CAMBRIDGE

Cambridge Legal Studies

Stage 6 Year 11

Fifth Edition

Paul Milgate
Kate Dally
Phil Webster
Daryl Le Cornu
Tim Kelly

Cambridge Legal Studies

Stage 6 Year 11

Fifth Edition

Paul Milgate
Kate Dally
Phil Webster
Daryl Le Cornu
Tim Kelly

CAMBRIDGE UNIVERSITY PRESS

ISBN 978-1-108-86281-3

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, Vic. 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108862813

First published 2006
Second Edition 2010
Third Edition 2013
Fourth Edition 2016
Fifth Edition 2020
20 19 18 17 16 15 14 13 12 11 10 9 8 7 6 5 4 3 2 1

Cover image by Jean-Michel Girard
Cover and text design by Cameron McPhail
Typeset by Integra Software Services Pvt. Ltd
Printed in Malaysia by Vivar Printing

A catalogue record for this book is available from the National Library of Australia at www.nla.gov.au

ISBN 978–1-108–86281-3 Paperback

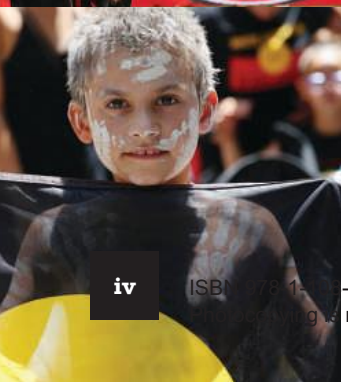
Additional resources for this publication are available at www.cambridge.edu.au/GO

Please be aware that this publication may contain images of Aboriginal and Torres Strait Islander people who are now deceased. Several variations of Aboriginal and Torres Strait Islander terms and spellings may also appear; no disrespect is intended. Please note that the terms 'Indigenous Australians' and 'Aboriginal and Torres Strait Islander peoples' may be used interchangeably in this publication.

Cambridge University Press acknowledges the Aboriginal and Torres Strait Islander Peoples as the traditional owners of Country throughout Australia.

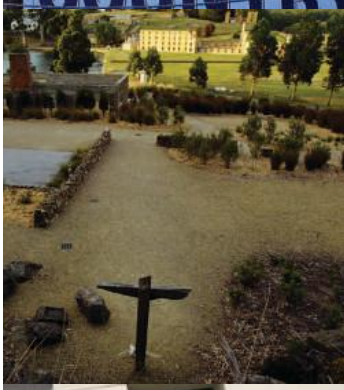
Contents

ISBN 978-1-108-86281-3



ISBN 978-1-[illegible]-86281-3 Milgate et al.




ISBN 978-1-108-86281-3






ISBN 978-1-108-86281-3 Milgate et al.

ISBN 978-1-108-86281-3 Milgate et al.

For a list of websites related to this book, go to www.cambridge.edu.au/legal115ed

ISBN 978-1-108-86281-3 Milgate et al.

About the authors

Paul Milgate

DipTeach, BEd, Grad Cert in Theology and Masters in Educational Leadership and is a Senior Consultant in the Directorate of the Catholic Schools Office in Lismore. He has had extensive experience in Legal Studies, having taught it since its inception, and been the principal author of the Preliminary and HSC textbooks for Edition three and four. Paul is also the author of Cambridge HSC Checkpoints Legal Studies (study guide) and has assisted over many years in the planning and running of HSC study days on the North Coast.

Dr Daryl Le Cornu

BA(Hons) DipEd PhD has many years of experience teaching Legal Studies in high schools. He has a passion for teaching about human rights, the United Nations, global governance and nuclear disarmament. Daryl has also been involved in curriculum development in New South Wales for many years. Currently, he is a History Curriculum Lecturer at the Australian Catholic University, the Education Officer for the World Citizens Association Australia and a member of the Board of ICAN Australia (International Campaign to Abolish Nuclear Weapons).

Kate Dally

(BA DipEd, Grad Cert Inclusive Education, Grad Cert Asian Studies) is Head Teacher of Social Sciences at Auburn Girls High School in Sydney. She has extensive teaching experience, having taught Social Sciences for the past 29 years as well as teaching education students at USYD for the last five years. Kate's experience also covers HSC marking in both Legal Studies and Business Studies.

Tim Kelly

BA DipEd Dip Law obtained his BA DipEd from the University of New South Wales in 1984 and completed his Diploma in Law from the Legal Practitioners Admissions Board in 1996. He began teaching Legal Studies in 1993 at St Mary's Maitland. Since 1998 Tim has been the HSIE Coordinator at St Mary's in Casino and is currently an Education Officer for the Lismore Catholic Schools Office.

Phil Webster

BA DipEd MEd MACE is Head Teacher of HSIE at Mosman High. He has over 25 years' experience in HSIE as a teacher of Legal Studies, Society and Culture, and Business Studies, with a particular interest in the changing role of law in society. Phil is passionate about issues of human rights, indigenous affairs and justice in a rapidly changing world.

ISBN 978-1-108-86281-3

About the cover illustrator

Jean-Michel Girard is a Québec City (Canada) based illustrator, who has been working professionally for the past thirty years for a global clientele. Although proficient in a wide variety of styles (from hyperrealism to cartoons), he has chosen to specialise in historical illustrations, being a long-time history enthusiast. Though he does not think of himself as a digital artist, he works with digital tools, transforming his computer into a genuine drawing table.

About the cover illustrations

Adored or reviled. Praised as global saviour or denounced as global pest. Classed as friend or enemy of the state. Speaker of truth or disseminator of lies. Though it may depend on where you sit on the political spectrum, one thing any mention of Julian Assange or Greta Thunberg is likely to do is provoke a reaction … and probably an opinion. Their standing on the world stage and influence on conversations around freedom of information and climate change is undeniable, transforming them into cultural icons. Their very image encapsulates an idea and a cause, sparking potential debate and discussion, and it is for this reason these controversial figures have been selected to appear on the covers.

ISBN 978-1-108-86281-3 Milgate et al.

How to use this resource

Part and chapter openers

Each part and chapter of *Cambridge Legal Studies Year 11* begins with an opener that contains:

- principal focus and themes and challenges from the Stage 6 Syllabus
- chapter objectives
- relevant law (including important legislation and significant cases)
- legal oddity.

In Court

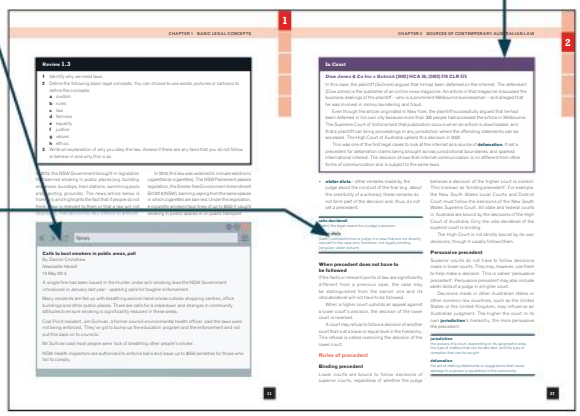
A number of relevant legal cases appear throughout the text. Each case allows you to apply your knowledge of the legal system to real-world situations. Many cases are followed by a range of questions to help you test what you've learnt.

Media articles

A range of current media articles is provided to help you understand how the law operates in real-world situations.

Glossary terms

Glossary terms are bolded in the text, and defined for you in the margin of the print book, or as pop-ups in the interactive version. They are also gathered in the Glossary.

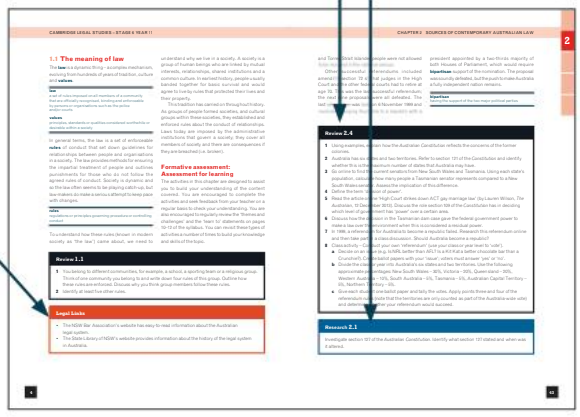


Review and research activities

Review activities are designed to help you test your knowledge of key concepts and skills. Research activities are designed to extend your knowledge by researching relevant cases or issues using source material.

Legal Links

In addition to the activities, there are a number of suggested links to internet resources and activities in each chapter. These will help you extend your knowledge and stay up to date with changes in the legal system.



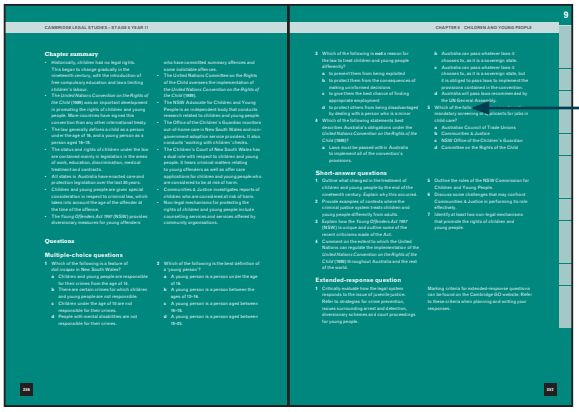
ISBN 978-1-108-86281-3

Legal Info

A number of relevant legal concepts are explored in order to give context to themes being explored.

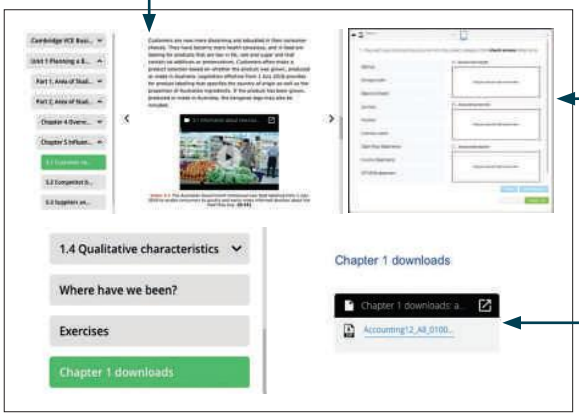
Case studies

Examples, or groups of examples, are examined in more depth to illustrate particular legal issues.



End-of-chapter sections

At the end of each chapter you will find a chapter summary and a set of questions to help you consolidate your learning from the chapter.



Video and audio

The interactive textbook contains video and audio items enrich the learning experience.

Interactive activities

Also included in the interactive textbook are automarked activities (for example, drag-and-drop questions) to assist recall of facts and understanding of concepts.

Downloadable Word documents

All review, research and end-of-chapter questions are available as downloadable Word documents, which can be accessed from within the interactive textbook or via Cambridge GO.

ISBN 978-1-108-86281-3 Milgate et al.

Components of Cambridge Legal Studies Year 11

The Cambridge Legal Studies Year 11 resource package consists of three components:

1 Student Book – print

The Student Book contains all topics in Part I, Part II (including additional topics under Law Reform in Action) and a range of contemporary high-interest topics in Part III.

2 Student Book – digital

Your purchase of the print book gives you access to the following digital resources on Cambridge GO:

- Downloadable **PDF textbook**
  A PDF of the print textbook, with additional digital-only content, including:
  - Chapter 11 – Migrants
  - Chapter 12 – Aboriginal and Torres Strait Islander peoples
  - Chapter 13 – People who have a mental illness
  - Chapter 15 – Alcohol and violence
  - Chapter 18 – Outlaw motorcycle gangs
  - Chapter 20 – Mohamed Haneef
  - Chapter 21 – The Northern Territory Emergency Response

  Online **interactive textbook**
  An online version of the textbook has a further host of interactive features to enhance the teaching and learning experience. These include:
  - Video and audio – drag-and-drop activities – auto-marked multiple-choice quizzes – additional digital-only chapters from the PDF textbook.
  - Other extra resources on the Cambridge GO website include: – all review, research and chapter questions in electronic format – marking criteria for the extended-response questions – weblinks – additional resources.

3 Teacher Resource Package

The Teacher Resource Package contains a wide range of material to support students and teachers with course, lesson, teaching plan, assessment and homework preparation

Statement for the Text Assessment for Learning

In 'Assessment and Reporting in Legal Studies Stage 6' NESA notes that 'assessment is an essential component of the teaching and learning cycle'. 'Assessment FOR Learning' activities provide opportunities for students to know if their current knowledge and understanding of the course work is on track. The review and research activities provide 'Assessment FOR Learning' opportunities in this chapter. Teachers are encouraged to discern which activities they will use with their students and the type of feedback they will provide as part of the ongoing teaching and learning cycle. This supports students to further inform the knowledge and skills they are developing throughout the course. It will also assist them to be able to respond to the 'Themes and challenges' and 'Learn to' inquiry questions in each topic.

ISBN 978-1-108-86281-3

Introduction

To the student

Congratulations on choosing *Cambridge Legal Studies Year 11 Fifth Edition*.

Since the introduction of Legal Studies as a HSC discipline in 1989, the world has undergone incredible change. Predictions of increasingly 'disruptive' technologies will continue to challenge the ability of the law to balance the tension of individual and community rights. Regardless, Legal Studies continues to contribute to students completing their secondary schooling as better informed citizens, able to think more critically about the processes and institutions that shape their lives on a daily basis.

The rights people enjoy within democratic societies have at times been eroded by governments when citizens become apathetic about their rights, freedoms and liberties. Legal Studies will allow you to explore the power vested in our democratic institutions and wielded by our elected leaders. It explores issues that will change the way you view the world and how you understand the concept of achieving justice through legal and non-legal means. Recent student action on climate change and increasingly the polarised state of politics and policy making in Australia highlights a society undergoing rapid change socially and economically with the gig economy.

Cambridge Legal Studies Year 11 Fifth Edition is a comprehensive resource that introduces you to a dynamic and challenging subject. It brings the law to life for you, both inside and outside the classroom.

You will discover a wealth of material that introduces you to the Australian legal system and how the individual interacts with and is affected by the law, and you will gain insight into how the law works in practice in a variety of contexts. You will be engaged and stimulated by up-to-date case law and recent legislative developments. Practically, updated research and review activities will help you build your research skills and make sure that you are ready for your exam.

We wish you luck and success.

Paul Milgate

ISBN 978-1-108-86281-3 Milgate et al.

Glossary of key words

Syllabus outcomes, objectives, performance bands and examination questions have key words that state what students are expected to be able to do.

