

The Australian Law Reform Commission is a permanent and independent agency tasked with reviewing Australian laws and considering potential improvements. In this chapter, you have learned in more detail about the work of the commission.

Research **9.6**

As a class, or in small groups, **consider** whether there is a contemporary issue in your community which in your view would benefit from the attention of a Royal Commission. Having identified such an issue, **develop** a set of terms of reference which could be given to the Royal Commissioners.

In order to carry out this task, you may find it helpful to **identify** and **examine** terms of reference which have been given to actual Royal Commissions in the past. A good set of terms of reference will have a number of characteristics:

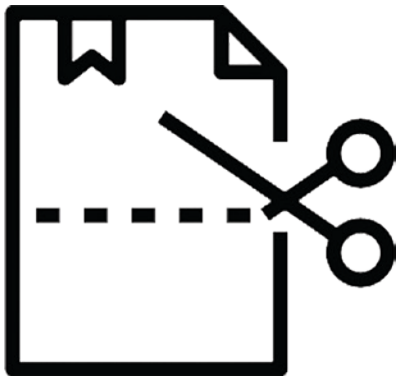
- the terms of reference should specifically identify those aspects of the general issue which are of key interest
- the terms of reference should be sufficiently narrow that the Royal Commission does not become side-tracked by issues which are of marginal or no relevance
- however, the terms of reference should be sufficiently broad that the Royal Commission is able to explore issues arising from its investigations without being too confined
- finally, given that the purpose of the Royal Commission is to make recommendations, good terms of reference will lend themselves to the development of practical and comprehensive recommendations.

Research **9.7**

As a class, or in small groups, go to the website of the Australian Law Reform Commission and find out what investigations are currently underway, and which are proposed for the future.

1. **Identify** a recent report of the Commission.
2. On the website, **identify** any discussion papers which were put forward to enable people to contribute their views to its work.
3. **Examine** the final report of the Commission to identify ways in which submissions made by people or organisations in the community have been taken into account.
4. **Examine** the actual recommendations made by the Commission.

If the Commission is currently examining an area of law which is of personal interest to you, remember that you are completely entitled, as a citizen, to make your own representations setting out your own views, which will then be considered by the commission.



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9.7 Topic review

Topic summary

- As society continues to evolve and change, so too does the law respond to our changing values, beliefs and practices. Legal systems that once served past communities well may no longer be appropriate for modern times.
- Several types of processes of societal change result in law reform, including patterns of wrongdoing, lobbying and advocacy, the changing environment (e.g. technology), inquiries and inquests, specialist taskforces and law reform agencies.
- Governments must find a balance between maintaining law and order while not imposing overly strict laws that will inhibit people from living their everyday lives. When this balance falls apart, law reform is often needed, such as the changes to bail laws, country-of-origin food labelling and domestic violence issues.
- Civil and criminal wrongdoings such as privacy and data breaches, the problematic consumption of alcohol, as well as significant events like the Port Arthur Massacre and the September 11 attacks, often result in significant legal consequences in Australia and overseas, demonstrating how law reform can be swift in cases regarding the safety of society.
- Law reform also takes place through various influences, such as cultural, social, moral, political and economic, often from the support of lobby groups which either promote a cause (promotional lobby group) or represent a particular sector of society (sectional lobby group).
- Rapid technological changes in society pose ongoing challenges for the legal system to prosecute new types of crimes or new methodologies for undertaking crimes that already exist. The rise of cyberbullying, cyberstalking, grooming, hacking and fraud has required law-makers and law-enforces to respond in new and creative ways to keep the community safe.
- When serious social issues emerge, the government may decide that a separate and impartial investigative process is required. Depending on the type and scope of the issue, these independent specialist bodies used are either a Royal Commission (known as Commission of Inquiry in Queensland), a Parliamentary Committee Inquiry or a coronial inquest. While the role of these bodies is to gather information and investigate issues, they cannot enact law reform, and only make recommendations of change to the government.
- Of the 150 Royal Commissions established in Australia, the most significant is the 1987 Royal Commission into Aboriginal Deaths in Custody, which has enduring relevance with this issue tragically continuing to worsen following the findings from the Commission.
- Specialist law reform agencies also function as processes for legal change. The Australian Law Reform Commission considers areas of potential law reform by conducting public inquiries and providing recommendations to the Attorney-General based on their research, such as improving the law by making it more current or removing defects, simplifying the law, adopting new or more effective methods to administer the law, and improving access to justice.
- The Australian Institute of Criminology is another specialist law reform agency that looks at crime statistically and scientifically to understand patterns of criminal offending while ensuring consequences are framed around justice rather than vengeance.
- Social divisions within society often mean that law reform will affect and impact people differently across society. What serves one group may not be well received by another. These divisions reflect a diverse society with a range of different opinions, values and beliefs, and while this is not problematic, it is important for all groups of people to be considered and accounted for in a law reform process.

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Short-response questions

1 **Create** a timeline to show the significant events in the history of the development of law in Australia.
2 **Explain** the aims of the Australian Law Reform Commission and how these impact on law and governance in Australia.
3 **Explain** the implications that technological advances have had on law reform and the regulation of white-collar crimes.
4 **Identify** and **explain** two issues that hinder the Queensland legal system from achieving just and equitable outcomes for stakeholders.
5 **Analyse** Sources 1–3 and **discuss** the relevance of the concept that Australia is a 'nanny state' being used as a challenge for law reform.

Source 1

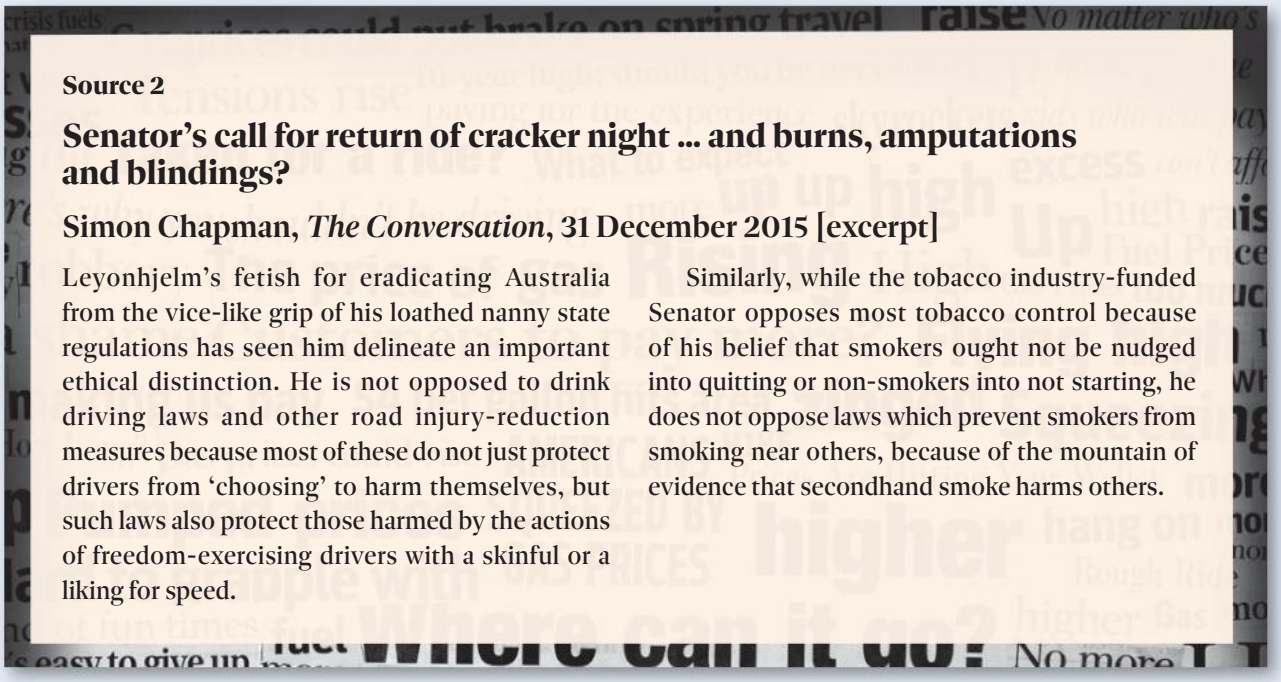
One hundred and fifty ways the nanny state is good for us

Simon Chapman, *The Conversation*, 2 July 2013 [excerpt]

In Australia, anyone who supports rules and regulations that make products safer or improve public health can expect to come under attack from critics arguing they're restricting freedom and turning the country into a 'nanny state'.

These 'nanny state' critics are everywhere and they're superficially persuasive. After all, who wants government to tell them how to live their lives? But scratch the surface and you'll discover nanny state critics are frequently backed by powerful vested interests, like the tobacco industry arguing against plain packaging on cigarettes, or the secretive PR outfit know as the Institute of Public Affairs (IPA) arguing against government per se.

Nanny state critics are almost always self-interested. They're rarely motivated by the freedoms they purport to defend. And invariably their arguments crumble under scrutiny.



Source 2

Senator's call for return of cracker night ... and burns, amputations and blindings?

Simon Chapman, *The Conversation*, 31 December 2015 [excerpt]

Leyonhjelm's fetish for eradicating Australia from the vice-like grip of his loathed nanny state regulations has seen him delineate an important ethical distinction. He is not opposed to drink driving laws and other road injury-reduction measures because most of these do not just protect drivers from 'choosing' to harm themselves, but such laws also protect those harmed by the actions of freedom-exercising drivers with a skinful or a liking for speed.

Similarly, while the tobacco industry-funded Senator opposes most tobacco control because of his belief that smokers ought not be nudged into quitting or non-smokers into not starting, he does not oppose laws which prevent smokers from smoking near others, because of the mountain of evidence that secondhand smoke harms others.

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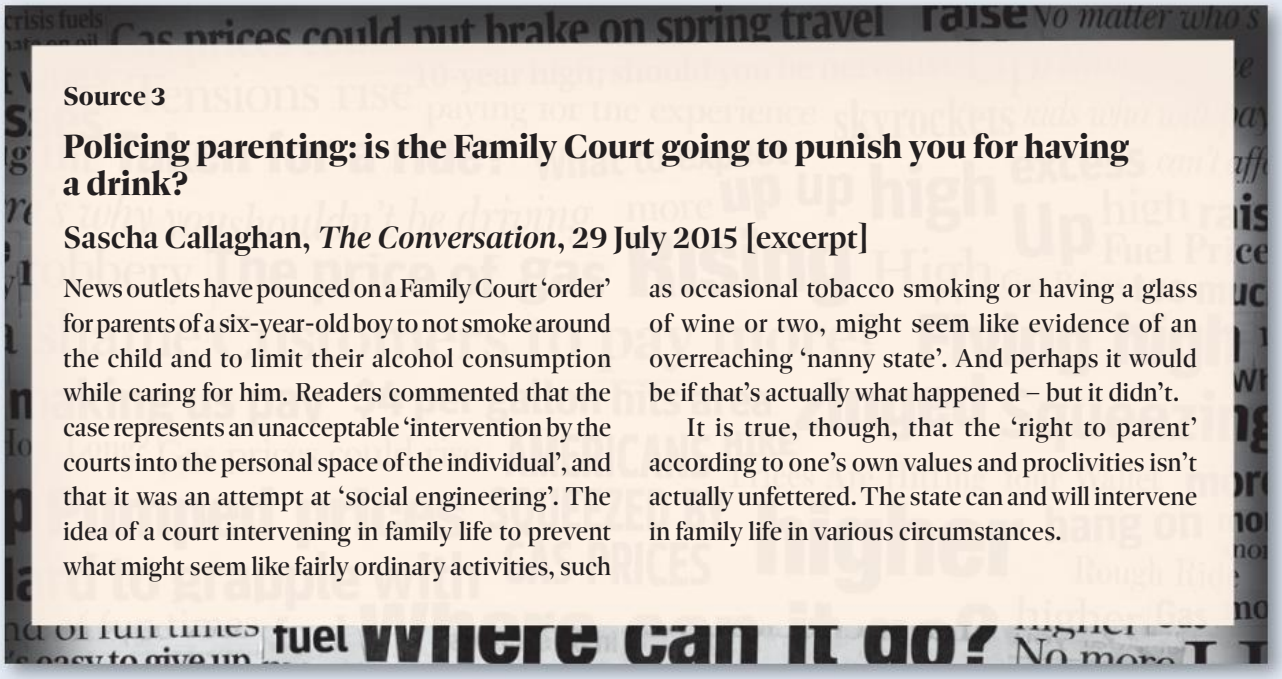

Source 3

Policing parenting: is the Family Court going to punish you for having a drink?

Sascha Callaghan, *The Conversation*, 29 July 2015 [excerpt]

News outlets have pounced on a Family Court 'order' for parents of a six-year-old boy to not smoke around the child and to limit their alcohol consumption while caring for him. Readers commented that the case represents an unacceptable 'intervention by the courts into the personal space of the individual', and that it was an attempt at 'social engineering'. The idea of a court intervening in family life to prevent what might seem like fairly ordinary activities, such as occasional tobacco smoking or having a glass of wine or two, might seem like evidence of an overreaching 'nanny state'. And perhaps it would be if that's actually what happened – but it didn't.

It is true, though, that the 'right to parent' according to one's own values and proclivities isn't actually unfettered. The state can and will intervene in family life in various circumstances.

6 **Explain** how the motivations for law reform between a sectional lobby group and a promotional lobby group differ.

7 Brainstorm as many current and contemporary legal issues that you can think of that might need law reform in order to better meet the needs of a changing society.

8 Complete the table below to **analyse** the viewpoints and **consider** possible reform options for 4–5 of the issues you identified in question 7.

Legal issue	Stakeholder 1	Stakeholder 2	Stakeholder 3	Possible reforms

Extended-response questions

1 **Create** an argumentative essay in response to the statement, 'the laws addressing the confiscation of proceeds and assets generated from crimes need reform to address growing trends.'

You could consider:

a the nature and scope of crimes that generate financial benefits for the perpetrator

b the use of the assets and finances confiscated

c the rates of recidivism for financially motivated crimes.

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2 **Create** an argumentative essay in response to the statement, 'Australia plays a leading role in the development of law reforms in response to terrorism.' **Evaluate** the effectiveness of law reform in regard to terrorism activities in Australia and the achievement of just and equitable outcomes in legal issues involving suspected terrorist activities.

You could consider:

- **a** the nature and scope of terrorism crimes in Australia
- **b** the significant events that have triggered law reform and the introduction of new anti-terrorism legislation
- **c** the limitations and issues raised by anti-terrorism laws in Australia
- **d** the frequency at which terrorism laws need reform in order to remain current in Australia.

Response-to-stimulus questions

1 **Create** an inquiry report to **examine** the introduction of complementary law in Queensland. Research the drivers for law reform in this area and why Queensland had previously lagged other states. **Analyse** this research to **evaluate** the implications of varying state-based legislation and **determine** a recommendation for how law reform can address more equitable outcomes for all Australians.

You could consider:

- **a** the reasons for state-based legislation and why states need to differ in their regulation and governance of different issues
- **b** the role of the federal government in overruling and intervening on matters
- **c** the conflict of issues that require more than one state's involvement (for example, The Murray–Darling Basin).

2 **Create** an inquiry report to **analyse** the recent reforms to law in Queensland to amend the age a person can be charged as an adult from 17 to 18. Investigate and **evaluate** the reasons for this reform and the implications of the reform on society. Following your evaluation, make recommendations for further reform or improved implementation regarding juvenile justice in Queensland.

You could consider:

- **a** the nature and scope of juvenile crime in Queensland
- **b** the reasons for amending the age from 17 to 18
- **c** the influences on the law, inquiries and advocates for change that led to the reform
- **d** the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2006* (Qld)

3 **Create** an inquiry report to **analyse** the nature and scope of current legal issues to evaluate and recommend the need for law reform. **Analyse** the current trends and viewpoints of a variety of stakeholders in order to **propose** the introduction or amendment of legislation.

You could consider:

- **a** areas of law such as family law, technology law, criminal law, counterterrorism laws, employment law and corporate law
- **b** access to justice and demographic issues affecting juveniles who offend.

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Unit 4

Human rights in legal contexts

Unit overview

In Unit 4, students consider legal concepts, principles and contemporary issues studied in previous units to consider fundamental concepts of human rights and analyse Australia's participation within the global community. They recognise how human rights create challenges in national and international contexts, including for minority groups, and examine Australia's legal response to international law and human rights.

This unit features contemporary contexts involving human rights matters in Australia and internationally. Examples of issues include:

- the rights of Indigenous Peoples to live in dignity and to self-determination
- reproductive rights
- the right to marry and create a family
- the right to be free from slavery and forced labour
- war and peace issues, for example, the Geneva Conventions and peacekeeping forces
- environmental issues, for example, climate change and the rights of future generations.

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Unit objectives

By the end of this unit, students should be able to:

1. Comprehend legal concepts, principles and processes of Australian human rights laws and obligations in national and international contexts.
2. Select legal information from sources relevant to Australian human rights laws and obligations in international contexts.
3. Analyse legal issues involving Australian human rights laws and obligations in national and international legal contexts.
4. Evaluate legal situations relevant to Australian human rights laws and obligations in national and international legal contexts.
5. Create responses that communicate meaning to suit the intended purpose.

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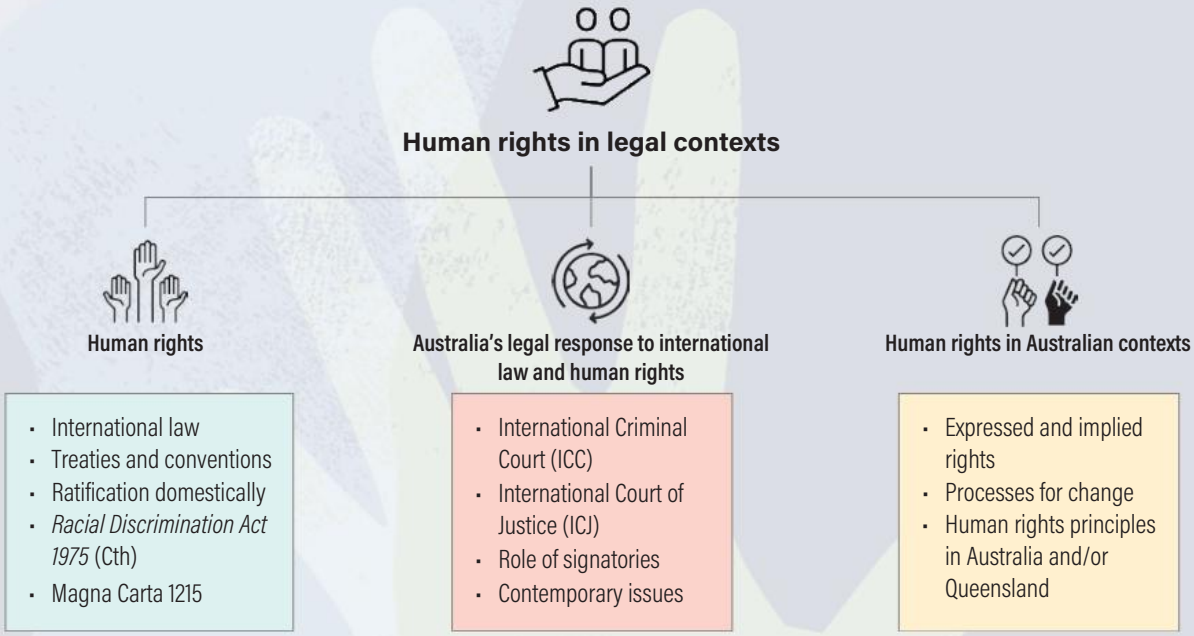
Concept map

In Unit 4 of the QCAA Legal Studies course, we will cover the following topics and content:



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Chapter **10** Topic **1**

Human rights

Chapter overview

In Topic 1, students explore the global context for human rights and how international laws and institutions affect Australia.

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Chapter objectives

By the end of this topic, students should be able to:

- Describe key terms using legal terminology, including human rights, covenants, treaties, states, sovereignty, convention, multilateral, bilateral, ratification, charter and bill of rights.
- Describe the main features (e.g. origins, purpose, underlying principles) of international law developed from the International Bill of Human Rights, consisting of the
  - Universal Declaration of Human Rights
  - International Covenant on Civil and Political Rights (ICCPR)
  - International Covenant on Economic, Social and Cultural Rights (ICESCR).
- Describe the main features (e.g. origins, purpose, underlying principles) of principal treaties, including the
  - Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967
  - International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD)
  - Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)
  - Convention on the Rights of Persons with Disabilities 2006 (CRPD)
  - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
  - Convention on the Rights of the Child 1989.

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- Explain the
  - process by which treaty obligations translate into domestic law through accession or ratification, the role of reservations, and the effect of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
  - rights of states (sovereignty, equality, political independence and territorial integrity), including Articles 2.1, 2.4 and 2.7 of the *United Nations Charter*
  - role of the UN, its agencies and other organisations, including the United Nations High Commissioner for Refugees.
- Describe key human rights initiated or promoted in the following important legal documents
  - Magna Carta 1215
  - *Racial Discrimination Act 1975* (Cth)
  - *Sex Discrimination Act 1984* (Cth)
  - *Disability Discrimination Act 1992* (Cth)
  - *Age Discrimination Act 2004* (Cth).
- Describe and explain the role of the Australian Constitution (including the external affairs power within s. 51) in protecting express and implied human rights in Australia.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

- *Age Discrimination Act 2004* (Cth)
- *Anti-Discrimination Act 1991* (Qld)
- Australian Constitution (*Commonwealth of Australia Constitution Act 1900* (Cth))
- *Australian Security Intelligence Organisation Act 1979* (Cth)
- *Commonwealth Electoral Act 1918* (Cth)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT)
- Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)
- Convention on the Rights of Persons with Disabilities 2006 (CRPD)
- Convention on the Rights of the Child 1989 (CRC)
- Convention Relating to the Status of Refugees 1951
- *Crimes (Torture) Act 1988* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
- *Human Rights (Sexual Conduct) Act 1994* (Cth)

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- *Human Rights Act 2004* (ACT)
- *Human Rights Act 2019* (Qld)
- *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* (Cth)
- International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD)
- International Covenant on Civil and Political Rights 1966 (ICCPR)
- International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)
- Magna Carta (1215)
- *Migration Act 1958* (Cth)
- Protocol Relating to the Status of Refugees 1966
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- United Nations Charter 1945
- Universal Declaration of Human Rights 1948

Significant cases

This topic will include the following cases:

- *Lange v Australian Broadcasting Corporation* (1997) 135 ALR 96
- *Mabo v Queensland (No. 2)* (1992) 175 CLR 1
- *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (Case S28/2023)
- *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1
- *Tham v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCA 17
- *Toonen v Australia*, Merits, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)

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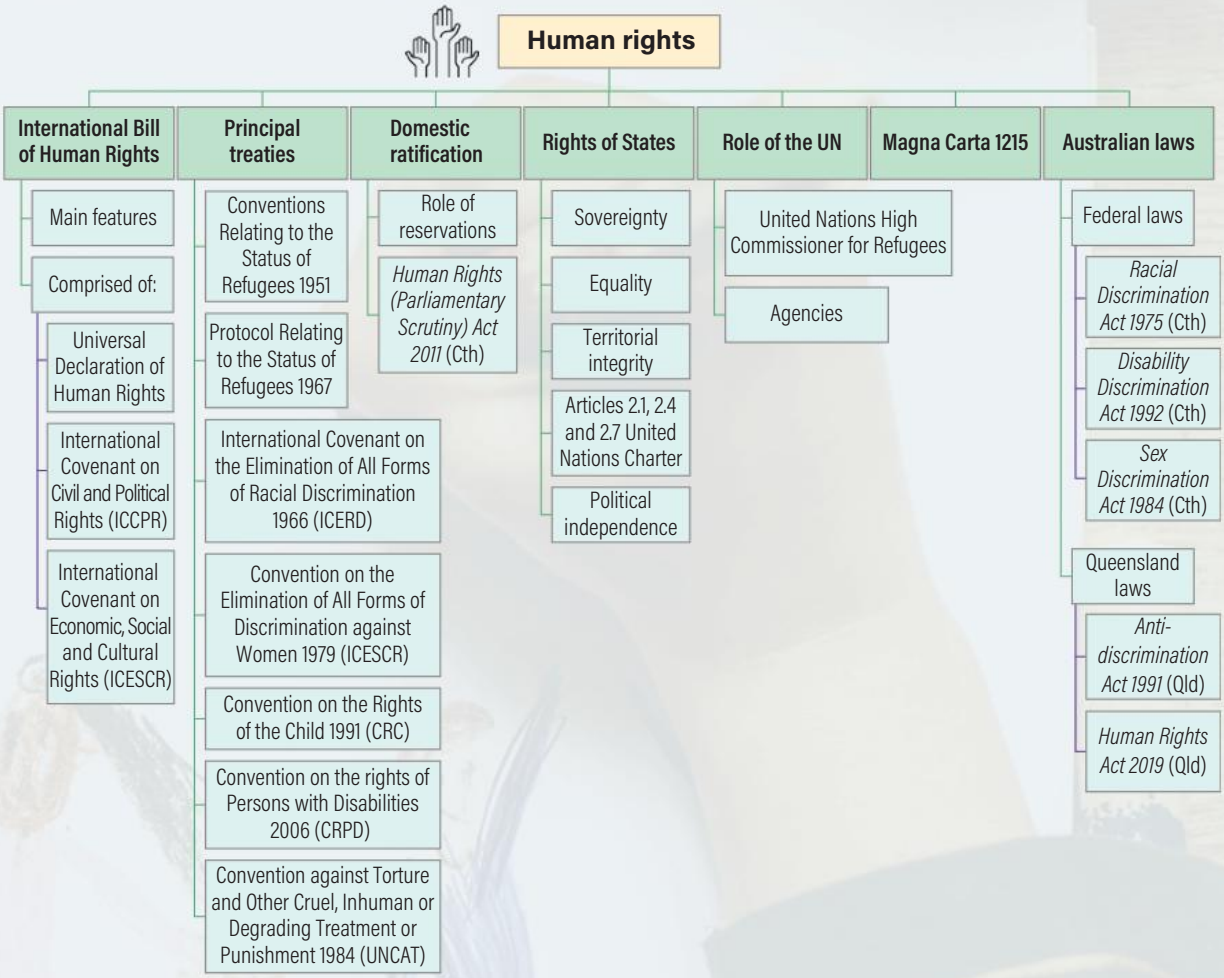
Concept map

In Topic 1 of Unit 4 of the QCAA Legal Studies course, we will cover the following content:



Note: Aboriginal and Torres Strait Islander readers are warned that this chapter includes an image of a deceased person.

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10.1 Sources of individual rights

Let's begin by defining **human rights**. The word 'human' means a member of the *Homo sapiens* species: a man, a woman or child – a person. The term 'right', in this instance, means morally good, justified or acceptable. So, the term 'human rights' is closely linked to the values we believe in and accept within our society. Many of these basic rights and values were developed by religious beliefs and the work of some of the great philosophers, such as Plato and Locke. Table 10.1 outlines some important dates in the development of human rights.

human rights fundamental rights that are considered to belong to every person regardless of race, gender, age, nationality or religion

Research 10.1

1 Research the following people and **describe** their contributions to the protection of human rights in 50 words or less.
   - **a** Nelson Mandela
   - **b** Edith Cowan
   - **c** Charles Perkins.

Figure 10.1 The late Charles Perkins (second from the right) was an important figure in protecting and promoting basic human rights in Australia.

2 Research the situation in China regarding the treatment of the Uyghur people. **Evaluate** what possible moral and legal problems might arise from this treatment.

Table 10.1 Key dates in the development of human rights

Date	Human rights development
Unknown	The Ten Commandments
539 BCE	The Cyrus Cylinder
1215	Magna Carta
1628	British Petition of Rights
1689	British Bill of Rights 1689, 1 Wm & M 2, c 2
1776	United States Declaration of Independence
1789	French Declaration of the Rights of Man and the Citizen
1791	Bill of Rights (United States)
1833	*Abolition Act 1883*, 3 & 4 Will IV
1863	Emancipation Proclamation
1945	United Nations established
1948	Universal Declaration of Human Rights
1948	Convention on the Prevention and Punishment of the Crime of Genocide
1951	Convention on the Status of Refugees
1960	The International Labour Organization's Discrimination (Employment and Occupation) Convention
1965	The International Convention on the Elimination of All Forms of Racial Discrimination
1966	The International Covenant on Economic, Social and Cultural Rights
1966	The International Covenant on Civil and Political Rights
1975	The *Racial Discrimination Act 1975* (Cth) passed in Australia
1979	The Convention on the Elimination of All Forms of Discrimination Against Women
1981	The *Human Rights Commission Act 1981* (Cth) passed in Australia, establishing the national Human Rights Commission

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Date	Human rights development
1984	The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
1989	The Convention on the Rights of the Child
1990	The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
1992	The *Disability Discrimination Act 1992* (Cth) came into force in Australia
1993	The Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner created in Australia
2002	The International Criminal Court established
2002	The *Age Discrimination Act 2004* (Cth) came into force in Australia
2004	The *Human Rights Act 2004* (ACT) enacted
2006	Convention on the Rights of Persons with Disabilities
2007	Declaration on the Rights of Indigenous Peoples
2010	International Convention for the Protection of All Persons from Enforced Disappearance
2019	*Human Rights Act 2019* (Qld)

Fundamentally, human rights are based on the principle that an individual should be treated with dignity and entitled to freedom and respect. Human rights are often spoken about with reference to **international laws** or domestic statutes. However, human rights are equally important at an individual level. Throughout history, there have been a number of people who have been regarded as great humanitarians, who have stood up for human rights in some way.

international law a body of rules established by custom or treaty and recognised by nations as binding in their relations with one another

Figure 10.2 Anti-war protest in Sydney to oppose Australia sending troops to Iraq in March 2003. Over 20 000 people joined this particular protest.

Sometimes, you might hear a person say, 'I've got the right to do that', but do they actually have that right? What are they referring to when they say that? The idea of having a 'right' is something that humans believe we possess automatically, but rights are generally an entitlement that people have been given.

This idea of having a 'right' can have different meanings and can exist in different forms. The notion of 'free speech' is often one of the very first rights that we automatically think of as a citizen, but is it a right? In reality, our rights are limited by the rules set by the government of the day.

Additionally, some of these rights will be restricted or limited as they might come into conflict with other rights. For example, the right to freedom of expression is important, but in some cases will be restricted if the way a person expresses themselves is offensive or racist.

However, certain rights are held to be absolute in international law. This means they cannot be restricted or limited. For example, the right to be free from torture or the right not to be held in slavery are absolute and cannot be infringed in any circumstances.

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The nature of rights

The most basic types of **rights** are legal and moral rights. A legal right exists in either common or statute law. The rights that exist in common law are those that, over time, were developed to provide some form of protection. The rules established in regard to negligence are a good example of common law rights, for example, *Donoghue v Stevenson* [1932] AC 562, in which duty of care was established. In law, protection is provided from acts or omissions that could affect those who are closely related.

An example of a legal right can easily be found in a range of Acts of Parliament designed to ensure that certain rights are protected. For example, a person has the right not to be discriminated against. This can be found in section 6(1) of the *Anti-Discrimination Act 1991* (Qld), which aims 'to promote equality of opportunity for everyone by protecting them from unfair discrimination'. We will discuss legal rights that grant or protect human rights in Australian law in more detail later in this chapter.

right the privilege or power to be able to do something or to not have something done to you; some rights are recognised by law

Figure 10.3 In April 2007, an Iranian woman gestures while talking to two morality policemen in Tehran. In 2022 thousands of Iranians protested the death in custody of Mahsa Amini, also known as Zhina Amini, an Iranian–Kurd woman who was detained by Iranian Morality police for violating a compulsory dress code. The protests highlighted authorities' human rights abuses against women in the country.

Moral rights exist within our society and in some respects are formally binding on us. The word 'moral' means a certain standard of behaviour that a person believes should exist and follow in relation to the way someone lives their life. One example of a moral right that has now become a legal right was the controversial right to end your own life. It is now a legal right throughout Australia. Those who support voluntary euthanasia (which, in general terms for these purposes, is the right to end one's own life with the assistance of a medical professional in order to ensure as little suffering as possible) long believed people in all states and territories in Australia should have this right. A person may make these arguments from a moral perspective, but in doing so also has to accept that a counterargument may be offered.

Another moral right that has recently moved to have the status of a legal right is the right of same-sex couples to be treated as equal to opposite sex couples, and to have equal rights in marriage. In 2017, this right was confirmed as a legal right following changes made to the *Marriage Act 1961* (Cth) and other related legislation. This occurred after a postal survey confirmed that a majority of Australians supported the change from a moral to a legal right.

Figure 10.4 One example of a moral right that has turned into a legal right in some places is voluntary euthanasia.

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Balancing competing rights

Across the world, some people and some groups find it difficult to claim their rights. It seems that the people in power, and even the law, could do more to ensure that people have equal rights and know how to claim those rights. On the other hand, in some situations the competing rights of individuals need to be balanced. Governments have interpreted the limitations and balancing of rights in different ways. The most obvious example of this is that 'the people' have given to the government the power to make and implement laws that remove the right of liberty from those who offend against the criminal laws of the country.

There are some people who believe that government 'interference' in the lives of citizens is almost always wrong, and that the rights of the individual are paramount. This argument is prominent when the issue of gun control is considered in the United States. In 1791, an amendment to the Constitution of the United States of America (the Second Amendment) stated:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
>
> *Source*: Constitution of the United States of America.

It was originally introduced to ensure the state militias (a military force raised from a civilian population to assist the regular army in an emergency) that existed in the United States at the time were armed sufficiently to oppose any foreign force or a tyrannical federal government that may control the new country of the United States. Having fought a war of independence against England from 1775 to 1783, this desire to ensure that citizens were able to protect themselves was understandable at the time.

The problem is that this amendment continues to be interpreted in different ways. Some argue that it is an anachronism that was never intended to allow the citizens of the United States to own what are now very dangerous automatic or semi-automatic weapons like those used in the Columbine High School shooting in 1999, where 15 people died, or the Las Vegas shooting in 2017 that resulted in the deaths of 60 people and the injuries of over 500, or the Florida school shooting in 2018, where 17 people were killed. The rate of gun violence in the United States is such that some studies have found a US citizen is 10 times more likely to die in a gun-related incident than citizens of other developed countries.

Others maintain that it is the right of the individual to own such a weapon, as protected by the Second Amendment, and that the state should not interfere with this right. Australia has had its own difficulties with this issue, including the 1996 Port Arthur massacre, where a lone gunman killed 35 people and injured another 23. This resulted in laws being passed that made it much more difficult for Australians to own weapons.

Clearly, in this area, the rights of the individual seem to be leading to a much higher risk of death than if the state were able to pass laws to make society a safer place. It remains a very divisive issue in the United States, a country that prides itself on protecting the rights of the individual as much as possible.

Figure 10.5 Guns collected from the 'buy-back' scheme put in place after the Port Arthur massacre. When gun laws were tightened to prohibit certain types, the Australian government bought back prohibited weapons from individuals and dealers to encourage them to be handed in and not hidden away or sold on the black market.

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Off the record

What do you think? Should the rights of the individual be better protected by Australia's gun laws? Why or why not? Justify your answer in a short argumentative essay (400–600 words) using at least two arguments.

The existence of these different types of rights within our society is important, but unless they have been recognised and enforced by the law, some would question whether these rights actually do exist. Individual rights in Australia stem from or are protected by a variety of processes and sources, some of which we will now consider.

Customary rights

Customary rights originate from customs and traditions that have been established over time within a certain sociocultural group like a trade or locality, but they have no legal basis. Customary rights/laws have also been discussed in Chapter 1 and you may recall, they have been somewhat recognised in Australia through legal decisions such as Mabo and Wik. Many of the laws that constitute Aboriginal customary laws vary between different Aboriginal communities, and in many cases these laws are kept secret within a particular community. These laws have developed as part of a culture that traditionally passed them on verbally through the generations.

An example of less significant 'customary rights' at school would be when a group of friends always sits in the same position at break time. Whereas this may be the tradition for that group, they would certainly have no legal right to this spot if another group decided to sit there one day. In a broader sense, the practice of 'squatting', or staying in houses or on land that you do not own, is an example of customary rights.

Social behaviours between individuals or groups in society sometimes become so important that they gain the force of law or become law. There is a certain respect between individuals, at least on most occasions, and this often becomes customary behaviour that, if breached, will bring customary enforcement or penalty. There is a hint of this in negligence and other law that, via the common law, applies the 'reasonable person' test.

Figure 10.6 Customary rights are born from traditions and customs that have grown over time within a particular sociocultural group, even in small instances like where students sit to have lunch.

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10.2 Other human rights sources and processes

While human rights are often formally protected in legislation under Australian law, there are other important legal documents and processes that, over time, have acted to formalise and protect certain rights. Some of these are quite old but are still viewed as being significant parts of the complex web of human rights protections that exist in Australia today.

The Cyrus Cylinder

Cyrus the Great was the first King of Persia. In 539 BCE, his Persian army conquered the ancient Medish city of Babylon as part of his military campaign to expand his empire. However, rather than acting like a conqueror, he made a number of decrees that even today still have an influence on how we look at human rights. He ordered that all slaves be freed, declared that all people had the right to choose their own religion and established racial equality. He had these decrees recorded in Akkadian cuneiform script (a very ancient type of writing) and baked on a clay cylinder.

This is known today as the Cyrus Cylinder and has been recognised as the world's first charter of human rights. Its provisions are seen today in the first four Articles of the Universal Declaration of Human Rights and it has been translated into all six official languages of the United Nations. While it has not been imported directly from Persia into Australian law, it sets out principles that have been recognised by our own legal system and have influenced the types of rights we hold dear in Australia today.

The Magna Carta (1215)

The Magna Carta, or 'Great Charter', is often considered the cornerstone of human rights protections in the English-speaking world.

In 1215, King John of England (the brother of the famous Richard the Lionheart) was facing much criticism. He was considered by many of the nobles in the kingdom to have violated several ancient English laws and customs by which England had been governed. Following a long struggle against his own barons, he was forced to sign the Magna Carta in 1215, which set out a number of principles that later came to be thought of as human rights.

The Magna Carta established principles of due process and equality before the law, such as the right to a trial by a jury of one's peers and not being held imprisoned without the prospect of a fair trial. This came about because King John (and other kings and queens before him) had essentially acted as 'judge and jury', and would hand out punishments as they thought fit, rather than following an established legal process. It also enshrined the right of the church to be free from governmental interference, as well as the rights of all free citizens to own and inherit property.

The Magna Carta contained provisions that guaranteed protection from excessive and/or arbitrary taxation and protected the right of widows who owned property to choose not to remarry. It also had a number of provisions forbidding bribery and official misconduct. It is clear to see that, based on these provisions alone, the Magna Carta remains one of the most important documents to protect human rights in legal history.

While the provisions of the Magna Carta have not been imported 'word for word' into Australian law, any law that sought to contradict the principles and rights protections of the Magna Carta would be viewed with scepticism and caution even today.

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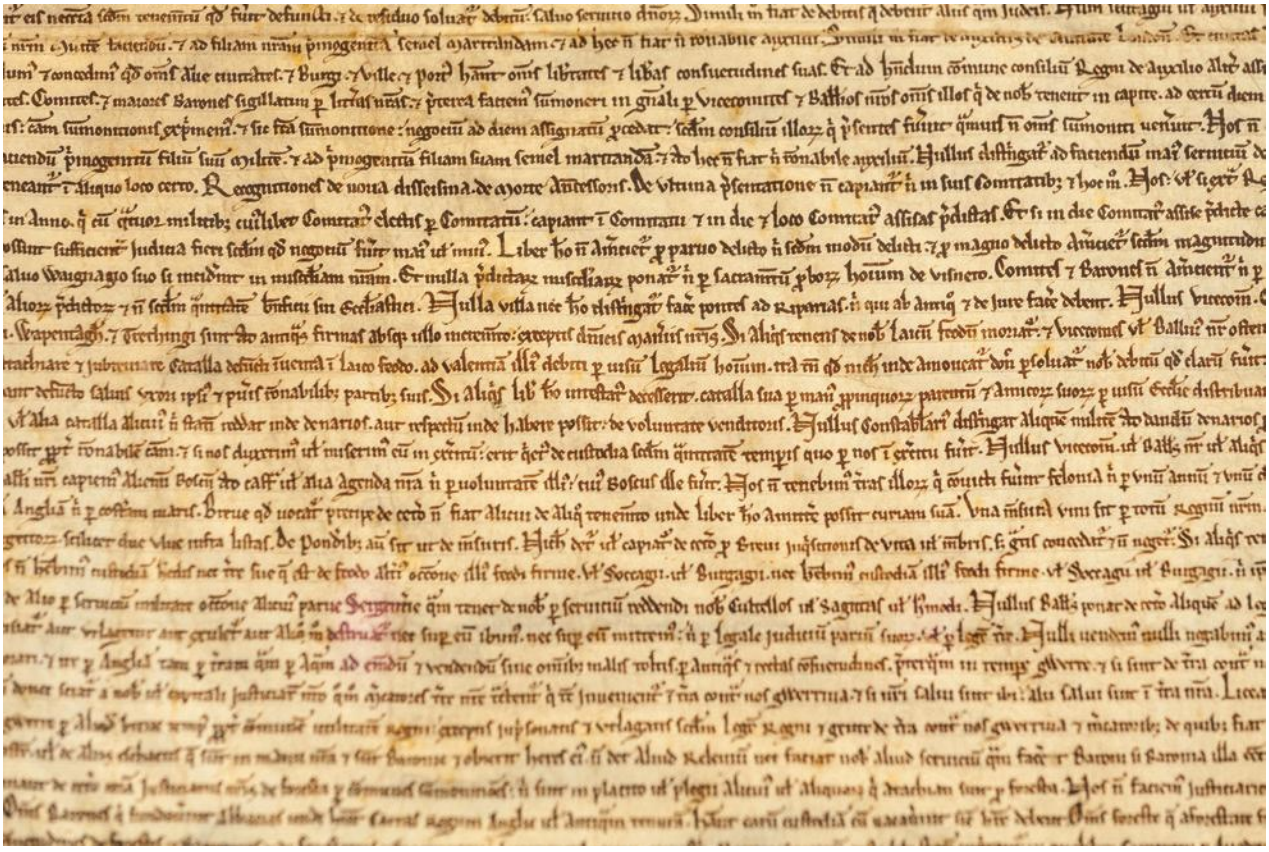

Figure 10.7 A copy of the Magna Carta in Salisbury Cathedral, England

Petition of Right (1628)

In 1628, the English Parliament sent the Petition of Right, a statement of civil liberties, to King Charles I. This arose because King Charles I had exacted forced loans and quartered troops in subjects' houses as an economy measure to support his unpopular foreign policy. The Parliament of the time had refused to support this, and as a result the two sides were in conflict. Citizens were subjected to a number of unpopular measures, including arbitrary arrest and imprisonment. The Petition of Right was based upon earlier statutes and charters, and it asserted four principles: (1) No taxes may be levied without consent of Parliament; (2) No subject may be imprisoned without cause shown (reaffirmation of the right of *habeas corpus*); (3) No soldiers may be quartered upon the citizenry; and (4) Martial law may not be used in time of peace.