A glossary of key words has been developed to help provide a common language and consistent meaning in the HSC documents. Using this glossary will help students and teachers understand what is expected in responses to examinations and assessment tasks.

account
account for; state reasons for; report on; give an account of; narrate a series of events or transactions

analyse
identify components and the relationship between them; draw out and relate implications

apply
use, utilise, employ in a particular situation

appreciate
make a judgement about the value of

assess
make a judgement of value, quality, outcomes, results or size

calculate
ascertain/determine from given facts, figures or information

clarify
make clear or plain

classify
arrange or include in classes/categories

compare
show how things are similar or different

construct
make; build; put together items or arguments

contrast
show how things are different or opposite

critically (analyse/evaluate)
add a degree or level of accuracy, depth, knowledge and understanding, logic, questioning, reflection and quality to

deduce
draw conclusions

define
state meaning and identify essential qualities

demonstrate
show by example

describe
provide characteristics and features

discuss
identify issues and provide points for and/or against

distinguish
recognise or note/indicate as being distinct or different from; note differences between

evaluate
make a judgement based on criteria; determine the value of

examine
inquire into

explain
relate cause and effect; make the relationships between things evident; provide why and/or how

extract
choose relevant and/or appropriate details

extrapolate
infer from what is known

identify
recognise and name

interpret
draw meaning from

investigate
plan, inquire into and draw conclusions about

justify
support an argument or conclusion

outline
sketch in general terms; indicate the main features of

predict
suggest what may happen based on available information

propose
put forward (for example, a point of view, idea, argument, suggestion) for consideration or action

recall
present remembered ideas, facts or experiences

recommend
provide reasons in favour of

recount
retell a series of events

summarise
express the relevant details concisely

synthesise
put together various elements to make a whole

ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3

Part I
The legal system

40% of course time

Principal focus

Students develop an understanding of the nature and functions of law through the examination of the law-making processes and institutions.

Themes and challenges

The themes and challenges covered in Part I include:

- the need for law in the operation of society
- the importance of the rule of law for society
- the relationship between different legal institutions and jurisdictions
- the development of law as a reflection of society
- influences on the Australian legal system.

Chapters in this part

ISBN 978-1-108-86281-3

Chapter 1
Basic legal concepts

Chapter objectives

In this chapter, students will:

- identify and apply legal concepts and terminology
- identify the changing nature of the law
- distinguish between customs, rules, laws, values and ethics
- explain the relationship between the legal system and society
- discuss the nature of justice in terms of equality, fairness and access
- discuss the concept of procedural fairness and the rule of law
- discuss the concepts of anarchy and tyranny
- communicate legal information by using well-structured responses.

Relevant law

SIGNIFICANT CASES

R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256

ISBN 978-1-108-86281-3 Milgate et al.

Legal oddity

Laws in Australia cover all kinds of human interaction and behaviour. Most of the time, these laws reflect the common values and beliefs of the majority of people. For instance, it is unsurprising that it is illegal to speed, steal a TV, or break into a house. But did you know you could receive a fine of $826.10 for flying a kite in Victoria? Under the *Summary Offences Act 1966* (Vic), it is an offence to fly a kite or carry on a game in a public place to the annoyance of another person. While no-one has yet been charged under this provision, it seems bizarre that a lovely day in the park could become an incredibly expensive endeavour.

ISBN 978-1-108-86281-3

1.1 The meaning of law

The **law** is a dynamic thing – a complex mechanism, evolving from hundreds of years of tradition, culture and **values**.

law
a set of rules imposed on all members of a community that are officially recognised, binding and enforceable by persons or organisations such as the police and/or courts

values
principles, standards or qualities considered worthwhile or desirable within a society

In general terms, the law is a set of enforceable **rules** of conduct that set down guidelines for relationships between people and organisations in a society. The law provides methods for ensuring the impartial treatment of people and outlines punishments for those who do not follow the agreed rules of conduct. Society is dynamic and so the law often seems to be playing catch-up, but law-makers do make a serious attempt to keep pace with changes.

rules
regulations or principles governing procedure or controlling conduct

To understand how these rules (known in modern society as 'the law') came about, we need to understand why we live in a society. A society is a group of human beings who are linked by mutual interests, relationships, shared institutions and a common culture. In earliest history, people usually banded together for basic survival and would agree to live by rules that protected their lives and their property.

This tradition has carried on throughout history. As groups of people formed societies, and cultural groups within these societies, they established and enforced rules about the conduct of relationships. Laws today are imposed by the administrative institutions that govern a society; they cover all members of society and there are consequences if they are breached (i.e. broken).

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 10–12 of the syllabus. You can revisit these types of activities a number of times to build your knowledge and skills of the topic.

Review 1.1

1 You belong to different communities, for example, a school, a sporting team or a religious group. Think of one community you belong to and write down four rules of this group. Outline how these rules are enforced. Discuss why you think group members follow these rules.
2 Identify at least five other rules.

Legal Links

- The NSW Bar Association's website has easy-to-read information about the Australian legal system.
- The State Library of NSW's website provides information about the history of the legal system in Australia.

ISBN 978-1-108-86281-3 Milgate et al.

1.2 Customs, rules and law

Customs

Put simply, **customs** are established patterns of behaviour among people in a society or group. Customs vary depending on the culture, religion and history of a group of people, society or country. For example, in Australia it is customary to shake hands when greeting a friend, whereas in Europe this greeting may be in the form of a kiss on each cheek.

Where a custom is followed by most of the population over time, it may become part of the laws of that society; however, because of differences between societies, not all customs become law. **Customary law** refers to established patterns of behaviour that are accepted within a particular social or commercial setting and are of sufficient importance to be enforced. These principles and procedures develop through general usage according to the customs of a people, **state** or group of states. Customs arose to deal with problems in the most harmonious ways. Over time, these customs become accepted as legal requirements. Three types of customary law that have influenced the Australian legal system are:

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

customs
collective habits or traditions that have developed in a society over a long period of time

customary law
principles and procedures that have developed through general usage according to the customs of a people or nation, or groups of nations, and are treated as obligatory

state
a politically independent country

In many societies, most customary law is never written down, as is the case with some Aboriginal and Torres Strait Islander peoples' customary laws. In other societies, customary law is eventually recorded and transferred into written law in formal legal systems.

Rules

If you were to look in a dictionary or on the internet, you would find many definitions of the word 'rules'. Generally, rules are prescribed directions for conduct in certain situations. Rules are generally made by groups and only affect people within those groups. These rules often vary between groups and are not enforceable by the state. For example, there are rules for playing games and for behaviour in a classroom. If these rules are broken, there is some form of punishment attached that is enforceable by those involved in the making of the rules (e.g. suspension or detention). Rules can also be altered by these people to deal with changes in situations. This usually happens after consultation with the members of the group.

In a legal sense, rules form the basis of laws. However, rules can be changed quite quickly with the agreement of those involved. Laws, as you will discover, are more difficult to change and punishment is not always a simple process.

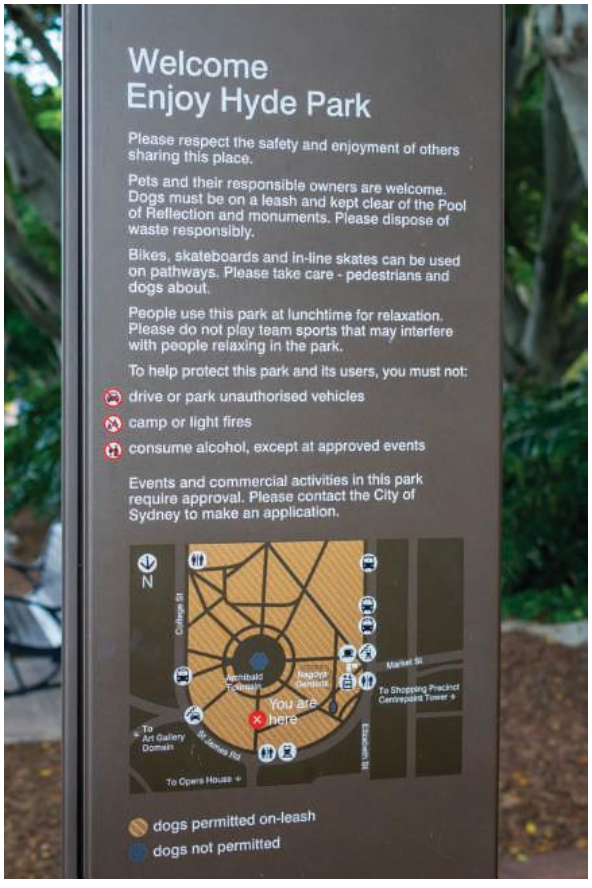


Figure 1.1 A sign in Hyde Park contains information and rules.

ISBN 978-1-108-86281-3 Milgate et al.

Law

The law, as we know it, is made up of the formal rules of society. These 'legal rules' have been agreed upon by the majority of those in the group and govern their behaviour and activities.

Laws are different from rules. For example, at the shopping centre, a sign on the escalator requests that you stand to the left and do not take strollers on it. These rules exist for the safety and comfort of shoppers. However, they are just rules, and that is why you will still see people standing on the right and taking their prams on the escalator. There are also signs telling you that you cannot smoke in shopping centres. This is a law, and if someone did 'light up', they would be asked to leave the shopping centre by a security or police officer, and the smoker might incur a fine. The consequences of breaking rules are comparatively minor.

Laws allow and prohibit a whole variety of activities, from where rubbish should be placed to how we should treat our fellow human beings. Failure to follow laws incurs penalties ranging from a fine to imprisonment.

Laws have certain characteristics that make them different from rules:

1 **Laws are binding on the whole community.** This means that they apply to all members of society.
2 **Laws can be enforced.** This means that penalties apply if a law is broken.
3 **Laws are officially recognised.** This means that governments and courts recognise laws and enforce them.
4 **Laws are accessible (or discoverable).** This means that people can find out which law applies to a particular situation.
5 **Laws relate to public interest.** This means that laws exist for things that concern the whole of society, and that interest is considered to outweigh the costs or drawbacks of the government's involvement in enforcing the laws.
6 **Laws reflect rights and duties.** This means that everyone in society has responsibilities to others (e.g. duty to drive safely) and that everyone has the right to be treated in a certain way.

In Australia today, the laws have been, and still are, mainly decided by elected government officials at local, state and federal government levels. Judges also have the power to make laws in certain cases when they set a precedent. This will be discussed in greater detail in the following chapters.

It is expected by society that the law looks after all members of the group and that laws are fair, just and equitable. It is also expected that laws reflect traditional and current **ethics** and values. Although this represents the ideal situation, what is actually attainable may be another matter.

ethics
(1) rules or standards directing the behaviour of a person or the members of a profession; (2) a major branch of philosophy that investigates the nature of values and of right and wrong conduct

Figure 1.2 A no smoking sign at Bondi Beach.

TABLE 1.1 Differences between laws and rules

Laws	Rules
to be obeyed by all citizens of a society	to be obeyed by specific individuals or groups
made by a law-making body	made by individuals or groups
enforced through the courts	enforced by leaders of a group
a breach results in a prescribed sanction imposed by the courts	consequences of a breach at the discretion of the leader of a group

ISBN 978-1-108-86281-3 Milgate et al.

Relationship between customs, rules and laws

As people have joined together in communities, a relationship has developed between rules, laws and customs:

- Whenever people have lived together in groups, they have developed rules to govern their behaviour and, thus, maintain the smooth running of activities.
- These rules were based on the traditions, customs and values of the group.
- These rules have penalties attached if members of the group fail to follow them.
- Groups usually put someone, or a small group, in charge to enforce these rules and the associated penalties; in modern times, this became the government.
- Over time, these rules became formalised laws, known in society as 'the law'.

Review 1.2

1 Identify a custom that exists in your day-to-day life. This may be within your favourite sport or at your school. Describe the custom and share it with the class.
2 Explain how laws are different from rules.
3 Describe the relationship between customs and rules and the process that may occur when rules transform into laws.

1.3 Values and ethics

We all have values by which we try to live. Living according to our ethics means that we do things that we consider to be morally right.

Law-makers try to incorporate these values and ethics into laws. However, it is very difficult to make rules and, thus laws, about everyone's values, especially as there are often groups in society that have different standards of what is morally right or wrong. For this reason, laws can only cover the ethical values that are common to the majority or the dominant group.

Over time, many groups have voiced their values and ethics in a public manner to try to influence the law and the legal system. Two recent examples (that had varying degrees of success) are:

- **School Strike 4 Climate:** In 2019, students from across the world took time off school to demand political action on climate change. Swedish student, Greta Thunberg – who protested outside the Swedish Parliament in 2018 – inspired the protests. The strikes had varying responses from politicians, community leaders and schools.
- **Abortion:** On 2 October 2019 in News South Wales, legislation – the *Abortion Law Reform Act 2019* (NSW) – came into effect that legalised abortion for pregnancies up to 22 weeks' gestation and with the approval of two doctors. This legislation was the result of decades of campaigning by advocates (such as the Women's Abortion Action Campaign) that wanted the law changed. However, the changes have been criticised and remain controversial.

What is meant by ethical behaviour?

'Ethics' and 'ethical behaviour' are difficult things to define, especially since different people have different ethical standards. Simply put, ethics is doing the right thing; that is, making a judgment about what is the best thing to do in certain situations, and what would be the wrong thing to do. For example, the law does not say that you should open a door for someone whose hands are full of packages, or to help a parent with a stroller down a flight of stairs, but many people carry out these actions, as they are the right thing to do. Often ethical behaviour affects our integrity; that is, how we feel about ourselves and how others see us. For these reasons, most people behave in an ethical (or moral) way and so laws do not have to be put in place to ensure people's behaviour is ethical.

ISBN 978-1-108-86281-3 Milgate et al.

1.4 Characteristics of just laws

The concept of **justice** involves the fair and impartial treatment of all persons, especially under the law. In simple terms, justice is the continued effort to do the fair thing by everyone. When it comes to making laws in a democratic society, justice involves consulting the people, and carrying out the decisions of the majority, while ensuring that the minority has the opportunity to put forward their point of view. A just law is one that allows everyone to receive fair treatment and outcomes, as well as ensuring that human rights are recognised and respected. This is not always an easy thing to do, as you will learn throughout the Legal Studies course.

justice
the legal principle of upholding generally accepted rights and enforcing responsibilities, ensuring that equal outcomes are achieved for those involved

1.5 The nature of justice

The interpretation and enforcement of laws by a country's system of courts (and those who work within the courts such as judges and legal practitioners, prosecutors and police officers) is known as the **legal system**. It is the task of the legal system to ensure that all citizens have equal access to the law and that the law provides equality, fairness and justice to all members of society. **Equality**, **fairness** and justice are central concepts that allow us to distinguish good law from bad law. However, if not all citizens have full and equal access to the legal system, equality, fairness and justice are just empty concepts. It is only by combining all of these principles that a legal system can provide justifiable and appropriate outcomes.

legal system
the system of courts, prosecutors and police within a country

equality
the state or quality of being equal; that is, of having the same rights or status

fairness
freedom from bias, dishonesty or injustice; a concept commonly related to everyday activities

Equality

Equality means that all people in a society are treated in the same way with respect to political, social and civil rights, and opportunities; and that no-one enjoys unfair advantage or suffers unfair disadvantage. Although we would like to think that equality applies to everyone, our society tolerates many levels of equality and inequality. For example, depending on the situation, a 10-year-old child will be treated differently from a 17-year-old teenager or a 40-year-old adult. The law takes into account people's different capacities (e.g. maturity) and recognises that some people are more vulnerable than others and so provides protection for them. For example, children under 10 years of age cannot be held legally accountable for their actions and therefore cannot be convicted of a criminal offence. This presumption is known as ***doli incapax***. In the case of 10–14-year-olds, the court will make an assessment about whether the child can tell the difference between right and wrong, and this will influence the way in which the matter is handled (this is studied in greater detail in the Year 12 Legal Studies course).

doli incapax
(Latin) 'incapable of wrong'; the presumption that a child under 10 years of age cannot be held legally responsible for his or her actions and cannot be guilty of a criminal or civil offence

Fairness

Fairness and justice are usually associated with each other. The difference is that 'fairness' applies to everyday life, whereas 'justice' has more legal connotations. People may have different opinions about what is fair.