Declaration of the Rights of Man and of the Citizen (1789)

In 1789, the people of France violently overthrew their monarchy, executed their king and queen, and established a different form of government called a republic. The Declaration of the Rights of Man and of the Citizen (in French, *La Déclaration des Droits de l'Homme et du Citoyen*) was adopted by the National Constituent Assembly for the new Republic of France.

The Declaration stated that all citizens are to be guaranteed the rights of 'liberty, property, security, and resistance to oppression'. It argued that the need for law derives from the fact that 'the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights'.

Source: United for Human Rights.

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Figure 10.8 A representation of the *Declaration of the Rights of Man and of the Citizen* by French artist Jean-Jacques-François Le Barbier, 1789

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The First Geneva Convention

This came about as a result of the horror that one man felt following his visit to wounded soldiers after a battle in 1859. A Swiss businessman called Henry Dunant was shocked by the inadequate medical aid and lack of facilities to help these soldiers. His experiences led him to suggest:

- a permanent relief agency for humanitarian aid in times of war
- a government treaty recognising the neutrality of the agency and allowing it to provide aid in a war zone.

The proposal led to the establishment of the Red Cross in Geneva. In 1864, the Geneva Convention was established. It was the first codified international treaty that covered the treatment and care of sick and wounded soldiers in the battlefield. It has been amended several times since, but it remains important today in terms of how the Australian armed forces conduct themselves in battle as well as how they would expect to be treated. It has also evolved to protect civilians caught in conflict situations and guarantees the right to a fair trial if a person is accused of a war crime (such as executing prisoners or taking hostages, among other things).

In recent times, a number of people and/or countries have been accused of breaching the Geneva Conventions. This topic is discussed further in Chapter 11.

Research 10.2

Research one of the following to summarise the alleged breaches of the Geneva Convention. **Investigate** what they were accused of doing and **explain** whether this was a breach of the Geneva Convention, and if so, **identify** which part of the Convention.

1 Saddam Hussein
2 The United States and Guantanamo Bay
3 Australian troops in Afghanistan
4 The Russian invasion of Ukraine.

10.3 International bodies and human rights

An examination of human rights protections available in Australia would be incomplete without a detailed consideration of how rights are viewed and protected from an international perspective first. The role and function of the United Nations need to be examined in order to understand how the United Nations operates to protect rights around the world and what Australia's obligations may be in relation to the body.

The United Nations

Background

After World War I, the League of Nations was set up as the first international body aimed at maintaining peace. It failed to prevent aggression by the Axis Powers that led up to World War II, which caused even more devastation and loss of life, as well as introducing the atomic bomb, an existential threat to all nations. Clearly a second attempt at creating a peace forum was needed.

In 1945, the leaders of 50 nations came together in San Francisco with representatives from many non-government organisations (NGOs), which are non-profit organisations that operate independently of any government. They are usually driven by a particular social, environmental or humanitarian mission. A couple of examples of NGOs are groups like Amnesty International, which focuses on human rights advocacy globally, and Save the Children, which works to improve the lives of children in need, providing healthcare, education and safety in various regions around the world.

The 1945 meeting took place following the end of World War II and was held with the determination that the world would never again

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Figure 10.9 The United Nations building in Geneva, Switzerland

experience such widespread destruction. The United Nations was thus formed. The UN Charter begins with the following words:

> We the peoples of the United Nations determined:
> 1 to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
> 2 to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
> 3 to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
> 4 to promote social progress and better standards of life in larger freedom.
>
> *Source:* United Nations.

The post-war record of the United Nations

In its 80-year history, the United Nations has:

- promoted the idea that everyone has human rights regardless of where they live
- led numerous peacekeeping operations
- served as the hub of a massive body of international law
- enabled dialogue to continue between hostile nations
- kept all nations as members, even those that have been at odds with the international community
- acted as a court of world opinion on issues of great importance.

Most importantly, since the organisation's formation, no further world wars have occurred, and one of the reasons is that the United Nations has acted as a forum in which to discuss problems, has worked hard to bring together rival groups to prevent war and has made the powerful nations of the world significant participants in the United Nations by giving them extraordinary powers as the five permanent members of the Security Council.

The organisation of the United Nations into separate bodies

The United Nations is divided into a number of separate bodies, each with a specific function and areas of control:

- The **General Assembly** is like the parliament and voting body of the United Nations for all member States. Each country has one vote, and this body makes appointments to the other bodies. It also makes recommendations to the Security Council, decides on admission of new members and develops a UN budget.
- The **Secretariat** comprises the Secretary-General and tens of thousands of international UN staff members who carry out the day-to-day work of the United Nations as mandated by the General Assembly and the organisation's other principal organs. UN staff members are recruited internationally and locally, and work in duty stations and on peacekeeping missions all around the world.
- The **International Court of Justice (IJC)** is the judicial body of the United Nations and is based in the Hague (Netherlands). The role of the ICJ is to settle legal disputes submitted to it by States according to the principles of international law. The ICJ will be examined more thoroughly in Chapter 11.
- The **Security Council** is responsible for the maintenance of international peace and security. It takes the lead in determining the existence of a threat to peace or act of aggression. The Security Council has 15 members consisting of five permanent members (the United States, the United Kingdom, China, Russia and France) and

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10 non-permanent members. Each member has one vote and under the UN Charter, all member States have to comply with Security Council decisions. It calls upon the parties to a dispute to settle it by peaceful means and recommends methods of adjustment or terms of settlement. The Security Council has the power to impose sanctions or even authorise the use of force to maintain or restore international peace and security.

Chapter VII of the UN Charter states that the UN Security Council can act under Article 42 of this part of the charter to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'. However, for nearly 50 years after World War II, tension existed between the two most powerful nations (or ideologies) of that era – the United States and the Soviet Union (the largest country of which was Russia). This was known as the Cold War. It prevented the Security Council from exercising its military powers because either the United States or the Soviet Union would veto (which means to vote against a resolution) any Security Council resolution that threatened its interests. A negative vote by any one of the five permanent members of the Security Council can veto any of the Council's measures or proposals or any changes to the United Nations as a whole. This makes UN reform very difficult to secure.

- The **Economic and Social Council** is the principal body responsible for economic, social and environmental issues. It is also in charge of the implementation of internationally agreed development goals and is the United Nations' central body for reflection, debate and innovative thinking on sustainable development.
- Taking over from the earlier League Of Nations Mandate system set up after World War I, the **Trusteeship Council** was established to provide international supervision for 11 Trust Territories (such as the Cameroons, New Guinea and Western Samoa, among others) and ensure that adequate steps were taken to prepare the Territories for self-government and independence. By 1994, all Trust Territories had attained self-government or independence, so the Trusteeship Council suspended operations. It now only meets as required – by its decision or the decision of its president, or at the request of a majority of its members or the General Assembly or the Security Council.

Figure 10.10 The United Nations General Assembly in session

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The UN Charter and the Rights of States

The UN Charter is similar to a constitution, outlining the rights and obligations of the members of the United Nations. The purposes of the United Nations, as stated in the **charter**, are to:

- maintain international peace and security
- develop friendly relations between nations
- cooperate in solving international problems of an economic, social, cultural and humanitarian nature
- promote respect for human rights.

As well as the rights of individuals, the United Nations also recognises the rights of individual nations (called 'States' in this context). The UN Charter outlines the rights and responsibilities of a State. Article 2, in particular, addresses a number of these rights.

> Article 2
>
> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> 1 The Organization is based on the principle of the sovereign equality of all its Members.
> 2 All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
> 3 All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
> 4 All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
> 5 All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
> 6 The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
> 7 Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.
>
> *Source*: United Nations.

Article 2.1 confirms the equal **sovereignty** of all members of the United Nations. This means a State exercises full control over affairs within a geographical or territorial limit, and can pass laws and enforce them within this area and exist as an essentially independent legal and political body in this space. Equal sovereignty or equality means that under the UN Charter, all States will be treated equally and their right to make laws for their own territory will be respected. Except in the case of the five permanent members of the Security Council, no State is given any more rights under the UN Charter just because they may be more powerful or larger than other States. The concept of the right to equality of nations is therefore enshrined in the Charter and is called **sovereign equality**.

charter a formal document that serves as a foundational or governing instrument for a community, institution or organisation; it establishes the rights, rules, guiding principles and privileges of the body it represents, outlining its purpose, structure and aims

sovereignty the concept that a government exercises full control over affairs within a geographical or territorial limit; this means it can pass laws and enforce them within this area and exists as an essentially independent legal and political body in this space

sovereign equality all States have equal rights, and except in the case of the five permanent members of the Security Council, no state is given more rights in the United Nations on the basis of size or power; for example, every State has only one vote in the UN General Assembly

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In Article 2.4, the UN Charter adopted the idea that force or the threat of force should not be the norm in international relations. It states:

> All Members shall refrain in their international relations from the threat or use of force against the **territorial integrity** or **political independence** of any state, or in any other matter inconsistent with the Purposes of the United Nations.
>
> *Source:* United Nations.

However, the UN Charter recognised that force would sometimes be used and so it sought to create a legal framework for this.

In Article 51, the UN Charter states that force can be used in self-defence. This means that the US invasion of Afghanistan in November 2001 was legal, and did not breach international law. The invasion was legal because it was carried out in response to an attack on the United States on 11 September 2001 by terrorists who were said to be from the Al-Qaeda organisation. At the time of the attack, Al-Qaeda had its bases in Afghanistan and was supported by the Taliban regime in that country.

territorial integrity the idea that a State has the right to its own territory and another State should not do anything to infringe on that right

political independence a State is free to exercise independent political processes of its choosing in its territory, free from interference by another State

Figure 10.11 Local residents stand among debris of a residential building partially destroyed by a missile attack in the town of Selydove, Donetsk region, on 8 February 2024, amid the Russian invasion of Ukraine.

It does mean that territorial integrity (the idea that a State has the right to its own territory and another State should not do anything to infringe on that right, for example, invade another country) is meant to be respected under international law and consequences apply when this is not respected. An example from more recent times was the Russian invasion of Ukraine.

Research 10.3

View *The Conversation* website and read 'MH17 convictions pave the way for war crime prosecutions from Ukrainian invasion' at: https://cambridge.edu.au/redirect/10479.

1 **Identify** the 'crime' that Russia has allegedly committed in relation to Ukraine.
2 **Analyse** and **evaluate** the consequences that have been applied to Russia as a result.
3 **Explain** whether they are or are not appropriate.

Check this out

Conduct an internet search using the phrase 'Russia Ukraine sanctions'. Identify what sanctions have been put in place and by whom. Is there any evidence you can find that the sanctions are effective?

A right similar to territorial integrity applies to the concept of nations having the right to political independence. This right ensures that within the territorial boundaries of a State, that State has the right to an independent political system of its own choice and should be free from interference from any other State in how that is exercised. There has been some recent concern of Russian interference in US elections. Australia has also become more concerned about the ability of foreign powers to interfere in Australian democratic processes.

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Figure 10.12 James Clapper (right), former Director of US National Intelligence, arrives on January 5, 2017 to testify at a US Senate Committee on the alleged election interference and hacking by Russian operatives. He alleged that the Russians hacked into servers used by the Democratic National Committee and released stolen data to WikiLeaks and other media outlets to influence voters against the Democratic presidential candidate Hillary Clinton.

Why Australia's tough national security laws cannot stop foreign interference in our elections

Sarah Kendall, *The Conversation*, 23 February 2022

ASIO chief Mike Burgess recently revealed the security agency had detected and disrupted a foreign interference plot in the lead-up to an Australian election. He warned Australia was seeing foreign interference attempts "at all levels of government, in all states and territories".

These types of threats have long been anticipated. In fact, in 2018, the federal government took the unprecedented step of passing nine new laws to counter foreign interference in politics. These serious national security crimes carry penalties ranging from ten to 20 years in jail. Similar crimes are not found in many other countries.

But are tough national security laws what we need? Will these do enough – or anything at all – to deter the threat of electoral interference in Australia?

What is foreign electoral interference?

First, it helps to define exactly what electoral interference is.

[ASIO] defines this as a covert or threatening action on behalf of a foreign power which aims to affect political processes or is detrimental to Australia's interests.

So, when foreign individuals or powers covertly seek to influence our politics and this has a detrimental impact on our interests (or benefits the interests of the foreign power), this is foreign interference.

This kind of conduct could take many forms. For example, it could mean a person who has connections with a foreign government (let's say

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China) identifies Australian candidates who might support the interests of China or be vulnerable to inducements.

This person then seeks to advance the candidates' political prospects without disclosing his or her links to the Chinese government.

This could occur through generous monetary support, placing favourable stories in foreign language media platforms, or providing other forms of assistance (such as hiring political consultants and advertising agencies).

The aim of political interference is to get candidates into positions of power and generate a sense of obligation and indebtedness that could subsequently be exploited by the foreign government.

Going back to our example, this could mean a person with links to the Chinese government encouraging candidates to hire certain people as political staffers, vote in a certain way, or pass on information about a party's position on defence policy, human rights or foreign investment.

This kind of conduct can seriously damage our sovereignty and undermine our democracy. Burgess warns the threat is emanating from various countries – it should be noted, he didn't specify China – and both sides of politics are being targeted.

Crimes of foreign interference

Australia's new laws make it a crime to engage in covert, deceptive or threatening conduct on behalf of a foreign government or entity with the intention of:

- influencing an Australian political or democratic process
- supporting a foreign intelligence agency
- prejudicing Australia's national security.

These offences capture all kinds of foreign interference in our electoral process (as well as any preparations for this kind of conduct). This gives law enforcement and intelligence agencies the power to intervene before any interference actually occurs, and to prosecute those people responsible.

While these crimes are similar to laws passed in the US and UK following the September 11 terrorist attacks, they are more far-reaching. And because Australia does not have a federal bill of rights, the laws have limited checks and balances.

Prosecuting (and deterring) perpetrators

But how easy would it be to actually prosecute offenders?

The foreign interference crimes apply to conduct that occurs in Australia. So, if the perpetrator was in Australia at the time they engaged in interference, then prosecuting them would be relatively straightforward, provided there was sufficient evidence.

This occurred with former Liberal candidate Duong Di Sanh, who was the first person charged with a foreign interference offence in Australia. He is still awaiting trial and the nature of his alleged interference has not been disclosed.

But a person does not have to be physically in Australia to hire a political consultant for a potential candidate, for example. If an offender is outside Australia at the time of the interference, they could still be charged with a crime. However, prosecuting them would be challenging.

The person would first have to be extradited back to Australia. Some countries do not have an extradition treaty with Australia (or it is not yet in force), such as China. And even if the country is an ally, extradition may be difficult. The attempted extradition of Julian Assange from the UK to the US for espionage crimes is one example of this.

Another problem is the anonymity of the internet and covert nature of foreign interference, which mean it might not even be possible to identify who was responsible for the interference – and therefore who to prosecute.

So, how can we counter the threat?

These examples show why our criminal laws are inadequate to counter the threat of foreign interference.

Not everyone who engages in interference will be prosecuted and punished. And the failure to punish offenders might undermine the deterrence effect of the laws, as others may continue to attempt interference without fear of being caught.

So, what can we do to protect ourselves and our nation?

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Reforming the laws will not be very helpful because the problems of extradition and identification of perpetrators will arise no matter how the offences are worded. These problems will also arise even if our allies (and other countries) enact similar foreign interference crimes.

According to Burgess, awareness is the most effective defence against foreign interference. Interference attempts are much less likely to succeed if we understand the tactics being used to undermine our sovereignty and democracy.

We must all be aware of what foreign interference looks like. But politicians have a special role to play – they must be aware who they are dealing with, and why.

They must understand the risks of foreign interference, ask the right questions of supporters (including querying what their motives are), be transparent about what type of support they have received, and stay alert to favours being asked of them that conflict with Australia's interests.

Because of how wide-reaching the threat of foreign interference is, security can no longer be the sole responsibility of agencies like ASIO. It is something we are now all responsible for.

Figure 10.13 ASIO chief Mike Burgess

Review 10.1

Read the article 'Why Australia's tough national security laws cannot stop foreign interference in our elections' on Australia's national security laws and answer the following questions.

1 **Identify** the concerns expressed in the article about the ability of foreign powers to interfere with Australian electoral processes.
2 **Analyse** the legislative response of the Australian government to deal with the issue.
3 **Decide** whether you consider this response to be effective. **Explain** why or why not.

Article 2.7 of the UN Charter is an interesting provision. It ensures the independence of States from UN interference in domestic matters within a State, unless such matters are potentially deemed a threat to international security. As well as including a self-defence clause, the UN Charter was realistic enough to legally allow the use of force in circumstances other than self-defence. The restriction placed upon this use of force was that it had to be agreed to by the UN Security Council.

The UN Security Council is like an inner circle consisting of the five permanent members: the United States, Russia, China, the United Kingdom and France. It also has 10 non-permanent members elected for two-year terms by the General Assembly, based on their region and a rotation system, but also reflecting their influence and diplomacy. Chapter VII of the UN Charter states that the UN Security Council can act under Article 42 of this part of the Charter to 'take such action by air, sea

Figure 10.14 The UN Security Council gathers during a meeting on 15 May 2018, at UN Headquarters in New York.

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or land forces as may be necessary to maintain or restore international peace and security'. This will be explored in more depth in Chapter 11, but it did allow a coalition of nations to invade Iraq after Iraq invaded Kuwait in 1990. This is a power that has been exercised very rarely, given the primary purpose of the United Nations to promote peace and the right to peaceful resolution of disputes.

Check this out

View the UN Security Council website FAQs and search for the question: 'What kind of measures involving the use of armed force has the Security Council imposed in the past?'

Identify examples of when the Security Council has authorised the use of force, and compare and contrast the different types of force and sanctions used.

The UN Charter can only be amended by a two-thirds vote in the General Assembly followed by ratification by two-thirds of all member nations including all the five permanent members of the Security Council (Article 108).

International law: The role of treaties in protecting rights

One of the foundation principles of the United Nations was to operate to promote and protect human rights around the world. The United Nations does this in a number of ways but probably the most important is by encouraging, facilitating and, at times, drawing up international agreements between nations, usually in the form of treaties. A **treaty** is an agreement between States, which signifies international agreement on matters relating to certain issues. A treaty is sometimes referred to in different ways such as a charter, **convention**, **covenant**, **protocol** and/or statute. They all have slight technical differences in international law but operate as international agreements signed by States that operate to ensure clarity and standards of expected behaviour in certain important issues. One difference is that a 'covenant' often refers to a specific type of treaty focusing on human rights, but the terms 'convention' or 'treaty' tend to be more general terms that can encompass various types of treaties dealing with different subjects. These issues often include human rights but also deal other matters such as commercial and trade agreements or defence pacts between States. These terms are often used interchangeably, and not all are drawn up with UN involvement.

Multilateral treaties are agreements entered into by more than two States, while **bilateral treaties** are agreements between two States. A State generally can be bound only by those treaties which it has signed. These are called **signatory treaties** and Australia is a signatory to a number of important treaties or statements that operate to promote and protect human rights. When a State signs a treaty, it is evidence of their intention to be bound by the obligations imposed by the treaty to act in accordance with, or refrain from acting against, the objects and purpose of the treaty. Under section 61 of the Australian Constitution, the Australian Government can enter into a treaty obligation without the approval of Parliament. This means that a treaty can be signed but has not actually been implemented until Parliament passes laws doing so.

treaty a formalised agreement between two or more States about a particular area of mutual interest (such as trade, prisoner exchanges or human rights); often used synonymously with convention, covenant, charter, protocol and/or statute

convention similar to a treaty but more often on specific matters or issues, and sometimes of a less formal nature; often used synonymously with treaty, covenant, charter, protocol and/or statute

covenant similar to a convention in effect and use; often used synonymously with treaty, convention, charter, protocol and/or statute

protocol an agreement that is sometimes used to add detail to and/or expand the impact or aid the enforcement of a treaty, convention or covenant

multilateral treaty a formal agreement entered into by more than two States

bilateral treaty a formal agreement entered into by two States

signatory treaty a State is generally only bound by a treaty to which it has signed; by doing so, a State shows its intention to only act in accordance with the objectives and purposes of the treaty

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10.4 Bringing international treaty obligations into Australian law

In Australian law, just signing a treaty is not enough to ensure it has actual legal force in Australia. Other steps are required, including legislation in most cases, culminating in **ratification**.

In many cases a treaty obligation requires parliament to pass domestic laws that have the same effect, in order to become a full part of the Australian legal system and have practical legal force in Australian law. Therefore, a treaty like the International Convention on the Elimination of All Forms of Racial Discrimination 1965 only truly became part of the Australian legal system when the Commonwealth Government passed the *Racial Discrimination Act* in 1975. In addition to legislation, or sometimes instead of it, there may be changes required to regulations and administrative processes. Legislative, regulatory and administrative measures may be referred to as implementation of the treaty.

The final action of a treaty's 'entry into force' is ratification, which is the issuing of a formal notification to the treaty partners and organisers. that the treaty has been adopted. It is now legally binding on Australia to adhere to its obligations.

An alternative to ratification by which Australia can be bound to international human rights obligations is called **accession**. This is where we may enter into a treaty that has already been negotiated and signed by other States earlier. The process also requires that any required legislation and/or regulation and administrative processes have been implemented, and it has the same legal effect as ratification.

Sometimes countries do not wish to be bound by all aspects of a treaty and may only ratify part of it. This is called a **reservation** and usually comes about where a treaty contains elements that contradict current domestic law in a country. One of the most famous reservations is that of the United States requiring the right of approval before it will have a matter heard before the International Court of Justice (ICJ). This came about when it signed the Convention on the Prevention and Punishment of the Crime of Genocide in 1986, and meant that the United States essentially would not recognise the right of the ICJ to rule unless it agreed with such a ruling.

Figure 10.15 The United Nations Climate Change Conference (COP25) in 2019 was another attempt to put in place lasting international agreements to stop global warming.

ratification (treaties) the process of formally notifying treaty partners and organisers. that the treaty has been fully adopted through legislation and/or regulation, and its obligations are legally binding on the State

accession when a State enters into a treaty that has already been formed after it has been negotiated and signed by other States

reservation when a State does not wish to be bound by every provision in a treaty so ratifies only the parts of the treaty by which it does agree to be bound; generally these cannot be incompatible with the overall object and the purpose of the treaty

Off the record

The position the United States has taken in relation to the jurisdiction of the International Court of Justice (ICJ) has been the subject of some criticism, with some claiming that it essentially weakens the position and threatens the credibility of the ICJ. Do you agree or disagree? Justify your answer.

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Research **10.4**

View and read the Australian Human Rights Council: Scope of international obligations at https://cambridge.edu.au/redirect/10480.

1 **Describe** reservations that Australia has made in relation to some important human rights treaties.
2 **Evaluate** whether those reservations seem justified.

10.5 Important human rights treaties

Australia has signed and ratified a number of important treaties that seek to promote and protect human rights. The most well-known is the Universal Declaration of Human Rights, but there are several other important international documents that are often referred to as the International **Bill of Rights**. They are:

- Universal Declaration of Human Rights 1948
- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social and Cultural Rights 1966
- Optional Protocol to the International Covenant on Civil and Political Rights
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

These important international agreements or declarations seek to promote and protect basic human rights around the world.

Universal Declaration of Human Rights

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). This declaration represents basic human rights and protections inherent to every human being and has been endorsed by all countries. Its framework covers a broad range of

bill of rights sometimes referred to as a charter of rights; it is a document that lists the fundamental rights that a person should have

Off the record

Australia is rare among western democracies in that it does not have a bill of rights. Instead rights in Australia are said to be protected by a 'web' of commonwealth and state laws.
There is also an International Bill of Rights. This is a collection of three international treaties or agreements that establish fundamental human rights standards at the global level. These treaties are:

1 Universal Declaration of Human Rights
2 International Covenant on Civil and Political Rights
3 International Covenant on Economic, Social and Cultural Rights

The International Bill of Rights provides a comprehensive framework for the protection and promotion of human rights globally.

Figure 10.16 The right to seek asylum: This image shows some of the 434 rescued refugees, including pregnant women, children and sick people, from a ferry stranded in the Indian Ocean. The refugees are on board the Norwegian cargo ship *MV Tampa*, about 120 kilometres off remote Christmas Island, 27 August 2001.

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areas that include civil, political, cultural, economic and solidarity rights. The UDHR is not considered a treaty as such, but rather an aspirational and comprehensive statement of what rights should be available to every person. Therefore, it does not directly create legal obligations for States but has been constantly referred to by States. Therefore, it is argued that is has become binding as a part of customary international law. The following are some examples of the rights and freedoms it enshrines.

Universal Declaration of Human Rights (1948)

The following is an extract, and the Universal Declaration of Human Rights has 30 articles in all. View and read the Articles of the Universal Declaration of Human Rights at https://cambridge.edu.au/redirect/10481.

Article 1

All human beings are born free and equal in dignity and rights ...

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ...

Article 3

Everyone has the right to life, liberty and security of person ...

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination ...

Article 10

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 ...

Article 13(1)

Everyone has the right to seek and to enjoy in other countries asylum from persecution ...

Article 16(1)

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution ...

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20(1)

Everyone has the right to freedom of peaceful assembly and association.

Article 26(1)

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit ...

Source: United Nations (1948).

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Check this out

Visit the United Nations Department of Public Information website and see how many UN conventions deal with human rights. In particular, look at the Articles in the Universal Declaration of Human Rights 1948 and list the rights that are most important to you.

Figure 10.17 Children of the United Nations International Nursery School looking at a poster of the Universal Declaration of Human Rights, circa 1948.

How is the UDHR used to protect human rights?

The United Nations does attempt to enforce the UDHR. The UDHR is aspirational rather than binding, meaning the rights outlined are rights all people should have rather than a binding legal list of rights that a State must protect and adhere to. The United Nations does work to promote human rights and encourage governments to protect them. To assist in this, bodies have been established which help the United Nations push a human rights agenda with States.

Human Rights Council

The principal UN Charter Body responsible for human rights is the Human Rights Council (HRC). Forty-seven UN member States sit on the HRC. One of its main purposes is to review the human rights record of every UN member State once every four years and to make recommendations for improvement. In 2017, Australia was elected as a member of the Human Rights Council from 2018–20.

The body has been the subject of some criticism, however. One problem is that the HRC can only make recommendations for improvement and does not actually have what many would consider necessary powers to mandate or enforce change if it is needed. There are a number of other problems with the way human rights can be protected by the United Nations.

Check this out

View *The Conversation* and read 'Human rights 70 years on: important victories as well as major misses' at https://cambridge.edu.au/redirect/10482.

Office of the United Nations High Commissioner for Human Rights

Another body that also impacts on how the United Nations works to protect human rights generally is the Office of the United Nations High Commissioner for Human Rights (OHCHR). This department of the United Nations Secretariat was established following the World Conference on Human Rights in 1993. Its role is to prevent human rights violations, promote the purpose and principles of the UDHR and secure respect for human rights by promoting international cooperation and coordinating the United Nations' human rights activities. The OHCHR conducts a very broad range of activities from its headquarters in Geneva. It also works directly in areas where there are severe human rights violations through field offices and as part of UN peace missions. Again, power to ensure change occurs is limited.

Australia has not ratified the UDHR in a single instrument. Instead, it seeks to protect the rights outlined in the UDHR with a legal 'web' of both federal and state statutes. Some argue this is not as effective as it could be to protect rights and that Australia should adopt a bill of rights.

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Check this out

View *The Conversation* and read 'Sending teens to maximum security prisons shows Australia needs to raise the age of criminal responsibility' at https://cambridge.edu.au/redirect/10483.

1 Identify the criticisms have been made about Australia's approach to juvenile justice.
2 Describe the solutions offered in order to better deal with this issue. Explain whether you agree or disagree with them.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights 1966 (ICCPR) came into force in 1976 and commits its parties to respect a number of important civil and political rights. Australia is a signatory to this multilateral treaty, but has in fact reserved certain rights. For example, Australia has stated it will not be bound by the provision in the ICCPR that states no juvenile offenders will be held in custody as current law in Australian jurisdictions has, and continues to make, detention of juvenile offenders an option.

A number of important civil and political rights are outlined in the ICCPR. These include:

- Articles 6–8 – right to life, prohibit torture and slavery
- Articles 9–10 – prohibit arbitrary arrest and detention and cover the rights of persons arrested or detained
- Articles 14–16 – need for procedural fairness to protect rights of accused and right to fair trial
- Articles 12–13 & 17–27 – freedom of movement, religion, thought, speech, assembly and association
- Articles 25 – right to vote.

Most of these rights are not absolute. Instead, they are subject to certain restrictions along reasonable limits. For example, it may be legitimate to limit a person's right to freedom of speech if that person could reveal confidential information that may affect the security of a State.

Some rights, such as the right not to be held in slavery and the right to be free from torture are absolute. Article 4 of the ICCPR identifies absolute rights which cannot be infringed in any circumstances.

Similar to the UDHR, the rights outlined in the ICCPR have not been ratified into a single document in Australia. This does not mean such rights are not protected, although some would argue the approach Australia has adopted means the protections are more fragmented and therefore complicated as a result. Australia has sought to protect these rights through a number of different statutes. For example, the right to vote is protected in the *Commonwealth Electoral Act 1918* (Cth). The right to freedom of religion is protected in the Constitution in section 116, although this right has been interpreted by the High Court as being somewhat restricted. However, there have been occasions when the federal government has taken direct legal action to ensure the rights outlined in the ICCPR are protected in Australia.

Figure 10.18 Freedom from torture is an important right protected by the International Covenant on Civil and Political Rights.

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Case study **10.1**

The case: *Toonen v Australia*, Merits, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)

Figure 10.19 *Toonen v Australia* saw a homosexual man take on the Tasmanian Government and win.

Facts

Nicholas Toonen was a gay man living in Tasmania. In 1994 he took a complaint to the United Nations Human Rights Committee challenging sections 122(a), 122(c) and 123 of the *Criminal Code 1924* (Tas). These sections outlawed sexual acts between men and effectively allowed aspects of his private life to be the subject of police investigation. If an offence was suspected, they could also detain him. Toonen alleged that the existence of these laws was a threat to his privacy and liberty, even if they were not enforced because of his homosexuality, and his work as a sexual health worker and gay rights activist. He claimed these laws violated Articles 17, 2(1) and 26 of the International Covenant on Civil and Political Rights 1966, because the laws discriminated against him on the basis of his sexual identity and orientation.

Interestingly, the Australian Government presented arguments in support of Toonen and against the submissions of the Tasmanian Government.

Legal issues

Did the laws of Tasmania violate the International Covenant on Civil and Political Rights?
There was conflict between sections 122(a), 122(c) and 123 of the *Criminal Code 1924* (Tas) and Articles 17, 2(1) and 26 of the International Covenant on Civil and Political Rights 1966.

Decision

Toonen had been discriminated against for the purposes of the International Covenant on Civil and Political Rights 1966, even though the criminal law had not been enforced against him.

It was recommended that Tasmania repeal the sections of the law that violated the International Covenant on Civil and Political Rights.

Ratio decidendi (reason for the decision)

The threat of enforcement of the laws, as well as their adverse impact on public opinion about homosexuals, meant the laws had been to the detriment of Toonen. The criminalisation of acts between men was not a reasonable measure and as similar laws had been repealed in all other Australian states, Tasmania's invasion of Toonen's privacy could not be deemed reasonable.

Obiter dicta (something to think about)

Tasmania denied that Toonen's rights under the International Covenant on Civil and Political Rights had been violated on the basis that the laws had not actually been enforced against Toonen as the most recent prosecution of the stated provisions was some 10 years earlier. Tasmania also argued that the provisions were necessary to protect Tasmanians from the spread of HIV/AIDS and moral depravity. Toonen and the Australian Government rejected the arguments of the Tasmanian Government and claimed that the laws violated Toonen's rights because they discriminated against him on the basis of his sexual orientation.

Video 10.1
Toonen v Australia (1994)

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How is the ICCPR used to protect human rights?

First Optional Protocol to the ICCPR

The First Optional Protocol established the ability of the Human Rights Committee to hear complaints from individuals against their government for breaches of the ICCPR. The Committee is responsible for oversight of the implementation of the civil and political rights set out in the ICCPR.

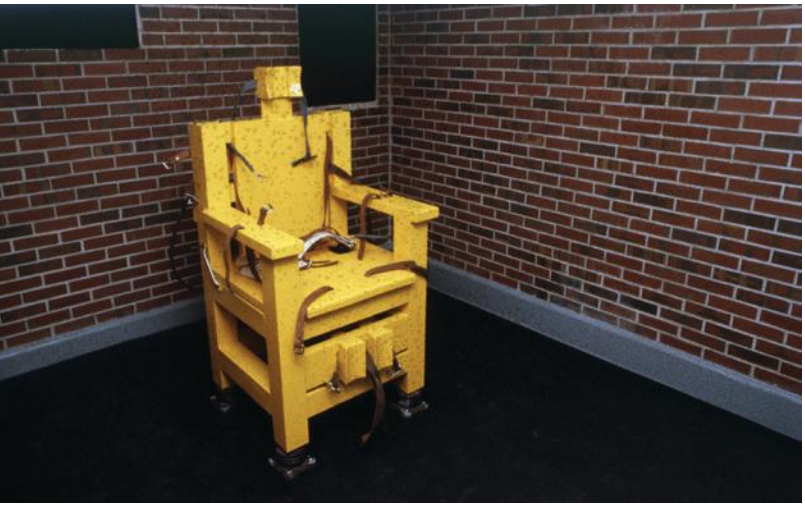
It was to this Committee that Toonen applied to have the Tasmanian laws criminalising homosexuality designated as discriminatory and contrary to his human rights.

The Committee has also criticised Australia for not incorporating the ICCPR into one piece of legislation. In many countries, this is done through a bill of rights, but as this does not exist in Australia, the rights which the ICCPR seeks to protect are not necessarily covered as comprehensively as the Committee believes they should be.

Second Optional Protocol to the ICCPR

The Second Optional Protocol is a treaty that prohibits the death penalty. Many countries have done so; however, there are still over 50 countries that still have capital punishment as a sentencing option. The Second Protocol does actually require that if a State still uses the death penalty, its use must be limited to the most serious crimes, must not be used against people under the age of 18, pregnant women or those who are suffering from serious mental illness after the sentence was imposed.

Figure 10.20 The electric chair at Holman Prison in Atmore, Alabama, United States. A number of US states still use capital punishment.



International Covenant on Economic, Social and Cultural Rights

In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) came into force and commits its parties to work towards the granting of economic, social and cultural rights. Rights in this area include:

- Articles 6 & 7 – recognise the rights to work and just and favourable conditions of work
- Article 8 – right to form and join trade unions
- Article 9 – right to social security
- Article 10 – protection and assistance for the family, especially mothers, children and young persons
- Article 11 – adequate standard of living
- Article 12 – highest attainable standard of physical and mental health
- Articles 13 & 14 – education
- Article 15 – take part in cultural life.

How is the ICESCR used to protect human rights?

Optional Protocol (2008)

The Optional Protocol allows the Committee on Economic, Social and Cultural Rights to consider complaints from individuals or groups who claim their rights have been violated.

The Protocol also provides a procedure for inter-State complaints to be investigated.

Australia has to submit progress reports to the UN Secretary-General who forwards them on to the Committee on Economic, Social and Cultural Rights about matters relating to the ICESCR articles.

Australia is yet to ratify the Optional Protocol. This means that, unlike in Toonen's case, an individual's right to appeal to the Committee may not be recognised by Australia.

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Australia as a signatory is required to submit reports about its progress in relation to its obligation under the ICESCR to the United Nations who then forwards such reports to the Committee.

Again, Australia has been criticised by the Committee for a lack of progress in a number of areas of concern. These include concerns around health and educational outcomes for Indigenous people, climate change policy, the treatment of asylum seekers and the support provided for victims of domestic violence and mental illness.

Check this out

View the Australian Lawyers for Human Rights' article 'Experts call on Australia to advance economic, social and cultural rights' at https://cambridge.edu.au/redirect/10484.
There is a link to a letter to the Attorney-General and Foreign Minister calling for Australia to sign the Optional Protocol to the ICESCR allowing complaints by individuals.
What are some of the most important reasons for signing outlined in the letter?

United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child 1989 (CRC) sets out the civil, political, economic, social, health and cultural rights of children. A child is defined as any human being under the age of 18, unless the age of majority is attained earlier under a country's own legislation. Every child is deemed to have basic rights including the right to life, to be raised by their parents within a family or cultural grouping and to have a relationship with both parents, even if they are separated. Children also have a right to their own name and identity. It also requires signatories to provide for separate legal representation for a child in judicial disputes concerning their care and asks that the child's viewpoint be heard. It also prohibits capital punishment for children.

Figure 10.21 Afghanistan's Taliban rulers have banned university education for women nationwide, provoking condemnation from the United States and the United Nations over another assault on human rights.

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Table 10.2 A simplified version of the United Nations Convention on the Rights of the Child

Article 1 Everyone under 18 years of age has all the rights in this Convention.	**Article 2** The Convention applies to everyone whatever their race, religion, abilities, whatever they think or say, whatever type of family they come from.
Article 3 All organisations concerned with children should work towards what is best for each child.	**Article 4** Governments should make these rights available to children.
Article 5 Governments should respect the rights and responsibilities of families to guide their children so that, as they grow up, they learn to use their rights properly.	**Article 6** Children have the right to live a full life. Governments should ensure that children survive and develop healthily.
Article 7 Children have the right to a legally registered name and nationality. Children also have the right to know their parents and, as far as possible, to be cared for by them.	**Article 8** Governments should respect a child's right to a name, a nationality and family ties.
Article 9 Children should not be separated from their parents unless it is for their own good. For example, if a parent is mistreating or neglecting a child. Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child.	**Article 10** Families who live in different countries should be allowed to move between those countries so that parents and children can stay in contact, or get back together as a family.
Article 11 Governments should take steps to stop children being taken out of their own country illegally.	**Article 12** Children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.
Article 13 Children have the right to get and to share information, as long as the information is not damaging to them or to others.	**Article 14** Children have the right to think and believe what they want and to practise their religion, as long as they are not stopping other people from enjoying their rights. Parents should guide children on these matters.
Article 15 Children have the right to meet with other children and young people and to join groups and organisations, as long as this does not stop other people from enjoying their rights.	**Article 16** Children have the right to privacy. The law should protect them from attacks against their way of life, their good name, their family and their home.
Article 17 Children have the right to reliable information from the media. Mass media such as television, radio and newspapers should provide information that children can understand and should not promote materials that could harm children.	**Article 18** Both parents share responsibility for bringing up their children and should always consider what is best for each child. Governments should help parents by providing services to support them, especially if both parents work.
Article 19 Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them.	**Article 20** Children who cannot be looked after by their own family must be looked after properly by people who respect their religion, culture and language.
Article 21 When children are adopted the first concern must be what is best for them. The same rules should apply whether children are adopted in the country of their birth or if they are taken to live in another country.	**Article 22** Children who come into a country as refugees should have the same rights as children who are born in that country.

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Table 10.2 A simplified version of the United Nations Convention on the Rights of the Child (Continued)

Article 23 Children who have any kind of disability should receive special care and support so that they can live a full and independent life.	**Article 24** Children have the right to good quality health care, clean water, nutritious food and a clean environment so that they will stay healthy. Richer countries should help poorer countries achieve this.
Article 25 Children who are looked after by their local authority rather than their parents should have their situation reviewed regularly.	**Article 26** The government should provide extra money for the children of families in need.
Article 27 Children have the right to a standard of living that is good enough to meet their physical and mental needs. The government should help families who cannot afford to provide this.	**Article 28** Children have the right to an education. Discipline in schools should respect children's human dignity. Primary education should be free. Wealthier countries should help poorer countries achieve this.
Article 29 Education should develop each child's personality and talents to the full. It should encourage children to respect their parents, their cultures and other cultures.	**Article 30** Children have the right to learn and use the language and customs of their families, whether or not these are shared by the majority of the people in the country where they live, as long as this does not harm others.
Article 31 Children have the right to relax, play and to join in a wide range of leisure activities.	**Article 32** Governments should protect children from work that is dangerous or that might harm their health or education.
Article 33 Governments should provide ways of protecting children from dangerous drugs.	**Article 34** Governments should protect children from sexual abuse.
Article 35 Governments should make sure that children are not abducted or sold.	**Article 36** Children should be protected from any activities that could harm their development.
Article 37 Children who break the law should not be treated cruelly. They should not be put in a prison with adults and should be able to keep in contact with their family.	**Article 38** Governments should not allow children under 15 to join the army. Children in war zones should receive special protection.
Article 39 Children who have been neglected or abused should receive special help to restore their self-respect.	**Article 40** Children who are accused of breaking the law should receive legal help. Prison sentences for children should only be used for the most serious offences.
Article 41 If the laws of a particular country protect children better than the articles of the Convention, then those laws should override the Convention.	**Article 42** Governments should make the Convention known to all parents and children.