For example, suppose one team wins a sport competition because all of its players, randomly selected, happen to be taller than the players on the other team. If the rules of the competition do not specify that both teams must have players of the same size, it may seem unfair to the losing team, but there is no 'fact of the matter'. If Ann places a bet on the team she knows has the taller players and none of the other people who placed bets knows anything about the teams or how tall the players are, Ann's winning of the bet may also be regarded as unfair – as a result of her having knowledge the others lacked. In other words, even if an opinion about what is fair is justified or mistaken, there is no single social mechanism for deciding what fair is or for ensuring fairness occurs.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 1.3 Teuila Fotu-Moala – a professional rugby player – attends the National Rugby League's judiciary at Rugby League Central on 17 September 2019 in Sydney.

When rules are made, the expectation is that they will be fair to those covered by them. In the same way, when a rule is translated into law, it is expected that it will be fair to all members of society. Justice is more specific than fairness, as the term is applied to situations covered by the law, which tries to ensure that everyone has the same opportunities.

Access

In a democratic society such as Australia, protecting the rights of all citizens is the ultimate goal of the law. However, for the legal system to meet this goal, all people must have the same level of **access** to the institutions and agencies of the law. Access is the ability to obtain or make use of something. The concept of justice suggests that everyone who is covered by a legal system and its laws should have equal access to that system. This includes ensuring that citizens are aware of the laws that affect them and understand their rights and responsibilities under these laws.

access
the right or opportunity to make use of something

However, in reality, the legal system is not accessible to everybody in an equal way. Such things as income, education and English-language skills can affect people's access to the law. In particular, women, financially disadvantaged people, people from non-English speaking backgrounds, people living with disability, Aboriginal and Torres Strait Islander peoples, and those who are institutionalised may have trouble finding appropriate legal solutions.

1.6 Procedural fairness and the principles of natural justice

Procedural fairness refers to the idea that there must be fairness in the processes that resolve disputes. It is closely linked to the concept of **natural justice**; the two terms are often used interchangeably.

procedural fairness/natural justice
the body of principles used to ensure the fairness and justice of the decision-making procedures of courts; in Australia, it generally refers to the right to know the case against you and to present your case, the right to freedom from bias by decision-makers and the right to a decision based on relevant evidence

ISBN 978-1-108-86281-3 Milgate et al.

Natural justice refers to the fact that everyone should be treated fairly in legal situations. There are two main principles of natural justice. These are:

- the right to be heard – this includes the right to a fair hearing
- the right to have a decision made by an unbiased decision-maker – even an appearance of bias is enough to constitute a breach of natural justice.

The assertion that 'justice should not only be done but should be seen to be done' comes from the English case of *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256. During this criminal trial – which resulted in McCarthy being convicted of dangerous driving – it was discovered that a clerk to the magistrates was also a solicitor who had represented the person suing McCarthy in a separate civil case arising out of the accident. Although the magistrates did not consult the clerk for his opinion, and the clerk gave them no advice on the matter, McCarthy's conviction was overturned based on the possibility of bias.

1.7 The rule of law

The principle of the **rule of law** is that no-one is above the law, including those who make the law. This means that all the groups and individuals who are involved in the legal system – such as the legislators and judges who make, administer and interpret the laws, the police officers who enforce the law and the lawyers who represent and advise people about the law – are answerable to the same laws as every other citizen. Thus, the rule of law means that everyone is subject to the same laws. Obvious breaches of the rule of law occur when officials make favourable decisions for relatives and friends but apply the law fully for everyone else.

rule of law
the principle that nobody is above the law; this can be seen in the requirement that governmental authority must be used in line with written, publicly disclosed laws, for which established procedural steps (due process) have been taken in the adoption and enforcement

Why do people obey the law?

Generally, people within a society like to have rules and laws because they create order. Laws help each person to feel a sense of security – the law is clear about what is expected of them as a citizen and what they can expect from others. As the law is based on customs, it also helps to reinforce the values of most members of society. In principle, the law embodies the concept that what each individual believes has the same importance to the larger group.

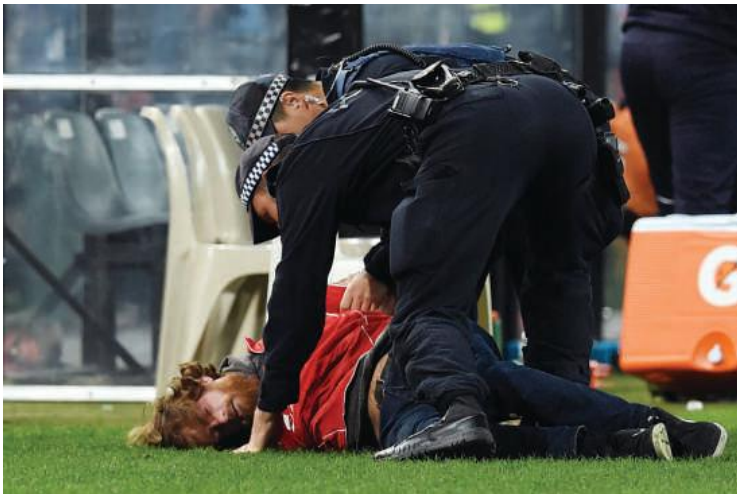


Figure 1.4 People sometimes disobey laws if they do not consider the penalty to be sufficiently harsh.

Laws also function to protect all members of society. They tell society which actions are allowed and which actions are not allowed. Laws apply **sanctions** to those found guilty of a crime and may act as a deterrent to those who might otherwise commit a crime. Laws enable the resolution of disputes, as they empower police officers and the courts to carry out and administer the law.

sanction
a penalty imposed on those who break the law, usually in the form of a fine or punishment

People will not follow rules if they do not agree with them or feel that the rules have no connection to them. This is especially so if the penalty attached to the rule is seen as inadequate. For example, think about the penalties for riding your bike or skateboard in areas where it is not permitted, or talking on a mobile phone when driving. While many people obey these rules and laws, others do not, as they do not consider the penalty (e.g. a fine or demerit points) to be enough of a deterrent. Some people believe that the law does not apply to them, or that they will not be caught, and so do not comply with the law. As would be expected, laws against more serious offences carry a range of stricter penalties, which are intended to make people think seriously about the consequences before breaking the law.

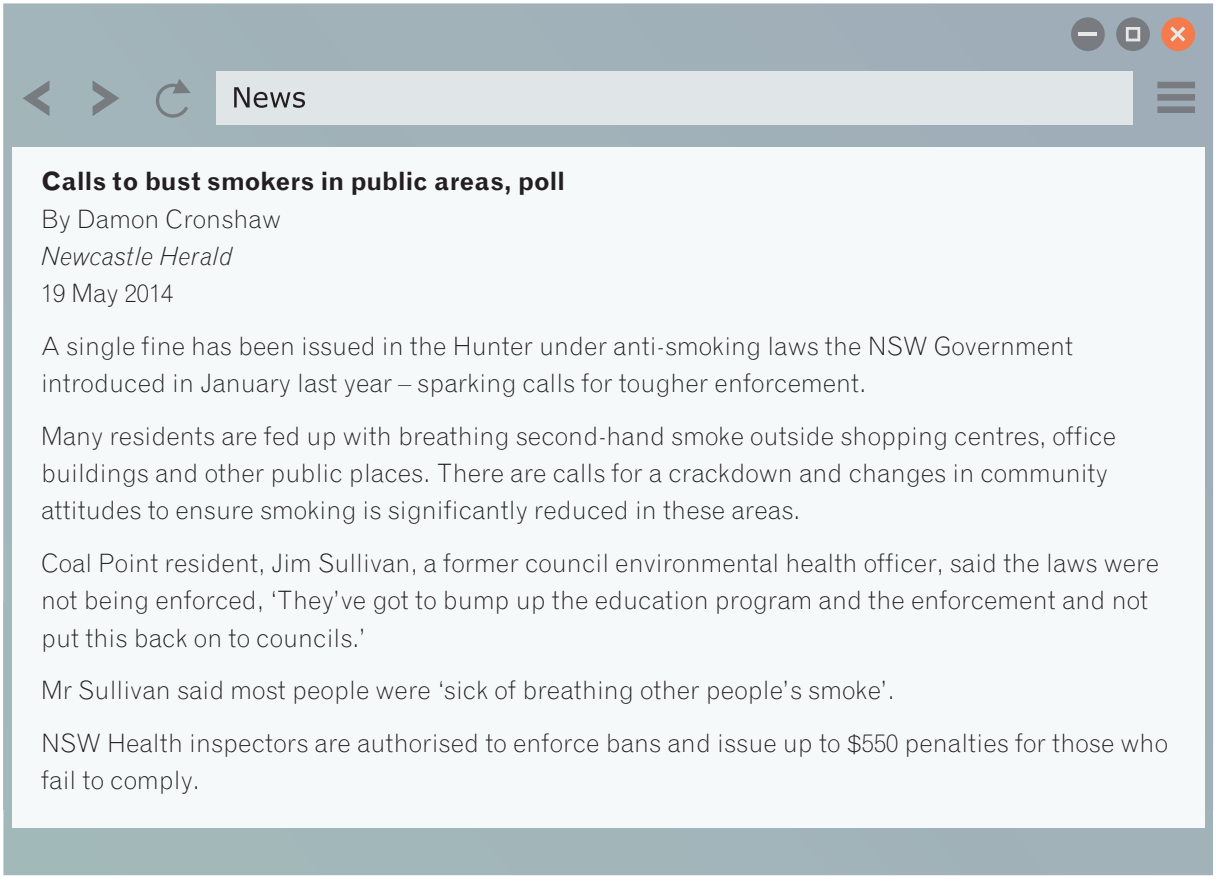
ISBN 978-1-108-86281-3 Milgate et al.

Review 1.3

1 Identify why we need laws.
2 Define the following basic legal concepts. You can choose to use words, pictures or cartoons to define the concepts:
   a custom
   b rules
   c law
   d fairness
   e equality
   f justice
   g values
   h ethics.
3 Write an explanation of why you obey the law. Assess if there are any laws that you do not follow or believe in and why this is so.

In 2013, the NSW Government brought in legislation that banned smoking in public places (e.g. building entrances, bus stops, train stations, swimming pools and sporting grounds). The news article below is from 2014 and highlights the fact that if people do not think a law is relevant to them or that a law will not be policed, that law will be very difficult to enforce.

In 2018, this law was widened to include electronic cigarettes (e-cigarettes). The NSW Parliament passed legislation, the Smoke-free Environment Amendment Bill 2018 (NSW), banning vaping from the same spaces in which cigarettes are banned. Under this legislation, e-cigarette smokers face fines of up to $550 if caught smoking in public spaces or on public transport.



Calls to bust smokers in public areas, poll
By Damon Cronshaw
Newcastle Herald
19 May 2014

A single fine has been issued in the Hunter under anti-smoking laws the NSW Government introduced in January last year – sparking calls for tougher enforcement.

Many residents are fed up with breathing second-hand smoke outside shopping centres, office buildings and other public places. There are calls for a crackdown and changes in community attitudes to ensure smoking is significantly reduced in these areas.

Coal Point resident, Jim Sullivan, a former council environmental health officer, said the laws were not being enforced, 'They've got to bump up the education program and the enforcement and not put this back on to councils.'

Mr Sullivan said most people were 'sick of breathing other people's smoke'.

NSW Health inspectors are authorised to enforce bans and issue up to $550 penalties for those who fail to comply.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

A Health Department spokeswoman said about 30 NSW Health inspectors worked 'across the state'. Mr Sullivan said health officers 'have enough on their plate' and many weren't employed to be 'smoking policemen'.

'It'd be one of their lowest priorities,' he said.

He said the 'best people to enforce it would be parking rangers'.

'They're used to booking people – they're tough bastards,' he said.

'They'd book people as quick as lightning.'

The NSW Health Department said the first priority in enforcing the laws had been 'educating the community to provide the opportunity for smokers to adjust their behaviour'.

'This has included regular compliance monitoring at all public outdoor sites covered by the legislation and the issuing of cautionary notices to people seen to be in breach,' a spokeswoman said.

Monitoring done last year showed 'a high level of compliance with the new rules on smoking in public places,' she said.

The laws ban smoking 'within four metres of a pedestrian entrance or exit' at public buildings, including shopping centres and offices.

Additionally, the bans apply to sportsground spectator areas, railway platforms, bus stops, taxi ranks and within 10 metres of children's play equipment.

One in five Hunter people smoke, state figures show.

NSW Health said 35 fines had been issued in New South Wales under the new laws since January 2013.

'This includes one fine in the Hunter region,' it said.

The department said compliance with the laws was high when people were 'aware of where they cannot smoke'.

It said a Cancer Institute NSW survey found 85 per cent of respondents were 'aware of the new smoking bans in certain outdoor public places'.

University of Newcastle Public Health Professor, Kypros Kypri, said laws with 'relatively low enforcement' could produce improvement because many people obey the law.

'They can be substantially enhanced with good enforcement and governments should be telling us what they're doing to enforce the new laws,' Professor Kypri said.

NSW Health said the second stage of managing the laws, which was in force now, involved 'strengthening compliance and enforcement'.

The ban will apply in outdoor dining areas from July 2015.

Also from that date, smoking will be illegal within four metres of an entry to a licensed premises, restaurant and café.

Cancer Council NSW regional manager, Shayne Connell, said his organisation advocated for a community-led push to change behaviour.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

Mr Connell urged people to complain to owners of places where people smoke.

This included places like Hunter Stadium and shopping centres, where 'people have to walk through a wall of smoke to get through the automatic doors'.

In total, NSW Health said it issued 4453 smoking fines in New South Wales from January 2013 to March 2014.

'During this period, 319 fines were issued in the Hunter region for smoking offences,' the NSW Health spokeswoman said.

Most of these fines were not issued under the new smoking laws, but public transport laws – which police and transport officials enforce.

When the government announced the new laws it said there was 'no safe level of exposure to second-hand tobacco smoke'.

'In adults, breathing second-hand tobacco smoke can heighten the risk of cardiovascular disease and lung cancer and worsen the effects of other illnesses such as bronchitis and asthma.

'It is even more dangerous for children, as their airways are smaller and their immune systems less developed.'

Mr Sullivan questioned why the government does not ban smoking 'across the board'.

'We all know it's killing people and costing taxpayers a fortune,' he said.

'I guess they say prohibition doesn't work.'