Source: United Nations Human Rights Office of the High Commissioner website, 'Convention on the Rights of the Child', adopted 20 November 1989.

The CRC has 54 articles in all. Articles 43–54 are about how adults and governments should work together to make sure all children get all their rights. Go to https://cambridge.edu.au/redirect/10574 to read all the articles.

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Figure 10.22 Makhewu, Eswatini, 7 June 2016, UNICEF Goodwill Ambassador David Beckham meets Sebenelle, 14, who receives support for management of malnutrition in HIV-positive children. Beckham travelled to Eswatini to see how the David Beckham UNICEF Fund is helping UNICEF to provide life-saving treatment, care and support to HIV-positive children.

Review 10.2

Review the simplified UNICEF version of the United Nations Convention on the Rights of the Child in Table 10.2.

1 **Identify** some of the most important rights of the child in your opinion. Name your top five and **justify** why they are most worthy of protection.
2 Articles 43–54 are about how adults and governments should work together to make sure that all children get all their rights. **Create** a list of at least three of the responsibilities imposed on governments in these articles. You may have to follow the link on the UNICEF website to examine these.

Off the record

Australia has been the subject of some criticism internationally for the processing and settlement offshore (not in Australia) of asylum seekers. Go to the Australian Human Rights Commission website and see what the AHRC has to say about our government's policies. Do you agree or disagree?

How is the CRC used to protect children's rights?

The United Nations has a Committee on the Rights of the Child which monitors compliance of the rights expressed in the CRC. All countries who have signed the CRC are required to report to and appear before this Committee every five years. Australia's most recent report was in 2018. It was again subject to some criticism for a number of issues in relation to the treatment of children in Australia. Concerns were expressed about 'what policies were in place to address the challenge of the overrepresentation of Aboriginal and Torres Strait Islander children in judicial proceedings. Violence against children was an issue in the country, and Aboriginal and Torres Strait Islander children were disproportionately affected by this phenomenon.'

Additionally, concerns about the age of criminal responsibility across Australia, measures being taken to eliminate marriages of 16 to 18 year-olds, and the application of the principle of the best interest of the child, notably in the areas of migration and asylum, were raised.

There is no single Act that protects the rights of children in Australia (another source of concern for the Committee). Australia claims to protect the rights of children through a web of state and federal law, but this has been subject to criticism both from the United Nations and within Australia by children's rights advocates for being ineffective and lacking in proper protection under law for all Australian children.

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Figure 10.23 Australia's approach to asylum seekers has been the subject of some controversy.

Convention Relating to the Status of Refugees and the Protocol

The Convention Relating to the Status of Refugees 1951 (CRSR) elaborates on Article 14 of the Universal Declaration of Human Rights 1948. It recognises the right of persons to seek asylum from persecution in other countries. It defines who is a refugee, and outlines what asylum is and the rights of individuals who are granted asylum. It also details the responsibilities of nations that grant asylum. Australia acceded to the CRSR in 1954.

Originally, the CRSR only applied for people displaced by the conflict in Europe in World War II but the geographical limit of the Convention's application was extended around the world by the 1967 Protocol.

A refugee is defined under the CRSR as a person who has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, and who is outside the country of their nationality or habitual residence. Asylum seekers differ from refugees in that they have not yet been granted official refugee status by the country in which they are seeking asylum. Instead, they are in the process of applying for refugee status and must undergo a series of interviews and assessments to determine whether they meet the criteria for refugee status.

One of the most important principles the CRSR enshrined was the principle of non-refoulement. Non-refoulement means a State cannot send refugees back to a country where they may be subject to persecution, torture or other human rights violations. This also means countries must have a just and equitable process to assess the status of asylum seekers.

How is the CRSR used to protect the rights of refugees and asylum seekers?

The United Nations endeavours to protect refugees and asylum seekers through the United Nations High Commissioner for Refugees (UNHCR). The UNHCR advocates for the rights of refugees and asylum seekers by lobbying governments and public awareness campaigns, as well as working with stakeholders to assist with the settlement of refugees in countries where they are welcome and will receive assistance.

If a State does not comply with the requirements of the CRSR, the UNHCR will often condemn the failure to comply publicly in an attempt to bring pressure on the State to ensure future compliance or assistance. Its ability to influence States is therefore somewhat limited.

Australia has been the subject of censure from the UNHCR for the way in which asylum seekers arriving by boat have been treated. The *Migration Act 1958* (Cth) is the principal Australian law that applies to refugees and asylum seekers. The Australian policy of mandatory offshore detention (asylum seekers who are intercepted at sea are sent to offshore processing centres in Papua New Guinea or Nauru), outlined in amendments to the *Migration Act 1958* (Cth), has been criticised for violating international human rights standards such as the principle of non-refoulement.

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Figure 10.24 The high security main gate of Melbourne Immigration Detention Centre in Broadmeadows where refugees awaiting review are detained.

Conditions in the offshore processing centres have also been raised as an issue since asylum seekers who have not had their claims for refugee status processed quickly have reported physical and sexual abuse, self-harm and suicide attempts. Another issue the UNHCR has is the Australian policy of turning back boats intercepted at sea before they reach Australia. The UNHCR has expressed concern that the policy again violates the principle of non-refoulement and places the lives of asylum seekers in danger.

Even the High Court of Australia has cast doubt on the policies stating in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, 'there can be some doubt whether the provisions … can be said to respond to Australia's obligations under the Refugee Convention.' The Court suggested Australia's offshore processing system may be inconsistent with the Convention's requirement that refugees should not be penalised for their mode of entry into a country and should be treated with the same respect and dignity as other persons.

In *Tham v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCA 17, the High Court found the Australian Government had a duty to provide procedural fairness to asylum seekers when making decisions that may affect their right to apply for protection in Australia. It held asylum seekers have a right to be heard and to respond to adverse information before a decision is made about their refugee status.

The High Court has therefore sought to ensure the powers exercised by the government are constitutional and appropriate and has not been afraid to point out when it has failed to reach those standards.

Recently, the High Court handed down a decision that determined Australia's system of indefinite immigration detention was unlawful. In the case of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (Case S28/2023), a significant shift in Australian law, spanning nearly two decades, took place. It had been previously deemed legal to detain someone for immigration purposes without a genuine likelihood of their removal from Australia in the foreseeable future. In 2004, the High Court in the *Al-Kateb v Godwin* case had ruled that holding individuals indefinitely was legally permissible.

The new ruling, in the case referred to as NZYQ, terminates the practice of indefinite immigration detention and marks a substantial change in the way in which asylum seekers can be dealt with.

International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) commits parties to the elimination of all forms of racial discrimination. It requires the elimination of racial segregation and the criminalisation of incitement of racial hatred as well as the promotion of understanding and tolerance. Australia ratified the ICERD in 1975 when the *Racial Discrimination Act 1975* (Cth) was passed.

The ICERD states some important human rights principles, generally. It outlines in the Preamble that 'all human beings are born free and equal in dignity and rights' in particular as to race, colour or national origin and further that 'all human being are equal before the law and are entitled to equal protection of the law against any discrimination'.

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Figure 10.25 Demonstrators take part in a Black Lives Matter protest in Sydney on 5 July 2020 to call for an end to Aboriginal deaths in custody in Australia.

There are a number of important Articles in the ICERD which impose obligations on States:

- Article 1 – defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms
- Article 2 – condemns racial discrimination and take effective measures to eliminate it in all its forms, including in public institutions and in the private sector
- Article 4 – adopts measures, including legislative and other measures, to prohibit and eliminate racial discrimination and incitement in all its forms
- Article 5 – guarantees equality before the law and equal protection of the law
- Article 6 – ensures effective protection and remedies for victims of racial discrimination, including access to justice and adequate compensation
- Article 7 – takes measures to promote understanding, tolerance, and friendship among different racial and ethnic groups
- Article 8 – establishes the Committee on the Elimination of Racial Discrimination, which is responsible for monitoring the implementation of the Convention by State parties
- Article 14 – establishes a mechanism for individuals to make complaints to the Committee.

How is the ICERD used to protect people from racial discrimination?

Under Article 8 of the ICERD, the ICERD Committee was established. This body of independent experts monitors compliance of States who have ratified the ICERD with the obligations outlined. States are required to submit reports regularly to the ICERD Committee which detail the steps the State has taken to ensure the ICERD is supported in that State. The ICERD Committee considers these reports and then publishes recommendations about what a State could do to improve the way it deals with racial discrimination.

The ICERD Committee also can consider complaints from individuals (Article 14) as well as publish general recommendations or outline concerns with the way a particular State is dealing with an issue.

Australia has at times been the subject of the ICERD Committee criticism. The treatment of First Nations peoples, particularly over-representation in the criminal justice system, has long been an issue for the ICERD Committee. Additionally, the continued disparity of social, health and economic outcomes for First Nations peoples has also been criticised. A further criticism is of Australia's treatment of asylum seekers and refugees, in particular the off-shore processing regime, as being discriminatory. The Committee has also expressed concern over the rise of racist and xenophobic attitudes and hate speech in Australia, particularly in relation to the Muslim community.

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Figure 10.26 A man holds a sign during a rally for peace 18 December 2005 in Sydney, Australia. Over 1000 people marched from the Sydney Townhall through the city to Belmore Park rallying for peace and condemning race-fuelled violence, following a week of racial unrest across the city.

How has Australia implemented the ICERD?

Racial Discrimination Act 1975 (Cth)

When Australia passed the Racial Discrimination Act in 1975, it had the effect of implementing the ICERD. This legislation seeks to ensure people in Australia are treated the same, regardless of race, ethnicity or background.

Under the *Racial Discrimination Act 1975* (Cth) (RDA), racial discrimination occurs when someone is treated less fairly than someone else in a similar situation because of their race, colour, descent, or national or ethnic origin. Racial discrimination is also deemed to have taken place when a rule or policy appears to treat everyone in the same way but has an unfair effect on more people of a particular race, colour, descent or national or ethnic origin.

The RDA also sets out certain guidelines about exactly how or in what situations it is against the law to discriminate. These include things such as:

- **access to places and facilities for use by the public** (RDA, s. 11) – when trying to use parks, libraries, government offices, hotels, places of worship, entertainment centres or hire cars
- **housing or accommodation** (RDA, s. 12) – when buying or renting a house
- **provision of goods and services** (RDA, s. 13) – when buying something, applying for credit, using banks, seeking assistance from government departments, lawyers, doctors and hospitals, or attending restaurants, pubs or entertainment venues
- **employment** (RDA, s. 15) – when seeking employment, training, promotion, equal pay or conditions of employment
- **advertising** (RDA, s. 16) – when advertising for a job, stating that people from a certain ethnic group cannot apply.

If a person believes they have been discriminated against under the RDA, they can make a complaint to the Australian Human Rights Commission (AHRC), a body set up to investigate and advise in relation to matters of human rights concern in Australia. This body and the processes it uses will be explored in more detail in Chapter 12. If the AHRC is unable to resolve a complaint, matters can be brought before the Federal Court of Australia, which may make orders as it sees fit, including compensation orders. The RDA has been the subject of debate in recent years, due to the former federal Coalition government proposing changes to the wording of section 18C.

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Figure 10.27 Racism and racist speech is still a problem in Australia.

The history of the *Racial Discrimination Act*

By political reporter Jane Norman, updated 21 March 2017

On one side of this debate you have libertarians and conservatives who argue the laws are too subjective and have a chilling effect on free speech.

Across the divide are the moderates and those representing ethnic communities who believe the laws effectively protect against hate speech and should remain unchanged.

Both sides agree on one issue: the Human Rights Commission's complaints handling process needs to be changed.

So what is Section 18C?

Section 18C was added to the *Racial Discrimination Act* in 1995 and makes it illegal to offend, insult, humiliate or intimidate on the basis of a person's race, colour or national or ethnic origin.

But Section 18D provides wide-ranging exemptions including anything said or done 'in the performance of an artistic work' and in the publishing of 'a fair and accurate report' of 'fair comment'.

How are complaints made?

Complaints can be lodged with the Human Rights Commission, which will investigate and either dismiss the complaint, or initiate conciliation processes.

If the matter cannot be resolved, it can be taken to court but – as of 2014 – fewer than 5 per cent of complaints made it this far.

Of the complaints that have made it to court, the majority were dismissed. Indigenous people have

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lodged most of the complaints to date, followed by members of the Jewish community.

HRC President Gillian Triggs previously noted the commission receives about 20 000 complaints each year, and under the Act, it must investigate any that are in writing.

Why all the controversy?

The first major push to change the laws came in 2011 when News Corp columnist Andrew Bolt was found to have breached the *Racial Discrimination Act* over two articles he wrote in 2009, in which he implied light-skinned people who identified as Aboriginal did so for personal gain.

Then-Liberal leader Tony Abbott slammed the decision and promised to repeal section 18C if he became prime minister. Well, he did become PM, but the move proved so controversial and divisive that he dumped plans to amend the Act in 2014.

Since then, there have been two high profile cases under Section 18C involving the late News Corp cartoonist Bill Leak and students from the Queensland University of Technology.

Both complaints have been dismissed but critics argue they highlight everything that is wrong with the controversial section.

What changes are being proposed?

A recent Parliamentary Inquiry recommended some procedural changes to the way the HRC deals with complaints, to speed up the process and give the commission the power to knock back vexatious claims, or those with little prospect of success, at an earlier stage.

But it failed to make any concrete recommendations about the wording of Section 18C itself. There's a push within sections of the Government to raise the threshold by replacing the words 'insult' and 'offend' with a stronger word like 'harass'.

That view is not shared by all Coalition members though, meaning the Prime Minister will need to build consensus for change and ultimately come up with a compromise.

Figure 10.28 Police officers at Surfers Paradise on 18 December 2005. The police presence increased after text messages began circulating, encouraging violence against ethnic groups.

Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) outlines non-discrimination requirements and women's rights, with an emphasis on political life, representation, and rights to nationality, education, employment and health. It also details women's right to equality in marriage and family life, along with the right to equality before the law. It affirms the principle that 'all human beings are born free and equal in dignity and rights' in the Preamble including distinction based on sex.

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There are a number of Articles of importance to consider:

- Article 1 – defines 'discrimination' as 'any distinction, exclusion or restriction made on the basis of sex … in the political, economic, social, cultural, civil or any other field'
- Article 2 – puts obligations, including legislation, on States to eliminate discrimination against women
- Article 3 – requires States to take measures to ensure the full development and advancement of women in order to guarantee them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

The agenda for equality is specified in fourteen subsequent articles. Some important ones are:

- Article 5 – obliges States to take measures to eliminate stereotypes and prejudices about the roles and capabilities of women and men
- Article 6 – recognises the trafficking of women and exploitation of prostitution as a violation of women's human rights
- Article 7 – requires States to eliminate discrimination against women in public and political life
- Article 10 – ensures equal access to education and training for women and girls
- Article 11 – seeks to eliminate discrimination against women in employment and to promote equal opportunities for men and women
- Article 12 – recognises the right of women to access healthcare services, including family planning and reproductive health
- Article 16 – obliges States to eliminate discrimination against women in matters relating to marriage and family law, including equal rights in marriage and divorce, and protection of women and children in cases of domestic violence.

Figure 10.29 A woman holds a placard during a march for the right of women to wear what they want without harassment

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How is the CEDAW used to protect people from sex discrimination?

The implementation of the CEDAW is monitored by the Committee on the Elimination of Discrimination against Women, which was established in Article 17. The Committee is composed of 23 experts nominated by their Governments and elected by the States parties as individuals 'of high moral standing and competence in the field covered by the Convention'.

The CEDAW Committee has a number of roles. It promotes the CEDAW and its principles, makes recommendations on issues relating to the CEDAW and conducts inquiries into issues of concern or violations of the CEDAW.

One important function is to review reports that States submit (as required by the Convention) about their implementation of the CEDAW. The Committee considers the reports and makes recommendations about how a State might better protect people from discrimination.

There was also an Optional Protocol to the CEDAW in 1999. Australia acceded to this in 2009. This Protocol gave the ability to individuals to make complaints to the CEDAW Committee.

Australia has a number of areas of concern identified by the CEDAW. One was the nature and prevalence of violence against women in Australia. The gender pay gap was also noted as an ongoing issue. The Committee also expressed concern about the disproportionate impact of discrimination and violence against Indigenous women and girls in Australia. The issue of access to reproductive healthcare services in Australia, particularly in rural and remote areas was another area of concern.

Review 10.3

Select one of the roles of the CEDAW Committee and **identify** facts and statistics relating to the role.

Figure 10.30 Discrimination still exists against women despite the 1979 Convention. The wage gap between men and women for doing the same work for differing pay is just one such example.

How has Australia implemented the CEDAW?

Sex Discrimination Act 1984 (Cth)

The *Sex Discrimination Act 1984* (Cth) (SDA) prohibits discrimination on the basis of sex (s. 5), marital or relationship status (s. 6), actual or potential pregnancy (s. 7), sexual orientation (s. 5A), gender identity (s. 5B), intersex status (s. 5C), breastfeeding (s. 7AA) or family responsibilities (s. 7A). The SDA is Australia's legislative implementation of the CEDAW.

Like the RDA, it specifically prohibits discrimination in the areas of work (s. 14), accommodation (s. 23), education (s. 21), the provision of goods, facilities and services (s. 22), the disposal of land (s. 24), the activities of clubs (s. 25) and the administration of Commonwealth laws and programs (s. 26) among other things.

Division 3 of the Act also prohibits sexual harassment across a range of contexts including employment (s. 28B), educational institutions (s. 28F) and accommodation (s. 28H).

There are also a number of exemptions which should be noted under the SDA. Section 30 of the

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SDA states it is not unlawful to discriminate if there is a genuine occupational requirement for the job. For example, a men's clothing store may prefer to hire male staff to model clothes. Other exemptions include domestic situations such as shared accommodation (s. 34) and religious institutions who may discriminate based on sex if it is necessary to comply with the beliefs of the religion (s. 37).

Enforcement processes of the SDA are similar to those that assist the RDA, for example, referral to the AHRC for resolution and, if that is unable to occur, recourse to the Federal Court of Australia.

Review **10.4**

Consider Division 4 Exemptions of the *Sex Discrimination Act 1984* (Cth).

1 **Identify** two examples of exemptions from s. 30 to 32, s. 35-36, and s. 38-42. This excludes the sections from which examples were quoted above (s. 34 and s. 37). that apply to the Act.
2 **Decide** whether you agree or disagree with the examples of exemptions you have chosen, and justify your reasons.

Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities 2006 (CRPD) is an international human rights treaty that aims to protect and promote the rights and dignity of persons with disabilities. It sets out a wide range of rights for persons with disabilities and provides a framework for countries to ensure their inclusion and full participation in society.

The CRPD recognises that persons with disabilities have the same human rights as everyone else and should be able to enjoy those rights on an equal basis with others. It covers areas such as accessibility, education, employment, health, participation in political and public life, and access to justice.

There are a number of Articles of importance to consider:

- Article 3 – establishes the general principles that guide the implementation of the CRPD, including respect for dignity, autonomy, non-discrimination, full and effective participation and inclusion, accessibility and equality of opportunity
- Article 5 – addresses the right to equality for persons with disabilities and prohibits discrimination based on disability and multiple forms of discrimination, including gender-based discrimination
- Article 9 – highlights the right of persons with disabilities to access the physical environment, transportation, information, and communication technologies, and other facilities and services open to the public
- Article 12 – recognises that persons with disabilities have the right to legal capacity on an equal basis with others and promotes supported decision-making and protects individuals from arbitrary deprivation of legal capacity
- Article 19 – enshrines the right of persons with disabilities to live independently and be included in the community and emphasises the importance of providing support services and ensuring access to community-based services
- Article 24 – recognises the right of persons with disabilities to education on an equal basis with others and calls for inclusive education systems that accommodate diverse needs and promote participation, accessibility, and lifelong learning
- Article 27 – promotes the right to work for persons with disabilities, which includes provisions for reasonable accommodation, equal opportunities, and the elimination of discrimination in the workplace
- Article 30 – recognises the right of persons with disabilities to participate in cultural, recreational, leisure, and sporting activities on an equal basis with others and aims to ensure accessibility and encourage inclusion in these areas.

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Figure 10.31 Full and effective participation and inclusion in society is a fundamental human right of all persons with disabilities.

How is the CRPD used to protect people from discrimination?

The Committee on the Rights of Persons with Disabilities is comprised of a body of independent experts which monitor the implementation of the CRPD around the world. States must report within two years of ratifying the convention and every four years after that, or when requested by the Committee. The Committee examines each report and addresses its concerns and recommendations to the State in the form of 'concluding observations'.

Research **10.5**

View the United Nations Office of the High Commissioner Human Rights website and read about the Committee on the Rights of Persons with Disabilities (CRPD) at https://cambridge.edu.au/redirect/10485.

1 **Identify** the 'concluding observations' for Australia.
2 When is Australia next obliged to report?
3 **Describe** some of the criticisms of Australia's implementation of the CRPD.

How has Australia implemented the CRPD?

The *Disability Discrimination Act 1992* (Cth) prohibits discrimination on the grounds of disability and promotes equal rights and opportunities for persons with disabilities.

There are a number of protections built into the Act for persons with disabilities. In sections 5 to 7 it defines what constitutes direct and indirect discrimination based on disability. It prohibits both forms, as well as discrimination by association (where a person is treated unfairly because of their connection with someone with a disability).

The Act makes it unlawful to discriminate against someone for having a disability in a number of areas such as work (s. 15–17), accommodation (s. 25), education (s. 22), the provision of goods, facilities and services (s. 24), sport (s. 28), the activities of clubs (s. 27) and the administration of Commonwealth laws and programs (s. 29), among other things.

Australia has also established institutions and mechanisms to monitor the implementation of the CRPD, such as the Disability Discrimination Commissioner within the Australian Human Rights Commission.

Additionally, Australia has taken steps to enhance accessibility, promote inclusive education, support employment opportunities, and improve the overall wellbeing of persons with disabilities. This includes the NDIS Scheme introduced in 2013 with full rollout in 2016.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT) aims to prevent and eradicate torture and other forms of cruel, inhuman or degrading treatment or punishment worldwide. Australia signed this treaty in 1984.

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Figure 10.32 Many forms of punishment that used to be acceptable are no longer considered appropriate.

The UNCAT has a number of important articles as follows:

- Article 1 – provides the definition of torture, stating that it encompasses any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by a public official or with their consent or acquiescence
- Article 2 – establishes an absolute prohibition on torture, stating that no exceptional circumstances whatsoever, including war, public emergency, or orders from a superior, can justify torture
- Article 3 – prohibits the expulsion, return, or extradition of a person to another State where there are substantial grounds to believe they would be at risk of torture
- Article 4 – requires State parties to enact legislation that criminalises torture, makes it punishable by appropriate penalties and establishes jurisdiction over acts of torture
- Article 5 – requires States to establish jurisdiction over acts of torture committed within their territory or by their nationals and obliges States to extradite or prosecute alleged torturers found within their jurisdiction
- Article 12 – obliges States to ensure that allegations of torture are promptly and impartially investigated and if there is sufficient evidence, those responsible should be prosecuted and, if found guilty, be subject to appropriate penalties
- Article 13 – guarantees victims of torture the right to complain about their treatment and to have their case promptly and impartially examined by competent authorities and ensures victims have access to appropriate remedies and rehabilitation
- Article 16 – States parties are required to take measures to prevent other acts of cruel, inhuman, or degrading treatment or punishment that do not amount to torture but still violate human rights.

How is the UNCAT used to protect people from torture?

The UNCAT also has a committee established under Article 19: Committee Against Torture. The Committee Against Torture is a body of independent experts that monitors the implementation of the UNCAT. States parties are required to submit regular reports every four years or as requested to the Committee on measures taken to comply with the UNCAT.

How has Australia implemented the UNCAT?

Australia has implemented the UNCAT by passing the *Crimes (Torture) Act 1988* (Cth), which makes the use of torture an offence (s. 6). It also interestingly removes any ability to plead a defence of exceptional circumstances or superior orders (s. 11). The UNCAT is incorporated into the *Crimes (Torture) Act 1988* (Cth) as a Schedule.

There is also an Optional Protocol (OPCAT) that Australia ratified in 2017. As a party to OPCAT, Australia is required to have established a National Preventive Mechanism (NPM) to monitor places of detention and prevent torture and other forms of ill-treatment. The NPM is responsible for conducting regular visits to places of detention, such as prisons, police stations and immigration detention centres, to assess the treatment and conditions of detainees and make recommendations to prevent abuses. This Optional Protocol also established a sub-committee called the United Nations Subcommittee on Prevention of Torture.

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Figure 10.33 Holding children in detention centres has been the cause for criticism of Australia's policies in relation to OPCAT.

Research 10.6

Research Australia's implementation of the UNCAT and OPCAT. **Identify** any areas where concern has been expressed about how these instruments are operating in Australia.
You may wish to use the following links to assist: https://cambridge.edu.au/redirect/10486 and https://cambridge.edu.au/redirect/10487.

Other Australian Laws to protect human rights

The Australian Constitution

The Australian Constitution is the set of rules that outlines the legal and political system by which Australia is governed. Within the framework of the Australian Constitution, the Commonwealth Government and the state governments have different responsibilities.

Although both the United States and Australia have a written constitution, we don't have a bill of rights, so we can't go about demanding them. However, the laws of the Australian Constitution can be changed with the approval of the people, through a referendum. The Constitution of Australia defines the responsibilities of the federal government which include international and inter-state trade, foreign affairs, defence, immigration, taxation, banking, insurance and marriage, to name a few. Governments of states and territories are responsible for all matters not assigned to the Commonwealth.
Section 51 of the Australian Constitution begins with:

> **Chapter I. The Parliament**
>
> **Part V – Powers of the Parliament**
>
> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...

Source: Parliament of Australia. Subject to Commonwealth of Australia copyright.

What is not included in section 51 remains the jurisdiction of state parliaments, although they can refer certain matters back to the Commonwealth.

As the Australian Constitution does not state exactly what the Commonwealth and States legislative powers are, there have been a number of High Court challenges to the power of the Commonwealth to make laws under section 51 – usually challenges by the states, indicating that certainty is not guaranteed. It is the role of the High Court to interpret the meaning of the Australian Constitution and to settle any disputes about its meaning.

Express and implied rights in the Australian Constitution

Perhaps surprisingly, the Australian Constitution is not a list of rights; however, some express rights are listed below:

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Section 41: No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.
Section 51 (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.
Section 80: The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.
Section 116: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.
Section 117: A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Source: Parliament of Australia. Subject to Commonwealth of Australia copyright.

Somewhat surprisingly, these are really the only rights people have that are expressed directly in the Constitution. The role of the Constitution is therefore limited in protecting human rights in Australia, especially **express rights**.

There has been an **implied right** (as opposed to expressed) interpreted into the Constitution. The right to freedom of political communication was found by the High Court of Australia to be an implied right in the case of *Lange v ABC* (see Case study 10.2). This was done using the essentially democratic nature of the Constitution through sections such as sections 7 and 24, which relate to the election of people to the Senate and House of Representatives and the views that may be expressed in relation to those elected representatives. This doctrine recognises that a representative democracy, as established by the Constitution, inherently requires freedom of political speech and discussion to function effectively.

express right a right that is explicitly and clearly stated within the text of the Australian Constitution

implied right a right that has been inferred by the courts based on the structure and principles of the Australian Constitution, even though it is not specifically mentioned

Case study **10.2**

The case: *Lange v Australian Broadcasting Corporation* [1997] HCA 25

Figure 10.34 Former NZ Prime Minister David Lange (left) sued the ABC for defamation.

Citation

[1997] HCA 25 means this case was decided in 1997 and is found in the High Court of Australia report for that year starting on page 25.

Facts

In 1995, Mr. Lange, a former Prime Minister of New Zealand and an Australian resident, brought a defamation action against the Australian Broadcasting Corporation (ABC).

The defamation occurred during a broadcast of the ABC's *Four Corners* program, where allegations were made about Lange's involvement in an

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incident known as the 'French Connection'. This incident was in regard to nuclear testing in the Pacific, which he said implied the government he led had come to be improperly under the influence of large business interests as a result of those interests making large donations to New Zealand Labour's 1987 election campaign funds.

Legal issue

The key legal issue in this case was whether Lange, as a public figure, was entitled to sue for defamation, considering the implied freedom of political communication under the Australian Constitution.

Decision

The High Court of Australia held, by a majority of 6 to 1, in favour of Lange. The Court ruled that the common law of defamation needed to be modified in recognition of the implied freedom of political communication.

Ratio decidendi (reason for the decision)

The majority reasoned that the implied freedom of political communication is essential for the effective functioning of representative democracy. They held that Lange, as a person actively engaged in political discourse, was entitled to the protection of this implied freedom, which could limit the application of defamation law. The court expanded a defence called 'qualified privilege', which protected publications on political matters as long as they were not motivated by malice and were reasonable in the circumstances.

Obiter dicta (something to think about)

The majority of the court emphasised the importance of protecting political discourse and ensuring that public figures could engage in robust debates without undue fear of defamation lawsuits.

McHugh J dissented, arguing that the majority's decision unnecessarily expanded the qualified privilege defence. The ABC also suggested this was an unnecessary restriction on the freedom of the press to report on issues involving those in power and hold them accountable.

There is another important section of the Australian Constitution that assists in protecting human rights in Australia. Section 51(xxix) gives the Australian Parliament the power to make laws with respect to 'external affairs'. This power is often referred to as the 'foreign affairs power'. It allows the Commonwealth to legislate on matters that relate to Australia's international relations, including the power to enter into treaties, make decisions about war and peace, and conduct diplomatic relations with other countries.

This means that whenever Australia enters into international human rights treaties and ratifies them, it does so under the power given by this section. Additionally, section 51 xxix has been interpreted by the High Court as giving recognition of customary international law as part of Australian law. For example, in the *Mabo v Queensland (No 2)* case, the High Court of Australia held that the doctrine of *terra nullius* (the notion that Australia was unoccupied before European settlement) was inconsistent with international law, and therefore invalid. This decision paved the way for the recognition of native title rights for First Nations peoples.

Apart from the Constitution of Australia, there are other laws at both a federal and a state level that

Figure 10.35 Murray Islands: Waier in foreground, Murray (also known as Mer, home of the late Eddie Mabo) beyond.

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seek to protect human rights in Australia in a more direct manner. These will be explored in more detail in Chapter 12 but are outlined briefly here.

Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (HRPSA) is a very important one in the Australian framework of laws that seek to protect human rights. Under the HRPSA, all new Bills must be compatible with the rights and freedoms recognised in the seven core international human rights treaties that Australia has ratified:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the International Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Elimination of All Forms of Discrimination Against Women
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities.

Source: Attorney-General's Department.

The Act also requires the establishment of a Parliamentary Joint Committee on Human Rights (PJCHR). The committee:

- examines Bills, Acts and legislative instruments for compatibility with human rights
- examines Acts for compatibility with human rights
- inquires into any matter relating to human rights referred to it by the Attorney-General.

This means all proposed federal laws in theory must be accompanied by a statement of compatibility (SOC) setting out whether the law would be compatible with Australia's most significant international human rights obligations.

The proposed law and the SOC is then reviewed by the PJCHR and the Committee makes a determination of the extent to which the proposed law is compatible with human rights and reports its findings to Parliament.

In some respects, the HRPSA would seem to be an important safeguard for human rights. However, it has been the subject of some criticism. For example, Parliament is not under any legal obligation to act on the findings from the PJCHR. Recently, the Committee has reduced the detail around how it operates and no longer details which Bills it has considered. Also, Bills have been enacted into law before the Committee which has reported on them, which clearly undermines the process of assessing compliance with human rights obligations and making recommendations about what should be changed in order to do so. The PJCHR has also been beset with partisanship and dissent. The government of the day has been able to influence the operations of the PJCHR by appointing the Chair of the Committee and ensuring the way Committee deliberations are recorded has been kept vague and reached no actual conclusions on the compatibility of laws with human rights obligations. Therefore, some may argue that the operation of the HRPSA is not optimal in protecting human rights in Australia.

Figure 10.36 People hold up placards at a protest outside an immigration office in Sydney on 4 February 2016.

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Review 10.5

The following extract comes from the Human Rights Law Centre at RMIT from their paper 'Human Rights Scrutiny in the Australian Parliament: Are new Commonwealth laws meeting Australia's international human rights obligations?'

Intelligence Services Amendment Bill 2018

Passed: December 2018
Initial PJCHR Report: February 2019
Final PJCHR Report: April 2019
How it changed the law: Empowered Foreign Affairs Minister to authorise the use of force (including the use of weapons) by ASIS officers overseas
Human rights analysis: PJCHR was unable to conclude its compatibility analysis because the Minister did not respond to its request for information. Scope of authorisations and Guidelines for implementation remained unknown.

PJCHR – Report 2 of 2019 (April 2019)

Education Legislation Amendment (2020 Measures No. 1) Bill 2020

Introduced: June 2020
Passed: June 2020
Initial PJCHR Report: July 2020
Final PJCHR Report: August 2020
How it changed the law: Introduced a mandatory 'Unique Student Identifier' (USI) – a kind of Australia Card for HE and VE students.
Human rights concerns: Making student funding contingent on obtaining a USI (with no exemptions available and no clear need for a change), raises privacy issues and may limit some students' right to an education.

PJCHR – Report 10 of 2020 (August 2020)

Source: Adam Fletcher, 'Human Rights Scrutiny in the Australian Parliament: Are new Commonwealth laws meeting Australia's international human rights obligations?' *Human Rights Law Centre*, December 2022, page 9.

Treasury Laws Amendment (International Tax Agreements) Bill 2019

Passed: November 2019
Initial PJCHR Report: December 2019
Final PJCHR Report: February 2020
How it changed the law: Enabled exchange of taxpayer information between Israel and Australia to 'improve administrative cooperation in tax matters to help reduce tax evasion and avoidance'.
Human rights concerns: PJCHR requested information on safeguards in both Israeli and Australian law, as well as remedies available for taxpayers whose information is not kept private.
In this case, the Government was able to provide the information to the PJCHR's satisfaction by pointing to relevant bilateral treaty and Privacy Act provisions.

PJCHR – Report 1 of 2020 (February 2020)

Coronavirus Economic Response Package Omnibus Bill 2020

Introduced: March 2020
Passed: March 2020
Initial PJCHR Report: April 2020
Final PJCHR Report: August 2020
How it changed the law: Provided for a range of increases to welfare and tax cuts to provide economic relief to citizens at the height of the COVID-19 crisis.
Human rights concerns: The law was generally protective of rights, but PJCHR noted that those on pensions seemed to be treated differently from those on other forms of welfare, without adequate justification.

PJCHR – Report 9 of 2020 (August 2020)

1 **Analyse** the weakness(es) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

2 Refer to the dates on which some of the laws above were passed. **Identify** the implications for proper scrutiny based on these dates.

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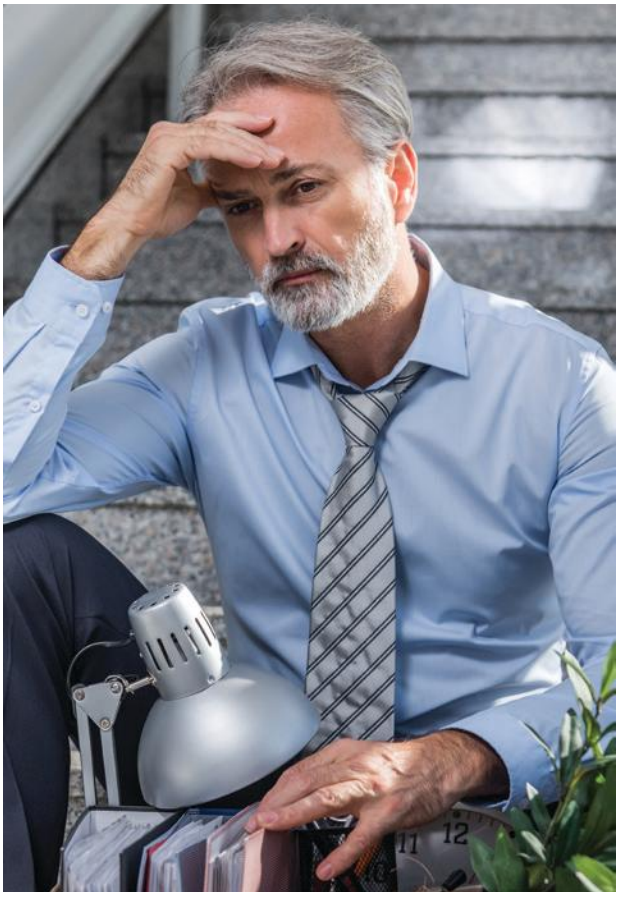

Figure 10.37 Older job seekers report that they are candidly or surreptitiously rejected through recruitment processes on the basis of age alone.

Age Discrimination Act 2004 (Cth)

A more recent addition to the laws protecting the right to freedom from discrimination in Australia is the *Age Discrimination Act 2004* (Cth) (ADA). The ADA prohibits age discrimination in areas such as employment, education, accommodation and the provision of goods and services. Under the Act, people of any age may not be unlawfully discriminated against. This has been increasingly important in Australia in recent times, as people are generally working later in life so need the protection from discrimination that this legislation provides. There are also, however, a number of exemptions from this Act. These include religious organisations, charitable organisations and so-called 'positive' discrimination, where someone may deliberately want to employ someone who is much older.

This is dealt with in a different way at an international level. There is no single document that protects people against discrimination on the basis of age. Instead, it is contained in a number of the human rights instruments:

1. Universal Declaration of Human Rights: Article 2 states that everyone is entitled to all the rights and freedoms set forth in the declaration without discrimination of any kind, including discrimination based on age.
2. International Covenant on Civil and Political Rights: Article 26 prohibits discrimination on various grounds, including age.
3. International Covenant on Economic, Social and Cultural Rights: Article 2 prohibits discrimination on various grounds, including age.
4. Convention on the Rights of the Child: It does not explicitly mention age discrimination, it establishes the principle of non-discrimination (Article 2) and emphasises that all rights must be ensured without discrimination of any kind.

Anti-Discrimination Act 1991 (Qld)

At a state level, Queensland has its own Act that seeks to protect the right to freedom from discrimination, the *Anti-Discrimination Act 1991* (Qld). This Act prohibits discrimination on the basis of the following attributes:

- sex
- relationship status
- pregnancy
- parental status
- breastfeeding
- age
- race
- impairment
- religious belief or religious activity
- political belief or activity
- trade union activity
- lawful sexual activity
- gender identity
- sexuality
- family responsibilities
- association or relationship with a person identified on the basis of any of the above attributes.

Source: Anti-Discrimination Act 1991 (Qld).

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Similar to the various federal laws, this Queensland Act operates in areas related to work, education, accommodation, and supply of goods and services.

The following table compares attributes on which discrimination is prohibited across Commonwealth, state and territory legislation – these are also known as protected grounds of discrimination.

Table 10.3 Summary of protected grounds of discrimination contained in Commonwealth and state and territory legislation

Protected grounds	Cth	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
Age	·	·	·	·	·	·	·	·	·
Breastfeeding			·	·			·	·	
Colour	·	·	·	·	·	·		·	·
Compulsory retirement	·	·	·	·	·	·		·	·
Criminal record (irrelevant or spent conviction)	·				·		·	·	
Descent	·	·	·	·	·	·		·	·
Disability	·	·					·		
Ethnicity	·	·	·	·	·		·	·	·
Family responsibilities	·				·		·		
Impairment	·		·	·	·	·		·	·
Marital status	·	·	·	·	·	·	·	·	·
Medical record	·								
National origin	·	·	·	·	·	·		·	·
Nationality	·	·	·	·	·	·		·	·
Parenthood			·	·			·	·	·
Physical features			·						
Politics	·	·	·	·	·		·	·	·
Pregnancy	·	·	·	·	·	·	·	·	·
Race	·	·	·	·	·	·	·	·	·
Racial hatred	·	·		·	·	·	·		·
Religion	·		·	·	·		·	·	·
Sex	·	·	·	·	·	·	·	·	·
Sexual harassment	·	·	·	·	·	·	·	·	·
Sexuality	·	·		·		·	·	·	·
Trade union activities	·		·	·			·	·	
Transgender		·				·	·		

Source: Australian Human Rights Commission (2013), 'How are human rights protected in Australian law?'

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Figure 10.38 Discrimination on the basis of involvement with trade union activity is unlawful in Australia.

Research **10.7**

1. From the list provided in Table 10.3, select one row (protected ground or attribute) and research how the law in each state/jurisdiction cover it. **Compare** and **contrast** the similarities and the differences in the laws and present your findings to the class.
2. It could be suggested that ethical behaviour includes not interfering unduly with the recognised rights of another individual (see for example the discussion on page 379 on competing rights). **Describe** a circumstance in which you believe this would not be possible from your 'ethical' perspective.

Human Rights Act 2019 (Qld)

The *Human Rights Act 2019* (Qld) (HRA) aims to ensure that human rights are respected, protected and promoted in Queensland, and to provide a framework for the resolution of human rights complaints.

The HRA sets out a number of human rights that are protected under the law in Queensland including the right to life; freedom from torture and cruel, inhuman or degrading treatment; freedom of expression; and the right to a fair trial.

The HRA requires all public entities and officials to act consistently with human rights and to consider human rights when making decisions. Compliance with the Act is monitored through the Queensland Human Rights Commission (which was previously known as the Anti-Discrimination Commission) and provides for complaints to be made to the Commission if a person believes their human rights have been breached.