It's time for action to clear the air for everyone.

Review 1.4

Read the article above, 'Calls to bust smokers in public areas, poll', and then answer the following questions.

1. Explain why councils may not actually prosecute anyone for breaching these anti-smoking laws.
2. Discuss why you think people may not obey this law.
3. Analyse if you think society needs a stronger type of legislation. Write two paragraphs, one arguing in favour of the legislation and the other arguing against it.
4. Carry out some research to see if you can find a more recent media item about whether this law is working.

1.8 Anarchy and tyranny

The rules and laws that have evolved for different societies are based on the customs, values and ethics that are part of these traditions. Most people want and accept rules as a necessary part of everyday life due to the belief that all people should be treated equally and with fairness. Rules are needed to ensure that our behaviour is regulated to meet the common expectations of society. The absence of laws and the inability to enforce laws, or the unfair and unequal application of laws, can result in states of anarchy or tyranny.

Video

ISBN 978-1-108-86281-3 Milgate et al.

Anarchy

When people believe that the law has let them down in some way, they may declare, 'We live in a state of **anarchy**!' What exactly do they mean by this? The word 'anarchy' is derived from *anarchia*, the Greek word for 'without a ruler'. Anarchy, therefore, is a term used to describe a state of chaos and disorder resulting from the absence of rules and laws.

anarchy
the absence of laws and government

A state of anarchy may break out during a revolution or after a natural disaster because the law-enforcement agencies no longer exist or are unable to enforce the laws. Violence and widespread looting are two early indicators that a society or group is on the verge of anarchy.

While the majority of people believe that an absence of rules and laws leads to a disorganised and chaotic society, certain philosophers, theorists and anarchist movements believe that anarchy does not imply chaos, but rather a ruler-free society with voluntary social harmony.

Research 1.1

Prepare a report that analyses anarchy and modern-day anarchist organisations. In your report include the following:

- a definition of anarchy
- a history of anarchy
- information about two anarchist organisations and their beliefs
- modern-day anarchists and their activities.

Two possible anarchist organisations are the Anarchist Federation and the Melbourne Anarchist Club; search online for information about these organisations. Alternatively, you may choose your own group to research.

Anarchist organisations often protest at:

- G8 summits
- European Union meetings
- World Trade Organization meetings.

Figure 1.5 Injured protesters wrapped in emergency thermal blankets leave the Hong Kong Polytechnic University on 19 November 2019 in Hong Kong.

ISBN 978-1-108-86281-3 Milgate et al.

Case Study

Hong Kong protests

On 3 April 2019, a Bill was proposed in the semi-autonomous region of Hong Kong that would allow criminal suspects to be extradited to mainland China. This Bill was widely opposed due to concerns it could be used to silence criticisms of the Chinese Government; on 9 June 2019, one million people marched in Hong Kong in protest of the Bill. This was the first of a series of ongoing demonstrations that expanded to being protests about general concerns over the communist Chinese Government's control over Hong Kong.

Hong Kong has been a semi-autonomous region since Britain returned the city to China in 1997. At this time, China agreed to give a 'high-level of autonomy' to Hong Kong for 50 years; this autonomy included free-speech and the continuation of capitalist markets and democratic principles in Hong Kong. However, in recent years there has been widespread concern about the Chinese Government's increasing influence on the Hong Kong Government.

So while the extradition Bill was formally withdrawn after two months of civil unrest, demonstrators continued to take to the streets with a list of other demands including an inquiry into police conduct and an amnesty for arrested protesters. Video footage of increasingly violent clashes between protestors and police officers were shown across the world. Hong Kong's airport was shut down for periods at a time, government offices were stormed by protesters, and police sprayed tear gas into crowds of demonstrators.

The movement labelled an 'era of evolution' by protesters has no clearly identified leader or structures but relies on multiple individuals or small-group organisers. The organisers alert people to *ad hoc* demonstrations via social media.

At the time of writing, the future of Hong Kong and its relationship with mainland China remains uncertain. The protests are ongoing and the leaderless structure of the movement means that no key players have been identified or arrested. In the meantime, the rest of the world watches closely.

Figure 1.6 Riot police hold a blue flag warning protesters to disperse during a protest gathering in Hong Kong on June 12 2020 to mark the one-year anniversary of major clashes between police and pro-democracy demonstrators.

ISBN 978-1-108-86281-3

Tyranny

If anarchy is the absence of laws and law-enforcement agencies, then **tyranny** is the opposite. By definition, a tyrant is a single leader who has unlimited power over the people in a country or state. Generally, tyrannical power involves severe punishment for any infringements of the law. Some modern-day examples of tyrannical power in action include Saddam Hussein's rule in Iraq before his arrest in 2003, Bashar al-Assad's presidency in Syria, Robert Mugabe's 30-year control of power in Zimbabwe, before his overthrow in 2017, and Kim Jong-un, the president of North Korea.

tyranny
rule by a single leader holding absolute power in a state

Figure 1.7 National Guard members deployed near the White House (Washington, DC) on June 6 2020 in response to the outbreak of Black Lives Matter protests in the wake of the death of George Floyd.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- The law of a country develops from the rules of the dominant community.
- These rules are based on the customs, values and ethics of that community.
- Rules and laws have different characteristics.
- The term for the absence of government is 'anarchy'.
- The law is based on the notions of fairness, equality and justice.
- The law covers all members of society and there are penalties for infringements of the law.
- People follow the law because it provides them with protection against wrongful behaviour.

Questions

Multiple-choice questions

1 Which of these statements about the difference between a rule and a law is true?
   - **a** Rules are not binding on the whole community.
   - **b** Rules are not enforceable.
   - **c** Rules have nothing to do with ethics.
   - **d** Rules do not involve rights and responsibilities.

2 What is anarchy?
   - **a** Anarchy is constant violence and disorder.
   - **b** Anarchy is the absence of law.
   - **c** Anarchy is wearing black clothes and breaking the rules.
   - **d** Anarchy is rebellion against the government.

3 What are ethics?
   - **a** Ethics allow people to be different.
   - **b** Ethics are a mix of equality and fairness.
   - **c** Ethics are the principles that help us make decisions about right and wrong behaviour.
   - **d** Ethics are different people's perceptions of the law.

4 A police officer charges a man for crossing the road against the lights, but does not book a woman doing the same thing. Why is this unjust?
   - **a** The police officer should concentrate on serious crimes.
   - **b** Studies show that women are better at crossing roads.
   - **c** The police officer has not treated all pedestrians equally.
   - **d** You should be allowed to cross the road wherever you want.

5 What is the purpose of the law?
   - **a** The purpose of the law is to divide power among all the different groups in society.
   - **b** The purpose of the law is to provide stability for the ruling government.
   - **c** The purpose of the law is to maintain order in society.
   - **d** The purpose of the law is to make people do things that no-one wants to do.

Short-answer questions

1 Describe the difference between anarchy and the law.
2 Explain how anarchy and a structured system of law are not compatible.
3 Describe the relationship between rules, laws and customs.
4 Compare and contrast 'rules' and 'laws'.
5 Explain the relationship between fairness, equality and justice.
6 Critically analyse whether laws are necessary.
7 Assess why people have different perceptions about the law. Explain your answer.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter 2
Sources of contemporary Australian law

Chapter objectives

In this chapter, students will:

- identify and apply legal concepts and terminology
- describe the key features and operation of the Australian and international legal systems
- discuss the effectiveness of the legal system in dealing with relevant issues
- explain the relationship between the legal system and society
- describe the role of the law in conflict resolution and its ability to respond to and initiate change
- locate, select and organise legal information from a variety of sources
- communicate legal information by using well-structured responses.

Relevant law

IMPORTANT LEGISLATION

Commonwealth of Australia Constitution Act 1900 (UK)
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Australia Act 1986 (Cth)

SIGNIFICANT CASES

R v Brislan [1935] HCA 78
South Australia v Commonwealth [1942] HCA 14 ('first uniform tax case')
Murphyores Inc Pty Ltd v Commonwealth [1976] HCA 20 ('Fraser Island case')
Commonwealth v Tasmania [1983] HCA 21 ('Tasmanian dam case')
Osland v R [1998] HCA 75
Dow Jones & Co Inc v Gutnick [2002] HCA 56; (2002) 210 CLR 575
Roper v Simmons (2005) 543 US 551
Google Inc v Australian Competition and Consumer Commission [2013] HCA 1
Wilkie v Commonwealth; Australian Marriage Equality Ltd v Cormann [2017] HCA 40
Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45 ('citizenship seven case')
Nathanson v Minister for Home Affairs [2019] FCA 1709

ISBN 978-1-108-86281-3 Milgate et al.

Legal oddity

Laws in Australia are the result of legislation passed in state and federal parliaments or because of legal precedents established in the courts. This will be explored in this topic. However, there are many odd laws that exist, some dating back from as far as the 1800s. Some laws make sense at the time they are enacted but as society changes they might not fit with the current times. For example, in 2016, a Sydney cab driver was fined $100 for wearing brown shoes. The charging officer relied on regulations made under the *Passenger Transport Act 1990* (NSW) that stated network uniforms must be provided for network taxi-cab drivers. While the regulations did not cover the colour of the shoe, the wording was flexible enough to allow the police officer to give a hefty fashion fine. Since that time, the regulations on taxis has been largely modified to accommodate the rise of ride-sharing services such as Uber and this bizarre provision has been removed.

ISBN 978-1-108-86281-3

2.1 Australia's legal heritage

Legal processes and practices used in Australia today are based on the model developed in England. When the British came to Australia in 1788, they brought with them the law that applied in Britain, known as **common law**. Contemporary Australian law has evolved from both common law and **statute law**. Common law refers to laws created in court; that is, decisions made by judges. Statute law refers to laws made by parliament. These concepts are discussed in further detail below.

common law
law made by courts; historically, law common to England

statute law
law made by parliament

The adversarial system of trial

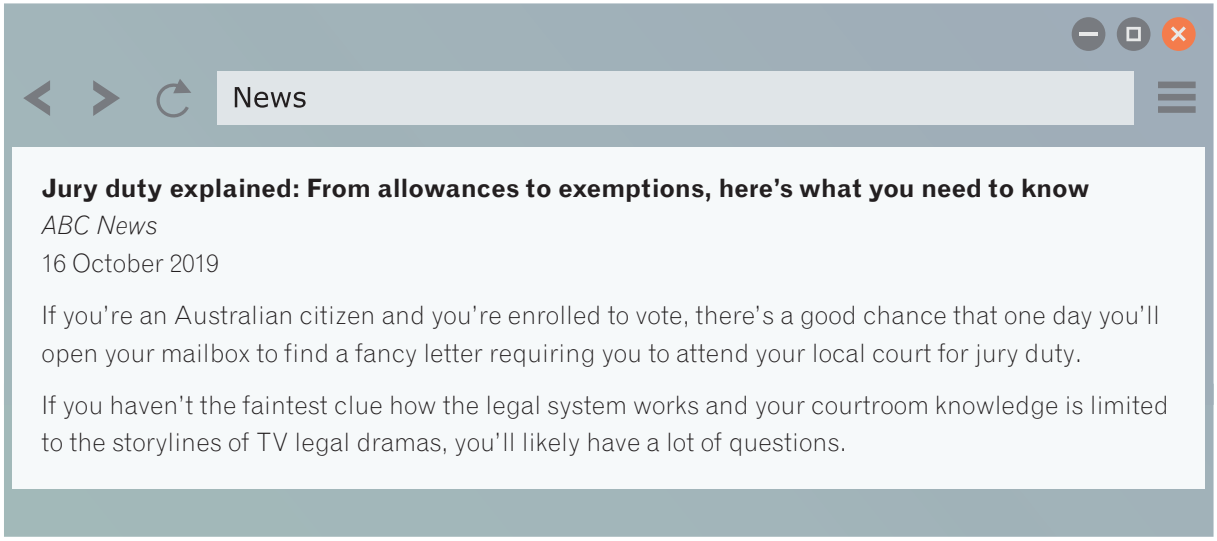
The English system of law has heavily influenced Australian law and practice, including the way court cases are conducted. Australia inherited the **adversarial system** as part of both criminal and civil court proceedings. The word 'adversary' means 'opponent'. In a trial, the two sides involved in the case try to prove their version of the facts and disprove the other side's version. In theory, the defendant in a criminal trial does not have to prove anything, as he or she is assumed innocent until proven guilty. However, the opposing sides to a trial, either civil or criminal, will have the opportunity to present arguments and both have the right to challenge the arguments each side is presenting. Most people involved in a trial will usually retain the services of a legal team to present and argue their case.

adversarial system
a system of resolving legal conflicts – used in common law countries such as England and Australia – that relies on the skill of representatives for each side (e.g.defence and prosecution lawyers) who present their cases to an impartial decision-maker

An impartial judge (and sometimes a jury) will listen to the evidence presented by both parties and make a decision as to which side has proved their case and, thus, disproved the other side's case. It is up to the defendant and their legal team to decide if they want to be heard by only a judge or a judge and jury.

Juries are made up of a random selection of the public and there is a good chance that one day you, or someone you know, will be called for jury duty. The article below explains the purpose of juries, how juries are selected, and what happens in the courtroom.

Figure 2.1 The Moss Vale Courthouse.



ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

For starters, what exactly does a juror do? If you've got to work, can you skip jury duty? What if you have family to look after or live far away from the court?

The good news is we've done the hard yards for you – so here's what you need to know.

WHAT DO JURIES DO? AND WHY DO WE HAVE THEM?

Juries are a key part of our legal system. They're generally made up of 12 people who are tasked with hearing evidence presented in a trial and returning a verdict of guilty or not guilty.

SO WHY DO WE HAVE JURIES? AND WHY DON'T WE LET JUDGES DECIDE EVERYTHING?

The key reason is that juries help people trust the justice system. Without juries, trials would be decided by a single judge (who might not be representative of the broader population) instead of a group of people representing a cross-section of society.

Think about someone who is particularly biased or prejudiced: if they were deciding on a case themselves, the outcome could be very different than if they had to reach agreement with 11 other people in a jury room.

Having a jury also forces lawyers to explain things in terms an average person can understand, rather than a bunch of legal mumbo jumbo.

After all, we need to understand the law if we're going to avoid breaking it, says Jacqui Horan, a jury researcher and associate professor at Monash University.

HOW CAN YOU GET EXCUSED FROM JURY DUTY?

Look, I get it. You saw the jury duty letter and thought, 'How I am going to get out of this?'

We all have busy lives and jury duty can be a major inconvenience. But, like voting, it's an important civic duty that we shouldn't take for granted. (I'll get to this shortly.)

All that said, sometimes jury duty is going to be impractical or impossible, which is why courts allow people to be exempted or excused in certain circumstances.

Here's a short and abridged list of some of the reasons you might be excused, courtesy of David Tait, a professor of justice research at Western Sydney University:

- if you are self-employed or run a small business that would be affected by your absence
- if you are a student or apprentice
- if you have a health issue or live with a disability that would make jury service difficult
- if you aren't living in the state where you have been summoned to attend court, or if you have transport difficulties (e.g. you live very far from the court)
- some professions may exempt you from serving on a jury; this usually covers criminal lawyers, police officers and other people who work in the criminal justice system, but each jurisdiction is different.