The HRA does have some limitations. It only applies to public entities and public officials (essentially those bodies that are state government bodies or state government officials acting in that capacity), which means that it does not cover private individuals or organisations. It also only covers 23 human rights listed in the Act which means those not listed are not directly protected. The way the HRA works means it does not actually have direct enforcement powers but instead relies on complaints made to the Human Rights Commission. The Commission can then investigate the complaint and make recommendations but does not have the power to enforce its findings.

The HRA aims to ensure that human rights are respected, protected and promoted in Queensland, and to provide a framework for the resolution of human rights complaints. The HRA sets out a number of human rights that are protected under the law in Queensland.

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Table 10.4 Rights covered in the *Human Rights Act 2019* (Qld)

1.	Recognition and equality before the law
2.	Right to life
3.	Protection from torture and cruel, inhuman or degrading treatment
4.	Freedom from forced work
5.	Freedom of movement
6.	Freedom of thought, conscience, religion and belief
7.	Freedom of expression
8.	Taking part in public life
9.	Peaceful assembly and freedom of association
10.	Property rights
11.	Privacy and reputation
12.	Protection of families and children
13.	Cultural rights—generally
14.	Cultural rights—Aboriginal peoples and Torres Strait Islander peoples
15.	Right to liberty and security of person
16.	Humane treatment when deprived of liberty
17.	Fair hearing
18.	Rights in criminal proceedings
19.	Children in the criminal process
20.	Right not to be tried or punished more than once
21.	Retrospective criminal laws
22.	Right to education
23.	Right to health services.

can then investigate the complaint and make recommendations but does not have the power to enforce its findings. In addition, the long-term effects on how public services are delivered and how well it protects human rights are yet to be seen. Restorative justice approaches, encouraged by the Act, may not be suitable for all situations and so may be limited in actually effecting real consequence.

It is also possible for the state government to override the HRA. The Queensland Parliament has the power to limit some human rights in extreme situations. These situations are called 'exceptional circumstances' and can include things like wars, emergencies, or major crises. This power has been used twice so far.

- The first time, it allowed them to make it a crime for young people to break bail conditions (and related matters).
- The second time, it allowed police to hold young people in custody for an indefinite period.

These actions meant that some human rights protections for children were temporarily overridden. These rights include:

- Protection from cruel, inhumane or degrading treatment or punishment.
- Being held separately from adults.
- Maintaining connections with family and relatives.
- Not being punished more harshly for a crime than the penalty in place at the time the crime was committed.

There has been some public concern about the ways in which the HRA can operate. In 2024, in accordance with section 95 of the HRA, a review of the Act was commenced. The review will assess how well the Act has been implemented and how well it is meeting its objective of building a culture of human rights across the Queensland public sector. The Reviewer will also be required to specifically consider:

- whether additional human rights should be included as human rights under the Act;
- whether further or different provision should be made in the Act with respect to remedies available under the Act; and
- whether the amendments made by the Act to the *Corrective Services Act 2006* and the *Youth Justice Act 1992* are operating effectively.

At the time of writing this review was ongoing.

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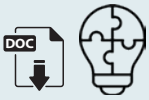

10.6 Topic review

Topic summary

- The term 'human rights' is closely linked to the values we believe and accept in our society.
- Human rights are based on the principle that an individual should be treated with dignity, freedom and respect.
- Legal rights are those rights that exist in either common or statute law.
- Australia's legal system has a number of laws that deal with the protection of human rights at the state and federal levels.
- Moral rights exist within our society, and in some respects have some formal binding action on us.
- It is not ethical to act towards another person in a manner that is discriminatory or negligent.
- Customary rights originate from customs and traditions, but they have no legal basis.
- Australia is also part of an international framework of processes that attempts to protect human rights around the world, through its involvement with the United Nations.
- The most relevant and most quoted United Nations convention dealing with rights is the Universal Declaration of Human Rights 1948.
- There are several other important international human rights treaties that Australia has signed and is obligated to enforce.
- The Australian Constitution is a set of rules that outlines the legal and political system under which Australia is governed.
- It is the role of the High Court to interpret the meaning of the Australian Constitution and to settle any disputes.

Short-response questions

1 **Describe** the processes used to ensure international human rights treaties and conventions play a role in promoting and safeguarding human rights in Australia.
2 **Explain** how the Australian parliament ensures Australian laws comply with human rights obligations.
3 **Describe** the role the High Court has played in protecting human rights in Australia.
4 **Explain** the process by which Australia accepts and adopts a new treaty (as opposed to signing an existing one), providing an example.
5 **Identify** the general obligations of a signatory country to a treaty or convention.
6 The Australian Constitution has expressed and implied rights. **Explain** the difference and provide examples for each.
7 **Describe** the features of the UN Charter.
8 **Describe** the function of the UN Human Rights Commissioner for Refugees.
9 **Explain** the relevance of the Magna Carta 1215 on human rights development.
10 **Outline** and **explain** the purpose of the Convention relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967. Provide two significant provisions in your explanation.

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Extended-response questions

1 Table 10.3 highlights the protected grounds of discrimination in the legislation of each state and territory. **Discuss** why different states/territories have varying forms of protection and provide some suggestions for how all states/territories could be protected equally. Justify whether or not this is necessary.

2 Visit the Department of Home Affairs website's pages on 'Immigration and citizenship and, using the lists of 'Our democratic beliefs' and 'Our freedoms' found on the page 'Learn about being an Australian citizen, research these beliefs and freedoms in our society. Prepare a presentation on how these beliefs and freedoms impact our lives.

Response-to-stimulus questions

1 'Australia's framework to protect human rights is one that most Australians can be proud of.' **Create** a 200–300-word persuasive speech about this statement. Try to include at least two arguments from either side of the debate and persuade your audience that your perspective is the correct one.

2 Read Source 1 from the Human Rights Law Centre at RMIT from their paper 'Human Rights Scrutiny in the Australian Parliament: Are new Commonwealth laws meeting Australia's international human rights obligations?'

Source 1

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021

Introduced: September 2020
Passed: November 2021
How it changed the law: Established extended 'supervision order' scheme for high risk offenders (replacing prior control order scheme). People considered to pose an 'unacceptable risk' to the community may be detained for up to 3 years (with possibility of extension) by court order.

Human rights concerns: May involve double jeopardy, undue restrictions on privacy and liberty, as well as freedom of movement and association, and possibly also rights to work, to educate oneself, to practise one's religion or to care for one's family (depending on the conditions attached to the supervision order). The PJCHR, after considering advice from the Attorney-General about how a person's risk factors would be assessed, concluded that the Bill 'inverts the basic assumptions of the criminal justice system', and that the Government simply claiming such a measure is not a 'penalty' does not make it so. It recommended that supervision orders be issued on the basis of a higher standard of proof than the balance of probabilities, which is the standard in civil matters. The PJCHR also had concerns about fair hearings, but concluded that the 'special advocate' regime set up for offences involving national security information was acceptable.

Source: Adam Fletcher, 'Human Rights Scrutiny in the Australian Parliament: Are new Commonwealth laws meeting Australia's international human rights obligations?' *Human Rights Law Centre*, December 2022, page 15.

Do you believe that the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021 strikes a fair balance between protecting the rights of individuals and ensuring the safety of society? In 200–300 words, provide arguments to support your stance, considering the potential human rights concerns mentioned in the extract.

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Chapter **11** Topic **2**

Australia's legal response to international law and human rights

Chapter overview

In Topic 2, students examine the role Australia plays in upholding human rights globally. Students focus on legal issues and international situations that impact human rights and Australia's legal response to them.

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Chapter objectives

By the end of this topic, students should be able to:

- Explain how human rights are monitored, including the reporting system, United Nations Special Rapporteurs, inter-State complaints, ancillary bodies and individuals.
- Explain the role of international legal institutions in upholding rights, including those within the International Court of Justice (ICJ) and the International Criminal Court (ICC).
- Analyse the legal implications of becoming a signatory to various internationally recognised treaties and conventions related to the protection of global citizens and property, e.g.
  - Universal Declaration of Human Rights 1948
  - Protocol Relating to the Status of Refugees 1967
  - Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 'Hague Abduction Convention')
  - United Nations Declaration on the Rights of Indigenous Peoples 2007
  - Geneva Conventions 1949 and The Hague Conventions of 1899 and 1907.
- Select legal information, then analyse and evaluate Australia's response to international law and human rights, focusing on one or more contemporary legal issues and/or international legal institutions, e.g.
  - the rights of the child, e.g. education, safety, health
  - the right to be free from discrimination, e.g. age, gender, disability
  - the rights of women, e.g. freedom from violence, reproductive rights
  - International Court of Justice (ICJ)
  - International Criminal Court (ICC).
- Create responses that communicate meaning to suit the intended purpose in paragraphs and analytical essay responses.

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Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

International law comes from a number of sources. For legislation to have international recognition, it generally has to take the form of a treaty (an international agreement between nation States or international organisations) that is then incorporated into the domestic laws of other countries through laws passed in those countries. The following is a list of major treaties, conventions and other internationally recognised instruments that seek to regulate the behaviour and relationships of States and their citizens in international contexts.

- Comprehensive Test Ban Treaty (1996)
- Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1985)
- Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)
- Convention on the Law of the Sea (1982)
- Convention on the Prevention and Punishment of the Crime of Genocide (1951)
- Convention on the Rights of the Child (1989)
- Convention Relating to the Status of Refugees (1951) and the Protocol Relating to the Status of Refugees (1967)
- General Agreement on Tariffs and Trade, updated in 1994 into the Marrakesh Agreement Establishing the World Trade Organization
- Global Plan of Action to Combat Trafficking in Persons (2010)
- International Convention on the Elimination of All Forms of Racial Discrimination (1966) (ICERD)
- International Treaty on Plant Genetic Resources for Food and Agriculture (2001)
- Kyoto Protocol (1997)
- Nuclear Non-Proliferation Treaty (1968)
- Paris Agreement (2015)
- Rome Statute of the International Criminal Court (1998)
- Statute of the International Court of Justice (1948)
- Treaty of Good-Neighborliness and Friendly Cooperation Between the People's Republic of China and the Russian Federation (2001)
- Treaty on the Prohibition of Nuclear Weapons (2017)
- Twin Covenants: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
- United Nations Charter (1945)
- Universal Declaration of Human Rights (1948)

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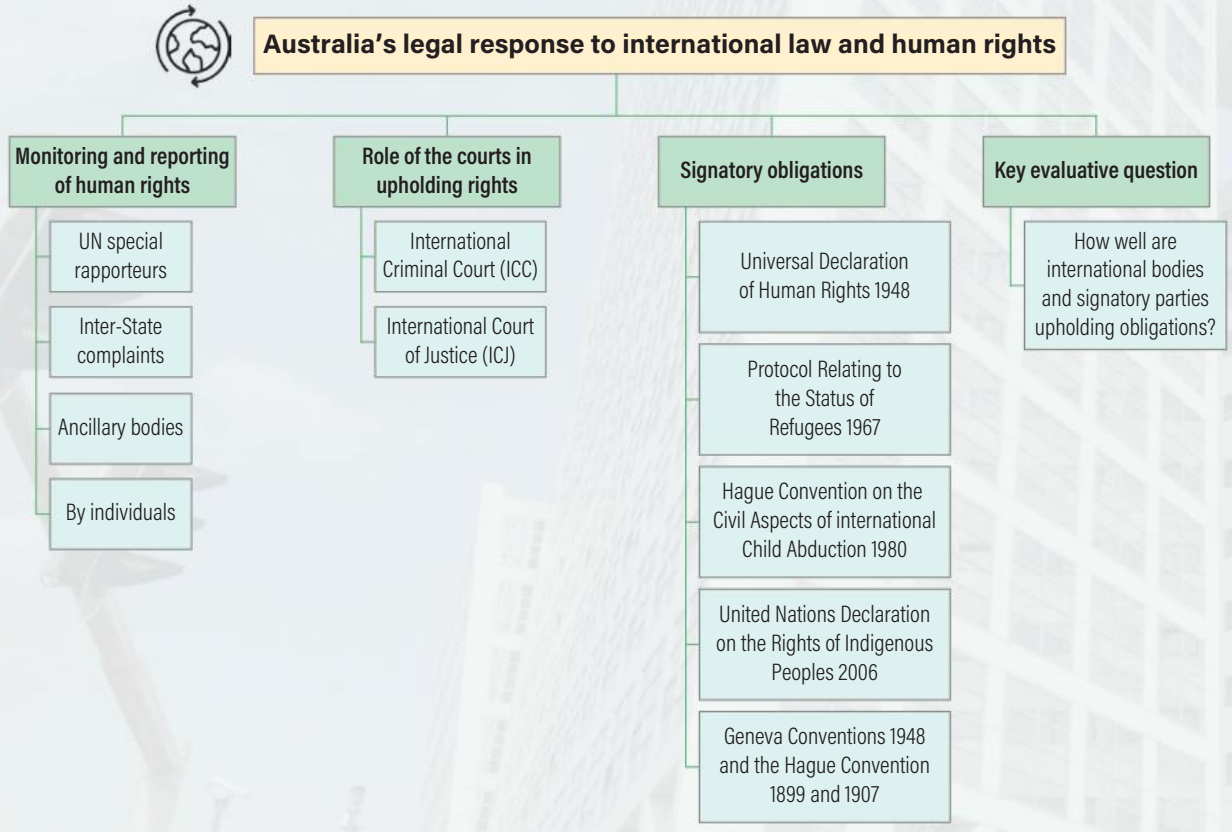
Significant cases

This topic will include the following cases:

- Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)
- *Chow Hung Ching v R* (1948) 77 CLR 449
- *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmania Dam Case*)
- *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) [1986] ICJ Rep 14
- *Nulyarimma v Thompson* (1999) 164 ALR 621
- Whaling in the Antarctic (Australia and New Zealand v Japan)

Concept map

In Topic 2 of Unit 4 of the QCAA Legal Studies course, we will cover the following content:



Background image: The International Criminal Court in the Hague, a city of the Netherlands.

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11.1 Overview of international law

In previous chapters, we have touched on the topic of international law as it relates specifically to human rights. Obviously, there is more to international law than just the Universal Declaration of Human Rights 1948 and other associated conventions, covenants or treaties that seek to protect people around the world. This means that an examination of international law as it operates more broadly is necessary. Additionally, Australia's response to international law and how human rights operate in that context is also important. In particular, the effectiveness of international law needs to be considered closely, as there is some debate about how effective international law can be if enforcement by any one sovereign body is not possible. The United Nations does not seek to operate as a 'ruling body' over nations, so there is always some debate about what to do if a nation chooses to ignore the United Nations or does not abide by UN treaties or conventions. A number of obligations may be imposed on people and countries that extend the concept of what is right or legal beyond basic or fundamental human rights.

International law – public and private

Due to the rapid **globalisation** of the world, the importance of international law has increased. This is evident with regard to the global issues of climate change and human rights. The international mobility of Australians has prompted interest in a wide range of international affairs, including the activities and dealings of Australian citizens in other countries.

International law is basically a set of rules that relate to how countries from around the world will deal with each other, and it has a long history. When we think of this area of law, the things that usually come to mind are war and attempts at peace, the United Nations and treaties, and Australian citizens who have been caught up in the laws of another country.

globalisation the reality that all countries are becoming more dependent on and connected with one another, socially, economically and through international law

Figure 11.1 Travelling internationally exposes citizens of one country to the laws of other nations.

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International law can be divided into public international law and private international law:

- **Public international law**, also described as 'the law of nations', is generally referred to simply as 'international law', which is the approach followed in this textbook
- **Private international law**, sometimes known as conflict of laws, deals with legal matters involving individuals, entities or corporations that are connected to multiple jurisdictions. Its primary aim is to resolve conflicts arising from different laws that exist in multiple jurisdictions. For example, if you buy a book online, you might be in Australia, and pay Australian currency for it, but the seller might be a company whose corporate base is in the Marshall Islands, but whose website (where you placed the order) operates in the United States. The book itself might be dispatched from Indonesia. In the event of a dispute, which law is applied? Australian? Marshall Island? United States? Indonesian? Private international law is a set of rules to resolve this question (see Figure 11.2 Divisions of international law).

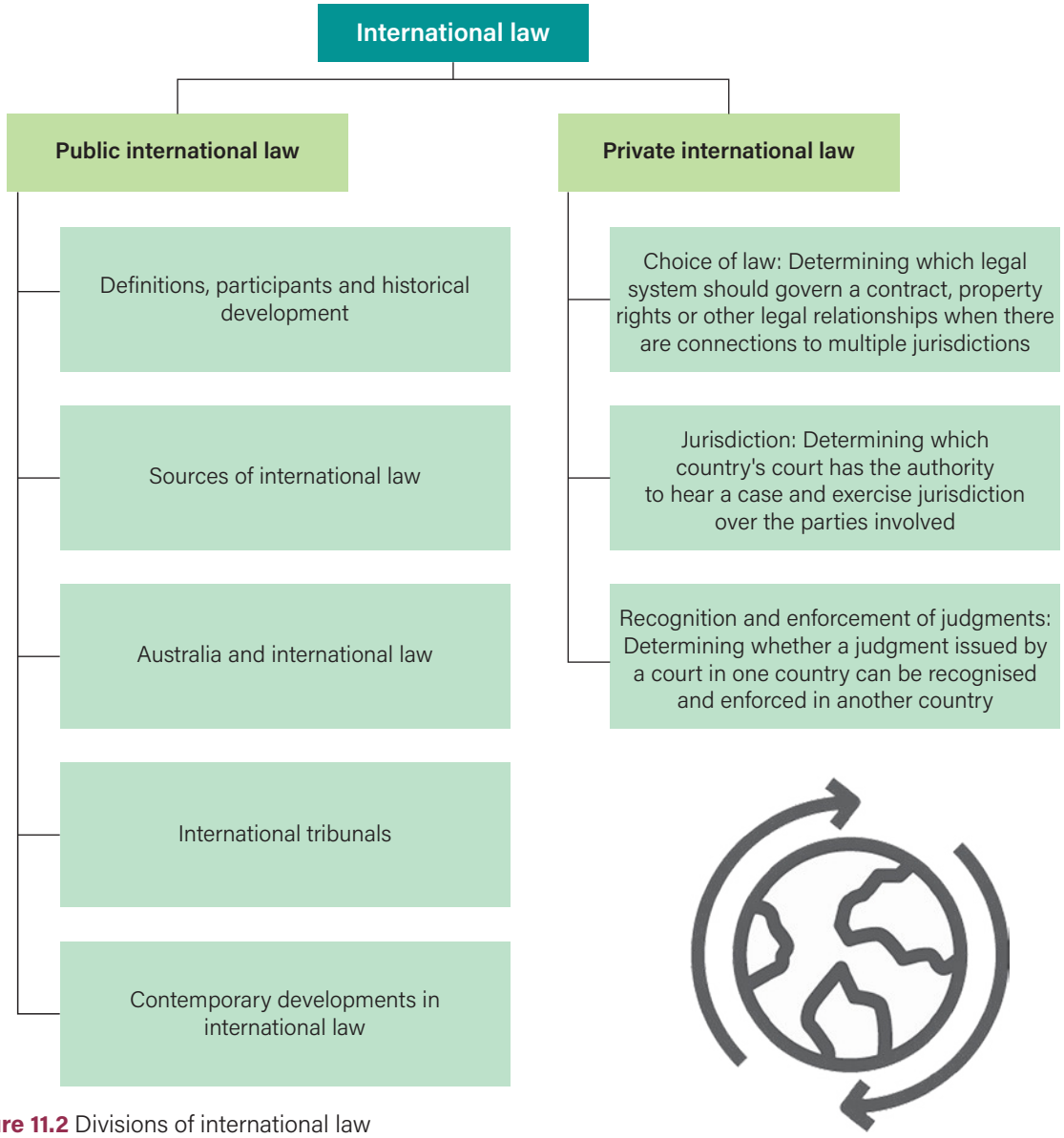

Figure 11.2 Divisions of international law

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Definitions

International law is different from the laws of Australia, where laws are passed by the legislative arm of government (the parliament), implemented by the executive arm of government (the Cabinet and government departments) and interpreted by the judicial arm of government (the courts). International law arises from a variety of sources; whether it applies in a particular country depends in large measure on whether that country recognises the law.

Here is an example of a traditional definition of international law:

> That body of law comprising principles and rules that states recognise as legally binding and that regulate the conduct of subjects of the law and relate to events and issues that transcend national boundaries (and are of international concern).
>
> *Source:* Blay, Piotrowicz and Tsamenyi, eds. *Public International Law: An Australian Perspective*, Melbourne: Oxford University Press, 1997, p. 1.

In simple terms, according to this definition, international law is made up of the legally binding rules that apply in international matters between countries. It establishes the rights and obligations of States and regulates their conduct in areas such as human rights, international treaties, diplomatic relations, armed conflicts and the use of force.

Some writers, however, point to the need to extend this definition of international law because of global developments – for example, international bodies and international moves to protect human rights and freedoms – and set out rules for the punishment of persons found guilty of international crime. An example of such an extended definition is:

> That body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their formal relations with each other, and which includes also: (a) the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and (b) certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community.
>
> *Source:* Reicher, *Australian International Law: Cases and Materials*, Sydney: Law book Company Information Services, 1995, p. 3.

International law is a subset of a broader concept: the **rules-based world order**. One of the major features of the rules-based world order has been the dramatic growth and development of international law over the last 60 years. In that time, international law has become a powerful force for world peace, for example, through the establishment of strategies for mediation and peacekeeping. Participants in international law are not individuals, but independent nations, the United Nations and a very limited number of other international organisations sometimes established as a result of specific treaties.

rules-based world order the activities of, and relationships between, all the world's countries, including power relations, international law, the global economy and global politics

Historical development

To fully understand international law, we need to delve into a little history. This will be confined to an examination of the international approach to the use of force and the role of the United Nations.

Figure 11.3 The use of force in Ukraine may be justified to defend the country from Russian military action.

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The use of force

'Force' is not necessarily a negative word. We are influenced by others to do certain things, many of which are to our long-term advantage. When we use the word 'force', negative connotations arise, but in any civilised society there is the need, on occasion, to allow the use of legitimate force to protect others.

The twentieth century presented many examples of countries using force against one another – force that most would now regard as having been a negative blot on the history of the world. In regard to the international arena, we will briefly examine the approach that has been taken with the controlled use of force following the two world wars. There are situations in which the use of military force is seen as appropriate and/or legal. The two world organisations established in the twentieth century to prevent war – the League of Nations and the United Nations – both recognised circumstances in which the use of force would be regarded as legal and necessary. In fact, there were few international rules on the use of force until the twentieth century.

After World War I, the League of Nations was formed. It attempted the approach of requiring that member countries to try every other way of resolving a matter before resorting to war. In 1928, a statement was made renouncing war. This was a positive step towards the elimination of war, but it was not a global treaty for peace and therefore was not applicable to non-member countries. This had negligible restraining influence on national leaders who were determined to use aggressive force.

Following World War II, the United Nations was formed. The Charter of the United Nations (UN Charter) adopted the idea that force or the threat of force should not be the norm in international relations. The UN Charter states in Article 2(4), that:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations.
>
> *Source:* United Nations Charter, Article 2(4), 1945.

However, the UN Charter recognised that force would sometimes be used, so it sought to create a legal framework for this. In Article 51, the UN Charter states that force can be used in self-defence. As discussed in Chapter 10, this Article has been used to justify US military action following the 9/11 terrorist attacks in 2001.

As well as including a self-defence clause, the UN Charter was realistic enough to legally allow the use of force in circumstances other than self-defence. The restriction placed upon this use of force was that it had to be agreed to by the UN Security Council (which is like an inner circle of major nations).

Chapter VII of the UN Charter states that the UN Security Council can act under Article 42 of this part of the charter to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'. However, due to the tensions that existed between the United States and its allies, Russia and its allies, and China and its allies, from the formation of the United Nations, the ability of the Security Council to exercise its military powers has been compromised. This is because the United States or the former Soviet Union

Figure 11.4 Force has a role in the maintenance of law and order in the international sphere. Here we see a UNIFIL vehicle patrolling a road along the Lebanon–Israel border on 12 October 2023 in Yarine, Lebanon. In the wake of a large-scale Hamas attack on Israel, which promoted a declaration of war from the Israeli prime minister, the Israeli army and militants of the Iran-backed Hezbollah engaged in deadly skirmishes along the Israel–Lebanese border.

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(now Russia) or China would use its **veto** power if any Council resolution affected its interests. The veto power means any of the five permanent members of the Security Council (the United States, Russia, China, the United Kingdom and France) can vote against any of the Council's resolutions/motions or any changes to the United Nations as a whole, and effectively block such resolutions or changes. This makes reform of the United Nations very difficult.

veto a constitutional right to reject a legal enactment

When the United Nations was being formed, it was made clear to the other nations of the world that without this veto power being given to the so-called 'Big Five' powers, there would not be a United Nations. As a result, many view the veto power as the most undemocratic part of the United Nations. This can be seen in how it has been used recently to delay or refuse to take action in relation to issues or incidents that many would regard as breaching a number of human rights.

In November 2017, Russia vetoed a 30-day renewal of a commission investigating chemical weapons attacks in Syria. Russia has close ties with the government of Syria, and the veto follows on from a February 2017 veto when China and Russia vetoed UN sanctions over chemical weapons in Syria. This continued in 2019 and 2020 when both China and Russia vetoed the provision of humanitarian support access to Syria.

The United States has also exercised the veto power in 2017, 2018 and 2023 when draft motions involving criticism of its ally Israel were proposed in relation to the ongoing conflict between Israel, the Palestinian territories in the Gaza Strip and the West Bank.

A further recent example involved Russia exercising the veto power in relation to a draft resolution calling on Russia to cease its military action and invasion in Ukraine in 2022. These uses of the veto power give credit to the argument that such a power is not always used in the best interests of all the world's nations and is often not used to protect human rights when it may have been.

Off the record

Go to the United Nations Security Council website and search for 'The Right to Veto' under 'Voting System and Records'.

How many times has the veto power been exercised? For what reasons and by whom? Should it be changed?

On 29 November 1990, a year after the collapse of the Soviet Union, the Chapter VII rules were applied for the first time since the foundation of the United Nations, when Iraq invaded Kuwait. They were used to authorise a multinational force against Iraq.

Another attempt at such **multilateral** action took place in Kosovo in 1998; however, the threat of veto by Russia and China – two of the permanent Security Council members – was enough to stop the council from taking immediate action to intervene in the **genocide** taking place in Kosovo, which is part of the nation of Serbia. Action was thought necessary because the Serbian Government, under the leadership of Slobodan Milošević, had begun conducting 'ethnic cleansing' of the Muslim population in Kosovo, which essentially meant killing or deporting them.

multilateral undertaken by more than two States

genocide the deliberate extermination of a race of people

Figure 11.5 The military action in Gaza by Israel in response to the Hamas attack of 7 October 2023 shows the complexity and subjectivity of the use of force in international affairs.

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The prospect of a humanitarian disaster prompted by the acts of genocide perpetrated by the Serbian forces caused great concern in Europe and the United States. As a result, in March 1999 the North Atlantic Treaty Organisation (NATO) successfully intervened in Kosovo. The UN Security Council, minus China (which abstained), then called for an international civil and security presence in Kosovo, thus enabling the NATO intervention to be viewed as legal and legitimate under international law.

As a general rule, multilateral or collective military intervention has the sanction of international law if it is in response to a situation where the threat to peace is significant. So the more multilateral a military intervention is, the more legal it is under international law. On the other hand, **unilateral** military intervention has been prohibited under international law since the end of World War II.

unilateral action taken by one State alone

Review 11.1

1 **Identify** the five permanent members of the United Nations Security Council.
2 **Create** a list of three instances of multilateral intervention that have occurred in the last 50 years and **analyse** how effective these interventions have been in the long term.
3 **Evaluate** whether the 2003 invasion of Iraq was legal under international law. Use the internet to research views on the legality of the invasion. **Create** a table of arguments for the legality and illegality of the war. Write an argumentative essay of 600—800 words outlining your position.

Figure 11.6 Refugees demonstrate during a 2018 UN Security Council delegation visit to Bangladesh to engage with the approximately 70 000 Rohingya Muslims seeking UN protection to return home to Myanmar.

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11.2 The United Nations

As discussed in Chapter 10, in 1945 the leaders of 50 nations came together in San Francisco with representatives from many non-government organisations. The meeting took place following the end of World War II and was due to a determination that the world would never again experience such widespread destruction. The United Nations was thus formed. Since the formation of the United Nations, no further world wars have occurred, so it could be argued that in that respect it has been successful.

The UN Charter

The UN Charter is similar to a constitution, outlining the rights and obligations of the members of the United Nations. The purposes of the United Nations, as stated in the charter, are to:

- maintain international peace and security
- develop friendly relations between nations
- cooperate in solving international problems of an economic, social, cultural and humanitarian nature
- promote respect for human rights.

Figure 11.7 UN Security Council meeting held to discuss the Israel-Hamas War at the UN headquarters in New York, 29 November 2023

The UN Charter (see Chapter 10 for more detail) also states that the United Nations should act in accordance with the following principles:

- the sovereign equality of its members
- the peaceful settlement of international disputes
- refraining from the threat or use of force against any nation
- non-intervention in matters within the domestic jurisdiction of any nation.

UN bodies

Table 11.1 provides a list of bodies that exist under the umbrella of the United Nations. One such body is the International Law Commission, which comprises a body of experts whose role is to codify and develop international law. The commission was established in 1947 and works on treaties, criminal law and the law of the high seas.

Another very important UN body is the United Nations Human Rights Council (UNHRC) (discussed in Chapter 10). This is the body that investigates abuses of human rights and so is often the primary reporting body of human rights issues. Complaints can be made to this body by individuals or groups that are victims of or have knowledge of human rights violations.

Check this out

Go to the UN Human Rights Council website and access the 'Human Rights Council Complaint Procedure' page. How are complaints made? Is this process an effective one?

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Table 11.1 The UN bodies

Peace and security	Development	Human rights	Humanitarian affairs	International law
• Security Council • Peacebuilding Commission • Counter-terrorism Implementation Taskforce • Disarmament Commission • Committee on the Peaceful Uses of Outer Space	• General Assembly Second Committee (Economic and Financial) • General Assembly Third Committee (Social, Humanitarian and Cultural) • Economic and Social Council • Economic and Social Council Commissions and Expert Bodies	• General Assembly Third Committee (Social, Humanitarian and Cultural) • UN Human Rights Council • Charter-based and Treaty-based Bodies	• General Assembly Third Committee (Social, Humanitarian and Cultural) • Economic and Social Council • United Nations Children's Fund • United Nations Development Programme • World Food Programme	• General Assembly Sixth Committee (Legal) • International Law Commission • United Nations Commissions on International Trade Law

UN Special Rapporteurs

As well as specially constructed UN bodies and ancillary organisations, the United Nations also has the power to appoint individual experts to work on its behalf. The title often given to these experts is Special Rapporteur (*rapporteur* is the French word for an investigator who reports to a deliberative body). They are appointed through the UNHRC and serve for between one and three years.

Figure 11.8 UN General Assembly

Special Rapporteurs are often tasked to investigate allegations of human rights violations. They can only go to countries that have invited them, and if a complaint is found to have been justified, they then inform the government of that nation by letter or appeal that such a complaint exists and needs to be attended to. Special Rapporteurs serve in a voluntary capacity and are not UN staff members.

There are two different types of Special Rapporteur, or independent expert, appointed to act in this way. One type is appointed to a country or territory. Currently there are 14 individual countries/territories that have Special Rapporteurs appointed to oversee and investigate human rights issues within those states.

The other type is appointed to serve under what is called a thematic mandate. These themes include concerns such as the environment, contemporary forms of slavery, education and freedom of opinion or expression. At the time of writing, there are over 40 of these themes that the United Nations considers important enough at a global level to appoint Special Rapporteurs to oversee them.

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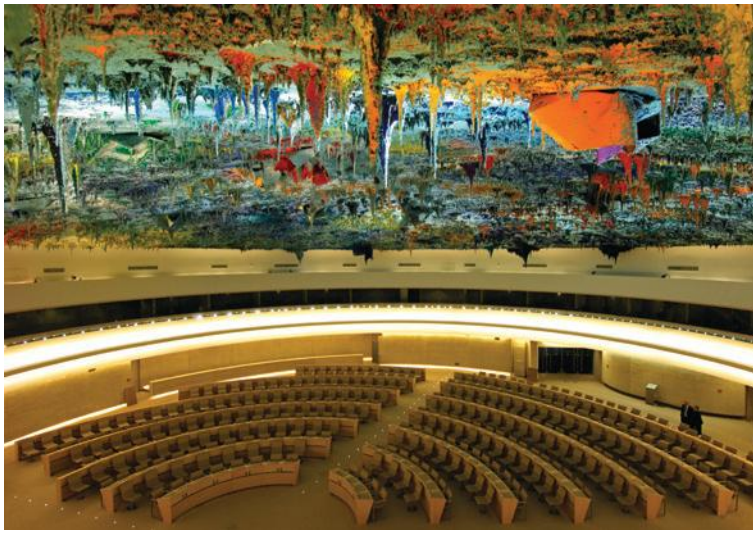
Review 11.2

Go to the UN Human Rights Council website and locate the answers to the following questions.

1 **Create** a list of countries that currently have an independent expert or Special Rapporteur appointed to them by the United Nations.
2 Select three of these nations and **identify** and **analyse** the reason why they have been appointed a Special Rapporteur.
3 **Identify** the themes that currently have a Special Rapporteur/independent expert appointed. **Evaluate** why these themes are considered worthy of special attention.

Figure 11.9 The meetings of the UN Human Rights Council take place in the Human Rights and Alliance of Civilizations Room of the Palace of Nations in Geneva, Switzerland.



11.3 Monitoring human rights

The major sources of international law in relation to protecting human rights are customary international law and treaties. There are a number of processes linked to treaties and how they work in this context.

Custom

Generally, issues of international customary law arise when nations feel bound to follow accepted customs or 'rules', such as the law of the sea or the law in relation to genocide.

International customary law is not written, but is based on the practices and behaviours of most nations over a long period of time. A certain type of behaviour or practice is regarded as part of this law if there is widespread agreement about it by the international community.

A specific example of international customary law is the concept of diplomatic immunity, in which the embassy of a foreign nation is considered part of that nation's territory. This customary right has existed since ancient times. Foreign diplomats have immunity from criminal prosecution or civil action in the countries to which they have been posted, but may be returned to their home country to face legal action there. In the case of *Chow Hung Ching v R* (1948) 77 CLR 449, the custom of immunity from prosecution was extended to the armed forces of a country (see Case study 11.1).

Over time, much international customary law has been incorporated into treaty law. Treaties have gradually replaced international customary law in a way similar to the way customary law (or common law) has been replaced by legislation in some areas of the domestic law in Queensland. One example of this is the previously mentioned customary concept of diplomatic immunity. This ensures the smooth functioning of diplomatic relations between countries by providing protection to diplomats and their missions. Diplomats are granted personal inviolability, which means they are immune from arrest, detention, lawsuits or any other form of personal harassment by the authorities of the host country. This immunity extends to their family members as well. This was a custom of international law for a long time, but it was codified in the Vienna Convention on Diplomatic Relations of 1961.

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Treaties

Treaties are agreements between countries (States) that have an international binding character. As we have already seen in Chapter 10, a treaty is sometimes referred to as a convention, charter, covenant, protocol and/or statute. These all refer to a process by which nations agree to be bound by a voluntary written agreement. The agreement, or treaty, places an obligation on signatory nations to act in a particular way or to adopt a certain type of behaviour as the norm. Usually, nations sign treaties because they perceive it will be to their benefit. Treaties are usually multilateral, though they can be bilateral. We have already considered a number of the most important treaties used to protect human rights in international law in Chapter 10, but treaties are also used to regulate other activities undertaken by States.

Treaties can cover trade, fishing rights, pollution, telecommunications, mineral rights, airspace, drug trafficking, economic cooperation, outer space, cyberspace, or anything else. Nations may agree to be bound by a treaty even if it limits their own sovereignty, because the very act of agreeing to the treaty is a sovereign act.

Another form of treaty is an **extradition** treaty. This is a treaty between countries that regulates arrangements for the transfer of people who have committed a crime in one jurisdiction to the other jurisdiction or country. Generally, unless an extradition treaty is in place, such a transfer is unlikely. This occasionally allows some people to avoid facing justice if they are able to flee to a country that has no extradition treaty with the country in which they allegedly offended. Australia will not, however, extradite people under any circumstances to other countries if the accused might face the death penalty in that other country.

extradition the act of forced transfer/delivery of a person who is alleged to have committed a crime in one jurisdiction to the law enforcement agencies of the jurisdiction from which they have fled

Off the record

Research one of the following individuals who have been the subject of extradition treaty processes. What did they do to invoke extradition processes? How successful were these processes?

- Julian Assange
- Edward Snowden
- Carlos Ghosn
- Kim Dotcom.

Since 1945, all nations have been obliged to lodge their treaties with the United Nations. This is stated in Article 102 of the UN Charter:

> Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
>
> *Source:* United Nations Charter, Article 102, 1945.

This requirement emerged after the end of World War II and had its origins in former US president Woodrow Wilson's 'Fourteen Points' speech of January 1919. The first of Wilson's 14 points was that treaties should be arrived at openly. This declaration was made in response to the belief that one cause of World War I was the existence in 1914 of secret treaties between governments that had not been approved by the peoples of the signatory nations.

Figure 11.10 Sources of international law

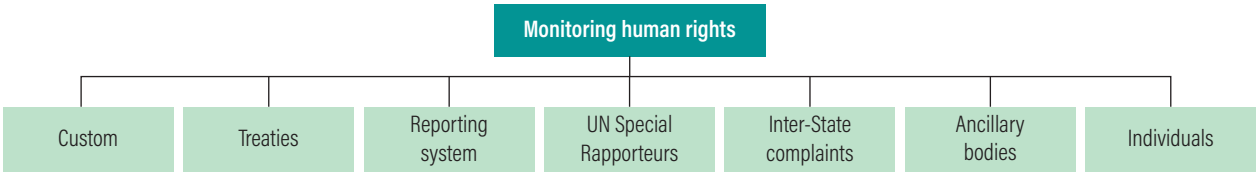

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Figure 11.11 Former US president Woodrow Wilson

Review 11.3

1 **Explain** international customary law.
2 Australia is a party to a range of agreements that cover areas such as shipping, health, defence, nuclear non-proliferation, the environment, maritime issues and technology. Select one of the areas in which Australia has signed treaties. Research the treaties that exist and **create** a brief summary of their content to share with your class.

Table 11.2 Significant treaties since 1945

- General Agreement on Tariffs and Trade 55 UNTS 194, updated in 1994 into the Marrakesh Agreement Establishing the World Trade Organisation 1867 UNTS 3
- Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277
- Convention on the Status of Refugees 189 UNTS 150 and Protocol relating to the Status of Refugees 606 UNTS 267
- Twin Covenants: The International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 ('ICESCR')
- Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161
- Convention on the Law of the Sea 1833 UNTS 396
- Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1465
- UNTS 85
- Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148
- Comprehensive Nuclear Test Ban Treaty (1996)
- Rome Statute of the International Criminal Court 2187 UNTS 90
- General Agreement on Tariffs and Trade (1947), updated in 1994 into the World Trade Organization
- Genocide Convention (1951)
- Refugee Convention (1951) and Protocol (1967)
- Twin Covenants: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
- Nuclear Non-Proliferation Treaty (1968)
- The Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 'Hague Abduction Convention') 11.2.7–9
- Convention on the Law of the Sea (1982)
- Convention Against Torture (1984)
- Kyoto Protocol (1997)
- Comprehensive Test Ban Treaty (1996)
- Rome Statute of the International Criminal Court (1998)
- Treaty of Good-Neighborliness and Friendly Cooperation Between the People's Republic of China and the Russian Federation (2001)
- International Treaty on Plant Genetic Resources for Food and Agriculture (2001)
- Global Plan of Action to Combat Trafficking in Persons (2010)
- The Paris Agreement (2015)
- Treaty on the Prohibition of Nuclear Weapons (2017)
- Global Compact for Migration (2018)

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We examined the Universal Declaration of Human Rights in some detail in Chapter 10, but there are other important treaties that monitor and seek to protect human rights that should be examined to see how effective they are in operation, and particularly how they sometimes have a direct impact on Australians.

The Hague Convention on the Civil Aspects of International Child Abduction 1980

The Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 'Hague Abduction Convention') 11.2.7–9 is aimed at providing a way for a parent whose child has been abducted by the other parent and taken overseas illegally to recover the child. The essential aim of the Convention is to preserve the custody arrangements that may have existed immediately before any alleged wrongful removal of a child from a country. It is aimed at deterring a parent from crossing international boundaries in search of a more sympathetic court. The Convention applies only to children under the age of 16.

Figure 11.12 International child abduction is a serious crime.

The Hague Convention has been the subject of some criticism recently. It is claimed that the Convention has been used to restrict the rights of women particularly when fleeing a violent or abusive relationship.

Research **11.1**

View and read *The Conversation* article 'Fleeing family violence to another country and taking your child is not 'abduction', but that's how the law sees it' at: https://cambridge.edu.au/redirect/10488.

1 **Identify** the main issues with how the Hague Convention operates.
2 **Analyse** the operation of this law and **identify** criticisms or 'loopholes' that seem to make this law less effective than it could be.
3 **Evaluate** what solutions could be offered to potentially address these problems.

Australia recently passed a new law in this area in an attempt to alleviate some of the issues and unintended consequences that the Hague Convention has had, particularly in relation to women fleeing violence and abuse.

Research **11.2**

View and read the following media release 'Ensuring family safety in Australian Hague Convention cases' by Australian Attorney-General Mark Dreyfus in December 2022 at: https://cambridge.edu.au/redirect/10489.

1 **Identify** factors that must now be considered in Australian cases of this nature.
2 **Evaluate** whether this new law will address the issue of women fleeing violence and abuse.

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United Nations Declaration of the Rights of Indigenous Peoples 2006

The United Nations Declaration of the Rights of Indigenous Peoples 2006 3.1 (IDRIP) is an important document in international human rights law that sets out the individual and collective rights of Indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. It emphasises the following rights:

- **The right to self-determination.** Indigenous peoples have the right to make their own decisions on issues that concern them
- **The right to cultural identity.** Indigenous peoples are equal to all other peoples, but they also have the right to be different and culturally distinct.
- **The right to free, prior and informed consent.** Indigenous peoples have the right to be consulted and make decisions on any matter that may affect them, having all the information, before anything happens, and without being pressured.
- **The right to be free from discrimination.** Governments must ensure that Indigenous peoples and individuals are treated equally, regardless of sex, disability or religion.

A total of 144 countries voted in favour of the IDRIP. Australia, under the Howard Coalition government, was one of only four countries that voted against the Declaration (along with Canada, the United States and New Zealand). As a result, Australia cannot officially become a signatory to the Declaration. In 2009, the Rudd government made a decision to formally endorse the Declaration, but First Nations leader Professor Mick Dodson stated, 'The value of human rights is not in their existence, it's in their implementation. That is the challenge for the world with this declaration. The standards have been set, it is up to us to meet them.'

Figure 11.13 Indigenous people around the world, including in Australia, deserve to have their rights recognised and protected. Pictured are members of the Waka Waka Aboriginal dance group performing during a Black Lives Matter protest, at King George Square in Brisbane on 6 June 2020, to express solidarity with US protestors and demand an end to frequent Aboriginal deaths in custody in Australia. Tens of thousands of Australians defied government calls to stay at home on June 6, spilling onto the streets for Black Lives Matter protests in major towns and cities across the country.

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Review 11.4

1 **Analyse** why the United Nations saw a need to issue this declaration. **Justify** your answer with reference to at least two examples.
2 **Describe** how you feel about the fact that Australia was one of only four out of 148 countries to vote against the Declaration. **Explain** why you think the countries that did not support it acted in the way they did.
3 Go to the Australian Human Rights Commission website. **Explain** what this body has said about Australia's progress on implementing the United Nations Declaration of the Rights of Indigenous Peoples 2006.

Geneva Conventions 1949

This important treaty (actually a series of treaties and protocols over a number of different decades in both the nineteenth and twentieth centuries) was developed in response to circumstances at those times. The First Geneva Convention is outlined in Chapter 10. Some breaches of the Convention are treated more seriously than others. More serious breaches (called 'grave breaches') include things like:

- depriving a protected person of the right to a fair trial if accused of a war crime
- taking hostages
- wilful killing, torture or inhumane treatment, including biological experiments
- compelling a protected person to serve in the armed forces of a hostile power
- causing great suffering or serious injury to body or health
- unlawful deportation, transfer or confinement
- extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

These actions are also sometimes referred to as war crimes and are able to be prosecuted as such in the International Criminal Court. States are required to enact laws penalising these crimes and to enforce them against anyone accused of committing them, regardless of nationality or where the crimes were committed.

Figure 11.14 A visitor looking at victims' portraits at the Kigali Genocide Museum in Rwanda. The Rwandan Genocide is considered a grave breach of the Geneva Conventions.

In recent times, a number of people and/or countries have been accused of breaching the Geneva Conventions, including Australian soldiers in Afghanistan.

Research 11.3

1 **Conduct** an internet search using the term 'Australian soldiers Geneva Convention.' **Describe** the circumstances involved in the alleged breaches.
2 **Evaluate** findings of the Brereton Report released in 2020. What action has been taken against the Australian Defence Force personnel allegedly involved in these incidents?
3 Research the nature of the Second, Third and Fourth Geneva Conventions and Additional Protocols I and II. **Discuss** how effective you consider they are today.

Hague Conventions of 1899 and 1907

The Hague Conventions of 1899 and 1907 11.2.7–9 were similar in tone but slightly different in emphasis. The Geneva Conventions deal with

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people in war but the Hague Conventions tend to focus more on the use of weapons in war. The Hague Conventions sought to regulate the use of a number of things in warfare, including bans on the use of gas and poison, projectiles and explosives fired from balloons, and so-called 'dum dum' bullets that spread on impact. Ironically, another conference was scheduled for 1914 but did not take place due to the outbreak of World War I, where many of the things banned in the Conventions were used anyway. Somewhat confusingly named, the Geneva Protocol to the Hague Conventions is considered an important addition to the Hague Conventions. The Geneva Protocol (1925) banned the use of all forms of chemical and biological warfare. The Protocol was considered necessary following the use of weapons such as mustard and chlorine gas in World War I and the horrors that resulted. The Biological Weapons Convention (1972), the Chemical Weapons Convention (1993), and the Convention on Cluster Munitions (2008) have further added to the restrictions on the way war can be waged and the types of weapons able to be used.

Off the record

In 2013, 2014, 2016 and 2018, the Syrian government is alleged to have carried out chemical weapons attacks against its own citizens. What evidence can you find in your own research that the Hague Conventions were applied and operated effectively? Identify the issues in ensuring such attacks are stopped in the future.

Convention Relating to the Status of Refugees (1951) and Protocol (1967)

Convention Relating to the Status of Refugees (1951) and Protocol (1967) is an elaboration on Article 13 of the 1948 Universal Declaration of Human Rights (discussed in depth in Chapter 10), which also discusses the role of the UN High Commissioner for Refugees (UNHCR).

Figure 11.15 Iraqi asylum seekers in a refugee camp in Indonesia react to the loss of family members in 2001. Approximately 350 people drowned when a boat carrying 418 asylum seekers, mostly Iraqis and some Afghans, Palestinians and Algerians, sank while coming to Australia.

The reporting system

Australia is a signatory to a number of the most important human rights treaties. As a member of the United Nations, Australia is expected to follow various reporting processes to fulfil its obligations under these treaties. The reporting system obliges States to submit reports periodically to the body that supervises the implementation of a particular treaty's obligations.

As seen in Chapter 10, there are a number of committees which monitor the way in which States protect human rights. It is generally to these committees that a State has to submit reports about the implementation of the treaty in that State. For example, the Convention on the Elimination of All Forms of Discrimination Against Women Committee (CEDAW), monitors the implementation of the CEDAW. This means Australia is obligated to report on its progress in promoting gender equality and eliminating discrimination against women to this Committee. The reporting cycle for the CEDAW is typically every four years. Most of these bodies have reporting cycles of every four to five years although the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has a reporting cycle of every two years.

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Sometimes there may be concerns about the way in which a State is following the principles set out in these treaties. The Committee can then seek information from other sources such as the media, various UN agencies that might be operating in the State as well as non-government organisations, in order to form a more accurate view as to what is occurring in that State.

Once a report has been submitted, the United Nations, through the Committee for that area of human rights, will review the State party report. The Committee, based on its analysis of State party reports and other relevant information, issues recommendations and general comments to assist countries in their efforts to combat human rights abuses in their jurisdiction.

The committees also have the power to address situations where there are credible indications of serious and systematic racial discrimination occurring within the territory of a State. It may issue early warning and urgent action procedures to draw attention to these situations.

Most committees also have a mechanism to consider individual complaints alleging violations of the rights protected by the treaty. It is usually a requirement for an individual seeking to involve a treaty Committee to exhaust domestic remedies. In Australia's case, this would mean having sought to resolve the matter through the AHRC, for example, before contacting a UN Committee. However, not all State parties have accepted the individual complaints procedure for all human rights treaties. For example, Australia has not signed the Optional Protocols for the ICESCR and Convention on the Rights of the Child 1991 and the federal government of the time stated in 2021 that it had no plans to do so.

Research 11.4

Go to Remedy Australia's website at https://cambridge.edu.au/redirect/10490.

1 **Identify** the following:
   - **a** How many human rights cases have been brought by individuals against Australia?
   - **b** How many cases have been left partially or unremedied?
   - **c** What are some of the ongoing violations about?

11.4 Inter-State complaints, courts and tribunals

There are times when States come into dispute about matters arising from treaties and their dealings with each other. There are a couple of mechanisms by which States can bring complaints against other member States for alleged violations of their obligations, treaties or conventions.

These inter-State complaints processes are often invoked as a last resort when other diplomatic or negotiation efforts have been exhausted. The processes aim to address disputes and resolve conflicts between States within the framework of international law, without resorting to open conflict either directly through military action or more indirectly through the imposition of sanctions or tariffs.

Treaty-specific inter-State complaint mechanisms

Some international treaties have specific provisions that allow States to bring complaints against other States for non-compliance or violations. These mechanisms are often established within the treaty itself or through additional protocols or agreements.

For example:

a. Under the ICERD, States parties can bring complaints against other States parties for non-compliance with the Convention's obligations. These complaints are examined by the ICERD Committee.

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b. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) establishes a system that allows States parties to bring complaints against other States parties for alleged violations of the Convention. These complaints are reviewed by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

c. The CEDAW does not have a specific inter-State complaints mechanism. However, the CEDAW Committee can consider inquiries or communications related to grave or systematic violations of women's rights in a State party, even in the absence of a formal inter-State complaint.

International tribunals

Enforcement of the law is always an issue. In international law, it is a very complex matter. The bulk of international law exists for mutual benefit, which means that nations sign treaties because they will benefit from them. Yet in other areas of international law, there is a problem of enforcement because there is no international police force that can routinely carry out law enforcement. When it comes to States in dispute, there is a forum which can hear such matters.

Figure 11.16 The International Court of Justice in The Hague is the principal judicial organ of the United Nations.

International Court of Justice

The International Court of Justice (ICJ) is a global court that is designed to deal with disputes between nations. It was established in 1946 as an organ of the United Nations; however, if a powerful nation decides to ignore a decision of the ICJ, the court is powerless to act. The ICJ can only hope that negative world opinion might shame the non-compliant nation into action.

The ICJ is based at The Hague in The Netherlands and has 15 judges elected by the United Nations. The questions before the court are usually decided by a majority of judges, and decisions are arrived at by applying international treaties/conventions and international customary law. The ICJ may refer to academic writings and previous decisions to interpret the law, although it is not bound by previous decisions. If no clear-cut conventions apply to a case, the court may make decisions based on the concept of 'justice and fairness' as long as the two parties agree to this basis for decision-making.

The ICJ hears two types of case:

- **Contentious issues between nations.** The court produces binding rulings between nations that have agreed to have their case submitted to the rulings of the court.
- **Advisory jurisdiction.** The court provides reasoned but non-binding rulings on questions of international law submitted by the UN General Assembly.

There are numerous treaties that confer jurisdiction on the ICJ.

In theory, the court's decisions are binding on the parties, final and without appeal, except in cases where it gives an advisory opinion. In practice, though, the ICJ's effectiveness has often been limited by the unwillingness of the unsuccessful party to abide by the court's ruling, as well as the reluctance of the Security Council to support action against a country to enforce the rulings. For example, in the case *Military*

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and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) [1986] ICJ Rep 14, the court ruled that the United States had to cease unlawful activities against Nicaragua. The majority of the ICJ judges reasoned that US actions against Nicaragua were in breach of the customary international law to not use force against another nation. The court ordered that the United States pay reparation to Nicaragua. However, the United States ignored the decision, refused to pay Nicaragua and withdrew from the ICJ. This demonstrates the difficulty of enforcing international law, especially against the most powerful nations. It means the effectiveness of international law and the bodies that seek to enforce it, like the ICJ, are often called into question.

Video 11.1 *Nicaragua v United States of America* [1986]

Research 11.5

1. **Conduct** an internet search using the term 'ICJ verdicts ignored'.
2. **Create** a list of examples of at least three different rulings of the ICJ ignored by powerful nations.
3. **Describe** how the rulings of the ICJ can be made more binding.

Figure 11.17 Emblem of the United Nations in the General Assembly, United Nations Building, New York

Australia has also been the subject of matters before the ICJ, both as the claimant party (the one who initiates the action) and as a respondent (the one who responds to the action from another).

One matter in which Australia was responding to a complaint from another State involved Timor-Leste. Timor-Leste and Australia had a dispute around the maritime border between the countries, which resulted from Timor-Leste's independence from Indonesia. Previously Australia and Indonesia had a treaty that allowed for joint exploitation of Timor-Leste's oil and gas resources, but when Timor-Leste became an independent nation, it sought to renegotiate the maritime boundary with Australia as it believed the existing boundaries were unfair and did not allow Timor-Leste a just share of its own oil and gas resources. Timor-Leste is a relatively small country with limited natural resources outside of the gas and oilfields, so they represented a very important resource to a new nation.

The case primarily involved allegations by Timor-Leste that Australia had seized and detained certain documents and data during a raid on a legal office in Canberra which would have advantaged Australia in these negotiations. The case was called 'Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*)' and was eventually settled through a confidential agreement between Timor-Leste and Australia in 2013. As part of this agreement, the two countries agreed to resolve the dispute and return the documents and data that were seized during the 2004 raid on the legal office in Canberra. The terms of the agreement were not publicly disclosed, and it was reported that both parties had reached a mutually satisfactory resolution to the dispute. As a result, there was no official ICJ judgment or ruling related to this matter because the parties involved settled the matter through diplomatic negotiations and an agreement, thus avoiding a formal court decision.

Video 11.2 *Timor-Leste v Australia* [2013]

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Figure 11.18 Former Australian Foreign Minister Alexander Downer (right) and former East Timor Minister for Foreign Affairs and Cooperation Dr Jose Ramos-Horta (left) sign the treaty on maritime arrangements in the Timor Sea, as former Australian Prime Minister John Howard (2nd right) and former East Timor Prime Minister Mari Alkatiri (2nd left) look on.

There have been other matters involving Australia, one of which is the subject of Research 11.6 where Australia was the claimant.

Research **11.6**

Visit The Hague Justice Portal and **investigate** the proceedings instigated by Australia against the government of Japan concerning Japan's alleged breach of its international obligations over whaling. Your search should include:

- background information regarding Japan's whaling program
- discussion about Australia's interpretation of the 1946 International Convention for the Regulation of Whaling 161 UNTS 72
- an analysis of Australia's application to the International Court of Justice and the importance of the proceedings for Australians.

International Criminal Court

The International Criminal Court (ICC) is an independent organisation separate from the United Nations. The Rome Statute of the International Criminal Court 2187 UNTS 90 ('the Rome Statute') is a treaty that was signed in 1998 by 121 nations, including Australia, which pledged the signatory nations to the establishment of a permanent ICC. The ICC was established in 2002 in The Hague, although its statute allows it to hear cases anywhere in the world if necessary. The ICC was given jurisdiction over genocide, war crimes and crimes against humanity – the three most serious types of international crime. Despite this autonomy, the ICC works closely with the United Nations. The establishment of the ICC was a historic event because it was the first permanent court in which individuals could be tried for crimes against humanity. The court is made up of four organs: the Presidency, the Judicial Division, the Office of the Prosecutor and the Registry.

The ICC has been criticised as focusing on smaller, less powerful nations and punishing leaders of those countries, while ignoring crimes committed by richer and more powerful States. Nations from Africa in particular have accused the ICC of an anti-African agenda and there have been threats from various African nations to withdraw from the ICC (with Burundi in fact doing so and South Africa confirming its intention to do the same).

There have also been some indications that the operation of the ICC means that dictators are now less likely to stand down peacefully as they fear prosecution by the ICC after they have left office.

The fact that the government of a nation is also required to cooperate with the ICC case investigations means a potential war criminal in power may simply refuse to cooperate and therefore essentially stall a potential investigation.

Australia has ratified the Rome Statute ensuring the jurisdiction of the ICC. This was necessary for Australia when it passed the *International Criminal Court Act 2002* (Cth). The Act establishes mechanisms to facilitate Australia's compliance with the Rome Statute and

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includes the provision of investigative assistance and the arrest and surrender of suspects.

In 2022 the Office of the Prosecutor for the ICC had received 39 State party referrals of the situation in Ukraine under Article 14 of the Rome Statute following the Russian invasion, including a referral from Australia. This demonstrates Australia's commitment to the ICC as an institution to protect people around the world from war and human rights abuses.

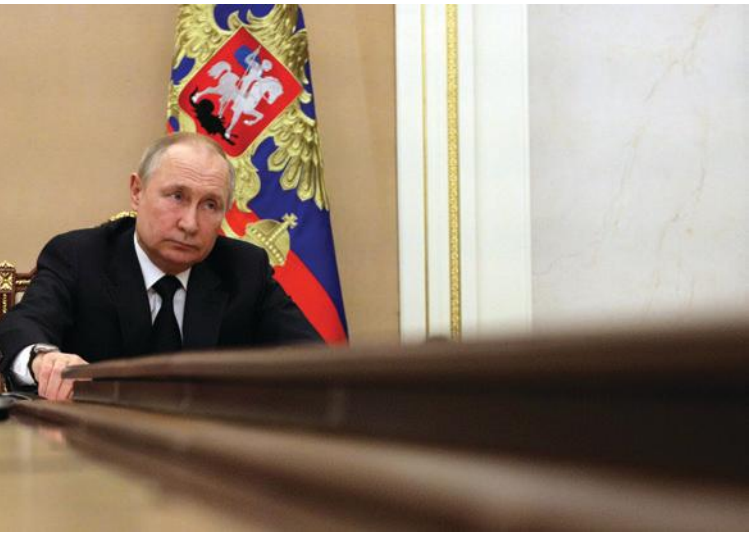
The ICC issued an arrest warrant against the President of Russia, Vladmir Putin, for war crimes arising from the invasion of Ukraine. The ICC's jurisdiction is not limited to specific individuals, and it includes accountability for heads of state or government officials if they are alleged to have committed international crimes. Heads of state or government officials are not immune from prosecution before the ICC, as it is based on the principle that no one should be above the law. The ICC operates as a court of last resort and complements national criminal jurisdictions, stepping in when States are unable or unwilling to prosecute these crimes themselves.

However, bringing heads of state to trial can be a complex and politically sensitive process due to issues of state sovereignty, diplomatic considerations and the potential for interference from powerful actors. In practice, the ICC may encounter challenges in pursuing high-ranking officials, especially if they are actively shielded by their governments or if there is insufficient political will to cooperate with the court's investigations.

The other issue with the way in which the ICC operates is the fact that only two of the five permanent members of the United Nations Security Council are parties to the Rome Statute, which established the ICC. France and the United Kingdom became members in 2000 and 2001, respectively.

The other three permanent members of the Security Council (China, Russia and the United States) are not parties to the Rome Statute and therefore bringing a head of state from one of these countries to the ICC would be very difficult without the support of the country in question.

Figure 11.19 Russian President Vladimir Putin is the subject of an arrest warrant issued by the ICC in 2023.



Off the record

View the International Criminal Court (ICC) website to see the allegations against Vladmir Putin at https://cambridge.edu.au/redirect/10491.

- What were the war crimes Putin is accused of committing?
- Who else was issued with an arrest warrant at the same time?
- How likely do you think it is that Putin will face a trial in the ICC for as a result of this warrant?

There are a number of articles worth reading which delve into the issue around bringing a head of state to justice, including:

https://cambridge.edu.au/redirect/10492

https://cambridge.edu.au/redirect/10493.

Based on what you have read, how significant do you think it is that Putin has been indicted?

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Figure 11.20 The International Criminal Court

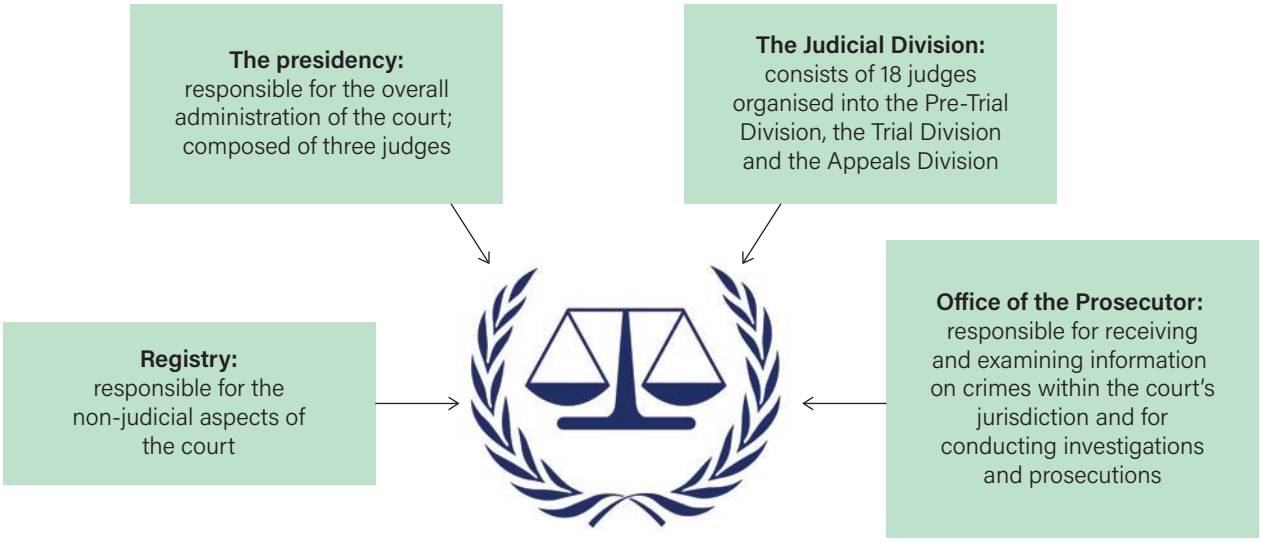

Figure 11.21 Wanted poster with portraits of those accused of perpetrating genocide with a bounty of US$500 000 per head. Fulgence Kayishema (top far right), one of the last four fugitives sought for their role in the 1994 Rwanda genocide, was arrested in South Africa on 24 May 2023.

Check this out

Read the article about the referral of Australians to the International Criminal Court (ICC) instigated by Senator Jacqui Lambie – 'The International Criminal Court is unlikely to prosecute alleged Australian war crimes – here's why' at https://cambridge.edu.au/redirect/10494.

1 Who has Senator Lambie referred to the ICC? Why might they be considered a slightly unusual choice given the circumstances?
2 What are the reasons given for why the ICC is unlikely to act on this referral? Do you agree with that if it is in fact the decision of the ICC not to proceed? Justify your answer.

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Ancillary bodies and individuals

There are a number of important ancillary bodies and individuals that operate under the umbrella of the United Nations to protect human rights in a variety of areas.

1. **The UN High Commissioner for Human Rights:** This individual runs the Office of the High Commission for Human Rights as part of the United Nations Secretariat and serves as the principal UN office responsible for promoting and protecting human rights. They provide assistance, guidance and expertise to States and advocates for human rights on a global scale. We have already looked at this position in Chapter 10.
2. **Special Procedures of the United Nations Human Rights Council:** Special Procedures are independent human rights experts appointed by the UNHRC to monitor and report on specific thematic issues or country situations. They investigate human rights violations, provide recommendations and engage with States to promote and protect human rights. There are two types of Special Procedures mandates: the thematic mandates, such as water and sanitation, arbitrary detention, the rights of migrants, violence against women, torture and human trafficking, and the country-specific mandates, such as those in relation to Russia, Myanmar and Syria, among others.
3. **Special Rapporteurs:** These individuals are independent experts appointed by the UNHRC to examine and report on specific human rights issues or thematic areas. They play a crucial role in monitoring and promoting human rights worldwide.
4. **Special advisors:** This position aims to prevent and respond to certain human rights issues or concerns such as genocide, climate action or the Responsibility to Protect, for example. Special advisors advise the Secretary-General and work with States, civil society and other stakeholders to raise awareness and develop strategies to prevent issues like genocide happening or encourage action in climate change, for example.
5. **Independent experts:** These individuals address human rights violations based on a number of diverse issues. These include those relating to sexual orientation and gender identity, albinism, rights of older persons among other things. They monitor and report on discrimination, violence and other human rights abuses and advocate for the protection of rights of people in a particular place or category.

Other international bodies and individuals

Apart from the ICJ and the ICC, a number of other major international tribunals have been established. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by a UN Security Council resolution in 1993. It has jurisdiction over breaches of the Geneva Conventions and international customary law committed in the territory of the former Yugoslavia since 1991. The most high-profile case to date was that of former Serbian leader Slobodan Milošević, who was arrested in 2001 for war crimes and crimes against humanity in Kosovo and placed on trial in 2002. Milošević died in 2006, before the completion of his trial.

The International Criminal Tribunal for Rwanda was established in 1994 and is based on the model of the ICTY. It has jurisdiction over acts of genocide committed in Rwanda in 1994. The Special Court for Sierra Leone was jointly established by the United Nations and the government of Sierra Leone. The function of the court is to try those who have violated the conventions for international humanitarian law since 1996.

Additionally, the Extraordinary Chambers in the Courts of Cambodia (ECCC), commonly known as the Cambodia Tribunal or Khmer Rouge Tribunal, was a court established to try the senior leaders and the most responsible members of the Khmer Rouge for alleged violations of international law and serious crimes perpetrated during the Cambodian genocide. It was considered a hybrid court, as the ECCC was created by the government in conjunction with

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the United Nations, but remained independent of the United Nations. Trials were held in Cambodia using Cambodian as well as international staff and resulted in numerous arrests and three convictions for crimes committed during the Cambodian genocide.

The Appellate Body of the World Trade Organization (WTO), which was established by the WTO in 1995, has jurisdiction over trade disputes. According to international lawyer Phillipe Sands in his 2006 book *Lawless World: America and the Making and Breaking of Global Rule*, the Appellate Body's **quasi-judicial** system for enforcing international laws makes it potentially the most powerful international tribunal in the world (for further information, see the WTO's Appellate Body website).

The European Court of Human Rights was set up in 1959 and has jurisdiction over issues relating to violations of human and political rights which are outlined in the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (European Convention on Human Rights). The court is made up of a number of judges equal to the number of member States of the Council of Europe, ratified in the European Convention on Human Rights. Each of the judges sits in their own right and does not represent any country.

Figure 11.22 Buddhist monks arrive at the court building to attend the verdict of former Khmer Rouge leaders Khieu and 'Brother Number 2' Nuon Chea at the Extraordinary Chambers in the Courts of Cambodia in Phnom Penh on 16 November 2018. Both were found guilty and sentenced to life imprisonment.

quasi-judicial authority that is judicial in nature, often exercised by a tribunal, as distinct from a court where a judge presides

Check this out

- Visit the Global Policy Forum website for information on International Criminal Tribunals and Special Courts.
- Visit the World Legal Information Institute website for information on International Courts and Tribunals.

Off the record

There are a number of important figures in relation to the protection of human rights in recent times. Select one of the following to research their contribution to protecting and promoting human rights:

- Navi Pillay
- Sergio Vieira de Mello
- Michelle Bachelet
- David Kaye
- Irene Khan
- Thomas Buergenthal
- Nils Melzer
- Marta Santos Pais.

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11.5 Australia and international law

The concept of **state sovereignty** is vital in the legal framework of international order. This means that no international obligations to uphold a legal principle will have any force in Australia unless the Commonwealth Parliament specifically incorporates it into Australian law. This principle in Australia dates back to the 1948 case of *Chow Hung Ching v R* as seen in the Case study 11.1.

state sovereignty the power of a government to run its own affairs and make laws for its territory

Case study 11.1

The case: *Chow Hung Ching v R* (1948) 77 CLR 449

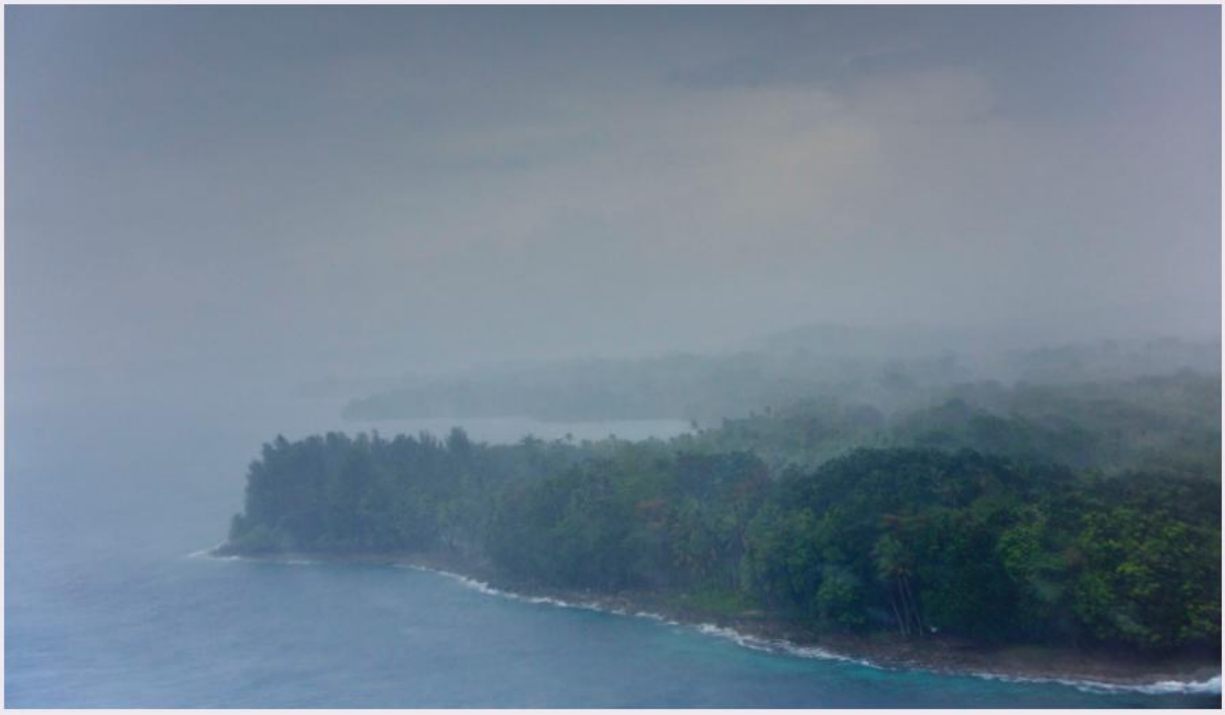

Figure 11.23 Manus Island was the setting of an interesting legal case following the end of World War II.

Citation

(1948) 77 CLR 449 means this case was decided in 1948 by the High Court and is reported in volume 77 of the Commonwealth Law Reports starting on page 449.

Facts

In 1948, there were present on Manus Island (in the mandated Territory of New Guinea) some 300 Chinese nationals, sent there to collect surplus war supplies sold to the Republic of China by the United States. They included army personnel and labourers. There was evidence that they were subjected to military discipline, exercised by officers of the Chinese Army, and that they were also subjected to Chinese military law. They did not carry arms. The army personnel acted as guards and the labourers as workmen. Two labourers, members of this body, were charged with having assaulted a native of the island and were convicted. They sought to appeal to the High Court of Australia, which had this jurisdiction.

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Legal issues

Did the labourers have immunity customarily extended to military personnel under international law?

Decision

The accused were not members of a military force, and therefore had none of the immunity from prosecution that might have been possessed by a member of such a force.

Ratio decidendi (reason for the decision)

Dixon J made these important remarks:

> The true view, it is held, is 'that international law is not part, but is one of the sources, of English law ... In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English law.'
>
> *Source:* Justice Dixon's closing remarks in *Chow Hung Ching v R* (1948) 77 CLR 449.

Such customary law applied only when a judicial Act created a new domestic rule from the 'source' of international law.

Obiter dicta (something to think about)

Since Australia initially adopted English law and was then for many years bound by English decisions in its hierarchy of courts, such law applied in Australia. Consequently, the only difference to how the remarks of Dixon J are now read is that 'English law' should be read as 'Australian law.' It is clear that Dixon J was saying that international law is only one of a number of sources of law in a country like Australia. It does not automatically become part of Australian domestic law and each rule or custom needs to be examined individually to see whether it has been enacted into Australian domestic law.

This position is reinforced by reference to another interesting case (Case Study 11.2).

Case study **11.2**

The case: *Nulyarimma v Thompson* (1999) 164 ALR 621

Figure 11.24 *Nulyarimma v Thompson* case sought the arrest of Prime Minister John Howard for genocide.

Citation

(1999) 164 ALR 621 means this case was decided in 1999 in the High Court of Australia and appears in the Australian Law Reports in volume 164 starting on page 621.

Facts

An application was made to the registrar of the Magistrates Court of the Australian Capital Territory to issue warrants for the arrest of the Prime Minister, Deputy Prime Minister and two members of federal parliament on the allegation that they had committed the criminal offence of genocide in connection with the formulation of the federal government's native title 'Ten Point Plan' to enact the *Native Title Amendment Act 1998* (Cth). The registrar refused to issue the warrants and Crispin J of the Supreme Court of the Australian Capital Territory rejected the applicants' bid for ***mandamus*** against the Registrar. The applicants appealed to the Full Court of the Federal Court.

mandamus an order sought from a court making it mandatory for a party to perform a specified act

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Legal issues

Was the crime of genocide part of Australian common law via international law?

Decision

Genocide was not actually a breach of Australian law and therefore the application was dismissed.

Ratio decidendi (reason for the decision)

An offence of genocide is recognised under customary international law, giving rise to obligations on Australia under the Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277. Australia had not legislated to introduce the relevant aspects of international customary law into Australian criminal law.

Legislation was necessary to introduce the norms of customary international law into Australian criminal law, just as it was necessary to implement Australia's obligations under international treaties.

Obiter dicta (something to think about)

This was so even if some non-criminal norms of customary international law could be regarded as having been introduced into Australian law without legislative intervention.

The decision confirmed the importance of ratification as a process in ensuring international law for serious human rights issues was also Australian law. In response to the decision, there was an attempt to pass a bill called the Anti-Genocide Bill by the Australian Democrats to address that gap. This did not become law but Australia did put in the place the *International Criminal Court Act 2002* (Cth), which did declare genocide a crime not long afterwards.

Review **11.5**

1 In your own words, **explain** the concept of state sovereignty.
2 **Justify** why *Chow Hung Ching v R* (1949) 77 CLR 449 is such an important case.

The Australian Constitution

The structure of Australia's federal government has implications for determining Australia's response to the search for international law. First, section 51(xxix) of the Australian Constitution states that only the federal government has the power to make laws with respect to external affairs, which would include entering into international treaties and agreements for Australia.

Technically, the executive branch of the federal government can sign any international agreement on its own without consulting parliament, but this is rare since the executive arm of government usually controls parliament. If the federal government wants to implement new legislation to support an international agreement that it has signed, then this must go through both houses of parliament.

Figure 11.25 Australian Coat of Arms (this one is above the entrance to Old Parliament House in Canberra)

The states of Australia and international law

Any international agreement entered into by the federal government can affect the states in some way. The federal government usually consults the states before signing an international agreement, but it is not obliged to do so. Sometimes international agreements can be a point of debate

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between the states and the federal government. In 1983, the federal government used its external affairs powers under the Australian Constitution to bring a halt to the Tasmanian Government's proposed construction of a hydro-electric dam on the Gordon River below its confluence with the Franklin River, which would have flooded a large section of the Franklin River. The High Court heard the matter in *Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmania Dam Case).

The question that was considered by the High Court was clarified by Chief Justice Gibbs, as seen in this extract from his judgment *Commonwealth v Tasmania* (1983) 158 CLR 1 at 60:

> No lawyer will need to be told that in these proceedings the court is not called upon to decide whether the Gordon-below-Franklin Scheme ought to proceed. It is not for the court to weigh the economic needs of Tasmania against the possible damage that will be caused to the archaeological sites and the wilderness area if the construction of the dam proceeds. The wisdom and the expectancy of the two competing courses are matters of policy for the Government to consider, and not for the court. We are concerned with a strictly legal question – whether the Commonwealth regulations and the Commonwealth statute [law passed by parliament] are within constitutional power.
>
> *Source:* Chief Justice Gibbs's ruling in *Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmania Dam Case).

The High Court decided (by a majority of four to three) that the federal government did have the constitutional power to make the law stopping the damming of the Gordon River. The external affairs power came into play in this instance because the federal government had placed the Franklin River on the World Heritage List.

Prior to Prime Minister Kevin Rudd ratifying the Kyoto Protocol in December 2007, a number of the states had been at odds with the previous government's refusal to ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148 on global warming. The states cannot enter into international agreements in their own right because this is the sole constitutional power of the Commonwealth. However, they can enact their own legislation that is in harmony with international agreements. For example, the New South Wales Government went further in adhering to UN human rights treaties with its *Anti-Discrimination Act 1977* (NSW) than the federal government did with the *Racial Discrimination Act 1975* (Cth).

Figure 11.26 A Greenpeace activist dressed as a polar bear displays a placard supporting the Kyoto Protocol during a demonstration in Sydney on 5 September 2007, where the world leaders met for the Asia–Pacific Economic Cooperation summit.

Review 11.6

1 **Identify** and **explain** the power that section 51 of the Australian Constitution gives the federal government.
2 **Explain** how international law enabled the federal government to stop the damming of the Gordon River by the Tasmanian Government in 1983.
3 **Summarise** the statement by Gibbs CJ. How did he distinguish the legal question from non-legal questions?

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Australia's role in global affairs

Since Federation, Australia, as a single nation, has taken its global responsibilities seriously. Australia's massive human contribution in World War I was due to its obligations to the maintenance of the British Empire, which it saw as essential to global stability, the spread of civilisation and the rule of law. Australia's contribution during World War I earned it recognition as a nation in its own right in the League of Nations, along with the other British countries of Canada, New Zealand and South Africa. As a foundation member of the League of Nations, Australia played a very active role internationally, and has continued to do so since, cooperating in many ways with the United Nations.

Australia's contribution to peacekeeping

Australia has consistently been involved in UN peacekeeping missions. It has contributed either military forces and/or police to more than 50 multilateral peacekeeping and security operations since 1947.

In 1999–2000, Australia played a leading role in establishing order in East Timor when Indonesian-backed militia went on a killing rampage after the East Timorese people voted for independence from Indonesia in a 1999 UN referendum.

Figure 11.27 An international peacekeeping soldier from Australia plays football with children at a refugee camp in Dili, East Timor (now known as Timor–Leste) in June 2007.

In November 2001, Australia sent units of its special forces to assist in the UN-sanctioned US invasion of Afghanistan. Then, in 2005, Australia recommitted Special Forces to Afghanistan to counter a resurgence of Taliban activity there. The majority of Australian combat forces withdrew from the country in 2013 and all Australian troops left in September 2021, which left the Taliban in control of the country again.

Australia has also been engaged in peacekeeping efforts internationally outside the United Nations. In recent years, Australia has conducted a peacekeeping operation in the Solomon Islands and committed police officers to assist Papua New Guinea among other places.

Australia is a leading advocate of the international doctrine Responsibility to Protect (R2P). This doctrine represents the commitment by a number of nations to ensure that the world is free of genocide, ethnic cleansing and other mass atrocities against humanity within States when their own governments are unable or unwilling to do so. The concept of R2P was developed and endorsed by the international community at the 2005 UN World Summit as a response to the failures to prevent or respond to mass atrocities in various parts of the world. There is obvious tension between the R2P doctrine and the concepts of sovereignty and territorial integrity, for example, that underpin the UN Charter.

Check this out

Read the article *The Conversation*: 'Ukraine: the UN's 'responsibility to protect' doctrine is a hollow promise for civilians under fire' at https://cambridge.edu.au/redirect/10495.

1 How effective has the Responsibility to Protect (R2P) doctrine been in relation to Ukraine?
2 What are the limitations of R2P in this situation?

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Australia and international agreements

Australia has also been a part of many international agreements to promote world order, for example, the 1947 General Agreement on Tariffs and Trade 55 UNTS 194 (GATT) and, since 1995, the Marrakesh Agreement Establishing the World Trade Organization (1994) 1867 UNTS 3 (WTO). Australia is also a signatory to the Geneva Conventions and the Rome Statute of the International Criminal Court 2187 UNTS 90, which led to the establishment of the International Criminal Court in 2002. Australia has many international obligations outside its multilateral agreements. The majority of the 900 treaties that Australia has signed are bilateral. For example, most of the one billion dollars in Australian aid for the victims of the 2004 Boxing Day tsunami was given as part of a bilateral agreement.

Review 11.7

1 **Identify** why Australia was involved in a peacekeeping operation in East Timor.
2 **Explain** why the international doctrine Responsibility to Protect may have come about. What historical events indicate a need for this type of doctrine?
3 **Identify** the important bilateral treaty that was passed by the Senate in 2004 only after significant amendments had been made. **Justify** why these amendments were required.

11.6 The effectiveness of international law – contemporary legal issues

Changing social values and composition of society

World opinion is shaped by changing social values and can represent a powerful agency of reform. The changing social values of the international community can often prompt the UN General Assembly to look into an issue and take action. A century ago, the social values of the majority of people of the world had little impact on world affairs and world opinion was not an ingredient of reform. World War I changed this. Many individuals opposed what they saw as the insanity of the war, believing that in future the people of each nation should have control of foreign policy, and that world opinion must exert itself through a world forum.

Former US president Woodrow Wilson was the first world leader to attempt to mobilise world opinion about war through his various speeches between 1916 and 1919, which were directed at people on both sides of World War I.

Today, politicians cannot afford to ignore world opinion and must take the changing social values of the international community into account. World opinion led to UN intervention in the former Yugoslavia, Rwanda and Somalia due to the genocide being committed in those countries. Since 2005, world opinion has been exerting pressure for action over human rights violations in Myanmar, North Korea, Zimbabwe, Sudan, Ukraine and Palestine. In China, practitioners of Falun Gong were singled out and tortured as well as put into detention. World opinion was also instrumental in ensuring global responses to natural disasters such as the COVID-19 pandemic in 2020–21, the Boxing Day tsunami in 2004 and the earthquakes in Pakistan in 2005 and Haiti in 2010. However, countries do sometimes take action that is not necessarily supported by world opinion such as the Russian invasion of Ukraine. In this case, it has galvanised support for Ukraine both in terms of public comment and condemnation of Russian actions as well as tangible support by supplying resources to Ukraine and imposing sanctions against Russia.