For most people though, simply having to work is not going to be a good enough reason to avoid jury service.

For a case in point, consider the chief financial officer who tried to dodge jury duty in Victoria because he had meetings to attend. For his indiscretion, he was fined $2000 and ordered to do 80 hours of community service.

ISBN 978-1-108-86281-3

News (continued)

HOW ARE JURIES SELECTED?

If you're called to court, it's not a given that you'll be put on a jury immediately.

For one, lawyers have an opportunity to veto potential jurors by using what's called a 'peremptory challenge'.

The reasoning for these challenges tend to be based on little more than superstition or folklore, says Professor Horan.

In Victoria, for instance, teachers and nurses are often challenged because of pervasive stereotypes that they have 'strong views' or are overly sympathetic to victims.

In many cases, lawyers will challenge potential jurors simply because of the way they look, Professor Horan adds.

If you are excused, challenged or otherwise exempted, you might be required to come back to court another time.

WHAT DOES JURY DUTY PAY?

Jurors are paid allowances by the court for their time (and sometimes travel), which can range from $40 per day to more than $100 depending on the state.

In longer trials, jurors are typically paid more to make up for the inconvenience.

Your work may also pay you while you're on jury duty.

Under the National Employer Standards, all employers are required to top up their staff's jury pay to their normal wage for the first 10 days of jury service, but this does not cover casual workers.

Some states like Victoria require employers to keep paying their staff at full pay. Some lucky employees (often public servants) will get full pay even when it isn't required by law.

But, if you don't have access to these generous perks, you're a casual worker, or if you're assigned to a particularly long trial, there's a real chance you could be left worse off financially for serving on a jury.

HOW LONG DO PEOPLE SERVE ON JURIES?

Jurors typically serve on trials that take between seven and 12 days, though more involved matters – such as those for alleged terrorists – can take months or even a year or more, says Professor Tait.

Jurors are often asked about their availability in advance if they could be selected for a particularly long trial.

WHAT HAPPENS IN THE COURT ROOM?

In court, the role of the juror is to be a 'fact finder', Professor Horan says. In a jury trial, jurors are asked to decide upon the key facts of the case and return a verdict of guilty or not guilty. (In judge-only trials, the judge also takes on this responsibility.)
Consider someone on trial for allegedly driving a getaway car in a robbery: the jurors have to decide whether the accused intended to rob something, the extent of their involvement and whether they were acting in concert or alone, Professor Tait says.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

The judge's role in jury trials, by comparison, is to deal with questions of law, such as what evidence can be presented to the court.

JURIES IN THE INTERNET AND SOCIAL MEDIA AGE

When jurors are empanelled, they are usually given stern instructions not to talk to anyone about the case or to look up information online.

The reason is fairness, Professor Tait says. In a court room, the defence lawyers have an opportunity to explain or question any evidence that's presented to the jury.

When a juror is searching around online in their private time, they might be reading something mistaken or misleading with knowing it. The defence doesn't have an opportunity to point this out, which could lead to a miscarriage of justice.

Similarly, jurors are often warned to keep off social media. The fear is that jurors could become aware of information that wasn't heard in court, that they contact people involved in the trial, or that they use social media to discuss the trial with others.

Judges take this stuff very seriously, and have even dismissed jurors who have researched online or posted about their cases on social media.

WHAT'S THE EXPERIENCE LIKE?

While most people are initially apprehensive about serving on a jury, those who have gone through it often value the experience.

'What we have learnt from surveying jurors is that although jurors are often initially nervous and hesitant … after they've been on a jury, they're far more inclined to do it again because they really appreciate what an amazing experience it can be,' Professor Horan says.

'You get to see what it's like being a judge for a week or two.'

For some people though, jury duty can be confronting and even traumatic.

If you're serving on a sexual assault or murder trial, you are likely to encounter confronting evidence. Jurors also feel pressure to make the right decision, which can be difficult when evidence is conflicting or confusing.

Sometimes, there are disagreements in the jury room. (In Australia, juries often have to come to an unanimous verdict, though in some circumstances judges will still accept verdicts of juries with one dissenting vote.)

It's a lot to deal with, so it's no surprise that one study found that 70% of Australian jurors found the experience stressful in some way. Today, many courts offer jurors counselling services to help manage this problem.

While it is not always going to be pleasant, jury duty can be a great experience – and one that we shouldn't necessarily shy away from.

'This is one of the most interesting experiences as a citizen you could possibly have,' Professor Tait says.

'You will meet people you would never meet otherwise, and you will have really momentous decisions resting on your shoulders. It's not just a duty, it's an opportunity.'

ISBN 978-1-108-86281-3

The inquisitorial system

In an **inquisitorial system**, the court is actively involved in determining the way in which the competing claims are presented. It is different from the adversarial system, where the court is required to act impartially, like a referee.

inquisitorial system
a legal system where the court or a part of the court (e.g. the judge) is actively involved in conducting the trial and determining what questions to ask; used in some countries that have civil legal systems rather than common law systems

The inquisitorial system derives from the Roman and Napoleonic codes. It is found in Europe, as well as Japan and some other countries. In this system, called the civil law system, a judge (or group of judges) has the task of investigating the case before him or her.

Indonesia uses an inquisitorial system for criminal trials. This means that the judges will conduct an inquiry into the truth of what occurred; that is, the facts behind the legal issues in dispute. They are able to admit evidence that might not be admitted in an Australian court. Judges are empowered to decide which witnesses will be called, and could even call for outside testimony that had not been requested by either side.

2.2 Common law

The term 'common law' has many different uses, and can be used in the following contexts:

- court-made law (as opposed to laws made by parliament or statute law)
- law developed by the courts of common law, as distinct from the courts of equity
- the system of court-based law used in the United Kingdom and many of its former colonies, including Australia, New Zealand, Canada and the United States.

Development of the common law

The British legal system itself developed from a number of sources. In Anglo-Saxon England, for example, questions about rights and obligations were decided based on local custom, and disputes were resolved by local courts. After the Normans invaded England in the eleventh century, they began a system of travelling judges who applied a common set of laws to all areas of England. These judges, also known as magistrates, dealt with petitions from people who felt that the local courts had been unjust. They used the premise that similar cases should be treated in a similar way. The decisions made by the judges provided the standards, or precedents, for later cases, and the laws they applied became the basis of the British legal system.

This system was the one brought over to Australia with the First Fleet, but gradually Australia has developed a legal system based on its own statute law and common law; however, many British legal principles have been retained in the Australian system. These include the principles of natural justice.

From about the sixth to the eleventh century in England, the law was enforced by local administrative bodies. The king's appointees, the church and local landlords all had a role in court resolution of legal matters. Crimes were treated as wrongs for which the

Figure 2.2 Guido Torres Morales from Peru (centre) attends his trial at a courtroom in Denpasar, Indonesia, on 18 November 2019.

ISBN 978-1-108-86281-3 Milgate et al.

offender had to compensate the victim. If the court accepted a case, both the person against whom the illegal act was allegedly committed (the plaintiff) and the person who was said to have committed it (the defendant) had to swear an oath. The defendant might have the help of 'oath-helpers' – people willing to swear to his innocence. If the court found the defendant's oath believable, he or she could simply walk away. If, however, the plaintiff had witnesses who would swear that the defendant had committed the act, the defendant might be required to participate in a 'trial by ordeal'.

Before the ordeal, the defendant had to fast for three days and attend a special Mass. He was then given a painful task to complete or to bear such as carrying a red-hot iron bar a certain distance in his bare hands, retrieving a stone from a cauldron of boiling water, putting his hand into a flame, or being thrown into a river or pond. If the defendant completed the task without injury or death, if the wound healed within a prescribed period, or if the defendant sank, he or she was considered innocent and set free; if not, execution usually followed.

Trial by ordeal continued after the Norman Conquest, though there were new requirements imposed by the church; for example, that no one could be made to undergo an ordeal without the bishop's permission. It was eventually condemned by the church in 1215 and abolished by royal decree in 1219.

In order to consolidate his hold on the country, in the eleventh century, William the Conqueror sent judges (or justices) around the country with three main tasks to carry out:

- administer a common set of laws throughout the country
- report on any threats to the throne
- assess the wealth of the country so that taxes could be levied.

When Henry II came to the throne in 1154, there was a well-established practice of sending royal justices throughout the countryside to listen to disputes, work out solutions, apply punishments, and ensure that common rulings were made overall. These judges also had authority to make decisions when they heard new cases. In this way, a set of uniform laws developed throughout England. Thus, common law as we know it today has evolved from judicial decisions that were based in tradition, custom and precedent.

Development of equity

The procedure for bringing a case before the court was rigidly formal. In Anglo-Saxon times, if a party failed to follow the prescribed steps, he could lose his case. Even later, the common law would hold that a person was bound by a contract, even if he had made a mistake or been tricked into signing it. By the fifteenth century, people were bringing petitions to the king claiming that the common law courts had made unjust decisions. It became the job of the Chancellor to deal with these petitions.

For many years, the Chancellor was a priest as well as a judge. Chancellors did not base their judgments on precedent and form; instead, they were influenced by Christian principles. This body of law, which developed to deal with the injustices that had crept into the common law and was set up to hear these petitions, became known as **equity**.

equity
the body of law that supplements the common law and corrects injustices by judging each case on its merits and applying principles of fairness

As a court of equity, the Court of Chancery looked at the features of each case to decide what was fair or just in the particular circumstances. The moral principles on which equitable decisions were based were called the rules (or maxims) of equity, and are still used today.

The systems of common law and equity co-existed, but not always peacefully. In the early seventeenth century, a dispute between the Chancellor and the Chief Justice of the King's Bench was resolved through the personal intervention of the king, James I, who called a conference of judges. They concluded that in the case of conflict between the common law and equity, equity should prevail. As a result, rules of equity always override common law.

There are equitable remedies for wrongs not recognised by the common law. Some of these remedies are non-financial; for example, the court may order someone to do what he or she promised but then failed to do, or may set aside an unfair contract.

In the 1870s, the British parliament passed legislation merging the courts of common law and the courts of equity, allowing judges to apply the rules of common law or equity (or both) in a particular case. The Australian colonies followed suit with similar legislation.

ISBN 978-1-108-86281-3 Milgate et al.

The doctrine of precedent

As stated above, the common law (or case law) is the law developed by judges when deciding cases. In addition to rules on the presentation of evidence and the running of the case, judges must resolve disputes by considering previous decisions made in similar cases. A previous judgment on similar circumstances is called a **precedent**, and it provides the authority for the legal principle contained in the decision. The concept that like cases must be treated alike is called the doctrine of precedent or ***stare decisis***.

precedent
a judgment that is authority for a legal principle and that serves to provide guidance for deciding cases that have similar facts

stare decisis
(Latin) 'the decision stands'; the doctrine that a decision must be followed by all lower courts

The purpose of precedent is to ensure that people are treated fairly and that the law develops in a consistent and coherent fashion. It means that old cases retain an authority, which allow their decisions to be used as the basis for decisions in newer court cases. Thus, the doctrine of precedent works to limit a judge's ability to be too creative when it comes to making a decision.

Making and following precedent

When there has been no previous decision to provide guidance for determining a case, a court must use principles of the existing common law and statute law to make its decision. The judge/s will also pay attention to social developments and common sense. This new decision creates a new precedent.

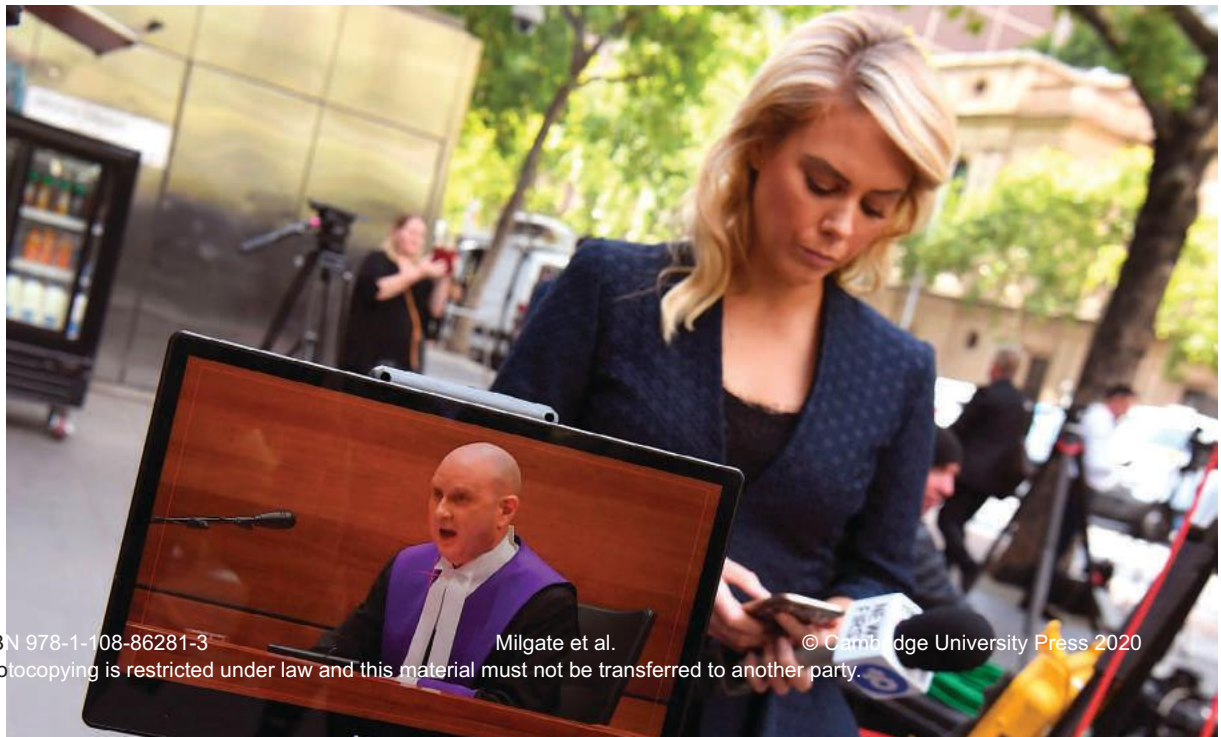
Another way in which precedents are created is in the interpretation of legislation. Where there is a dispute about the meaning or application of a section of an act, or about the meaning of a word, a court may have to resolve the question. For example, if a statute requires that the local council must approve the removal of trees from any land, a developer might not agree that the term 'trees' includes dead trees. Judicial interpretation of the legislation might be needed to determine whether council approval must be sought for the removal of dead trees just as for live ones.

While courts are not bound to follow other courts' interpretations of statutes, they are usually expected to do so. This is because, if a court decision has not resulted in parliament changing the wording of legislation, it suggests that parliament is satisfied with the court's interpretation.