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Figure 11.28 A man hurries to walk away from a building that was just hit by a Russian bombardment, and had caught fire, in the Moskovsky district in Kharkiv, Ukraine, 25 March 2022. (*Source:* Photo by Marcus Yam in *Los Angeles Times*.)

There are a number of issues that illustrate the effectiveness (or sometimes otherwise) of international law in seeking to protect human rights and how Australia has dealt with this sometimes difficult problem.

The rights of women – reproductive rights

We have seen in Chapter 10 how the rights of women are sought to be promoted and protected in international law as well as in Australian contexts. The main treaty to do so is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It recognises reproductive rights as an integral part of women's rights and calls for measures to ensure women's access to reproductive healthcare services including family planning and safe abortion.

Reproductive rights refer to the rights of individuals to make decisions regarding their reproductive health including the right to access reproductive healthcare services, family planning information, contraception, and safe and legal abortion. These rights are often closely linked to issues such as gender equality, bodily autonomy and sexual health education.

Beijing Declaration and Platform for Action – adopted at the Fourth World Conference on Women in 1995 – emphasises reproductive rights and addresses issues such as access to family planning, maternal healthcare and the elimination of harmful practices against women including female genital mutilation and forced sterilisation.

The recognition and protection of reproductive rights can vary significantly from country to country. Some countries, like Australia, have strong legal frameworks and policies that protect reproductive rights and attempt to provide comprehensive reproductive healthcare services.

However, in other parts of the world, reproductive rights may be restricted due to legal, cultural, religious or political factors. Some

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Figure 11.29 Reproductive rights have often been a source of conflict in many nations.

countries have laws that severely limit access to reproductive healthcare services including contraception and abortion. In some cases, access to reproductive health information and services may be restricted based on age, marital status or other criteria. These restrictions can have a significant impact on an individual's ability to make informed decisions about their reproductive health and can disproportionately affect marginalised communities, particularly women and girls.

In 2022 in the United States, the Supreme Court overturned the the landmark 1973 decision of *Roe v Wade* that found there was a constitutional right to abortion. A conservative Supreme Court found there was no such right implicitly protected by any constitutional provision and left abortion regulation to individual US states. Many states have now severely restricted this right for women in the United States.

In Australia, the situation is slightly more protective of the reproductive rights of women. Abortion has been fully decriminalised in all states and territories except for Western Australia, which is still regulated by the Criminal Code. Medical abortions are available in all states and territories until nine weeks' gestation, while the availabilities of surgical abortions vary from 16 weeks in the Australian Capital Territory to 24 weeks in Victoria.

There are some concerns, however, which are explored by the UNSW Australian Human Rights Institute below.

Check this out

View the UNSW Australian Human Rights Institute page 'Abortion rights and access in Australia: Implications of Roe v Wade' at https://cambridge.edu.au/redirect/10496.

1 What is meant by the term 'postcode lottery' with respect to women's rights in this area?
2 Explain the three significant non-legal barriers to abortion access.
3 Select one of these barriers and explain what you think could be done to better protect the rights of women in this area.

The rights of the child

The Convention on the Rights of the Child 1991 (CRC) is the primary international instrument used to safeguard children around the world. We had a closer look at this instrument and how it works in

Figure 11.30 The conflict between Israel and Hamas has had serious and concerning impacts on the lives of children on all sides of the issue.

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Chapter 10, but there are certainly still concerns about how effective international law is in protecting children and how that may operate in Australia. Article 24 of the CRC deals with the rights of children to the highest attainable standard of health, health services, nutrition and clean drinking water, for example. Article 24 also details the protection that should be afforded to children against things such as child labour, drug abuse and harmful traditional practices such as female circumcision.

There are some specific instances where the United Nations has expressed concern for the way in which children are currently living. For example, the civil war in Syria has exposed children to risks that are clearly in contradiction to the CRC. More recently, the conflict between Israel and Hamas in Gaza has also raised serious concerns about how the lives of children have been threatened by military action by both sides.

Review **11.8**

Read the article *The Conversation*: 'The UN is calling the Israel-Hamas war a 'graveyard of children.' In an adult conflict, the young are suffering most' at https://cambridge.edu.au/redirect/10497.

1 **Explain** the main concerns outlined about the plight of children on both sides in the Israel-Hamas conflict.
2 **Describe** how international law is dealing with the issue.
3 **Discuss** what more could or should be done.

According to UNICEF, 22 000 children die from poverty each day. There is a concern that globalisation is making poverty worse in many parts of the world. In 2016, the United Nations 17 Sustainable Development Goals came into force. The countries of the world adopted a set of goals aiming to end poverty, protect the planet and ensure prosperity for all.

The idea is that the countries of the world will work together to monitor and track progress towards the achievement of these goals over the next 15 years, but there are no consequences if the targets are not reached.

Australia also has some issues with the way in which some children are living.

Check this out

Read the article 'National Children's Commissioner calls for action after shocking research on child maltreatment in Australia' on the Australian Human Rights Commission website. at https://cambridge.edu.au/redirect/10499.

1 What are the main concerns outlined in this article about how children in Australia are being treated?
2 What solutions or suggestions are made as to how the situation should be addressed?

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11.7 Topic review

Topic summary

- International law can be divided into public international law and private international law.
- Public international law is generally referred to simply as 'international law', while private international law is referred to as a 'domestic matter with a foreign element'.
- International law is a broad concept that takes into account relationships between countries and between international bodies.
- Historically, the United Nations has played a significant role in the development of international law, including when the use of force is accepted.
- The sources of international law are customs, treaties, general principles and the judicial decisions/teachings of significant individuals.
- International customary law is based on the practices of most nations.
- Treaties may be bilateral or multilateral.
- International law is not effective in Australia unless it has been specifically incorporated into domestic law by an action of the Commonwealth Parliament.
- Only the federal government (not the states or territories) has the constitutional power to ratify international treaties.
- The federal government has used its external affairs power to override the wishes of states.
- Australia has a long record of effective involvement in international affairs including peacekeeping.
- Attempts have been made to establish tribunals to deal with conflicts between countries.
- Major tribunals with wide jurisdiction are the International Court of Justice and the International Criminal Court.
- The effectiveness of these tribunals is affected by state sovereignty.
- Other tribunals have been established to deal with particular breaches of international law in specific countries including Kosovo and Rwanda.
- The Appellate Body of the World Trade Organization (WTO) is said to be likely to become a powerful international tribunal.
- In a rapidly changing world, there are many issues that affect relations between countries.
- These issues give urgency to the need for international law reform.
- Challenges include the difficulty of getting agreement between world leaders, rapid changes in technology, the fear of nuclear war and the threat of terrorism.
- The impacts of human rights violations, disease, poverty and globalisation are also issues of concern for international law.
- Australia has taken many steps to protect rights in Australia but there are still issues that arise with how this operates for many Australians.

Short-response questions

1 **Propose** reasons why the WTO Appellate Body has been touted as 'becoming the most powerful international court'.
2 **Describe** the role of Special Rapporteurs to examine and report on specific human rights with reference to at least two examples.
3 **Explain** the process of the UN Security Council right of veto and give examples of its use.
4 **Explain** the charges in which the International Criminal Court has jurisdiction.
5 Signatories to the Universal Declaration of Human Rights 1948 have the obligation to protect and fulfil human rights. **Describe** two human rights outlined in the declaration.
6 **Identify** the implications of the Hague Convention on the Civil Aspects of International Child Abduction 1980.

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7 The United Nations Peacekeeping Force is an available tool to maintain peace and security. **Explain** the role of the UN Peacekeeping Force.

8 **Explain** how inter-State complaints are resolved. Provide one example to demonstrate your understanding.

9 The Geneva Conventions and the Hague Conventions set guidelines/rules to the treatment of prisoners of war. **Explain** two expectations of host countries when detaining a prisoner of war.

Extended-response questions

1 **Evaluate** the effect of the two cases *Chow Hung Ching v R* (1948) 77 CLR 449 and *Nulyarimma v Thompson* (1999) 164 ALR 621 on Australia's adoption of international law.

2 **Investigate** the conflict between Japan and other countries (including Australia) over whaling.

a What international tribunal has jurisdiction in this matter?

b What are the issues of the various countries involved in this whaling dispute?

c How do you think this conflict might be resolved?

Figure 11.31 People wave as the whaling ship *Nisshin Maru* leaves with a whaling fleet from a port of Shimonoseki City, Japan.

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Response-to-stimulus questions

1 'Diplomatic immunity is a concept that is able to be relied on to protect a person from criminal action for wrongdoing.' In an argumentative essay of 600–800 words, **analyse** this statement, **justify** this customary right and **discuss** whether there should be exceptions to its application.

2 'International law is a "toothless tiger". Without a sovereign body or state to enforce it, international law is of limited effectiveness.' In an argumentative essay of 600–800 words, **analyse** this statement and **evaluate** its accuracy with reference to examples.

Use Source 1 to answer questions 3 to 5.

3 The International Criminal Court (ICC) is requesting arrest warrants for leaders on both sides of the Israel-Hamas conflict. **Identify** the specific crimes the ICC is accusing each side of committing.

4 The article mentions that the ICC lacks its own enforcement power. **Identify** the two main challenges this creates for the ICC in holding powerful leaders accountable.

5 The article discusses the case of Slobodan Milošević, a former leader who was eventually tried by an international court. **Discuss** what this case suggests about the conditions needed for the ICC to successfully prosecute high-level suspects.

Gas prices could put brake on spring travel

Source 1

ICC seeks arrest warrants for Benjamin Netanyahu, Yahya Sinwar and other Israeli and Hamas leaders – but this is unlikely to bring quick justice

Victor Peskin, The Conversation, 30 April 2024

The chief prosecutor at the International Criminal Court has requested that the court's judges issue arrest warrants for Israeli and Hamas leaders, stemming from Hamas' Oct. 7, 2023, attacks on Israeli civilians and Israel's subsequent siege of Gaza.

Karim A.A. Khan, the chief prosecutor of the International Criminal Court, often known as the ICC, said in a statement that he was seeking arrest warrants for Israeli Prime Minister Benjamin Netanyahu and the Israeli defense minister, Yoav Gallant – as well as Hamas leaders Yahya Sinwar, Muhammad Deif and Ismail Haniyeh. Khan said that both the Israeli and Hamas leaders "bear criminal responsibility" for "war crimes and crimes against humanity," which he detailed in the statement.

The ICC's allegations against Hamas include extermination, murder, taking hostages, and committing rape and other acts of sexual violence. And the ICC allegations against the two Israeli leaders include starving Palestinians in Gaza, "intentionally directing attacks against a civilian population," as well as persecution and "willful killing."

The ICC, an independent tribunal based in The Hague, Netherlands, prosecutes genocide, crimes against humanity and war crimes – the latter being a legal term that includes attacking civilians and committing other wartime violations, such as blocking humanitarian aid.

Khan had announced an investigation in November 2023 to scrutinize Hamas and Israeli suspects in the aftermath of Hamas' attack in Israel that killed 1,200 people and kidnapped hundreds more, and Israel's subsequent war in Gaza, which has so far killed more than 34,000 Palestinians.

The ICC's criminal investigation comes on the heels of the high-profile genocide case that South Africa brought against Israel in December 2023 in another international tribunal called the International Court of Justice.

But these investigations and courts are distinct. While the ICC can hold trials of individuals allegedly responsible for criminal violations of international humanitarian law, the International Court of Justice is a part of the United Nations that rules on civil litigation and cannot charge individuals with crimes.

As a scholar of human rights and international courts, I think it is important to emphasize that the ICC and other contemporary international criminal tribunals lack any enforcement powers of their own.

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That means in the Israel-Hamas situation, the ICC may never be able to arrest suspects or bring them to trial.

These international courts therefore have a mixed record of holding senior political and military leaders accountable for their crimes. It's only if and when political leaders fall from power that there is any chance that their governments will arrest and hand them over to international courts for prosecution.

The challenge for international courts

Take the example of Russian President Vladimir Putin, who, since March 2023, has defied an ICC arrest warrant for allegedly committing war crimes during the Ukraine war. As long as Putin remains in power, there is practically no prospect of his arrest.

International criminal tribunals such as the ICC have a twofold problem. First, these tribunals do not have an actual international police force to carry out arrests.

Second, governments implicated in their leaders' alleged crimes often try to obstruct international tribunals by not turning over suspects and by seeking to attack the tribunals as biased.

The enforcement problem, as my scholarship has shown, can allow the leaders of a powerful country such as Israel or an entity like Hamas to evade arrest warrants from international courts – as long as the suspects remain within their country or territory.

In this situation, Israel is not a party to the ICC, meaning it never agreed to abide by its rulings or arrest warrants and does not otherwise accept the court's jurisdiction. The U.S. and other countries, including Qatar, where at least one of the Hamas leaders named in Khan's arrest warrant request lives, are also not ICC members and do not face a legal obligation to make arrests.

If the ICC pre-trial chamber approves Khan's request for arrest warrants for Netanyahu and Gallant, they could travel to meet with U.S. leaders in Washington, D.C., without fear of arrest. But they will now likely avoid travel to European Union countries, all of which are part of the ICC and would be obliged to arrest Netanyahu.

All of this may also contribute to Israel's further international isolation and pressure over its wartime conduct.

Issuing arrest warrants for the Hamas leaders also threatens to stigmatize Hamas internationally.

The U.S., which at times has strongly opposed the ICC but has also supported the court on an ad hoc basis, as has happened in the ICC's Ukraine war case, has warned that issuing arrest warrants for Israeli leaders could compromise a potential cease-fire agreement between Israel and Hamas.

Milosevic's fall from power

Not all arrest warrants fail.

The trial of Serbian leader Slobodan Milosevic in the mid-2000s illustrates how international tribunals might be able to prosecute alleged war criminals once they fall from power.

In 1993, as the war in Bosnia was still being fought, the United Nations Security Council set up a special court, called the International Criminal Tribunal for the former Yugoslavia, to address crimes committed during the regional wars.

This court indicted Serbian nationalist leader Slobodan Milosevic for war crimes and crimes against humanity in 1999 during the ongoing Kosovo war. Milosevic's alleged crimes in Kosovo included a massive ethnic-cleansing campaign waged against Kosovar Albanians, the largest ethnic group there. Milosevic later faced additional charges for alleged crimes in Bosnia and Croatia.

But Milosevic was still in power when the indictment was issued, and his government shielded him from arrest. Milosevic lost a presidential election in late September 2000 and, after widespread protests, stepped down.

The U.S. promised the new democratic government in place in Serbia substantial economic assistance to speed its postwar recovery. This helped prompt the Serbian government to arrest Milosevic and then transfer him to the the international tribunal in June 2001.

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A potential playbook for Israeli and Hamas leaders

Milosevic's trial was launched in February 2002, but he died in prison in 2006, shortly before the end of his trial.

His trial still shows that under specific circumstances, international courts can overcome their lack of enforcement powers and bring high-level suspects to trial. International political pressure and incentives often serve an essential role in this process.

As long as any political and military leaders facing potential arrest remain in power, it is likely that no amount of political pressure or promises will persuade Israel, Qatar or other countries to cooperate with an international court and turn over any leaders, if they are indicted.

And history also shows that even if Hamas leaders are overthrown or Israeli leaders lose elections, there's no guarantee that potential suspects will ever stand trial at the ICC.

There is broad public opposition to the ICC in Israel, with politicians across the political spectrum condemning Khan's request for arrest warrants.

Despite the fact that Khan is also seeking to prosecute Hamas leaders, Israeli politicians have reacted to the ICC's arrest requests with outrage. Moreover, at least in the short term, it is highly unlikely that the U.S. will apply the type of pressure against its close ally, Israel, that it successfully applied on Serbia for Milosevic's arrest after his fall from power.

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Chapter **12** Topic **3**

Human rights in Australian contexts

Chapter overview

In Topic 3, students continue to focus on human rights and explore how this area of law is addressed in Australia and Queensland. They explore the role of different groups in both protecting rights and influencing just and equitable outcomes.

Legal Studies 2025 v1.1 General Senior Syllabus, Page 27. © Queensland Curriculum & Assessment Authority.

Chapter objectives

By the end of this topic, students should be able to:

- Explain and analyse the rights that Australians have in criminal and civil contexts, including the role of express and implied rights in ensuring equality under the law, e.g.
  - right to free speech
  - right to protest and the freedom of assembly
  - freedom from discrimination
  - right to democratic representation
  - freedom of religion
  - right to trial by jury.
- Explain the legal processes available to citizens for resolving human rights complaints in Australia, including protesting, lobbying, lodging complaints, tribunal/court actions.
- Explain and analyse the roles of the following groups in protecting and/or advocating for human rights in Australia, including how they achieve their role/s
  - Australian Human Rights Commission, Australian Law Reform Commission, and state and territory Law Reform bodies
  - the courts
  - Queensland Council for Civil Liberties, Human Rights Law Centre, Australian Lawyers for Human Rights
  - special interest groups, e.g. Amnesty International, church groups, International Federation of Red Cross and Red Crescent Societies (IFRC)
  - the media.
- Analyse and apply human rights principles to a variety of Queensland and/or Australian case studies by
  - determining the nature and scope of the legal issue
  - examining different relevant viewpoints and their consequences.

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- Evaluate the legal situation using the analysis (above) by
  - presenting legal alternatives to make a recommendation/s
  - justifying using legal criteria and
  - discussing implications.
- Analyse and evaluate legal issues to resolve or improve human rights in Australia and Queensland.

Legal Studies 2025 v1.1 General Senior Syllabus, Page 27. © Queensland Curriculum & Assessment Authority.

Things you need to know

Study cards covering the key content you need to understand about this topic are available for download.

Important legislation

This topic will include the following laws:

- *Act of Toleration of 1689*
- *Age Discrimination Act 2004* (Cth)
- *Anti-Discrimination Act 1991* (Qld)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Commonwealth Electoral Act 1911* (Cth)
- Convention on the Rights of Persons with Disabilities
- *Criminal Code Act 1889* (Qld)
- *Criminal Code Act 1995* (Cth)
- *Defamation Act 2005* (Qld)
- *Disability Discrimination Act 1999* (Cth)
- *Evidence Act 1995* (Cth)
- *Federal Court of Australia Act 1976* (Cth)
- *Guardianship and Administration Act 2000* (Qld)
- *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
- *Human Rights Act 2004* (Cth)
- *Human Rights Act 2019* (Qld)
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- *Judiciary Act 1903* (Cth)
- *Jury Act 1995* (Qld)
- *Legislative Standards Act 1992* (Qld)
- *Mental Health Act 2000* (Qld)
- *Peaceful Assembly Act 1992* (Qld)
- *Privacy Act 1988* (Cth)
- *Public Interest Disclosure Act 2010* (Qld)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- Universal Declaration of Human Rights
- *Youth Justice Act 1992* (Qld)

Background image: Climate protesters in Melbourne, 20 September 2019.

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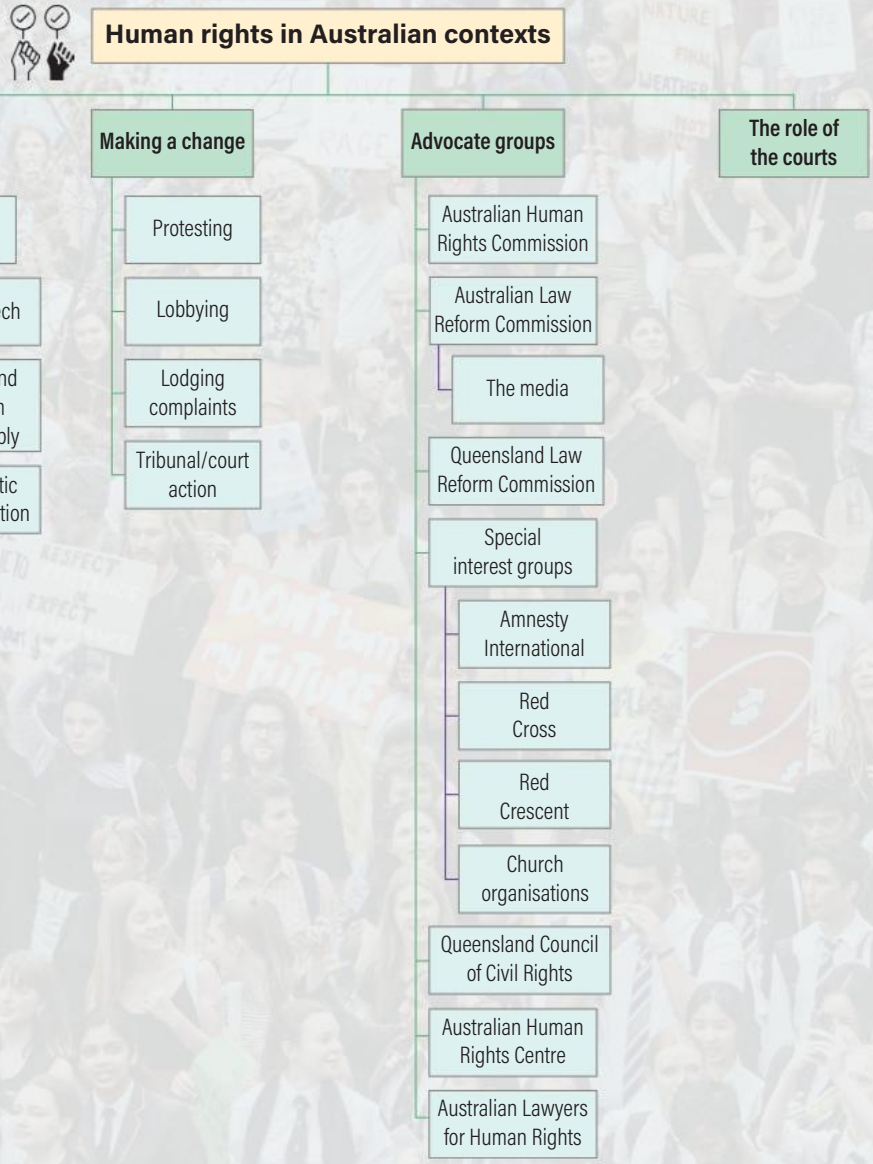
Concept map

In Topic 3 of Unit 4 of the QCAA Legal Studies course, we will cover the following content:



Introduction

This chapter extends and builds upon the concepts studied in the previous two chapters on human rights, and focuses learning on human rights in Australian contexts. The chapter begins with a study of criminal and civil human rights (criminals are still entitled to human rights) and the source of power for these rights – statutory, constitutional or bestowed under international human rights covenants. The chapter evaluates how human rights complaints are resolved and how we protect and advocate for human rights in Australia.

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12.1 Australian criminal and civil human rights

We learned in Chapter 10 that the Australian Constitution does not include a bill of rights but some human rights are mentioned, such as the right to compensation if the government acquires your property (s. 51(xxxi)), your right to a trial by jury in some circumstances (s. 80) and the freedom to practise your own religion (s. 116). Apart from these protections, how does Australia guarantee and protect other rights such as your **civil rights**, for example? Additionally, we will consider the rights that should be protected if a person is involved in criminal activity and how, even then, there are important rights that must be respected.

civil rights a class of rights that protect individuals' freedom from infringement by governments, social organisations and private individuals

Federal human rights protections

At the federal level, we have already seen examples in Chapter 10 of how human rights are protected in Australia by legislation that has ratified Australia's obligations under international law. These laws include:

- *Australian Human Rights Commission Act 1986* (Cth)
- *Privacy Act 1988* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1999* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth).

In addition to these Acts, the federal parliament enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which requires that a member of parliament who proposes to introduce a Bill to the parliament must include a statement of compatibility that contains an assessment of whether the Bill is compatible with human rights.

Queensland human rights protections

For many years, unlike other Australian states and territories, Queensland did not have specific human rights legislation (based on the human rights listed in the International Covenant on Civil and Political Rights) that addressed the limited number of rights mentioned in the Australian Constitution. Queensland relied mainly on the courts applying common law principles and the federal government's obligations under international law, as well as specific state legislation such as:

- *Anti-Discrimination Act 1991* (Qld)
- *Legislative Standards Act 1992* (Qld)
- *Criminal Code Act 1889* (Qld)
- *Youth Justice Act 1992* (Qld)
- *Guardianship and Administration Act 2000* (Qld)
- *Mental Health Act 2000* (Qld).

However in 2019, Queensland passed the *Human Rights Act 2019* (Qld). This act aims to protect and promote human rights in Queensland and seeks to ensure that individuals' fundamental rights and freedoms are respected, protected and promoted by public entities, including government departments and agencies.

This means that:

- parliament must consider human rights when proposing and scrutinising new laws
- courts and tribunals, so far as is possible to do so, must interpret legislation in a way that is compatible with human rights
- public entities – such as state government departments (e.g. Queensland Corrective Services, Queensland Health, Child Safety, Youth Justice), local councils, state schools, the police, non-government organisations and businesses performing a public function – must act and make decisions compatible with human rights.

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Figure 12.1 Human rights are protected in a variety of ways in Australia.

The Act clearly states that rights can be limited, but only where it is reasonable and justifiable.

The *Human Rights Act 2019* (Qld) protects 23 fundamental human rights:

- recognition and equality before the law
- right to life
- protection from torture and cruel, inhuman or degrading treatment
- freedom from forced work
- freedom of movement
- freedom of thought, conscience, religion and belief
- freedom of expression
- peaceful assembly and freedom of association
- taking part in public life
- property rights
- privacy and reputation
- protection of families and children
- cultural rights – generally
- cultural rights – Aboriginal peoples and Torres Strait Islander peoples
- right to liberty and security of person
- humane treatment when deprived of liberty
- fair hearing
- rights in criminal proceedings
- children in the criminal process
- right not to be tried or punished more than once
- retrospective criminal laws
- right to education
- right to health services.

Source: Legal Aid Queensland website, 'Human Rights Act 2019', 18 April 2023.

It is important to note, that if these rights are breached, complaints can be made to the Queensland Human Rights Commissioner.

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Review 12.1

Visit the website for the Queensland Human Rights Commissioner.

1 **Identify** the process for making complaints.
2 **Describe** types of complaints that can be dealt with by the Commission.
3 Read the section 'What is the Commission's Role?' **Compare** and **contrast** the strengths and weaknesses of how the Commission can deal with complaints.

The Queensland government has been the subject of some criticism at times for passing laws that seem to be in breach of its own *Human Rights Act*.

Research 12.1

Listen to the radio interview with the Queensland Human Rights Commissioner at https://cambridge.edu.au/redirect/10500.

1 **Explain** some of the criticisms made of the way in which the Queensland government has attempted to deal with the issue of youth crime.
2 **Describe** an alternative perspective on how youth crime could be addressed. **Decide** which perspective you find more convincing. **Explain** why.

Figure 12.2 The consequences of serious youth crime can be tragic.

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Along with the *Human Rights Act 2019* (Qld), the *Anti-Discrimination Act 1991* (Qld) is the other significant piece of legislation that currently provides human rights protections in Queensland. The Act provides that it is an offence for a person to be discriminated against on the basis of factors such as sex, age, gender identity, race and impairment, and in certain contexts including work, education and the provision of goods and services. The Anti-Discrimination Commission Queensland has called for amendment of this legislation, stating in 2016 that 'improvements could be made to the *Anti-Discrimination Act 1991* (Qld) which is now 25 years old, to provide better protection from discrimination, sexual harassment, victimisation and vilification'.

Figure 12.3 The right to peacefully protest is an important civil right.

Check this out

Read the Queensland Government's response to the Human Rights Commission's review of the *Anti-Discrimination Act 1991* (Qld) at https://cambridge.edu.au/redirect/10501.

1 How many of the recommendations have been accepted?
2 What were the responses by the Queensland Government to the recommendations about religious bodies? Identify any issues the government has outlined as potential problems in the responses.

Rights in civil and criminal justice contexts

When it comes to basic human rights, we have seen how these are protected by a combination of international law, federal Acts, as well as some state legislation. One of the most important categories of human rights in need of protection involves those that relate to the justice system. After all, for many people around the world, justice and how it operates, whether in a civil or criminal context, can be very problematic. Being imprisoned without a trial, being subjected to corporal or capital punishment, or simply not being able to have legal representation at all are often the hallmarks of a totalitarian regime with little to no respect for human rights.

In Australia, we try to ensure the rule of law (see page 10) is part of how our political, legal and social systems operate.

On a more specific level, there are basic human rights that relate to how an effective and equitable justice system should operate.

Civil justice rights

The rights that apply in civil justice contexts are clearly important and, in some respects, pervade both civil and criminal justice matters. For example, a foundational right is the right to a fair hearing (or trial in a criminal matter). This includes a number of factors considered necessary in order to ensure justice is done. Fair trial and fair hearing rights include:

- all persons are equal before courts and tribunals
- the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

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It is important that people are equal before the law and that power, position or money, does not give special legal privileges. Additionally, the right to a public hearing stems from the saying, 'Justice should not only be done, it should be seen to be done.' Having public hearings is important to ensure transparency and instil confidence in our justice system. Another important principal is to ensure the ability of all people to access the justice system if needed. For a system to work properly, people need to be able to use it if it is needed. This means the ability to afford legal consultation and representation is a cornerstone of an effective justice system. Australia does have some issues in this area, especially in relation to access to the civil justice system.

Check this out

Read *The Conversation*: 'Extra funding for legal assistance services should only be a start' at https://cambridge.edu.au/redirect/10502.

1 What are the issues surrounding access to justice in Australia?
2 What change is needed?
3 What are some of the concerns identified with the findings? Do you agree with them?

Criminal justice rights

The right to a fair hearing (or trial in a criminal matter) also means a number of other human rights specific to criminal matters. These are sometimes referred to as minimum guarantees. These are:

- **presumption of innocence:** The principle that every individual is considered innocent until proven guilty beyond a reasonable doubt. The burden of proof rests with the prosecution to establish the defendant's guilt.
- **right to legal representation:** Defendants have the right to be represented by a lawyer throughout the criminal proceedings. If they cannot afford legal counsel, the court may appoint a defence representative for them.
- **right to be informed of charges:** Defendants have the right to be informed of the charges against them in a language they understand. They should also be informed promptly and in detail of the nature and cause of the accusations.
- **right to remain silent:** Defendants have the right to remain silent and not testify against themselves during the trial. They cannot be compelled to be a witness against themselves.
- **right to confront witnesses:** Defendants have the right to confront and cross-examine witnesses brought against them by the prosecution.
- **right to compulsory process:** Defendants have the right to present evidence and call witnesses in their defence.
- **right to a speedy trial:** Defendants have the right to have their case heard without undue delay. This right is intended to prevent prolonged pre-trial detention and avoid potential harm to the presumption of innocence.
- **protection against double jeopardy:** Defendants cannot be tried for the same offence twice. This principle prevents the government from subjecting individuals to repeated trials for the same alleged conduct.
- **protection against self-incrimination:** Defendants have the right to avoid self-incrimination, meaning they cannot be forced to confess to a crime or provide evidence against themselves.
- **right to interpretation and translation:** Defendants who do not speak the language used in court have the right to interpretation and translation services to understand the proceedings.
- **right to appeal:** Defendants have the right to appeal their conviction or sentence to a higher court if they believe there were errors in the trial.

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Figure 12.4 Even though you may be a convicted criminal, you still have rights.

These rights have been outlined in several important human rights treaties. The rights to fair trial are outlined in Articles 7 (equality before the law), 8 (right to have rights protected), 10 (public hearing), 11 (innocent until proven guilty, right to public independent trial), 12 (protection of the law) of the Universal Declaration of Human Rights (UDHR).

These rights are set out in more detail in the International Covenant on Civil and Political Rights (ICCPR), in particular, in Articles 14(3), (5–7) and 16. This covenant is a key international human rights treaty, providing a range of protections for civil and political rights and those in relation to the administration of justice in particular.

These rights are incorporated into Australian law through a variety of Commonwealth laws. This is necessary as although Australia has signed the UDHR and ICCPR, ratification by the passing into Australian legislation of the provisions of covenants and treaties is needed to give legal effect to those conventions. The *Evidence Act 1995* (Cth) contains provisions relevant to criminal proceedings such as section 20 that provides protection against self-incrimination. Section 30 allows the use of interpreters to ensure the accused understands the nature of the legal process to which they are being subjected. Criminal offences under state and federal law are primarily heard in state and territory courts. Sections 68 and 39 of the *Judiciary Act 1903* (Cth) allow for appeals to be heard in accordance with ICCPR Article 14(6). Section 30AA of the *Federal Court of Australia Act 1976* (Cth) and section 73 of the Constitution and Part V of the *Judiciary Act 1903* (Cth) extend this right to the Federal Court and High Court.

The Australian Constitution also expressly enshrines the right to a trial by jury for indictable federal offences (s. 80), so Australian law does try to give effect to the ICCPR and UDHR fair trial provisions. These principles have also been recognised by decisions taken by Australian courts such as that of *Dietrich v R* in which the court found the right to legal representation as it related to the right to a fair trial was upheld as part of Australian law (*Dietrich v R* [1992] HCA 57). The right to be protected against self-incrimination was also supported by the High Court in *Sorby v The Commonwealth* ([1983] HCA 10).

Case study 12.1

The Case: *Dietrich v The Queen* (1992) 177 CLR 292

Citation

This case was decided in the High Court in 1992 and was reported in volume 177 of the Commonwealth Law Reports on page 292.

Facts

Olaf Dietrich arrived in Melbourne after a trip to Thailand in 1986. The following day, Dietrich was arrested by Australian Federal Police. He was accused of smuggling seventy grams of heroin by swallowing small packets to get them past customs. In court, Dietrich argued the drugs were planted by police, but he was found guilty on three out of four drug trafficking charges under the *Customs Act* of 1901. These charges carried a maximum sentence of life imprisonment. Though his appeal to the Supreme Court was denied, Dietrich took his case all the way to the High Court of Australia.

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Legal Issues

During the trial, Dietrich had no legal representation. He had applied for assistance from the Legal Aid Commission of Victoria, but they would not represent him unless he agreed to plead guilty to all charges. He then applied to the Supreme Court of Victoria for legal assistance, but this request was also denied. The High Court had to consider whether his lack of legal representation represented a lack of a fair trial.

Decision

The High Court majority found an accused has the right to a fair trial, and that courts have power to adjourn a matter where necessary to ensure this right is met. The court ordered the application to appeal be granted, the conviction be quashed and Dietrich be granted a new trial.

Ratio decidendi (Reason/rationale for the decision)

A majority of judges in the High Court decided that the right to a fair trial existed. Justice Toohey referring to a previous case [at 9], explicitly stated: 'the right to a fair trial is engrained in our legal system.' Dietrich's lack of legal representation, in this case, meant that the original trial was unfair.

Obiter dicta (Something to think about)

Dietrich subsequently changed his name by deed poll to Hugo Rich and received a life sentence for the murder of a security guard in 2009 with a non-parole period of 30 years.

Prisoner's rights

A sentenced prisoner still has their basic human rights and entitlements protected by common law and the legal instruments mentioned previously. These include:

- the right to a lawyer
- the right to information
- the right to vote (conditional)
- the right to medical attention
- the right to make a complaint
- the right to complain about discrimination
- the right to complain about health services
- the right to sue for damages
- the right to apply for transfer to another prison, including an interstate prison.

Prisoners have the right to vote in federal elections and referenda if they are serving three years or less of a prison sentence, but under Queensland law they cannot vote in Queensland state or local elections.

Check this out

Go to the Anti-Discrimination Commission Queensland website and search for 'Human rights in prison'. Look at the *Corrective Services Act 2000* (Qld).

In one paragraph, analyse how the rights of prisoners in Queensland are protected. Evaluate the challenges involved for prison administrators and the government.

Review 12.2

1 **Explain** the purpose of the *Human Rights Act 2019* (Qld).
2 **Explain** why the Anti-Discrimination Commission Queensland has called for an amendment to the *Anti-Discrimination Act 1991* (Qld).
3 **Summarise** the rights of prisoners in Queensland.

In Chapter 10, we looked at some of the rights that are expressly protected by the Australian Constitution and what right was impliedly protected. However, as we have seen, it is not just the Constitution that operates to protect human rights. There are a variety of ways in which a number of important human rights are protected in Australia.

Right to free speech

In Australia, do we have the right to free speech? The right to freedom of opinion and expression is contained in Articles 19 and 20 of the ICCPR. Similar rights are also outlined in Articles 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Articles 12 and 13 of the Convention on the Rights of the Child (CRC) and Article 21 of the Convention on the Rights of Persons with Disabilities (CRPD).

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Figure 12.5 In Queensland, a sentenced prisoner has the right to apply for transfer to another prison, including an interstate prison.

However, in terms of the Australian Constitution, it does not specifically outline the right to free speech. If you recall, there are some rights which are specifically protected in the Constitution. Rights such as freedom of religion (s. 116), a trial by jury for federal indictable offences (s. 80) and the acquisition of property by the government to be on just terms (s. 51(xxxi)) are all express rights in the Constitution. It is instead an implied right within our democratic form of government. This right is further restricted in some respects as the High Court found it related to the human right that allows individuals to express their political beliefs, opinions and ideas without fear of government censorship, persecution or punishment. So it is not a general right but restricted to freedom of political expression. This was confirmed in the case of *Lange v ABC* [1997] HCA 25 (see Case study 10.2).

In Australia, citizens do not have an express constitutional right to free speech as is the case in the United States, where free speech is guaranteed to its citizens in the **First Amendment**. In Australia, there are basically two elements to free speech: **freedom of opinion** and **freedom of expression**.

First Amendment an amendment to the US Constitution that forbids Congress from interfering with a citizen's freedom of religion, speech, assembly or petition

freedom of opinion the right to communicate one's opinions and ideas without fear of government retaliation or censorship

freedom of expression the right to express your opinion in any medium; a human right under Article 19 of the *Universal Declaration of Human Rights* and recognised in international human rights law in the *International* Covenant on Civil and Political Rights

Off the record

Free speech is not a guaranteed right in the Australian Constitution; it is an implied right regulated by statute and common law. Do you agree or disagree that this should be a right guaranteed by an Australian Bill of Rights? Justify your response.

Figure 12.6 Free speech in Australia is not a guaranteed right in the Australian Constitution.

Freedom of opinion is the right to hold opinions without interference; there are no exceptions to or restrictions on this right.

Freedom of expression is your right to use any medium, including written and oral communication, the media, public protest, broadcasting, artistic works and commercial advertising. This right is restricted in areas such as posting on the internet, the urging of violence or classification of artistic material and publishing defamatory information about someone. Your right to freedom of expression relates to any medium. This right protects unpopular ideas as well as favourable ones, including opinions that may offend or shock, subject to some limitations and restrictions.

The source of power in Australia for the right to free speech is contained in seven core international human rights treaties to which Australia is a signatory. The right to freedom of opinion and expression is contained in the ICCPR. The CRPD gives people with a disability the right to accessible formats and technologies, enabling them to exercise their right to freedom of opinion and expression.

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So while we do have freedom of opinion and expression, Australian laws strike a balance between preserving these freedoms and protecting people from unfair treatment and discrimination. Therefore, Australia has domestic laws to protect the community against exposure to obscenities and to protect a person's good name and integrity against false information such as defamation and discrimination. Laws regulating such matters are contained in the *Defamation Act 2005* (Qld) and *Anti-Discrimination Act 1991* (Qld). There are also laws to protect a person's private information and against saying or writing things to incite hatred against others because of their race, religion, sexuality or gender identity. The right to freedom from hate speech is protected by acts such as the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth), for example. Freedom of speech is not an excuse to harm others.

Although people in Australia have the right to express their opinion about the government, either verbally or in writing, the *Criminal Code Act 1995* (Cth) restricts this right in relation to any comments urging force or violence, or the overthrow of the Constitution or the government of Queensland or Australia. It also contains offences relating to using the fixed and mobile telephone network if it is used to menace, harass or offend people.

Under the *Anti-Discrimination Act 1991* (Qld), it is illegal to incite others to hatred, serious contempt or severe ridicule of a person or group because of their race, religion, sexuality or gender identity, for example, by publicly encouraging another person to hate disadvantaged or minority groups. Under the *Racial Discrimination Act 1975* (Cth), it is illegal to commit an act likely to offend, insult, humiliate or intimidate another person or group if you are doing it because of their race, colour or national or ethnic origin. Any act or action by another party that results in the aforementioned forms of discrimination relates to the content of any material that could be offensive to another person, as well as how and where such content has or was distributed and exhibited.

Right to protest and freedom of assembly

Check this out

Go to the ABC News website and locate the article by Corinne Grant titled 'A Helpful Guide to Free Speech: Don't Be a Dick' (17 February 2016).

Evaluate whether we really have freedom of expression in this country. Do you agree or disagree? Justify your response.

The right to **protest** and hold a peaceful assembly is considered a very important human right. According to Amnesty International Australia:

> 'It is an important way in which people can speak the truth to those in power.
>
> 'Every man of humane convictions must decide on the protest that best suits his convictions, but we must all protest.
>
> Dr Martin Luther King JR – African-American activist who led the 1963 march on Washington for African-American rights and jobs'.
>
> *Source:* Amnesty International Australia website.

The ICCPR Articles 21 and 22 outline that people should be free to peacefully assemble and associate with others. No restrictions should be placed on these rights except 'those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order …, the protection of public health or morals or the protection of the rights and freedoms of others.'

As Australia has signed the ICCPR, this operates to protect the rights of those who gather peacefully to protest, as well as the right to associate to pursue common goals. As we saw with the right to freedom of speech, there is nothing expressly provided for in the Constitution to protect this right. However, in Queensland it is governed somewhat by the *Peaceful Assembly Act 1992* (Qld).

protest a statement or action expressing disapproval of or objection to something

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Figure 12.7 Peaceful public assemblies in Queensland are defined as any rally or demonstration held in a public place, including those that move between an assembly point and another location.

Figure 12.8 Sometimes police are needed to ensure a protest is peaceful.

Peaceful public assemblies in Queensland are defined in the Act as any **rally** or **demonstration** held in a public place, including those that move between an **assembly point** and another location. A public place includes a road, a place usually open to or used by the public, or a place that is temporarily open or being used by the public. The right to protest and freedom of assembly in Queensland is a **regulated right** that is restricted under Queensland law. The state government imposes restrictions in the interests of protecting public safety, maintaining public order, protection of others' rights and freedoms, and the rights of other people not involved in the protest or assembly to enjoy the natural environment and carry on their business.

In recent times, the right to protest and freedom of assembly came into conflict with measures the governments around Australia took to ensure public health and safety in the COVID-19 pandemic. Restricting the rights of people to gather was considered by some an overreach of government power and unfairly restricted people's rights to assemble and/or protest against what the government was doing. Others considered it a necessary restriction given the seriousness of the pandemic.

rally a mass meeting of people making a political protest or showing support for a cause

demonstration a public meeting or march protesting against something or expressing views on a political issue

assembly point a point where a group of people gather together in one place for a common purpose

regulated right a right that is regulated, defined and controlled in legislation

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Check this out

Read *The Conversation*: 'Public protest or selfish ratbaggery? Why free speech doesn't give you the right to endanger other people's health' at https://cambridge.edu.au/redirect/10503.

Do you agree with the arguments raised about the restrictions on protesting and gathering? Why or why not?

Figure 12.9 Discrimination is unlawful in Australia.

> The *Peaceful Assembly Act 1992* (Qld) requires that any public protest or assembly must be authorised by the police and other relevant local authorities, for example, local government (council). This involves giving the relevant authorities a notice of intention to hold the protest or assembly and getting official approval to do so.
>
> *Source:* Queensland Government, Right to Protest.

Freedom from discrimination

As we have already seen, the federal, state and territory governments have introduced a number of laws to help protect people from discrimination and harassment. In Queensland, the primary laws that protect your right to freedom from discrimination are the *Anti-Discrimination Act 1991* (Qld) and the *Human Rights Act 2019* (Qld).

There are also a number of federal laws that seek to do the same. These include Acts we have already considered in some detail such as the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

Additionally, other federal laws also play a role:

1. ***Australian Human Rights Commission Act 1986*:** This Act establishes the Australian Human Rights Commission, which is responsible for promoting and protecting human rights in Australia. The Commission handles complaints related to discrimination and provides education and awareness about human rights and anti-discrimination laws.
2. ***Fair Work Act 2009*:** While not exclusively an anti-discrimination law, the *Fair Work Act* includes provisions against workplace discrimination and harassment. It ensures that employees are treated fairly and equitably in the workplace.

Commonwealth laws and the state and territory laws generally overlap, and prohibit the same type of discrimination. As both state and territory laws and federal laws apply, you must comply with both. However, state and territory laws are not identical to other state and territory laws or to Commonwealth laws, so they apply in slightly different ways; this results in some gaps in the protections offered between different states and territories and at a federal level.

Source: Adapted from the Australian Human Rights Commission, *A Quick Guide to Australian Discrimination Laws*.

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Figure 12.10 The federal House of Representatives.

Right to democratic representation

As we learned in Chapter 10, the right to democratic representation is provided for in the Australian Constitution. However, the political idea of representation is based on the principle of representative government, where the people elect others to represent their beliefs, attitudes and perspectives in parliaments and local councils across the country.

The ICCPR expressly mentions the right to vote. Specifically, it states in Article 25:

> 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) To have access, on general terms of equality, to public service in his country.'
>
> *Source:* Australian Human Rights Commission website, *'Right to take part in public affairs, voting rights and access to public service'*.

In Australia, this occurs through the electoral process and requires that Australians also have the **right to vote**. The idea underpinning democratic representative government is the concept of government of the people, by the people, for the people (President Abraham Lincoln, Gettysburg Address 1863), a concept embraced here in Australia that requires our elected representatives to face the people at regular intervals to be either chosen again as representatives or replaced. This occurs in elections for all three levels of government in Australia. So the right to democratic representation in Australia is exercised through the **ballot box**.

right to vote a constitutional or legislated right of eligible citizens to elect a representative to parliament or a local council from a list of candidates

ballot box the sealed container into which an elector places a completed ballot paper

Once elected, the representatives of the people are delegated responsibility by the people who elected them to perform certain functions, including:

- deciding who will form government
- making laws in the best interest of the people, country, state or territory
- debating and investigating issues on behalf of the people (constituents) they represent

Figure 12.11 Voters have their names crossed off the electoral roll by AEC volunteers in the 2022 federal election.

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- making representations on behalf of their constituents to the government and the public service
- monitoring the expenditure of public money and the actions of the government.

Not all countries have compulsory voting. In fact, many do not including the United States, the United Kingdom and New Zealand. It has been argued that countries such as the United States would benefit from such a process due to the complexities of the electoral system currently in place.

Compulsory electoral enrolment

According to the Museum of Australian Democracy website, the *Commonwealth Electoral Act 1911* (Cth) introduced compulsory electoral enrolment for all Australians who are eligible to vote. Compulsory voting was first advocated by Alfred Deakin shortly after Federation, but voting remained voluntary at the first nine federal elections. Proponents of compulsory voting argue that it teaches citizens the benefits of participation in political and parliamentary representation. Since the introduction of compulsory voting in 1924, the turnout at Australian elections has never fallen below 90 per cent.

Figure 12.12 Votes being counted in Australia's first compulsory federal election in 1924.

Review 12.3

Read the following quotes and answer the following questions.

> *One of the most important ways that individuals can influence governmental decision-making is through voting in parliamentary elections. In a representative democracy such as Australia, voting gives people the power to affect how their country is governed by electing those who will represent their interests in parliament.*
>
> *Source:* Museum of Australian Democracy, Old Parliament House, Canberra.

> *While the right to vote was one of the principles of democratic reform demanded by the British Chartists, it was initially limited in colonial Australia to a select group of men who held property of a certain value. The list of those eligible to vote was gradually expanded but universal suffrage, the right of all adult men and women to vote, was not achieved nationally until 1963 when Indigenous Australians were granted the right to vote at federal elections.*
>
> *Source:* Museum of Australian Democracy, Old Parliament House, Canberra.

1 **Evaluate** these quotes. **Decide** whether this process is effective in regard to the right to democratic representation for all Australians. **Justify** your response.
2 **Argue** whether the right to democratic representation is conditional upon all Australians having the right to vote. **Justify** your response.

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Issues do exist with the right to vote in Australia. The Australian Human Rights Commission has raised concerns that these rights are not always enjoyed by all Australians.

In Australia, our federal, state and territory parliaments and local councils carry out the role of representing the people because it is not feasible for all the people to be involved all the time, even if they were so inclined, in the business of government. So the right to democratic representation in Australia means that the people delegate the task of representation to their elected members of parliament and local government councils.

Figure 12.13 All Australians with voting rights get a say at election times.

Check this out

Read the article 'The right to vote is not enjoyed equally by all Australians' at https://cambridge.edu.au/redirect/10504.

1 What are some of the historical and contemporary barriers that have limited the equal enjoyment of the right to vote for certain groups of Australians?
2 The article mentions the importance of addressing issues related to voting rights, including for First Nations peoples and those with disabilities. How can these issues be addressed to ensure equal access to the right to vote for all Australians?
3 In the article, the author suggests that Australia has made progress in improving voting accessibility. What specific measures or reforms have been implemented to enhance the enjoyment of the right to vote? What further steps could be taken to continue this progress?

Freedom of religion

The right to freedom of religion is considered a basic human right and is protected by a number of international human rights instruments. Article 18 of the UDHR states that 'Everyone has the right to freedom of thought, conscience, and religion', including the right to change one's religion or belief, and freedom (either alone, in community with others and in public or private) to manifest their religion or belief in teaching, practice, worship and observance.

Article 18 of the ICCPR further elaborates on the right to freedom of thought, consciences and religion. It emphasises the right to manifest one's religion or belief through worship, observance, practice and teaching. The right to freedom of religion given in Article 18 protects not only the 'traditional' religious beliefs of the major religions but also **non-theistic** and **atheistic** beliefs, as well as the right not to profess *any* religion or belief.

non-theistic not believing in one God as the creator and ruler of the universe

atheistic the doctrine or belief that there is no God

The right recognised in Article 18 is simultaneously an individual right and a collective right. It has both an 'internal' dimension (the freedom to *adopt* or *hold* a belief) and an 'external' dimension (the freedom to manifest that belief in worship, observance, practice or teaching).

There is also a separate instrument called the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the '1981 Declaration'). This Declaration sets out principles for the elimination of discrimination and intolerance based on religion or belief.

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Figure 12.14 Religious freedom is guaranteed in Australia.

The right to freedom of religion in Australia is provided under section 116 of the Constitution of Australia, which makes it a protected constitutional right. It prohibits the federal parliament from enacting laws establishing any religion, imposing any religious observance or prohibiting the free exercise of any religion, and prevents the Commonwealth making religious tests a requirement as a qualification to hold any office or public trust.

In Queensland, the right to freedom of religion is protected under the *Anti-Discrimination Act 1991* (Qld), which makes it illegal to discriminate against a person based on 'religious belief or activity'. However, this is a restricted or limited right. The legal protection offered under state law must take into account Article 18(3) of the International Covenant on Civil and Political Rights, to which Australia is a signatory. For example, the law is limited or restricted to those laws that are necessary for the protection of public safety, order, health or morals, or the fundamental rights and freedoms of others.

Additionally, Section 20 of the *Human Rights Act 2019* (QLD) says that:

1. Every person has the right to freedom of thought, conscience, religion and belief, including-
   a. the freedom to have or to adopt a religion or belief of the person's choice; and
   b. the freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
2. A person must not be coerced or restrained in a way that limits the person's freedom to have or adopt a religion or belief.

Source: legislation.qld.gov.au, 'Human Rights Act 2019'.

The *Human Rights Act 2004* (Cth) protects the rights of every person to think and believe what they want, and to have or adopt a religion without being influenced to do so. This right includes being able to publicly and privately practice their religion as an individual or in a group.

It has been suggested that the way in which marriage laws in Australia currently stand does not fully support freedom of religion. Many cultures support multiple spouses (e.g. one man may have up to four wives in certain Islamic countries like Saudi Arabia in accordance with Islamic law). In countries like Tibet and Nepal, a woman may have multiple husbands in accordance with religious beliefs and culture in those countries. These religious practices are not allowed in Australia under the marriage laws here and it could be argued such a restriction is a religious as well as cultural one.

Off the record

The ALRC website reminds us that:

> Legal protection of religious freedom is a relatively modern phenomenon. British history is punctuated by Acts of Parliament that discriminated against some groups on the basis of religion. For instance, the *Act of Toleration* of 1689 – a reform Act of its day – allowed freedom of worship to Protestants who dissented from the Church of England (known as Nonconformists) but not to Catholics, atheists or believers in other faiths such as Judaism.
>
> *Source:* Australian Law Reform Commission website, 'The Common Law', 31 July 2015.

There has been some discussion in recent years as to whether Australia needs a 'Religion Discrimination Act' to better protect those with religious views from discrimination. This debate has been quite divisive at times and there are some quite detailed arguments for and against such a law.

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Figure 12.15 In the 2021 Census data, 38.9 per cent of people in Australia identified as having no religion. This was an increase from 18.7 per cent in 2006.

Review 12.4

Read *The Conversation*: Why Australia does not need a Religious Discrimination Act at https://cambridge.edu.au/redirect/10505. Consider the right of freedom of religion and the legal obligations and answer the following questions.

1 **Outline** arguments for and against a Religious Discrimination Act disclosed in the article and other relevant sources.
2 **Evaluate** the statement 'A Religious Discrimination Act would allow discrimination against LGBTQIA people.'
3 **Explain** why religious groups believe such a law is necessary.

Right to trial by jury

The right to a trial by jury is considered by many to be a cornerstone of an effective and impartial justice system. It has its roots in the Magna Carta of 1215 and since then has become a human right that has been vigorously protected. Some key international legal instruments protect the right to a trial by jury.

Figure 12.16 Jury trials are an important part of the legal system.

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Article 10 of the UDHR 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'. While the UDHR does not explicitly mention trial by jury, it underscores the importance of a fair and impartial tribunal.

The ICCPR also details rights in relation to trial generally. Article 14(1) of the ICCPR states that 'All persons shall be equal before the courts and tribunals'. Article 14(2) further specifies that 'Everyone charged with a criminal offense shall have the right to be presumed innocent until proven guilty according to law' and 'to have the determination of his case by competent, independent and impartial tribunal established by law'. While the ICCPR does not require trial by jury, it emphasises the need for an independent and impartial tribunal.

The right to trial by jury is provided for in section 80 of the Australian Constitution. However, this right only applies to the more serious indictable offences that are heard in the **superior courts**, such as the District or Supreme Courts. The minor summary offences are dealt with in the **lower courts**, or Magistrates Courts, in each state or territory jurisdiction as a judge-only trial. So the right to trial by jury in Australia is a limited right that depends on the nature of the offence. (Refer to Chapter 2 for further information.)

superior court a higher court of record or general jurisdiction; a state Supreme Court

lower court the first court in a hierarchy; the Magistrates Court

Summary and indictable offences

In Queensland, the majority of criminal laws have been codified in the *Criminal Code Act 1899* (Qld). The Code covers a range of offences relating to violence, sex offences, property, fraud, arson, corruption, breaches of the peace and others. It also contains procedural rules and practices to be followed. Summary offences in the Code include disorderly behaviour, traffic offences, and minor criminal offences and misdemeanours. The more serious indictable offences mentioned in the Code, such as murder, rape, robbery, assault, and break and enter, are referred by the Magistrates Courts to the higher courts for trial by jury. The *Jury Act 1995* (Qld) provides for the selection and composition and role and responsibilities of jurors. As Brisbane-based lawyer Michelle Makela puts it:

> In Queensland the *Summary Offences Act 2005* creates a range of offences which are generally designed to maintain good order in the community, most particularly in public spaces. Despite the title of the Act, some of the offences contained in it are serious and carry a maximum penalty of imprisonment upon conviction.
>
> *Source:* Michelle Makela, *Armstrong Legal* website, 'Summary offences'.

Trials by judge alone

In Queensland, some indictable offences can be heard by a judge alone instead of by a judge and jury. The prosecution or the defence may apply to the court for a no jury order under section 614 of the *Criminal Code 1889* (Qld). If it is an application from the prosecution, the accused must agree to the court granting a judge-only trial instead of a trial by jury. The judge will decide whether such an order should be made and apply an 'interests of justice' test; that is, the judge will only permit this mode of trial if it is in the interests of justice to do so under section 615(1) of the Code. Sometimes it is argued that the interests of justice cannot be served by a trial by jury if:

- the trial would be unreasonably burdensome on a jury because of its length or legal complexity
- there is a possibility of offences against jury members
- there has been significant pre-trial publicity that would compromise the principle of a fair trial.

Off the record

Evaluate how the court would apply this section of the Code when deciding whether or not to grant a judge-only trial.

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Queensland – s 615 *Criminal Code 1899*

Making a no jury order

(1) The court may make a no jury order if it considers it is in the interests of justice to do so.

(2) However, if the prosecutor applies for the no jury order, the court may only make the no jury order if the accused person consents to it.

(3) If the accused person is not represented by a lawyer, the court must be satisfied that the accused person properly understands the nature of the application.

Without limiting subsection (1), (2) or (3), the court may make a no jury order if it considers that any of the following apply;

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 section 119B would be committed in relation to a member of a jury;

c There has been significant pre-trial publicity that may affect jury deliberations.

Without limiting subsection (1), 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.

Source: Queensland – s.615 Criminal Code 1899, legislation.qld.gov.au.

Figure 12.17 Jurors are banned from researching aspects of their case online during the trial.

Figure 12.18 Various types of decision strategies – some of them inappropriate – have helped juries make up their minds.

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Review 12.5

Read *The Conversation*: 'All about juries: why do we actually need them and can they get it 'wrong'?' at https://cambridge.edu.au/redirect/10506.

Consider the right of trial by jury and answer the following questions.

1 **Identify** some of the perceived problems with the jury system outlined in the article.
2 **Evaluate** the legal implications inherent in the statement 'the internet age meant jurors were finding it harder to switch off from the outside world.'
3 **Evaluate** why it is important for any prior criminal history of the defendant *not* to be disclosed to a juror.
4 **Decide** whether you agree or disagree that 'the jury system is necessary for Australia's justice system.' **Explain** why or why not.
5 In some jurisdictions, a judge-only trial is not an option, where juries are required for all sex offences and murder trials. **Evaluate** why the internet age could compromise the impartiality of a juror.
6 Unlike a jury in a judge-only trial, the judge must give reasons for their decision. **Evaluate** both situations. In the interest of justice, **identify** situations where each option would be best. **Justify** your response.

In civil matters, juries are less common than in criminal matters. There are a number of reasons for this. Litigants in civil cases usually prefer having a highly trained judge rather than a jury decide on contested facts. Also, jury trials tend to be more time-consuming and expensive and in civil litigation this is an issue generally for litigants. Additionally, the burden on the publicly-funded justice system is already heavy so any move to make justice less expensive and move more quickly is significant. The option for jury trials exists but it is generally not taken unless there are cases involving defamation, in which jury trials are often the norm. Civil juries also consist of four jurors rather than 12 in Queensland.

12.2 Resolving human rights complaints

In Australia, there are several avenues available to people who wish to resolve a human rights complaint: under federal legislation through the discrimination laws using the Australian Human Rights Commission, or in Queensland, under the *Anti-Discrimination Act 1991* (Qld) or the *Human Rights Act 2019* (Qld) using the Queensland Human Rights Commission.

Australian Human Rights Commission

The Australian Human Rights Commisssion (AHRC) can investigate and resolve complaints of discrimination, harassment and bullying based on a person's:

- sex, including pregnancy, marital or relationship status (including same-sex de facto couples), breastfeeding, family responsibilities, sexual harassment, gender identity, intersex status and sexual orientation
- disability, including temporary and permanent disabilities; physical, intellectual, sensory and psychiatric disabilities, diseases or illnesses; medical conditions; work-related injuries; past, present and future disabilities; and association with a person with a disability
- race, including colour, descent, national or ethnic origin, immigrant status and racial hatred
- age, covering young people and older people.

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A complaint on one of the listed grounds is considered a complaint of unlawful **discrimination** and as such may also constitute a breach of federal, state and territory anti-discrimination laws.

discrimination unjust or prejudicial treatment of different categories of people or things, especially on the grounds of race, age or sex

The AHRC can also investigate and resolve complaints of discrimination, harassment and bullying in employment, based on a person's criminal record, trade union activity, political opinion, religion or social origin. It also investigates and resolves complaints about alleged breaches of human rights against the Commonwealth and its agencies.

In Australia, it is against the law to be discriminated against in many areas of public life, including employment, education, the provision of goods, services and facilities, accommodation, sport and the administration of Commonwealth laws and services.

Source: AHRC.

Check this out

Go the AHRC website and search for 'Complaint Information'. Explain the complaints process and how the Commission resolves complaints.

Federal legislation

A human rights complaint can be brought under various federal Acts, depending on the nature of the alleged breach. These complaints can be heard in the Federal Court of Australia and can be brought under any one or more of the following Acts:

- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Age Discrimination Act 2004* (Cth).

The Federal Court has the power to hear proceedings under section 46PO of the *Australian Human Rights Commission Act 1986* (Cth). However, if the matter is or has been before the Commission, the Commission must issue a **notice of termination** before the Federal Court can begin to deal with the complaint. This means you must make the complaint first to the AHRC.

notice of termination an official written notification that a matter has been terminated

To lodge a complaint with the Federal Court of Australia, it must be lodged within 60 days after the issue of the notice of termination from the AHRC. The person making the complaint must prove three things:

- what happened, what was done and who did it
- that what happened was unlawful under one of the discrimination statutes
- that harm or damage was suffered because of what was done.

There is therefore a method of dealing with a complaint if the AHRC's attempts to resolve the issue fail. However, court action is time-consuming and expensive so it is not surprising that many choose not to proceed with this option.

> All Australian states and territories have enacted anti-discrimination legislation. Under the Australian Constitution, they can do so, as long as the state laws are not inconsistent with

Figure 12.19 Dr Tim Soutphommasane speaks at a conference in Sydney in 2018. He was Australia's Race Discrimination Commissioner at the Australian Human Rights Commission from 2013 to 2018.

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federal laws. Often the state laws go further in the protection they offer because states are not limited in their powers, as the federal government is, by the terms of international treaties. Some state laws, for example, protect against discrimination on the ground of religion or sexuality, grounds not covered by federal laws.

Source: Adapted from the Attorney-General's Department website, 'Australia's anti-discrimination law'.

State legislation

In Queensland, the state government has responsibilities for human rights enacted by the parliament in the *Anti-Discrimination Act 1991* (Qld) and the *Human Rights Act 2019* (Qld), and a human rights complaint can be brought under these Acts. The aim of the Acts is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct. The principles contained in the *Anti-Discrimination Act 1991* (Qld) and the *Human Rights Act 2019* (Qld) are derived from international **human rights treaties**. Any alleged breach of human rights under these laws can be lodged with the Queensland Human Rights Commission, which is the statutory authority that promotes and protects human rights in Queensland.

human rights treaty an agreement and obligation undertaken by signatory nations to ensure that everyone enjoys the human rights set out in the treaty

Lodging complaints

A human rights complaint can be **lodged** through the AHRC for a federal breach or with the Queensland Human Rights Commission (QHRC) for a state or local breach.

To lodge a complaint with the AHRC or QHRC similar requirements are in place. The complaint must be in writing and include details of all necessary information regarding the nature of the complaint. The AHRC and QHRC prefers the details of the complaint to be completed on their complaint forms, which are available from the Commissions online or in hard copy by request. A person can submit the complaint form online or by printing the completed form and posting it to the Commission.

lodge present a complaint, appeal or claim formally to the proper authorities

Figure 12.20 Anti-discrimination laws give people a voice.

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Both commissions require that a complaint must set out reasonably sufficient details to show that the person complained about may have breached the relevant laws such as federal discrimination Acts, the *Anti-Discrimination Act 1991* (Qld), or the *Human Rights Act 2019* (Qld) or committed a **reprisal** under the *Public Interest Disclosure Act 2010* (Qld).

The main way of resolving complaints is through **conciliation**. This form of alternative dispute resolution involves a neutral third party (the conciliator) to reach a mutually acceptable agreement or resolution of the issue in dispute. The primary goal of conciliation is to facilitate communication and negotiation between the parties so they can resolve their differences without resorting to formal legal proceedings, such as litigation or arbitration. The process allows parties to put forward their views and is more informal and flexible than a court proceeding. The main aim of the conciliator is to facilitate communication, assist in problem-solving, and guide the parties toward a resolution, but they do not make decisions or impose solutions. The success of conciliation often depends on the willingness of the parties to collaborate and find common ground. The main disadvantage with the process is that a party cannot be compelled to do anything, which makes actual enforcement or change difficult.

Figure 12.21 Allowing a person to put forward their perspective may help resolve a dispute.

As we have already seen, if you are unhappy with the resolution of the issue by the AHRC, you have the option of pursuing the matter in Federal Court.

Similar rights apply in relation to the QHRC. You have 28 days to ask your QHRC conciliator to refer your complaint to:

- the Queensland Industrial Relations Commission (QIRC) – for work-related complaints
- the Queensland Civil and Administrative Tribunal (QCAT) – for all other complaints.

Again, many choose not to proceed due to the potential costs of litigation, although QCAT is much more affordable in terms of costs that the Federal Court.

reprisal an act of retaliation

conciliation a form of alternative dispute resolution that involves a neutral third party (the conciliator) to help parties reach a mutually acceptable agreement or resolution of the issue in dispute

Check this out

View the Queensland Human Rights Commission website for Case Notes – Human Rights at https://cambridge.edu.au/redirect/10507.

Read through some of the cases.

1 What are some of the human rights that a variety of tribunals (including QCAT) and courts in Queensland have sought to protect?
2 Pick one case. Identify the different perspectives of the parties involved. What were the differences that led to the dispute between the parties in the first place?
3 What legal alternatives can you identify to the final decision that was made? Why do you think the parties did not pursue these other options?

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12.3 Law reform bodies and human rights

In Chapter 9, we learned how law reform responds to the changing needs of contemporary Australian society. This process is also important to the laws on which we rely to protect our human rights. To ensure that the various statutes that protect human rights across all jurisdictions are equitable, modern, fair and efficient, the federal government established the Australian Law Reform Commission to oversee human rights law reform.

Australian Law Reform Commission

As we saw in Chapter 9, the Australian Law Reform Commission (ALRC) is a federal agency that reviews Australia's laws to ensure they provide all Australians with improved access to justice. The Commission is a federal agency operating under the *Australian Law Reform Commission Act 1996* (Cth) and the *Public Governance, Performance, and Accountability Act 2013* (Cth).

The ALRC conducts inquiries, also known as references, into areas of law at the request of the Commonwealth Attorney-General. Based on its research and consultations throughout an inquiry, the ALRC makes recommendations to the government so that government can make informed decisions about law reform. The ALRC recommendations do not automatically become law; however, over 85 per cent of ALRC reports have been either substantially or partially implemented, making it one of the most effective and influential agents for legal reform in Australia.

The ALRC is part of the Attorney-General's portfolio. However, it is independent of government and is able to undertake research, consultations and legal policy development, and to make recommendations that:

- bring the law into line with current conditions and needs
- remove defects in the law
- simplify the law
- adopt new or more effective methods for administering the law and dispensing justice
- provide improved access to justice.

When conducting an inquiry, the ALRC also monitors overseas legal systems to ensure Australia compares favourably with international best practice.

The ALRC aims to ensure that the proposals and recommendations it makes do not trespass unduly on the personal rights and liberties of citizens. It also tries to ensure those rights are able to be exercised by citizens as easily as possible and, as far as practicable, they are consistent with the ICCPR.

The ALRC must also have regard to any effect that its recommendations may have on the costs of access to and dispensing of justice.

Figure 12.22 The Australian Law Reform Commission tries to ensure Australian laws are the best they can be.

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Important human rights investigations undertaken by the ALRC

1 Family Violence and Commonwealth Laws – Improving Legal Frameworks (2011):
   - The ALRC conducted an inquiry into family violence laws, which included a focus on how the legal system responds to family violence, child protection and family law matters.
   - The recommendations made by the ALRC in this inquiry aimed to improve the protection and rights of victims of family violence, particularly women and children.

2 Inquiry into Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (2016):
   - In this inquiry, the ALRC examined the extent to which traditional rights and freedoms were being encroached upon by Commonwealth laws.
   - The ALRC's recommendations focused on safeguarding individual rights and freedoms, addressing national security legislation, and maintaining a proper balance between security and civil liberties.

3 Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (2018):
   - The ALRC conducted an inquiry into the high rates of incarceration among Indigenous Australians. The inquiry addressed issues related to the criminal justice system, child protection, and social determinants of Indigenous overrepresentation in the criminal justice system.
   - The recommendations sought to improve the protection of the rights and wellbeing of Indigenous peoples and promote social justice.

4 Review into the Framework for Religious Exemptions in Anti-Discrimination Legislation (2019):
   - In this inquiry, the ALRC examined the legal framework for religious exemptions in anti-discrimination laws and their implications for human rights, particularly in the context of freedom of religion and the rights of others.
   - The ALRC's findings and recommendations aimed to strike a balance between religious freedom and the protection of individuals from discrimination.

5 Review of Judicial Impartiality (2020):
   - The ALRC examined laws pertaining to judicial impartiality and bias, focusing on the federal judiciary, which includes the High Court, Federal Court, Federal Circuit and Family Court.
   - The review seeks to ensure that the law maintains public confidence, provides clarity on conflict management, and offers appropriate mechanisms for addressing allegations of bias, whether actual or perceived.

Review **12.6**

1 **Explain** the three avenues available to a person attempting to resolve a human rights complaint in Australia.
2 In the Federal Court of Australia, **identify** under what Acts the court can hear a human rights complaint.
3 **Explain** how a Notice of Termination is used in a human rights complaint before the Federal Court of Australia.
4 **Identify** the Queensland Act that protects human rights in the state and analyse how a complaint can be lodged under this Act.
5 **Explain** the three things that a person lodging a human rights complaint must prove.
6 **List** the different state and territory law reform bodies that are responsible for state and territory law reform.

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State and territory law reform bodies

Each state and territory has its own approach to human rights law reform (see Table 12.1).

In Queensland, the QLRC fulfils a similar role to the ALRC. Its primary function is to review and recommend reforms to Queensland's laws and legal processes in order to improve the efficiency, fairness and effectiveness of the legal system. The QLRC plays a crucial role in shaping and modernising Queensland's legal framework.

Figure 12.23 In Queensland, the Queensland Law Reform Commission fulfils a similar role to the Australian Law Reform Commission on a national level.

Check this out

View the 'completed reviews' section of the Queensland Law Reform Commission (QLRC) at https://cambridge.edu.au/redirect/10508.

Pick one of the recent reviews.

1. Identify the different perspectives that were sought when the review was conducted. Which organisations/bodies/individuals had input into the recommendations? What did they say?
2. Examine what recommendation the QLRC made in relation to the issue.
3. Research to find the government response to the recommendations made. Did new laws result? If not, why not and what could be the implications of this not happening?

Table 12.1 State and territory law reform bodies

Jurisdiction	Reform body
New South Wales	The NSW Law Reform Commission is an independent statutory body constituted under the *Law Reform Commission Act 1967* (NSW). Provides expert law reform advice to the NSW Government on matters that the Attorney-General refers to it.
Victoria	The Victorian Law Reform Commission is the central agency for law reform in Victoria. It is a statutory authority, established under the *Law Reform Commission Act 2000* (Vic).
Tasmania	The Tasmanian Law Reform Institute was established in 2001 by agreement between the state government, the University of Tasmania and the Law Society. The functions of the Institute include the review and reform of Tasmanian laws.
South Australia	The South Australian Law Reform Institute was established in December 2010. The Institute, based at the Adelaide Law School, is formed by an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.
Western Australia	The Law Reform Commission of Western Australia assists in keeping the law up to date and relevant to the needs of society by making recommendations for the reform of areas of law referred to it by the Attorney-General. The Attorney-General tables the Commission's reports in parliament as required by the *Law Reform Commission Act 1972* (WA).
Queensland	The Queensland Law Reform Commission is an independent statutory body established under the *Law Reform Commission Act 1968* (Qld). The Commission's key statutory duties, as provided in section 10(3) of the *Law Reform Commission Act*, include undertaking law reform reviews referred to it by the Attorney-General.

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Jurisdiction	Reform body
Australian Capital Territory	The ACT Law Reform Advisory Council (LRAC) was established in 2009 as a collaboration between the ACT Government and the ANU College of Law. LRAC's Terms of Reference specify that its role is to 'provide expert advice and recommendations to the Attorney-General on terms of reference dealing with law reform matters referred to it by the Attorney-General.'
Northern Territory	The Northern Territory Law Reform Committee is a non-statutory committee established to advise the Attorney-General on the reform of the law in the Northern Territory. The Committee considers matters referred to it from time to time by the Attorney-General. The Legal Policy Division of the Department of the Attorney-General and Justice provides executive and administrative support to the Committee.

12.4 Specialist interest groups

We have already seen how lodging complaints, tribunal and court actions and the law reform bodies work to advocate and protect human rights. Other bodies also operate to do this in different ways. The organisations that follow often operate as important lobby groups.

A lobby group works to influence government policies, legislation, and public opinion in favour of certain issues – in this case, protecting and promoting human rights. Their primary goal is to ensure that governments and institutions respect, uphold and advance

Figure 12.24 Public pressure can influence legislation of rights.

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human rights principles, both domestically and internationally. Lobby groups play a critical role in advocating for the rights of marginalised and vulnerable populations and holding those responsible for human rights abuses accountable. They contribute to shaping public policy and legislation to align with human rights standards, fostering a more just and equitable society. Lobbyists will often make representations to government about how an issue should be addressed so the groups that follow operate in this way quite effectively.

In addition to lobbying, sometimes organisations like the Queensland Council for Civil Liberties will assist with or even participate in protests on particular human rights issues. As we saw in Chapter 10, we do have certain rights to freedom of assembly and expression, as long as they are not exercised unlawfully. Protests can bring very public pressure on governments to act in relation to an issue and there have been many examples of protests taking place in relation to human rights concerns that have led to governments acting on an issue when they may otherwise have not. Pressure brought in this way can also act to force changes for the better in relation to human rights issues by highlighting public concerns, bringing attention to an issue and putting pressure in a public way on governments to intervene.

Check this out

Read *SBS News* 'Four times protests have helped bring about real change in Australia' at https://cambridge.edu.au/redirect/10509.

1 Analyse the role protests played in the advancement of Indigenous land rights in Australia and explain whether significant change resulted from these protests.
2 Identify an example of a specific protest or movement discussed in the article that contributed to progress in women's rights in Australia and explain how it did so.
3 In the context of environmental activism, describe how have protests in Australia influenced government policies and actions. Give an example of a recent environmental protest and what results came from it.

Queensland Council for Civil Liberties

The Queensland Council for Civil Liberties (QCCL) is a voluntary organisation concerned with the protection of individual rights and civil liberties. It was founded in 1966 with the aim of protecting and promoting the human rights and freedoms of Queensland citizens. The desire to create a civil liberties organisation began in the shadow of what many considered to be the Queensland Government's repression of civil liberties during anti-Vietnam War protests.

QCCL works towards a society in which the human rights enshrined in such documents as the UDHR and the ICCPR, to which Australia is a signatory, are enjoyed by all Queenslanders and Australian citizens.

The aims of the QCCL are to:

- be vigilant in matters affecting civil liberties and to safeguard and develop respect for human rights and freedoms
- provide information about threats to, and the abuse of, rights and liberties and to foster the study of legal and human rights
- seek solutions to problems related to civil liberties, including prison reform, censorship and rights of minority groups
- provide, when necessary, neutral observers at marches and demonstrations.

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Figure 12.25 The Queensland Council for Civil Liberties is focused on protecting the human rights of all Queenslanders.

The QCCL conducts a range of activities such as:

- makes submissions to governments, inquiries or relevant authorities
- publicly opposes laws and actions that undermine civil liberties
- holds lectures and seminars on civil liberties and addresses groups by invitation
- encourages public discussion on civil liberties issues by issuing media releases and responding to media requests
- supports publication of books and pamphlets on relevant subjects
- mobilises citizens to actively engage with their local, state and federal members about human rights violations
- coordinates volunteers: we rely on the financial contributions of our members and on donations and do not receive financial support from government or corporations.
- encourages members to get involved and take action to raise awareness of civil liberties issues that affect us all.

Source: QCCL website. https://www.qccl.org.au/history1

The role of the QCCL is important in that it often operates to highlight issues within Queensland society and the operations of government. It may be limited in what it is able to directly do to protect against human rights abuses, but it does bring attention to issues and is an important voice in protecting human rights.

Check this out

View the Queensland Council for Civil Liberties (QCCL) website at https://cambridge.edu.au/redirect/10510 and read 'The government fails to live up to its own standards', dated 25 August 2023.

In a paragraph, evaluate the concerns of the QCCL regarding possible human rights breaches in the proposed legislation.

Australian Human Rights Centre

The Australian Human Rights Centre (recently renamed the Australian Human Rights Institute (AHRI)) is a research and teaching institute based in the Faculty of Law at the University of New South Wales. It is highly respected as a focus of academic and public intellectual thought in the human rights sphere in Australia and overseas. The centre promotes public awareness and academic scholarship about domestic and international human rights standards, laws and procedures through research projects, education programs and publications.

The AHRI brings together lawyers, policymakers, researchers and students from Australian and international organisations and universities to engage in research and teaching activities and public debate on a range of human rights issues. These include issues related to disability, violence, gender, social security, social media, migrants and refugees, housing and health.

The centre publishes the *Australian Journal of Human Rights*, a high-quality peer-reviewed research publication, and the *Human Rights Defender*, a more informal and accessible publication for a general audience. Each year, the AHRI convenes

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a number of public seminars and events, coordinates human rights courses and internships for students and hosts a number of international and Australian Visiting Fellows. The centre is an important advocacy source for human rights in Australia.

Check this out

View the Australian Human Rights Institute (AHRI) 'Our Impact' tab at https://cambridge.edu.au/redirect/10511.

What are the issues the AHRI has had an impact on recently? What have they done to assist in protecting human rights in these examples?

Australian Lawyers for Human Rights

Australian Lawyers for Human Rights (ALHR) was established in 1993. The ALHR is an association of legal professionals active in practising and promoting awareness of international human rights standards in Australia. It has a national membership of Australian lawyers, barristers, judicial officers, legal academics and law students, with active national, state and territory committees and national specialist thematic committees.

The ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international law and human rights in Australia in order to:

- promote and support lawyers' practice of human rights law in Australia
- promote federal, state and territory laws across Australia that comply with the principles of international human rights law
- engage with the United Nations in relation to Australian human rights violations
- engage internationally to promote human rights and the rule of law
- advocate for human rights by making submissions to government inquiries, participating in public debates, and engaging in legal advocacy on specific human rights issues
- engage in or support public interest litigation cases that involve significant human rights implications.

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS™

Figure 12.26 Australian Lawyers for Human Rights was established in 1993 and is another important voice advocating for human rights issues in this country.

Again, like many of these organisations, the ALHR is an important voice in protecting human rights in Australia and bringing attention to issues that may arise in relation to human rights.

Review 12.7

Identify what statements the Australian Lawyers for Human Rights has made in relation to the following issues.

Pick one of the following issues to **explain**.

- Advocating for asylum seekers and refugees, including offshore detention
- Supporting Indigenous rights
- Campaigning for marriage equality
- Addressing concerns about counter-terrorism laws
- Promoting gender equality and women's rights

The media

The role of the media, in all its different forms, in advocating and protecting human rights is significant but complex. On one hand, it is the primary job of the media to report events and pass on information to the public without bias or pushing a particular agenda. However, there is also the importance of using platforms to expose injustice or wrongdoing. When we talk about the 'media', this traditionally meant newspapers and TV reporting. However, this could also be extended now to social media platforms such as Facebook or X (formerly Twitter). As such, often

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everyday people rather than journalists, may play a role as well in bringing attention to injustice. Social media campaigns such #MeToo brought much needed attention to the issue of sexual assault of women and also resulted in criminal convictions for some after women came forward to report incidents as a result of the campaign. Additionally, the #BlackLivesMatter movement that started on social media in 2013 in the United States received huge attention following the death of an African–American man George Floyd in 2020. Floyd's death during an arrest by police started a wave of protests around the world about the treatment of people of colour. This included discussions in Australia around the extremely high rates of Indigenous people in jail among other things.

The media safeguards human rights by exposing abuses, raising public awareness and amplifying marginalised voices. Through investigative journalism, it will often uncover wrongdoing and holds the culprits accountable, while also providing a platform for vulnerable populations to ensure their stories are heard.

In a sense, the media serves as a watchdog, monitoring government actions and promoting dialogue on human rights issues. It educates the public and advocates for human rights causes, facilitating international pressure and preventive efforts. By documenting abuses, the media supports legal accountability and may deter potential violators.

However, its effectiveness depends on factors like press freedom and government responsiveness, and journalists may face risks in the process. In essence, a responsible and free media is a critical force in protecting and promoting human rights, ensuring that violations are exposed and addressed.

The media must exercise its role responsibly though, as it has at times been accused of also infringing on rights of individuals. This often arises in relation to the right to be considered innocent until proven guilty. In some instances, reporting on a particular case may potentially encourage the public to form an impression that the person accused should be seen as having 'done the crime'. This is often known as 'trial by media' and has been the subject of complaints from judges that such reporting can undermine the rights of those accused of crimes.

Figure 12.27 The media often play an important role in holding those in power accountable. Pictured is Michele Bullock, governor of the Reserve Bank of Australia, answering questions during a news conference in Sydney on 6 February 2024.

Research 12.2

Read *The Conversation*: 'Australia needs a Media Freedom Act. Here's how it could work' at https://cambridge.edu.au/redirect/10512.

1. **Identify** the arguments made in favour of a Media Freedom Act.
2. **Decide** whether you agree or disagree with these arguments. **Explain** why or why not.
3. **Determine** whether there any dangers or difficulties with creating such an act.

Amnesty International

Amnesty International is a global movement of more than ten million people who take injustice personally. It is an advocacy group campaigning for a world where human rights are enjoyed by all.

Amnesty International is funded by its members and is independent of any political ideology, economic interest or religion. It believes that no government is beyond scrutiny and no situation is beyond hope. In 1961, British lawyer Peter Benenson was outraged when two Portuguese students were jailed just for raising a toast to

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freedom. He wrote an article in *The Observer* newspaper and launched a campaign that provoked an incredible response. Reprinted in newspapers across the world, his call to action sparked the idea that people everywhere can unite in solidarity for justice and freedom. This inspiring moment didn't just give birth to an extraordinary movement; it was the start of extraordinary social change:

> 'Few would have predicted when we started that torturers would become international outlaws. That most countries would abolish the death penalty, and seemingly untouchable dictators would be made to answer for their crimes.'
>
> *Source:* Peter Benenson, Amnesty International founder.

Research 12.3

View Amnesty International 'How it Works' at https://cambridge.edu.au/redirect/10513.

1 **Describe** the ways in which Amnesty International operates to help protect and advocate for human rights.
2 **Explain** some of their 'wins'.