When a judge gives a decision in a case, it usually is made up of two parts:

- the ***ratio decidendi*** – the essential legal reason why a judge came to a particular decision; a *decidendi* in a higher court sets a binding precedent on lower courts

Figure 2.3 When a judge gives a decision in a case, it is usually made up of two parts: the *ratio decidendi* and the *obiter dicta*.



ISBN 978-1-108-86281-3 Milgate et al.

In Court

***Dow Jones & Co Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575**

In this case, the plaintiff (Gutnick) argued that he had been defamed on the internet. The defendant (Dow Jones) is the publisher of an online news magazine. An article in that magazine discussed the business dealings of the plaintiff – who is a prominent Melbourne businessman – and alleged that he was involved in money laundering and fraud.

Even though the article originated in New York, the plaintiff successfully argued that he had been defamed in his own city because more than 300 people had accessed the article in Melbourne. The Supreme Court of Victoria held that publication occurs when an article is downloaded, and that a plaintiff can bring proceedings in any jurisdiction where the offending statements can be accessed. The High Court of Australia upheld this decision in 2002.

This was one of the first legal cases to look at the internet as a source of **defamation**. It set a precedent for defamation claims being brought across jurisdictional boundaries, and sparked international interest. The decision shows that internet communication is no different from other forms of communication and is subject to the same laws.

- ***obiter dicta*** – other remarks made by the judge about the conduct of the trial (e.g. about the credibility of a witness); these remarks do not form part of the decision and, thus, do not set a precedent.

ratio decidendi
(Latin) the legal reason for a judge's decision

obiter dicta
(Latin) comments from a judge in a case that are not directly relevant to the case and, therefore, not legally binding (singular: *obiter dictum*)

When precedent does not have to be followed

If the facts or relevant points of law are significantly different from a previous case, the case may be *distinguished* from the earlier one and its *ratio decidendi* will not have to be followed.

When a higher court upholds an appeal against a lower court's decision, the decision of the lower court is reversed.

A court may refuse to follow a decision of another court that is at a lower or equal level in the hierarchy. This refusal is called overruling the decision of the lower court.

Rules of precedent

Binding precedent

Lower courts are bound to follow decisions of superior courts, regardless of whether the judge believes a decision of the higher court is correct. This is known as 'binding precedent'. For example, the New South Wales Local Courts and District Court must follow the decisions of the New South Wales Supreme Court. All state and federal courts in Australia are bound by the decisions of the High Court of Australia. Only the *ratio decidendi* of the superior court is binding.

The High Court is not strictly bound by its own decisions, though it usually follows them.

Persuasive precedent

Superior courts do not have to follow decisions made in lower courts. They may, however, use them to help make a decision. This is called 'persuasive precedent'. Persuasive precedent may also include *obiter dicta* of a judge in a higher court.

Decisions made in other Australian states or other common law countries, such as the United States or the United Kingdom, may influence an Australian judgment. The higher the court in its own **jurisdiction**'s hierarchy, the more persuasive the precedent.

jurisdiction
the powers of a court, depending on its geographic area, the type of matters that can be decided, and the type of remedies that can be sought

defamation
the act of making statements or suggestions that cause damage to a person's reputation in the community

ISBN 978-1-108-86281-3 Milgate et al.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 10–12 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 2.1

1. Describe how common law originated.
2. Outline how people were tried for crimes in medieval England. Discuss the problems with this system.
3. Define equity law and explain how it differs from common law.
4. Describe how the principle of precedent is used in court decisions.
5. Explain why Australian law is based on common law principles.
6. Evaluate the importance of *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575.

2.3 Court hierarchy

Australia has two overlapping jurisdictions of law: state and federal. As a result, there are separate state and federal jurisdictions, each of which has its own court structure.

All courts have the power to hear a case for the first time. Some courts can also hear appeals from lower courts. This means they can reconsider the decision of a lower court, where the losing party believes there has been an error in the lower court's legal reasoning. Figure 2.4 shows the structure of state courts in New South Wales, and federal courts in Australia. The arrows show the specific courts that can hear **appeals** from each of the lower courts.

appeal
an application to have a higher court reconsider a lower court's decision, on the basis of an error of law

State and territory courts

The state court system in New South Wales operates under the following hierarchy:

1 lower courts
2 intermediate courts
3 superior courts.

The Australian Capital Territory does not have the intermediate level but is otherwise similar. Each court has its own jurisdiction, or area over which it has authority. Minor matters are dealt with lower

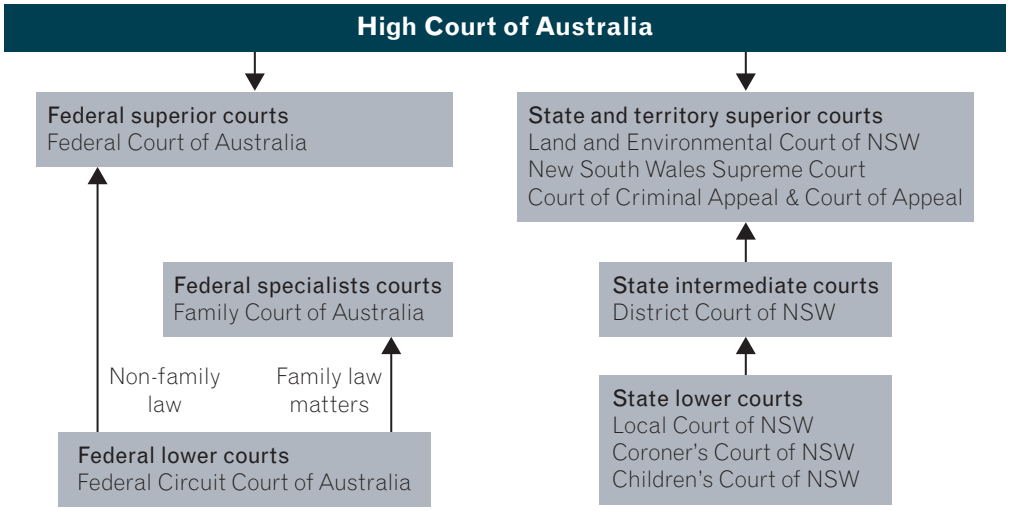


Figure 2.4 Australia's court hierarchy; showing courts at the federal and state (or territory) levels.

ISBN 978-1-108-86281-3 Milgate et al.

in the court hierarchy, and the higher courts are reserved for more serious matters and appeals from the lower courts.

In criminal cases, minor offences such as loitering and obstructing traffic are called **summary offences** – these are dealt with in the lower courts. More serious criminal offences, such as assault and murder, are called **indictable offences** – these are dealt with in the higher courts.

summary offence
a criminal offence that can be dealt with by a single judge without a jury and does not require a preliminary hearing

indictable offence
a serious criminal offence that requires an indictment (a formal, written charge) and a preliminary hearing; it is typically tried before a judge and jury and is subject to greater penalties than non-indictable offences

Lower courts

Local Court and Magistrates' Court

In New South Wales, the Local Court deals with minor criminal matters and minor civil disputes. In this court, a magistrate will hear and decide the case and will set the punishment for criminal offences. The Local Court is also known as the Magistrates' Court. In the Australian Capital Territory, the court that has this role is called the Magistrates' Court.

Most criminal matters are heard in the Local or Magistrates' Court, as only very serious crimes are referred to the District or Supreme Courts. In the case of indictable offences, the magistrate will listen to an outline of the evidence to determine whether the prosecution has a strong enough case to be able to try the defendant in the District Court or Supreme Court. This preliminary hearing is called a **committal hearing**.

committal hearing
an inquiry held in the Local Court or Magistrate's Court to determine whether there is enough evidence against the defendant to warrant a trial in a higher court (this is called establishing a *prima facie* case)

The Local Court in New South Wales has jurisdiction to deal with the following areas:

- minor criminal and summary offences
- civil matters with a monetary value of up to $100 000
- committal hearings
- a limited range of family law matters (e.g. property settlements and residence orders for children); for these matters, the Local Court has federal jurisdiction and is essentially part of the Federal Court hierarchy.

The Magistrates' Court of the Australian Capital Territory has similar jurisdiction, although it can hear and decide civil matters with a maximum monetary value of $250 000.

Coroner's Court

In New South Wales and the Australian Capital Territory, the role of the Coroner's Court is to ensure that unexplained or suspicious deaths (or suspected deaths), fires and explosions are properly investigated. If necessary, **coronial inquests** are carried out and cases are handed to a higher court for trial if the inquest finds evidence of criminal action/s. For example, in March 2015, a visiting Brazilian student Roberto Laudisio Curti died in Sydney after police fired tasers at him 14 times. The coronial inquest recommended that charges be laid against the police officers for using unnecessary and excessive force in the arrest. The matter proceeded to trial, and one of the four police officers involved was found guilty of assault.

coronial inquest
an investigation into a death that has occurred in unusual circumstances, held in the Coroner's Court and overseen by a magistrate called the coroner

Children's Court

In New South Wales and in the Australian Capital Territory, the Children's Court deals with civil matters concerning the protection and care of children and young people. It also deals with criminal cases involving persons under the age of 18 at the time of the offence, or (in New South Wales) under the age of 21 when charged with a crime they committed while under the age of 18.

Land and Environment Court

The Land and Environment Court is a specialist court responsible for interpreting and enforcing environmental law in New South Wales. It has a wide jurisdiction and deals with matters related to environmental planning (e.g. zoning of park lands), environmental offences (e.g. illegal polluting or dumping) and appeals against local council rulings.

ISBN 978-1-108-86281-3 Milgate et al.

Intermediate courts

District Court of New South Wales

The District Court of New South Wales deals with more serious criminal matters. These range from charges of **larceny** up to charges such as manslaughter, sexual assault and large-scale drug importation. The only charges the District Court cannot deal with are murder, treason and piracy: these need to be dealt with by the Supreme Court.

larceny
taking another person's property with the intention of permanently depriving them of it; also known as stealing

A judge, and sometimes a jury, will hear cases tried in a District Court. The District Court deals with criminal offences such as:

- manslaughter, malicious wounding and dangerous driving
- assaults
- sexual assaults
- offences relating to property, including robbery, breaking and entering, larceny and embezzlement
- importing, supplying or possessing prohibited drugs
- offences involving fraud, including forgery, obtaining money by deception and passing valueless cheques.

The District Court's jurisdiction is unlimited in cases of claims for damages for personal injuries arising out of a motor vehicle accident. It also handles civil cases where the amount claimed is below $750 000, or larger amounts if both parties agree. It also has **appellate jurisdiction**.

appellate jurisdiction
the ability or power of a court to hear appeals of the decisions of lower courts and to reject, affirm or modify those decisions

Superior courts

Supreme Court of New South Wales

The Supreme Court is the highest court in the state or territory hierarchy. It deals with the most serious criminal matters and civil cases involving large sums of money (there are no monetary limits on its civil jurisdiction) and most cases where an equitable remedy is sought. It also deals with appeals from the lower courts in that state or territory.

The Supreme Court has criminal jurisdiction over the most serious indictable offences such as manslaughter and murder, attempted murder, kidnapping, major conspiracy and drug-related charges. It also deals with Commonwealth prosecutions for major breaches of the **corporations law**.

corporations law
legislation that regulates corporations and the securities and futures industry in Australia; it is administered by the Australian Securities and Investments Commission

In civil matters, there is no upper limit to monetary damages that can be awarded in the Supreme Court. This court hears matters on claims for damages for personal injury, professional negligence, breach of contract, defamation and possession of land. A judge alone deals with most civil matters, but a jury is used in some limited circumstances.

The Supreme Court also hears appeals. The Court of Appeal is the highest court in each state and territory, for both civil and criminal matters; in New South Wales, there is also a Court of Criminal Appeal, which is constituted separately from the Court of Appeal. It also makes decisions about procedural fairness in lower courts. Appeals are usually heard by three judges, but in some cases there are only two and, in special cases, more than three may hear them. If the judges cannot agree, a majority view is taken. It is possible to appeal from the Court of Appeal or Court of Criminal Appeal to the High Court, but only with special permission from the High Court.

Figure 2.5 Actor Geoffrey Rush at the Federal Court of Australia in Sydney on 9 November 2018.

ISBN 978-1-108-86281-3 Milgate et al.

Federal courts

The federal court system has a hierarchy in much the same way as the state court system does.

Federal Circuit Court of Australia

The Federal Circuit Court of Australia was established as the Federal Magistrates Court by the Commonwealth Parliament towards the end of 1999 and conducted its first sittings in July 2000. In November 2012, the federal parliament passed legislation changing the name of the Federal Magistrates Court of Australia to the Federal Circuit Court of Australia. The title of 'federal magistrate' was changed to 'judge'.

The Federal Circuit Court was established to relieve some of the caseload of the Federal and Family Courts and reduce the cost and time required to deal with more minor federal matters. The Federal Circuit Court has jurisdiction over areas such as family law and child support, human rights, copyright, bankruptcy, migration, consumer protection and trade practices, privacy, administrative law and industrial law. It does not deal with criminal matters. It shares its original jurisdiction with the Family Court of Australia and the Federal Court of Australia; matters can be transferred between these courts, depending on the complexity of the legal issues.

The Federal Circuit Court plays a strong role in settling disputes in regard to trade practices, human rights, copyright, industrial law, privacy and migration. It currently deals with over 90% of migration and bankruptcy applications. In many of its recent cases, the court has dealt with issues for Fair Work Australia, where workers have been underpaid.

Federal Court of Australia

The Federal Court of Australia was established by the *Federal Court of Australia Act 1976* (Cth). It assumed some of the jurisdiction previously managed by the High Court of Australia and the entire jurisdiction of two courts that had dealt with industrial matters and bankruptcy. It deals with civil disputes governed by federal law (except for family law matters), as well as some summary criminal offences. The Federal Court's position in the federal court hierarchy is equivalent to that of the Supreme Courts in the states and territories. In terms of the federal court hierarchy, it is equal to the Family Court of Australia, and above the Federal Circuit Court.

An example of the court's work can be seen where an application to review a migration decision of the Administrative Appeals Tribunal (AAT) was dismissed. The Federal Court did not accept the applicant's argument that the AAT had not afforded them procedural fairness in the conduct of their case: *Nathanson v Minister for Home Affairs* [2019] FCA 1709.

Family Court of Australia

The Family Court of Australia is a superior federal court that deals with the most complex family law matters. The Australian Parliament established it in 1975. Its main function is to rule on cases related to specialised areas in family law such as divorce, parenting orders, the division of property and spousal maintenance. In its appellate jurisdiction, it can hear appeals from a decision of a federal magistrate or a single Family Court judge.

High Court of Australia

The High Court of Australia was established in 1901 under section 71 of the *Australian Constitution*. It is the highest court in the Australian judicial system, and deals with appeals from the Federal Court of Australia, the Family Court of Australia, and the state and territory Supreme Courts. It also deals with cases concerning the interpretation of the *Australian Constitution* and the constitutional validity of laws.

In a recent case, the High Court had to make a decision about the validity of the Australian Marriage Law Postal Survey when two challenges were raised about the validity of using the Australian Bureau of Statistics and the Australian Electoral Commission in assisting to conduct this vote. The High Court ruled in favour of the government and the survey went ahead (*Wilkie v Commonwealth; Australian Marriage Equality Ltd v Cormann* [2017] HCA 40).