International Federation of Red Cross and Red Crescent Societies

The International Federation of Red Cross and Red Crescent Societies (IFRC) was founded in 1919 in Paris in the aftermath of World War I. The war had revealed a need for close cooperation between Red Cross Societies, which through their humanitarian activities on behalf of prisoners of war and combatants had attracted millions of volunteers and built a large body of expertise. A devastated Europe could not afford to lose such a resource.

It was Henry Davison, president of the American Red Cross War Committee, who proposed forming a federation of these National Societies. An international medical conference initiated by Davison resulted in the birth of the League of Red Cross Societies, which in October 1983 was renamed the League of Red Cross and Red Crescent Societies, and then in November 1991 became the International Federation of Red Cross and Red Crescent Societies.

The first objective of the IFRC was to improve the health of people in countries that had suffered

Figure 12.28 British lawyer and Amnesty International founder, Peter Benenson (1921–2005) pictured in 1994 (left). Amnesty International is an international non-governmental organisation focused on human rights, pictured (right) is their offices in London, United Kingdom. The non-government organisation says it has more than 10 million members and supporters worldwide.

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Figure 12.29 Red Cross workers get ready to go out on an aid supply mission, in Kharkiv, Ukraine, 24 March 2022. (*Source:* Photo by Marcus Yam, Los Angeles Times.)

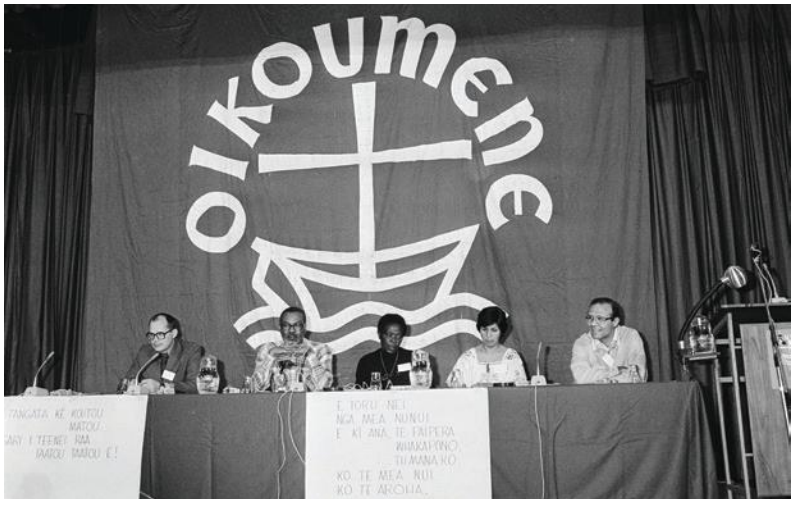

Figure 12.30 Opening conference of the World Council of Churches (WCC) in The Netherlands in June 1980. The WCC is an important human rights organisation. The logo of the WCC is seen on the wall behind the table.

greatly during the four years of war. Its goals were 'to strengthen and unite, for health activities, already-existing Red Cross Societies and to promote the creation of new Societies'.

There were five founding member societies: the United Kingdom, France, Italy, Japan and the United States. This number has grown over the years, and there are now 190 recognised National Societies – one in almost every country in the world.

Off the record

'Only when the last prisoner of conscience has been freed, when the last torture chamber has been closed, when the United Nations Universal Declaration of Human Rights is a reality for the world's people, will our work be done.'

Source: Peter Benenson, Amnesty International founder.

The World Council of Churches

The World Council of Churches (WCC) is a special interest ecumenical group that advocates and lobbies for human rights. It achieves this by bringing together churches of various denominations in more than 110 countries and territories throughout the world. The World Council of Churches represents over 500 million Christians, including most of the world's Orthodox churches, scores of Anglican, Baptist, Lutheran, Methodist and Reformed churches, as well as many United and independent churches.

While the bulk of the WCC's founding churches were European and North American, today most member churches are in Africa, Asia, the Caribbean, Latin America, the Middle East and the Pacific. There are now 348 member churches. A key aim of the WCC is to serve a human need by breaking down barriers between people and seeking justice and peace throughout the world.

Review 12.8

1 **Evaluate** how the Australian Human Rights Centre lobbies for human rights and law reform in Australia. Do you think it has been effective? **Explain** why or why not.
2 **Analyse** how Australian Lawyers for Human Rights advocates for and promotes human rights issues in Australia and worldwide.
3 **Evaluate** the significance, importance and effectiveness of the following specialist interest groups protecting and advocating for human rights:
   a Amnesty International
   b the International Federation of Red Cross and Red Crescent Societies
   c the World Council of Churches.

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12.5 Topic review

Topic summary

- At the federal level, human rights are protected in Australia by legislation that identifies Australia's obligations under international law.
- Human rights protections in state and territory jurisdictions exist under state and territory statute laws.
- The *Anti-Discrimination Act 1991* (Qld) is the key legislation providing human rights protections in Queensland.
- Freedom from discrimination is protected under federal, state and territory Anti-Discrimination Acts.
- The Australian Constitution protects a limited number of human rights; all other human rights are implied rights under state and territory laws.
- The right to trial by jury only applies to indictable offences; all other summary offences are judge-only trials.
- Significant pre-trial publicity and access to the internet and mobile phones by jurors have made appointing impartial juries and ensuring a fair trial difficult for the courts.
- Human rights complaints in Australia can be resolved in three ways: under federal legislation, or state and territory legislation, or through the Australian Human Rights Commission.
- The Australian Law Reform Commission oversees human rights law reform.
- Each state and territory has its own law reform body that includes human rights law reform.
- Specialist interest groups are non-government organisations that also promote and advocate for human rights.
- Australia has been prosecuted for human rights breaches in the Australian Human Rights Commission.

Short-response questions

1 **Explain** why prisoners cannot vote in Queensland but can do so in federal elections. Do you agree or disagree with this? **Explain** why or why not.

2 **Evaluate** how the Australian Law Reform Commission reviews Australia's laws to ensure improved access to justice for all.

3 **Propose** recommendations to improve the jury system in the interests of justice for all who come before the courts.

4 **List** the major aims of the Queensland Council of Civil Liberties.

5 **Explain** the concept of freedom of religion as it is interpreted in Australia. Refer to the Australian Constitution and contemporary issues.

6 *Mabo v Queensland* (No 2) [1992] HCA 23 was a fundamental case in progressing Aboriginal and Torres Strait Islander peoples' rights in Australia. **Explain** the importance of this case in relation to human rights.

7 Freedom from discrimination is a fundamental human right; however, it can be argued that access to legal representation indirectly discriminates. **Explain** the issues with legal aid and how this impacts legal representation.

8 **Explain** the aims of Amnesty International and how they influence change in Australia. Provide an example where this special interest group has had an impact on creating change.

9 The media can be a formidable advocate for human rights infringement. Provide an example of a human rights breach which was publicised and therefore gained further public support in creating a change.

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Extended-response questions

1 Research the arguments for and against the introduction of a Human Rights Act in Queensland. **Argue** the case for and against the introduction of such an Act.

2 In a paragraph, **compare** and **contrast** the different law-reform bodies in each state and territory.

3 **Evaluate** how each state and territory engages in law reform. **Propose** recommendations that would improve this process regarding human rights law reform.

Response-to-stimulus questions

1 Go to the State Library of New South Wales website and under 'Find Legal Answers: Hot Topics 77: Refugees' search for 'Chapter 6: Landmark cases in Australia'. In a paragraph, **evaluate** how landmark cases have resulted in important legislative changes and human rights law reform in Australia. Select two cases as examples to support your response.

2 Go to the Australian Human Rights Commission website and search for 'Human Rights Explained: Case Studies: Complaints about Australia to the Human Rights Committee'. Scroll through the cases and select a case of interest. **Evaluate** the human rights breaches involved. Consider the outcome and the decision of the Commission. Do you agree or disagree? **Propose** recommendations that would ensure similar breaches are avoided in the future.

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Glossary

absolute majority the government has more than half of all members elected to the parliament

acceptance (in contract law) when a party who has received an offer agrees to that offer unconditionally; once an offer has been accepted, a contract is in place

accession when a State enters into a treaty that has already been formed after it has been negotiated and signed by other States

adjournment the postponement of legal proceedings to a later date

admissible evidence that is introduced and allowed during trial

adversarial system a system of law in which each side presents evidence in order to prove their case

advocacy describes people bringing forward arguments to advance the interests of some person or group in society by such means as writing to a local member seeking to change a law or a major group meeting directly with government to influence policy and law

age of criminal responsibility the age at which a young person can be held responsible for their action

aggravating factor a factor which makes a criminal offence objectively worse and which, therefore, suggests the need for a heavier, not a lighter, punishment

agreement when one party makes an offer, and the other accepts it, the two parties are said to have reached agreement; if all of the other elements of formation are present, the agreement becomes a contract

alleged criminal situation where an unproven accusation of a crime is reported to the police for investigation

alternative dispute resolution settling a dispute without having to go through a more formal process such as a court hearing; methods include mediation, conciliation, arbitration, case appraisal and settlement

anticipatory breach if it becomes clear that a contract is going to be breached, the innocent party need not wait for the breach to actually occur, they can anticipate the breach and take steps to terminate the contract and seek damages

appeal an application to the courts when a party believes that the judge or jury made the wrong decision, or the trial was not conducted according to the law

appellate court any court that can hear an appeal from another court: when the Supreme Court sits as the Court of Appeal; or the High Court as the final court of appeal

arraignment formal reading of the charges in the District or Supreme Court

assault the unlawful, intentional threat of force or infliction of injury on another person

assembly point a point where a group of people gather together in one place for a common purpose

atheistic the doctrine or belief that there is no God

Australian Constitution the set of basic rules by which Australia is governed; it is set out in the *Commonwealth of Australia Constitution Act 1900* (UK)

bail a process whereby a person who is accused of a criminal offence is allowed to remain in the community until their trial, rather than being remanded in prison

balance of power when another political party or independent members support a minority government, these other members hold the balance of power in the parliament

balance of probabilities the standard of proof in civil cases, requiring that a party's claims are more likely true than not, or 'probably true', for the court to rule in their favour

ballot box the sealed container into which an elector places a completed ballot paper

barrister argues cases in court proceedings

beyond reasonable doubt the highest standard of proof in a criminal trial, where the prosecution must prove the defendant's guilt to the extent that there is no reasonable doubt left in the minds of the jurors

bicameral a legislature, assembly or parliament consisting of two houses

bilateral treaty a formal agreement entered into by two States

bill of rights sometimes referred to as a charter of rights; it is a document that lists the fundamental rights that a person should have

bipartisan involving the agreement or cooperation of political parties that usually oppose each other's policies

Bolam principle a doctor is not negligent if they act in accordance with accepted practice at the time, as deemed proper by a responsible body of medical opinion, even though other doctors adopt a different practice

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breach of contract if one party has failed to complete their obligations under the contract

burden of proof the obligation in a legal proceeding for one party to provide sufficient evidence to support their claims or allegations

bureaucratic procedures rules and often time-consuming methods, procedures and protocols for carrying out the business of a house of parliament or government department

burglary the act of entering a building or other premises with the intent to commit an indictable offence

but-for test determining whether the harm or damage would have occurred if the defendant had taken the action or not taken the action

capacity a person is fully able to enter into a contract if they have reached 18 years of age, and if they are not affected by any condition (such as mental illness or intoxication) which removes their ability to understand the nature of the contract they are entering into

carnal knowledge the act of engaging in sexual intercourse

case law the principles of law arising from judicial decisions as distinguished from statute law; also termed common law

causal relationship the direct relationship between the harm and damage caused by the original action

causation the harm, damage or injury that was directly caused by the defendant

certainty when the court is able to read the words of a contract and attach a meaning to them; if the court cannot identify any clear meaning at all, the term is uncertain

charter a formal document that serves as a foundational or governing instrument for a community, institution or organisation; it establishes the rights, rules, guiding principles and privileges of the body it represents, outlining its purpose, structure and aims

Chief Justice the senior justice of the High Court of Australia

civil rights a class of rights that protect individuals' freedom from infringement by governments, social organisations and private individuals

class action a lawsuit initiated by a single person on behalf of members of a group of people who are seeking financial compensation for wrongdoing

coalition a government formed with the support and cooperation of two or more political parties

code a written form of the laws of a society; may also indicate appropriate sanctions for a breach of the code

cognitive capacity capable of understanding the nature and effect of decisions about the matter and freely and voluntarily able to make decisions about the matter and communicate decisions in the same way

colonisation the action of establishing control over the indigenous people of an area; the action of appropriating a place for one's own use

Commission of Inquiry a specialist, independent, temporary body created to examine a matter of public importance

committal hearing when a charge is more serious, the magistrate must decide whether the evidence against the accused is strong enough for the case to go to trial in a higher court; if the magistrate is satisfied that there is sufficient evidence, the case is committed for trial in the District Court or the Supreme Court, depending on the seriousness of the charge

committee system committees comprising members of parliament that scrutinise government activities, including legislation, and inquire into specified matters

common law the body of laws made through legal custom as well as the decisions of the courts – as distinct from statute law; also referred to as judge-made law

common mistake when two parties make a contract and both of them are mistaken about some crucial fact regarding the contract – both of them make the same mistake – then there is a common mistake; a contract entered into under a common mistake may be rescinded

community service a criminal punishment whereby the offender is required to give up a certain amount of their free time to complete public projects such as litter removal

compensation something – typically money – awarded to someone in recognition of loss, suffering or injury

compensatory damages damages that are awarded in order to compensate a plaintiff for personal injury or injury to property caused by the defendant's wrongful act

completeness for a contract to be valid, it must be sufficiently complete, meaning that all of the key, central terms of the contract must be present; for example, a contract to sell an item would be incomplete if the contract did not include a price

conciliation a form of alternative dispute resolution that involves a neutral third party (the conciliator) to help parties reach a mutually acceptable agreement or resolution of the issue in dispute

concurrent powers both the federal and state governments have the power to make laws in areas such as education and taxation

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concurrent punishment a punishment served at the same time such as a person sentenced to two or more criminal offences will often serve those sentences concurrently, so a sentence of five years each for two charges, will be served as five years in total

condition (in contract law) a term of the contract which is so important that a breach of the term would entitle the innocent party to terminate the contract and seek damages

consideration something that each side gives in a contract such as money, an item, services, promises or rights

constitutional monarchy a system in which the king or queen's power is severely limited, because they act only on the advice of the politicians who form the government

consultations these occur when the government is contemplating a new law or a new policy, and it seeks opinions and guidance from the community and specific stakeholders, who are most likely to be affected; for example, if a government planned to build a new highway bypass around a regional town, we would expect consultations with the local community and road user groups

consumer guarantee Australian Consumer Law contains a number of guarantees in relation to goods and services, which bind the supplier of goods or services and protect the purchaser (consumer); these are implied into every consumer contract and cannot be set aside (not even by agreement)

consumer protection law any legislation which ensures that consumers of goods and services are treated fairly during the transaction; the principal legislation in Australia (but not the only legislation) is the Australian Consumer Law

contra proferentum some provisions, such as exclusion clauses, will be read by the court under the expectation that if there is any ambiguity or doubt about the meaning of the clause, the party not relying on that clause will be given the benefit of that doubt

contributory negligence when a person has acted or omitted to act in such a way that they have contributed to or partly caused the damage to themselves

convention similar to a treaty but more often on specific matters or issues, and sometimes of a less formal nature; often used synonymously with treaty, covenant, charter, protocol and/or statute

conviction the finding, by a court, that a person has committed a criminal offence; this either happens after a trial resulting in a verdict of guilty or after a plea of guilty

councillor a person elected as a representative of a division or ward on a local government council

counter-claim a legal response filed by a defendant in a lawsuit against the plaintiff, in which the defendant asserts their own claims or demands against the plaintiff

counteroffer when a party receives an offer which they do not accept, one option open to them is to negotiate by making an offer in response; it is important to understand that this new offer extinguishes the original offer, so the original offer can no longer be accepted

country of origin labelling a statutory scheme which enables consumers to see whether the products they are purchasing (particularly food) were grown, manufactured, processed and packaged in Australia or another country

covenant similar to a convention in effect and use; often used synonymously with treaty, convention, charter, protocol and/or statute

crime or offence an act or omission which renders the person doing the act or making the omission liable to punishment

criminal act (*actus reus*) the physical performance of a crime (guilty act)

criminal intent (*mens rea*) a person's mental state and awareness of the fact that their conduct is criminal

criminogenesis factors which lead to criminal offending such as poverty, mental health crisis and substance addiction

cumulative punishment punishments served one after another such as a person sentenced to five years each on two charges cumulatively will serve ten years in prison

customary law the practices and systems among First Nations peoples that have developed over time, regulating behaviour and connecting people with each other and the land through a system of relationships

cyberbullying when one person bullies another using electronic processes and telecommunications; especially when this occurs using technological means to remain anonymous

damages monetary compensation awarded by a court to a party as a remedy for harm or loss suffered due to the wrongful actions of another party

default judgment given in favour of the plaintiff because the defendant has failed to file a notice of intention to defend

defence the claims of the defendant in opposition to complaints against them; the party who presents and argues the case on behalf of the accused or the defendant

defendant (criminal offence) a person who has been charged with a criminal offence and brought before the court to face that charge

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defendant (civil offence) the party against whom a lawsuit is filed, accused of wrongdoing or facing legal action in a civil case

democracy government by the people, directly or indirectly, through a system of representation, usually involving periodically held free elections

demonstration a public meeting or march protesting against something or expressing views on a political issue

denunciation (an objective of sentencing) where the sentence imposed upon a person is meant to show that the society as a whole forbids the criminal conduct that they have engaged in

diminished responsibility a defence that is used when an accused does not fully understand what they have done

discrimination unjust or prejudicial treatment of different categories of people or things, especially on the grounds of race, age or sex

doctrine of precedent a legal principle that obligates courts to follow and apply the legal decisions and interpretations established in prior cases of higher or equal authority when deciding similar future cases

double dissolution the simultaneous termination of the House of Representatives and the Senate by the Governor-General and the calling of new elections for both houses

double jeopardy a procedural defence that forbids a defendant from being tried again on the same (or similar) charges following a legitimate acquittal or conviction

double majority a majority of voters in a majority of states, together with a majority of voters across the whole country, voting 'yes' in a referendum

Drug Court a Queensland Court that offers some drug dependent offenders intensive rehabilitation instead of prison

due process the concept that the fair and equal treatment of all persons can be ensured during trial through procedural legal processes

duress an act carried out because of a threat to you or a loved one

duty of care an obligation imposed on a person to take reasonable care to ensure that they do not cause another person to suffer harm

electoral roll list of people who are registered and eligible to vote at federal, state, territory and local government elections and referenda

electorates districts comprising an approximately equal number of voters that each elect a single member to the parliament

elements of an offence the facts of an offence that must be proven to find the offender guilty

empanelled the process of being chosen for jury service for a particular trial

enforceable (relating to a contract) where the court has the power to rule in relation to disputes under the contract and to provide a remedy, which usually means all five elements of contract formation must be present, and no invalid factor may be present

equitable even and impartial; 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

evidence facts or information indicating whether a belief or proposition is true or valid

exclusion clause a clause designed to limit or remove the liability that one party might have if they fail to deliver on their obligations under the contract; fair notice must be given to the other side and notice must be given *before* the contract is formed

exclusive powers federal government powers, not shared with states, for example, the power to pass laws in relation to the defence forces and currency regulation

executive and executive government the prime minister and ministers (also called the ministry) who lead and manage government departments and are responsible for putting into action government policy and the laws made by the parliament

express right a right that is explicitly and clearly stated within the text of the Australian Constitution

express term (in a contract) the term which is actually and clearly stated whether in writing or orally

extradition the act of forced transfer/delivery of a person who is alleged to have committed a crime in one jurisdiction to the law enforcement agencies of the jurisdiction from which they have fled

fair treating people equally without favouritism or discrimination

fair trial a court hearing in which the procedures are fair to both sides

fine a punishment where the offender is required to pay money to make amends for their offending; these are often paid off over a long period of time, with the money going to the government

First Amendment an amendment to the US Constitution that forbids Congress from interfering with a citizen's freedom of religion, speech, assembly or petition

first mention the first time that a matter is heard in the Magistrates Court; at the first mention, the matter can finish with a plea of guilty or be adjourned for further mentions

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fit for purpose when goods or services are suitable for the usual purposes that most people would expect of those goods and services, and if they are suitable for any specific purpose which was made known by one of the parties

foreseeability the ability to reasonably anticipate the potential results of an action, such as the damage or injury that may happen if one is negligent or acts in a particular way

foreseeable damage damage that occurs as a result of an action that a person should reasonably have foreseen would happen if they were negligent

formal contract a special type of contract which must be in writing, and which does not necessarily require consideration

freedom of expression the right to express your opinion in any medium; a human right under Article 19 of the *Universal Declaration of Human Rights* and recognised in international human rights law in the *International Covenant on Civil and Political Rights*

freedom of opinion the right to communicate one's opinions and ideas without fear of government retaliation or censorship

frustration if some unforeseen event occurs, not the fault of either party, and it fundamentally changes the nature of the contract

Full Bench when all justices, or judges, of the court (High Court and Supreme Court) sit together to hear a matter, usually in cases of significant legal or constitutional importance

Full Court when two or more justices, or judges, sit to hear a matter before the court

genocide the deliberate extermination of a race of people

globalisation the reality that all countries are becoming more dependent on and connected with one another, socially, economically and through international law

good behaviour bond a form of penalty, much like a warning, which is a promise by the offender not to commit further offences; if they reoffend, next time they will be sentenced as a person who has already had the benefit of a good behaviour bond, but who has broken that bond

governance a method or system of government, the systems by which entities are directed or controlled

Governor-General the chief representative of the Crown in a Commonwealth country

grooming the process (usually but not always online) where a malevolent person obtains the trust of a future victim, and builds rapport with that future victim, for the purpose of then using that trust and rapport to commit offences upon that victim

hand-up committal the prosecutor gives (hands up) evidence to the magistrate without having the witnesses present; this procedure was introduced to promote efficiency during committal proceedings

human rights fundamental rights that are considered to belong to every person regardless of race, gender, age, nationality or religion

human rights treaty an agreement and obligation undertaken by signatory nations to ensure that everyone enjoys the human rights set out in the treaty

illegality in contract law the courts will not enforce a contract to commit a crime or a contract to do something which is forbidden by the law; similarly, if a contract is lawful but a party performs the contract in an unlawful way, the court will not allow that party to enforce the contract

implied right a right that has been inferred by the courts based on the structure and principles of the Australian Constitution, even though it is not specifically mentioned

implied term (in a contract) the term which is not actually written into the contract but will be part of the contract anyway, which may be understood from the facts surrounding the contract or from the law itself

imprisonment a punishment where a person is deprived of their liberty and held in a prison for a set period of time, or until they earn their release on parole

inadmissible evidence against the accused that cannot be used in court during trial

indefinite sentence a prisoner who is never to be released from prison unless a court determines that they are no longer a threat to the community

indictable offence a more serious criminal offence that requires a committal hearing and trial

indictment the document that brings the matter to trial and sets out all the appropriate information about the charges the accused is facing

injunction a court order that prohibits an action that may cause injury, or compels an action to stop the risk of injury

inquest a special type of court proceeding held to determine the circumstances of a person's death and what can be learned from that death to prevent similar deaths in future

inquisitorial system a method of legal practice in which the judge endeavours to discover facts while simultaneously representing the interests of the state in a trial

insanity state of mental disease or natural mental infirmity

intensive correction order an order which places an offender under close supervision but allows them to continue living in the community

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intention (in contract law) a party's actual intent to enter into a contract

interlocutory steps judgments being given on specific issues or points during the course of a legal action

international law a body of rules established by custom or treaty and recognised by nations as binding in their relations with one another

interrogatories a formal set of written questions that one party may ask another party to clarify before a hearing

intervening act (sometimes called *novus actus interveniens*) an intervening act that breaks the chain of causation and, if proven, means that the defendant may not be liable for the damages caused to the plaintiff

intoxication the state of impairment caused by the consumption of alcohol or drugs

invitation to treat a prelude to a contractual negotiation, which essentially says that a party is open to offers in relation to some matter; these can be difficult to distinguish from offers

issues paper released by government when the government is contemplating a new law on a particular topic; the government will explain the problem it is trying to solve, various solutions it is considering and will seek views on which of those should be preferred and why

joint sitting a meeting of both houses of parliament together to make a decision on a proposed law on which the two houses, sitting separately, have not been able to agree

judge the senior judicial officer presiding in the District Court or higher courts, including the Supreme Court, Court of Appeal, Federal Court, Federal Circuit and Family Court and the High Court of Australia

judiciary the High Court and other federal courts that make judgments about the law

jurisdiction the power or authority of a court to hear and try a case, including the geographic area in which a court has power or the types of cases it has the power to hear

jurist (from Medieval Latin) someone who researches and studies jurisprudence (the theory of law)

just legally right, conforming to that which is lawful or fair and proper in the (or all) circumstances

justice a judge appointed to the High Court of Australia

juvenile a person who is not old enough to be held responsible for criminal acts; in most states and on the federal level, this age threshold is set at 18 years

law reform the continuous process of examining current laws to see if they need to be changed to meet changes in our society and of examining areas where they might need to be entirely new laws

laws rules that are made by government to ensure that our society functions properly

legal issue a subject or matter involving the law that is worthy of investigation or debate

legal relations when parties make an agreement which they intend to be enforceable by a court; on the other hand, if family and friends make an agreement among themselves with no thought of getting a court involved, they will have no intention to create legal relations

legal representation the legal work that a lawyer performs on behalf of a client

legal situation (for the purpose of this syllabus) a legal situation develops from an analysis of a legal issue; a set of circumstances where the nature, scope and viewpoints have been determined or identified, to enable an evaluation or judgment

legally binding a court or tribunal decision that is binding on the parties; agreement or contract that has the force of law

legislation a law or body of laws formally made by parliament

Legislative Assembly the organisation, or one of the two parts of the organisation, that makes laws in some countries and states

legislature parliaments or assemblies, such as the Legislative Assembly in Queensland, with the power to make, change and amend laws

lobbying the process whereby a person or group attempts to influence the decisions of parliamentarians or members of the executive government; it comes from the United Kingdom, where lobbyists would literally wait in the lobbies around the House of Commons seeking to speak to and influence the members of parliament

lodge present a complaint, appeal or claim formally to the proper authorities

loiter linger idly by; to move slowly about

loss of future earnings types of damages payable for loss of earnings that would have existed but for the injury suffered

lower court the first court in a hierarchy; the Magistrates Court

magistrate the judicial officer presiding over the Magistrates Court

majority verdict where a jury consists of 12 jurors, at least 11 jurors agree; or where a jury consists of 11 jurors, at least 10 jurors agree

mandamus an order sought from a court making it mandatory for a party to perform a specified act

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maximum penalty the penalty which should be imposed in the worst imaginable case of the offence; when parliament establishes an offence, it usually sets out the maximum penalty for the offence

member of parliament a member of a house of parliament, usually used to describe a member of a lower house and, in Australia, referring to Members of the House of Representatives, who may use the initials MP after their names

Member of the Legislative Assembly a representative elected to represent an electorate in the Queensland Parliament

mere puff a statement, for example, in advertising, which talks about a product or service but in a way that nobody could be expected to believe literally

minority government a government formed by a party or coalition of parties or independents that do not have a majority in the lower house of parliament on their own

misleading and deceptive conduct under the Australian Consumer Law, people must not, in trade or commerce, behave in a way that gives the wrong idea or is dishonest, or is likely to mislead or deceive; essentially, this is a legislated version of misrepresentation

mitigating factor a factor which suggests to the court that a lighter, rather than a heavier, punishment would be appropriate in a particular case

mitigation if one party breaches the contract and it causes harm, the other party is not allowed to stand still and allow the harm to get worse

multilateral undertaken by more than two States

multilateral treaty a formal agreement entered into by more than two States

native title a form of land title that recognises the unique ties Aboriginal and Torres Strait Islander peoples have to land

natural justice rules of fair play originally developed in the common law courts; rules and procedures to be followed by a person or body with the power to settle disputes

nature (of a legal issue) the essence and elements of the legal issue being considered

necessaries a minor (a person under 18 years of age) can be bound by a contract if it is a contract for things of a normal type for any young person of that age to require; these are not limited to things that are necessary

negligence an important legal principle that enables a party who has suffered loss or damage resulting from the wrongful actions or inactions of another to claim compensation from the party responsible for their loss; no contractual relationship between the parties is necessary

non-theistic not believing in one God as the creator and ruler of the universe

notice of termination an official written notification that a matter has been terminated

offer where a party puts forward a deal, or a set of obligations, which it is prepared to be bound by; if the deal is accepted by one of its recipients, then a contract is formed. An offer can either be made to someone specific (a bilateral offer) or to the world at large (a unilateral offer).

omission a failure to act resulting in a breach of duty or damage

Parliamentary Committee Inquiry when a parliamentary chamber establishes a committee of its members to examine some matter; the most advanced system of parliamentary committees in Australia is in the Australian Senate

parliamentary privilege words spoken in the parliament, or by a witness providing information to a parliamentary committee, which cannot be used as evidence in court; the purpose is to ensure that debates in the parliament can be free from outside restrictions

parol evidence rule when parties have written down the terms of their contract, neither party may (at trial) rely on oral evidence to suggest that there were in fact other terms agreed to by the parties; therefore, the written contract will be considered to be the whole contract

parole the conditional release of a prisoner prior to the end of their sentence; the prisoner is closely monitored and is allowed to complete their sentence while living in the community

parties to a contract the natural persons or legal persons (usually corporations) who have agreed to the terms of the contract, who have accepted obligations under the contract and who have given consideration for the contract

peppercorn consideration when two people make a contract, each side must provide consideration; however, the law is silent as to the amount each side must provide, so a token amount, even one single peppercorn, is enough to be considered good consideration

plaintiff the party who initiates a lawsuit and seeks a legal remedy in a civil court, typically by claiming damages or other relief against the defendant

plea (in criminal proceedings) the answer given of 'guilty' or 'not guilty' in response to the charges

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pleadings the documents in which the plaintiff and defendant set out what they hope to prove at the trial

police discretionary powers powers afforded to police to make decisions based upon what seems to be the most appropriate action in the circumstances

political independence a State is free to exercise independent political processes of its choosing in its territory, free from interference by another State

possession for a person to be in possession of a drug, they generally have to be aware of its existence and be exercising control over it; they must also know that the substance is a drug or have reason to suspect that it is a drug

precedent rule or principle established in a previous legal case that is either persuasive to or binding on a court when it is deciding subsequent cases with similar facts or issues

prerogative a right or privilege exclusive to a particular individual or class

prescribed (in this context) something that is laid down in legislation – contained in Acts and regulations

President of the Senate the equivalent of the Speaker in the House of Representatives; the presiding officer responsible for the bureaucratic procedures of the Senate

presumption against bail reverses the expectation that courts usually have of releasing an accused person on bail unless there is a good reason to hold them on remand (in prison)

presumption of innocence the concept that the accused is innocent until proven guilty

Privy Council the principal council advising the sovereign (King or Queen); the court of final appeal for the UK overseas territories and Crown dependencies and Commonwealth countries that have retained their appeal to the King or Queen in Council

probation a form of punishment where the offender is allowed to remain in the community, but they are placed under the supervision of Queensland Corrective Services; it is enforced in an effort to avoid imprisoning offenders except as a last resort

procedural fairness a common law duty to act fairly in the making of administrative decisions that affect a person's rights, interests and legitimate expectations; the right to due process

product recall when a product has been sold to the public, and it emerges that the product is unsafe, the seller (or manufacturer) will initiate to recall (remove) the product from sale and to warn everyone that the product needs to be returned for refund or repair

promotional lobby group a group which focuses on a particular issue, such as environmentalism, tax reform or local heritage, and seeks to influence government decisions in relation to that issue

proportionate sentencing a key principle of sentencing, which reflects the concept that the punishment should fit the crime, so the punishment is neither too light nor too heavy when considered in the context of the criminal offending which is being punished

prosecution the party who presents and argues the case on behalf of the Crown against the accused

prosecutor a government official who conducts criminal prosecutions on behalf of the state

protection (an objective of sentencing) if a person's history suggests they are so dangerous that they must be segregated from society in order to keep society safe, then they are imprisoned (or imprisoned for a longer period)

protest a statement or action expressing disapproval of or objection to something

protocol an agreement that is sometimes used to add detail to and/or expand the impact or aid the enforcement of a treaty, convention or covenant

proviso (Latin expression) meaning provided; a clause, condition, stipulation or limitation

punishment financial loss, confinement or another penalty imposed for wrongdoing

quasi-judicial authority that is judicial in nature, often exercised by a tribunal, as distinct from a court where a judge presides

Question Time a daily period of time in each house of the parliament in which ministers are asked questions without notice by other members concerning their responsibilities

rally a mass meeting of people making a political protest or showing support for a cause

ratification (treaties) the process of full adoption of the obligations imposed by a treaty or covenant into Australian law by the passing of legislation through the federal parliament that mirrors and enacts the treaty obligations

reasonable foreseeability test if the damage that results from a negligent act could be foreseen by a reasonable person, then the injured party is entitled to those damages

reasonable suspicion facts that would cause a reasonably minded person to conclude something – this may be an incorrect suspicion, but it must be a reasonable one

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received law the reception of English law into the penal colony of New South Wales

recidivism when a person who has been punished for a criminal offence then commits further criminal offences

regulated right a right that is regulated, defined and controlled in legislation

regulatory offence an act that is prohibited by legislation and carries a fine as its maximum penalty

rehabilitation an objective of sentencing, which helps the offender to change whatever factors in their life led them to offending. This might involve health interventions and counselling, addressing addiction or increasing education and skills.

remand (in custody) the procedure of keeping an accused person in legal custody while waiting to appear at a committal hearing or trial

remedy (relating to a contract law proceeding or any civil proceeding) the order made by the court to restore or compensate the winning party, which is usually in the form of money (damages) but may also be in the form of orders compelling people to do, or not do, something

representative government a basis for government where the citizens elect representatives to serve in the parliament and make decisions on their behalf

reprimand under the *Youth Justice Act 1992* (Qld), a court can choose to formally tell the young person that their conduct has been unacceptable, and that there will be much worse consequences if that behaviour should be repeated

reprisal an act of retaliation

repudiation if a party makes it clear, by words or conduct, that they are no longer ready, willing or able to complete their obligations under a contract

rescind/rescission when the court cancels a contract; the court then makes orders which seek to place each party in the same position as they were prior to the contract being made – to return the parties to a situation as though the contract had never been

reservation when a State does not wish to be bound by every provision in a treaty so ratifies only the parts of the treaty by which it does agree to be bound; generally these cannot be incompatible with the overall object and the purpose of the treaty

reserve powers rarely used powers that enable the Governor-General to act independently

residual powers powers left to the states to pass laws including civil law and urban planning

responsible government a system where the government is answerable to elected representatives of the people for its actions, especially a system where the ministry is drawn from within the parliament from members of the political party or parties with the support of a majority of the lower house (in Australia, the House of Representatives), and must maintain the confidence of the majority of that house

restitution part of the sentencing process, which involves the offender paying back any benefit they have received from their crime; for example, a person who has stolen money might be required to pay that money back

restorative justice conference under the *Youth Justice Act 1992* (Qld), a young offender is provided the opportunity to come face to face with their victim and to understand the consequences of their offending for other people

retrial a new trial ordered after a jury has been unable to reach a verdict and has been discharged

right the privilege or power to be able to do something; some rights are recognised by law

right to vote a constitutional or legislated right of eligible citizens to elect a representative to parliament or a local council from a list of candidates

Royal Assent the signing of a Bill by the Governor-General, which is the last step in making a Bill into an Act of Parliament or law

Royal Commission a specialist, independent, temporary body established by the Commonwealth Government to examine an area of national importance; it is headed by a commissioner, who is a person of great eminence in society, often a former judge

rule of law the principle that all people are subject to the law and equal before the law

rules the decisions your parents, guardians and school make about your safety and needs

rules-based world order the activities of, and relationships between, all the world's countries, including power relations, international law, the global economy and global politics

scope (of a legal issue) the extent of the components of the legal issue

sectional lobby group a group which exists to represent the interests of a specific sector of society such as farmers, veterans or students

select committee the Australian Senate sometimes appoints specific purpose committees of senators (from all parties) to examine a specific issue of public importance

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self-defence the lawful use of force against a person who is threatening the life or wellbeing of another

senator member of the Australian Senate, the upper house of the federal parliament

sentence the punishment imposed by the court on a person who has been convicted of a criminal offence

sentencing principles a series of principles set out in section 9 of the *Penalties and Sentences Act 1992* (Qld), which provide guidance to the court regarding the principles the court should apply when determining the sentence to impose upon an offender

separation of powers doctrine requires that all three arms be separated to ensure that no individual body or person has complete control; the distinct roles of the executive, the judiciary and the legislature are strictly maintained

signatory treaty a State is generally only bound by a treaty to which it has signed; by doing so, a State shows its intention to only act in accordance with the objects and purposes of the treaty

solicitor provides a wide range of legal information to clients

sovereign equality all States have equal rights, and no state is given more rights in the United Nations on the basis of size or power; for example, every State has only one vote in the UN General Assembly

sovereignty the concept that a government exercises full control over affairs within a geographical or territorial limit; this means it can pass laws and enforce them within this area and exists as an essentially independent legal and political body in this space

Speaker person who makes sure that members of the house obey the rules (standing orders) of the house and follow the correct procedures

special damages types of damages capable of precise calculation such as medical bills

specific performance an equitable remedy granted in contract law, where the court requires a party, who is in breach of a contract, to perform obligations under that contract (rather than merely paying damages)

stakeholder person, group or organisation that is affected by, can affect or is concerned with an issue

standard of care the degree of caution required, usually with reference to the 'reasonable person', of an individual who owes a duty of care

standing committee the Australian Senate maintains a series of standing committees, which continue in existence through an entire parliament and oversee both legislative inquiries and more general 'references' inquiries in their areas of policy responsibility

State a country recognised as having legal standing under international law as they have a defined territory, one government and a permanent population coupled with the ability to enter into relationships recognised by law with other States

state sovereignty the power of a government to run its own affairs and make laws for its territory

statute law the most common form of law within our society, which is a law passed by parliament that can cover any topic and it takes precedence over common law

statutory interpretation the process used by judges and magistrates in court to interpret and apply the legislation

strict liability offences where only the criminal action (*actus reus*) needs to be proved

submissions on sentence the arguments made to the court by the prosecutor and defence lawyer, after an offender has been convicted; the purpose of the submissions is for each side to state what the appropriate penalty should be

subpoena an official document that requires a person to give evidence in the District or Supreme Court

summary judgment the court makes a judgment due to the weakness of the case presented by the other party

summary offence a simple or less serious criminal offence heard by a magistrate

summons an official document that requires a person to give evidence in the Magistrates Court

superior court a higher court of record or general jurisdiction; a state Supreme Court

suspended sentence a sentence which occurs when a person is convicted of a criminal offence and sentenced to a period of imprisonment but is not actually required to go to prison, with the sentence being 'suspended' for a period of time, but if the offender commits any further offences, they may be required to serve their original sentence plus any new sentence

termination of an offer if an offer has not yet been accepted, the person making an offer can withdraw the offer by communicating the withdrawal of the offer to the party who has received the offer; once withdrawn, an offer cannot be accepted

terms of reference given to various committees or commissions to set out the matters which they are required to inquire into

terra nullius (Latin expression) meaning 'land belonging to no one', which is used in international law to describe territory that has never been subject to the sovereignty of any state

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territorial integrity the idea that a State has the right to its own territory and another State should not do anything to infringe on that right

time is of the essence (in a contract) the timing of steps taken under the contract is so crucial that if things are done late – even a tiny bit late – this will be a breach allowing the other party to terminate the whole contract

tort a legal wrong that is not a criminal offence, or stemming from a contract, that may result in payment of damages for the loss or injury suffered

town plan a plan of the physical and social development of a town, including the construction of all new facilities, buildings, roads and parks

trafficking typically, selling drugs; however, 'trafficking' is of wider import, meaning 'knowingly engaging in the movement of drugs from source to ultimate user'

treaty a formalised agreement between two or more States about a particular area of mutual interest (such as trade, prisoner exchanges or human rights); often used synonymously with convention, covenant, charter, protocol and/or statute

ultra vires (Latin term) meaning 'beyond power', acting outside the scope of a granted power

unanimous verdict where all jurors collectively agree on the verdict

unconditional discharge when a person has been convicted of an offence, but the court considers that in all circumstances they do not require further punishment

unconscionability if one person takes advantage of another person's vulnerability or disability in a way that is contrary to good conscience; the court is likely to not enforce an unconscionable contract

undue influence when a party in a position of strength or authority uses (or might be seen to be using) their position to force or coerce a vulnerable party to agree to a contract

unicameral a system of governance where there is only one legislature or parliament

unilateral action taken by one State alone

unilateral mistake occurs when two parties make a contract and one of them (but only one) is mistaken about some key fact relating to the contract

verdict the finding of a judge or jury in a trial

veto a constitutional right to reject a legal enactment

vicarious liability a third party such as an employer is regarded as being liable or responsible for the acts or omissions of another person (the employee acting in the course of employment)

victim impact statement a statement, unsworn and not cross-examined, made by a victim of crime to tell the court about the effects of an offence upon the victim

viewpoint an attitude or opinion, or the circumstances of an individual, group or stakeholder that contribute to an attitude

vitiation when some factor of a contract is identified which means that the contract has become, or has always been, unenforceable

volenti non fit injuria (Latin term) meaning 'there can be no injury to the willing'; a person who accepted the risk of injury that may result from their actions

warranty (in contract law) a term of the contract which is not so significant that it goes to the heart of the contract; a breach of a warranty entitles the innocent party to damages, but does not entitle them to terminate the contract

Westminster system a system of government, originating in the United Kingdom, the main features of which are a head of state who is not the head of government, and an executive that is drawn from and directly responsible to the parliament

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