ISBN 978-1-108-86281-3 Milgate et al.

Legal Links

- The Legal Access Services website was set up to provide legal advice to ordinary Australians. It provides information on the Australian legal system.
- The NSW Department of Justice has information on its website about the state and federal courts in New South Wales.
- The ACT Law Courts and Tribunals website provides information on that territory's courts and tribunals.
- The Attorney-General's website has information about the federal legal system and courts.

Review 2.2

1 Outline the need for courts in society.
2 Explain what 'court hierarchy' means.
3 Identify the highest court in Australia.
4 Describe the types of cases that are dealt with in the New South Wales District Court. Identify who decides these cases.
5 Describe the role of the New South Wales Supreme Court.
6 Explain the importance of the High Court of Australia.
7 Identify which court would likely hear the following matters:
   a a murder trial
   b an appeal from the New South Wales Supreme Court
   c a hearing for the offence of using offensive language in public
   d an investigation into a suspicious death
   e an armed robbery trial
   f the preliminary hearing for a kidnapping case
   g a civil dispute between business partners involving $100 million
   h a case dealing with an aspect of the *Australian Constitution*.

2.4 Statute law

Statute law is the law made by parliament. It is also known as 'legislation' or 'Acts of Parliament'. In Australia, any parliament has the power to make statute law. This means that state, territory and federal governments all have the right to make laws. The *Australian Constitution* sets out the powers of the state and federal parliaments with respect to making law.

The role and structure of parliament

A parliament is a body of elected representatives. It debates proposed legislation, passes or rejects it, and amends legislation. Apart from Queensland and the territories, all state parliaments and the federal parliament are **bicameral**. This means that they have two houses, an upper house and a lower house. The Australian Capital Territory's parliament

Legal Links

The Legal Information Access Centre, at the State Library of NSW, contains an 11-minute video explaining how our laws are made.

ISBN 978-1-108-86281-3 Milgate et al.

is unicameral: it only has a lower house, called the Legislative Assembly. In New South Wales, the lower house is known as the Legislative Assembly and the upper house is called the Legislative Council.

bicameral
containing two chambers or Houses of Parliament

In federal parliament, the upper house is the Senate and the lower house is the House of Representatives. The political party that wins the majority of seats in the lower house forms the government. Sometimes different parties will unite to form a government (such as the Liberal–National Coalition). The leader of the winning party becomes the prime minister and, hence, is the leader of the government. The political party or parties who have the remaining seats in the lower house form the opposition.

Ministers are those members of the government who have a special responsibility for particular departments; for example, Minister for Education, Minister for the Environment. The prime minister offers their positions (or portfolio) to them and these ministers usually form the Cabinet, or the 'front bench' as they sit at the front in parliament sittings. Cabinet makes decisions on policy and laws to be drafted for consideration by parliament.

Non-ministerial members of parliament are known as the 'back bench'. When changes are made to the front bench positions, this is known as 'reshuffling the Cabinet'.

The opposition party appoints shadow ministers who are responsible for forming and promoting the opposition's position on such areas as defence, health and education.

The Executive Council is made up of the Governor or Governor-General and selected ministers. It is the body that enables legislation to be put into operation. The British monarchy still plays a role in parliament in Australia.

The Queen must assent to laws. At the federal level, she is represented by the Governor-General and at the state level by a governor in each state.

Figure 2.6 Prime Minister Scott Morrison on 18 September 2019. The Coalition government announced an inquiry into the family law system. Morrison announced that the new joint parliamentary committee would conduct a wide-ranging review of the family law system, with Victorian MP Kevin Andrews to chair the inquiry.

ISBN 978-1-108-86281-3 Milgate et al.

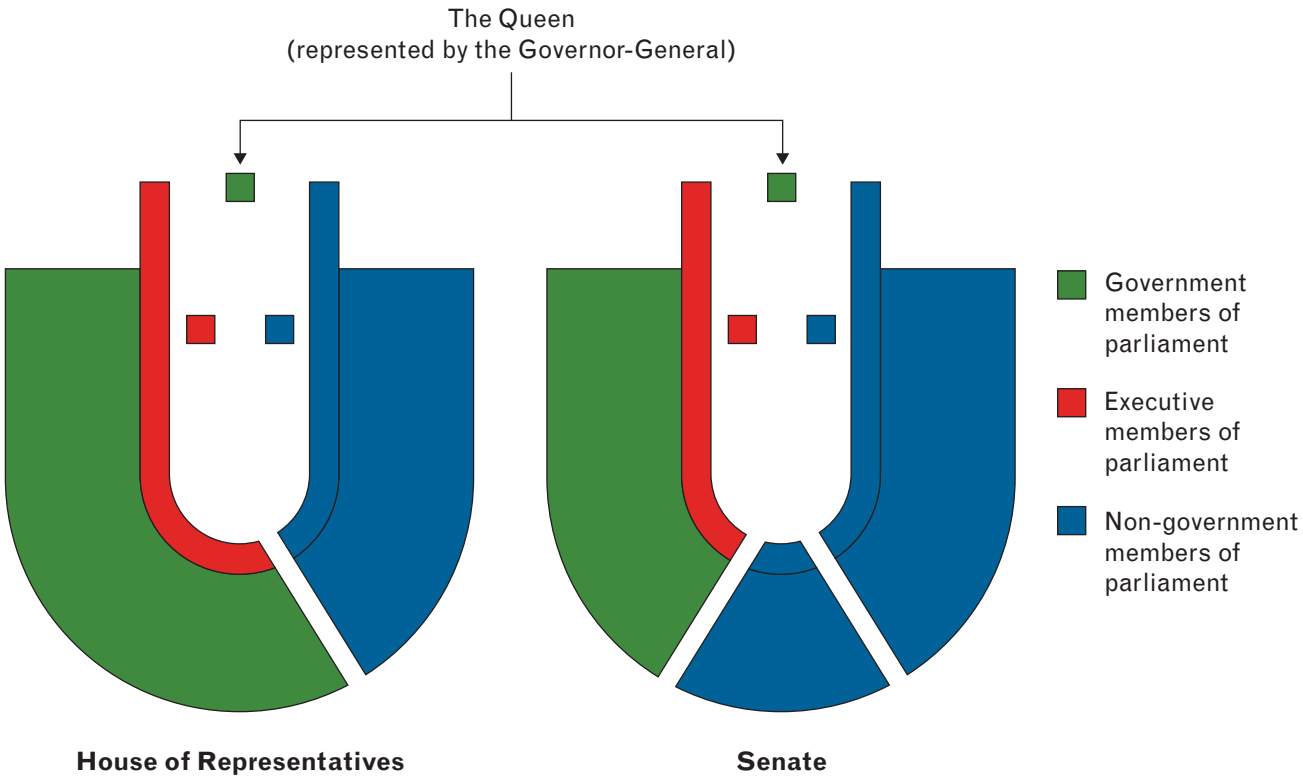


Figure 2.7 The Parliament of Australia – the number of members of parliament in each house is determined at the conclusion of each election.

Legal Links

For information about the Commonwealth Parliament, go to the Australian Parliament's website.

The legislative process

Passing legislation

One of the most important functions of parliament is the passing of laws. The party that holds government introduces most laws. A proposed new law is known as a **Bill**. Ministers, who are responsible for their preparation, usually introduce Bills. Any Member of Parliament can introduce a Bill; however, if a member introduces a Bill who is not a minister (called a backbencher), the Bill is known as a private member's Bill.

Bill
a drafted law that has not yet been passed by parliament

The making of a law can be time-consuming and difficult. The process is open to public scrutiny and, as a result, well-organised pressure groups and members of the public can influence parliamentarians' opinions.

As members of parliament are subject to elections every few years, they are well aware of the consequences of passing unpopular legislation. This means that proposed legislation often undergoes much discussion in parliament and may be redrafted many times.

Before a Bill passes and becomes federal law, it requires the approval of both Houses of Parliament and the Governor-General. It then becomes an **Act of Parliament**.

Act of Parliament
statute law, resulting from a Bill successfully passing through parliament and gaining royal assent

The process for passing laws through the New South Wales Parliament (as well as other states with bicameral parliaments) is generally the same

ISBN 978-1-108-86281-3 Milgate et al.

as passing laws through federal parliament. This process is outlined in Figure 2.8.

The process for passing laws in the Legislative Assembly of the Australian Capital Territory has fewer steps, as there is only one legislative chamber. Bills of the Australian Capital Territory are not given royal assent by the Governor-General, and this territory has no governor or administrator.

The process of passing a Bill through parliament

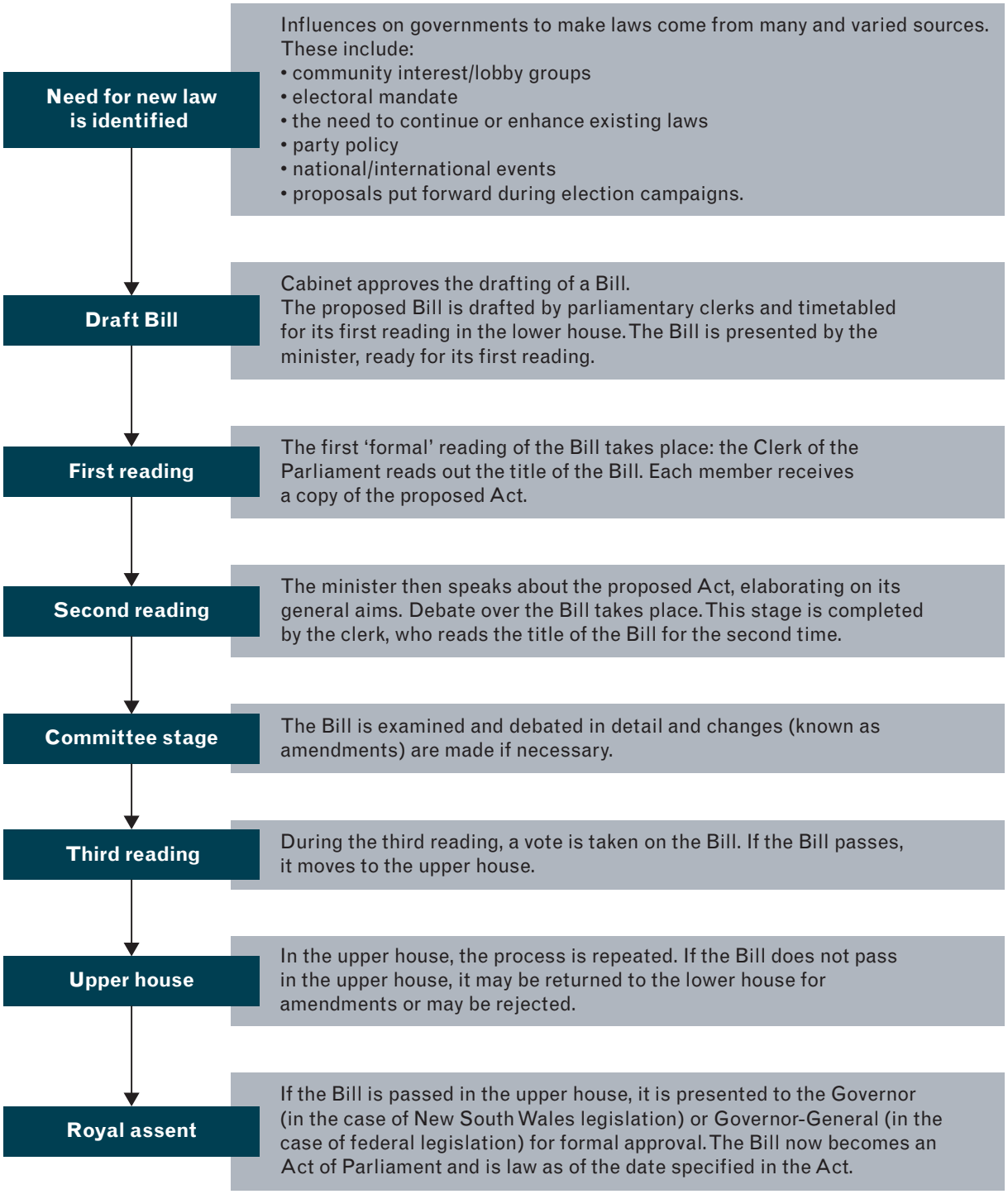


Figure 2.8 The passage of a Bill through parliament.

ISBN 978-1-108-86281-3 Milgate et al.

Delegated legislation

Delegated legislation is legislation made by non-parliamentary bodies. It involves 'less important' laws that parliament does not have time to draft, consider and pass, and so delegates (passes on) the responsibility to 'subordinate' bodies such as government departments or local councils. The Act that authorises a body to make delegated legislation is called an 'enabling Act'.

delegated legislation
laws made by authorities other than parliament, which are delegated the power to do this by an Act of parliament

Types of delegated legislation include:

- **Regulations** – laws made by the Governor-General, state governors or members of the Executive Council
- **Ordinances** – laws made for Australian territories (e.g. Norfolk Island and the Australian Antarctic Territory)
- **Rules** – legislation made for government departments, usually by the department involved
- **By-laws** – laws made by local councils, which are restricted to the area governed by that council.

2.5 The *Australian Constitution*

A constitution is a set of rules or principles that may apply to a social club, a large-scale organisation or even a nation. A constitution provides the framework, or guidelines, which outlines how these institutions function. On 1 January 1901, Australia gained a Commonwealth *Constitution*, which outlined the legal framework and rules that apply to the governance of Australia.

Prior to the *Australian Constitution* coming into force, Australia consisted of six colonies, which were independent of each other with the right to govern within their own borders. These six colonies were not answerable to any authority in Australia, but rather to the British Government. Throughout the 1800s, many groups and individuals began to promote the concept that Australia would be better off if the six colonies amalgamated into one nation, under one centralised government. An emotional and sometimes bitter debate raged for the two decades in the lead up to **Federation** in 1901.

federation
the process of uniting several states to form a single national government

TABLE 2.1 The advantages and disadvantages of delegated legislation

Advantages	Disadvantages
The people making the legislation are usually experts in that field.	Elected members of parliament do not have the time or expertise to fully check the delegated legislation.
Delegation of minor legislation frees up parliamentary time for very serious issues.	With many different bodies involved in making delegated legislation, there can be inconsistencies.
It is easier to amend delegated legislation and, thus, it is more flexible.	Little publicity surrounds delegated legislation and, thus, the public usually cannot voice their views.

Review 2.3

1 Describe the differences between court-made law and statute law.
2 Explain how an Act of parliament is made. You may wish to use a diagram, a series of cartoons or a storyboard.
3 Using examples, explain the need for delegated legislation. Describe the extent to which delegated legislation can be undemocratic.

ISBN 978-1-108-86281-3 Milgate et al.

The different viewpoints and the fears of the smaller colonies of being 'consumed' by New South Wales and Victoria played a substantial role in shaping the final constitution document. As with any democratic process, politicians have to persuade the public to vote for their proposals, and sometimes they have to make trade-offs to gain voter confidence. This was essential to get the necessary votes in each of the Federation **referendums**.

referendum
the referral of a particular issue to the electorate for a vote

After a series of referendums in 1898, 1899 and 1900, the colonies eventually found a compromise position on a proposed constitution, but, before it could take effect, approval from the British Parliament was required. The *Commonwealth of Australia Constitution Act 1900* (UK) was passed and Australia came into existence as a nation on 1 January 1901. The following are the key features of this British Act:

- Australia was a federated nation consisting of six states (Western Australia joined shortly after the other states). The Northern Territory gained self-government in 1978 and the Australian Capital Territory in 1988.
- There was a bicameral federal parliament (House of Representatives and Senate).
- A High Court of Australia was established to oversee any other courts and provide 'final and conclusive' judgments upon any appeals it hears (s 73 *Australian Constitution*).
- It outlined both the division of power (s 51) and the separation of powers as they would apply in Australia.
- It enabled the *Constitution* to be altered by a referendum (s 128 *Australian Constitution*).

It is interesting to note that there was considerable pressure for New Zealand to join Australia; in fact, Walter Burley Griffin in 1912 when there was still hope that New Zealand may become part of Australia named the Canberra suburb of Manuka after a native New Zealand tea tree.

The *Constitution* itself is section 9 of the *Commonwealth of Australia Constitution Act 1900* (UK). Although the *Constitution* came into force through an Act of the British Parliament, the Act brought the Commonwealth of Australia into existence as a nation, and the *Constitution* can be changed only by a referendum of Australian voters.

TABLE 2.2 Arguments for and against Federation in 1901

Arguments for Federation	Arguments against Federation
Economics: the removal of trade barriers between the colonies would promote a more efficient economy	Trade: **tariffs** could be used to protect industries in certain colonies from competition in other colonies
Transport: a national rail network would overcome problems caused by the colonies having different **rail gauges**	Fear: smaller states believed that the more populous and 'richer' states would override their interests
Defence: as the colonies were far from Britain and from Britain's ability to assist in the event of an attack, a unified military force would reduce vulnerability	Apathy: many people felt that Federation was irrelevant to their daily lives; this was compounded by the severe economic depression of the 1890s
Nationalism: there was a desire to foster a unique Australian identity and culture distinct from the 'mother country' of England (in 1900, 96% of Australians were of British origin)	Expense: a Federation would be expensive to achieve and a national government would be expensive to run
Racial 'purity': implementing national policies restricting immigration would 'keep Australia white' (the **White Australia Policy**)	Cheap labour: Queensland was determined to protect its sugar industry by allowing Pacific Islander 'kanakas' to work on the sugar plantations

ISBN 978-1-108-86281-3 Milgate et al.

tariff
a tax that must be paid on imports or exports

rail gauge
the distance between the inner sides of the two rails of a train track

White Australia Policy
the government policy of allowing only Europeans and English-speaking people to immigrate to Australia; so-called 'undesirables' were kept out by use of the infamous 'Dictation Test'

The 'founding fathers' were also very wary of foreign interference in the functioning of the new parliament of Australia and inserted sections which have had lasting, and a surprising, impact. Britain, the United States, Canada nor New Zealand exclude dual citizens from becoming a member of parliament but section 44 of the Australian Parliament states:

> **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 …
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Throughout the latter half of 2017, this section of the *Constitution* had a dramatic impact on the makeup of parliament with the development of a parliamentary

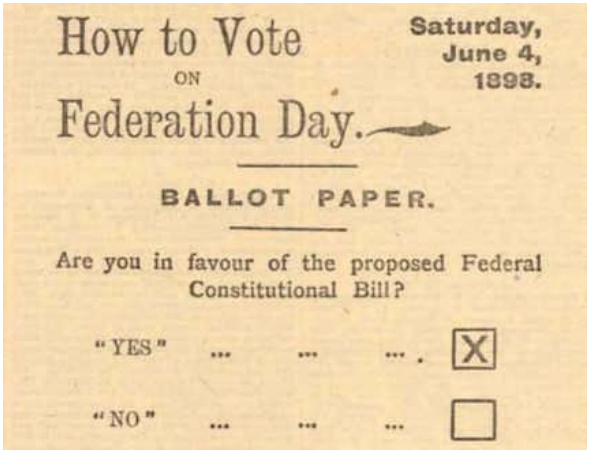

How to Vote ON Federation Day.
Saturday, June 4, 1898.
BALLOT PAPER.
Are you in favour of the proposed Federal Constitutional Bill?
"YES" X
"NO" ... ... ☐

Figure 2.9 A 'how to vote' card for the South Australian referendum on the proposed *Australian Constitution*.

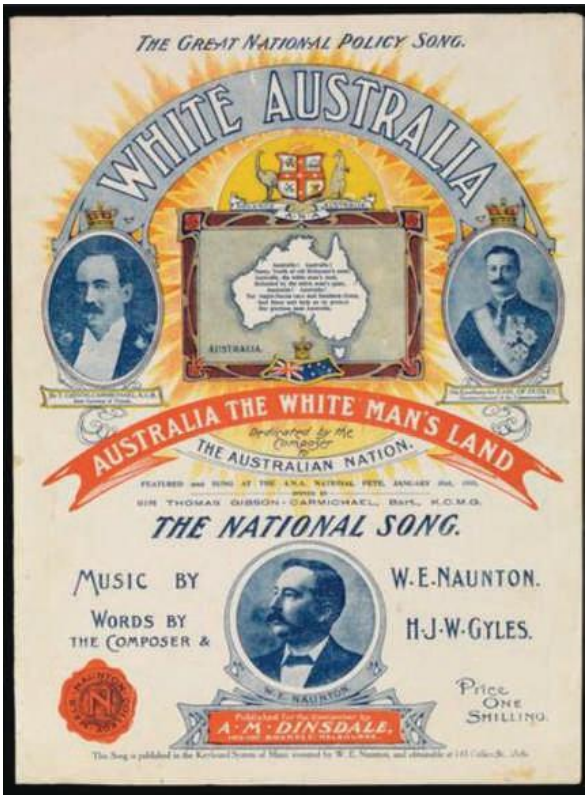


Figure 2.10 Promotional material for the White Australia policy.

eligibility crisis. Several parliamentarians were ruled ineligible by the High Court and many more referred themselves to seek clarification of their status. The High Court's role in this will be examined later in the chapter.

The *Australian Constitution* contains certain 'checks and balances' as a result of debate and discussion during the Federation process:

- The Senate provides a 'check' (restraint) on the power of the House of Representatives. The Senate is sometimes called the 'states' house', since all states have the same number of senators (12) regardless of population. Each territory has two senators.
- Section 128, which covers the process for altering the *Constitution*, specifies that a majority of states need to vote 'yes' on a proposal for it to succeed; that is, four out of six states. In addition, an absolute majority of voters Australia-wide must vote 'yes'; that is, 50% of voters plus one. It should be noted that this strict requirement has made constitutional change very difficult: no referendum has succeeded since 1977.
- The 'division of power' outlined in section 51 ensures that the states have control over the 'residual

ISBN 978-1-108-86281-3 Milgate et al.

powers'; that is, those not listed in section 51. This will be examined in detail later in this chapter.

Division of power

The actual makeup of the *Australian Constitution* clearly reflects the chief concerns of the Federation process as outlined in Table 2.2. The reluctance of the states to hand over complete control to the Commonwealth is evident in Chapter I, Part V of the *Constitution*, in sections 51 to 60. These sections provided the split (or division) of powers between the Commonwealth and the states.

Section 51 of the *Constitution* specifies the **legislative powers** of the federal parliament. The federal parliament has the power to make laws with respect to all of the matters listed in section 51. These are sometimes referred to as the 'enumerated powers'. It is important to realise that the states can also make laws in many of the areas listed in section 51; namely, those areas over which the federal and state governments have **concurrent powers**.

legislative power
the legal power or capacity to make laws

concurrent powers
existing at the same time; powers held by both state and federal parliaments

Section 52 outlines the **exclusive powers** of the federal government; that is, only the Commonwealth (federal) Parliament can legislate on:

i the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes

ii matters relating to any department of the public service [controlled by the Commonwealth, according to the *Constitution*]

iii other matters declared by the *Constitution* to be within the exclusive power of the parliament.

exclusive powers
powers that can be exercised only by the federal parliament

Commonwealth government legislative powers

Section 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:

(i) trade and commerce with other countries, and among the States;
(ii) taxation; but so as not to discriminate between States or parts of States;
[…]
(v) postal, telegraphic, telephonic, and other like services;
(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
[…]
(xii) currency, coinage, and legal tender;
[…]
(xv) weights and measures;
[…]
(xix) naturalization and aliens;
[…]
(xxi) marriage;
(xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;
[…]
(xxvi) the people of any race, for whom it is deemed necessary to make special laws;
(xxvii) immigration and emigration;
(xxviii) the influx of criminals;
(xxix) external affairs;
[…]

ISBN 978-1-108-86281-3 Milgate et al.

(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;
(xxxii) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;
(xxxiii) the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
(xxxiv) railway construction and extension in any State with the consent of that State;
(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
[…]
(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

The exclusive powers of the federal government include the areas of trade and commerce with other countries, foreign relations ('external affairs') and national defence. While section 90, for example, states clearly that the federal government has exclusive power over customs, and section 114 forbids the states from raising or maintaining any military force, determining how the *Constitution* applies to a real-life question or dispute is not always clear-cut. As society, technology, and values and ethics have evolved over time, it has fallen to the High Court to interpret how the *Constitution* applies in a contemporary context (see High Court cases later in this chapter).

Figure 2.11 The Australian Defence Force is the responsibility of the Commonwealth Government as national defence is an exclusive power and section 114 of the *Australian Constitution* forbids the states from raising their own military forces.

Obviously there needs to be a conflict-resolution mechanism in place if a state and the Commonwealth make contradictory laws. This is found in section 109: 'When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' This will be discussed later in this chapter.

Those powers that belong solely to the states are known as the **residual powers**; that is, all the powers left over that are not otherwise given to the Commonwealth exclusively. Each state has its own constitution, which enables the state to make laws in various areas, but excludes any area directly denied to the states by the *Australian Constitution*. Chapter V of the *Constitution* outlines some of these

residual powers
those matters on which the states can legislate, as they are not referred to in the *Australian Constitution*

ISBN 978-1-108-86281-3 Milgate et al.

In Court

Commonwealth v Tasmania [1983] HCA 21 ('Tasmanian dam case')

If either the Commonwealth Government or a state government passes a law that contravenes the *Australian Constitution*, that law is unconstitutional and invalid. Technically, the government passing the contravening law is acting ***ultra vires*** (beyond legal authority). But what happens if the state and Commonwealth laws are both valid, as can often be the case with a concurrent power? This situation arose in the case of *Commonwealth v Tasmania* [1983] HCA 21, known more commonly as the 'Tasmanian dam case'.

ultra vires
(Latin) beyond the power or authority legally held by a person, institution or statute to perform an act

Tasmania wanted to build a hydroelectric dam on the Franklin and Gordon river system. A group of environmentalists began a campaign against this proposal, and the Wilderness Society and the Australian Conservation Foundation got actively involved. Nationwide protests were organised under the 'no dams' slogan, and a range of high-profile personalities took up the cause.

The Tasmanian Government argued that the building of the dam was a residual power and the protesters, while entitled to their view, were not going to change the Tasmanian Government's decision. In the lead-up to the 1983 federal election, the leader of the Australian Labor Party promised to stop the dam if elected. Labor won the election, but Tasmania continued to build the dam.

The federal government recognised the Wild Rivers area in Tasmania as a region of special significance, and it was listed under the World Heritage Convention. The federal government also passed the *World Heritage Properties Conservation Act 1983* (Cth), which specified that such areas of special significance should be protected. The Franklin River was included as one such area. Now there was a state law allowing the construction of the dam and a federal law that demanded it be stopped. The case went to the High Court.

There are seven judges on the full bench of the High Court. In a 4–3 decision, the court ruled that the federal government was validly using the **external affairs power** of the *Constitution* (s 51(xxix)), which gives it the authority to legislate on any matter of 'international concern'. Although the Tasmanian Government argued that the construction of the dam and the regulation of that area were purely internal or domestic affairs, the High Court held that the Commonwealth had the power to make laws with respect to international obligations that also govern conduct within Australia. Under section 109 of the *Constitution*, the federal law overrides the state law; section 109 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'. The construction of the dam was stopped and the Franklin River was ultimately preserved for future generations.

external affairs power
the power of the Commonwealth to legislate on international matters involving Australia; interpreted by the High Court to mean that when the Commonwealth signs an international treaty or convention, it has the authority to enact laws to give effect to this international law within Australia

Figure 2.12 Franklin River, Tasmania.

ISBN 978-1-108-86281-3

prohibitions. Some of the key residual powers are in the areas of de facto relationships (in New South Wales this now includes same-sex relationships), crime, hospitals and public transport. Environmental protection is another obvious area that was not a consideration at the time the *Constitution* was drafted and is thus considered a 'residual power'. In the HSC unit 'Global Environmental Protection', how the federal government has gained some power over this is explained in detail and is also referred to in the Tasmanian dam case, above.

It should be noted that there is a provision in section 51(xxxvii) that allows for a 'referral of powers', whereby states are able to 'give' power to the Commonwealth to make laws with regard to a specific matter (e.g. in 2009, New South Wales referred some industrial relations matters to the Commonwealth under the *Industrial Relations (Commonwealth Powers) Act 2009* (NSW)).

Amending the *Australian Constitution*

The law and the legal system must be dynamic to be effective. Mechanisms must be in place to change ineffective, obsolete or unfair laws. Statutes (Acts of Parliament) can be changed through the parliamentary process. Common law can be changed through the courts when a judge sets a new precedent. The *Australian Constitution*, while technically a statute, has a unique alteration process contained within it. This process is found in section 128 under Chapter VII, 'Alteration of the *Constitution*', and is known as a referendum.

Once again the fear of the smaller colonies of being made irrelevant by Federation resulted in a process that makes constitutional change difficult. Of the 44 proposed amendments to the *Constitution*, only eight have been successful. In some published copies of the *Australian Constitution*, these successful amendments are often shown in bold type or by having deleted parts ruled through (see s 51(xxvi)). The margin notes also indicate alterations made to the *Constitution* after a successful referendum. The specifics of successfully altering the *Australian Constitution*, as set out in section 128, are:

- **i** The proposed change must pass both houses (Senate and House of Representatives) with an absolute majority.
- **ii** The proposed change must be put to the electors 'not less than two months nor more than six months' after going through both houses.
- **iii** There must be an absolute majority of voters Australia-wide who approve the change; that is, 50% of voters plus one.
- **iv** There must be a majority of states that approve the change; that is, four of the six states must vote for the change.
- **v** The alteration must go to the Governor-General for royal assent.

In 1967, the most successful referendum in Australian history (90.77% vote in favour) altered section 51(xxvi) and deleted section 127, which enabled the Commonwealth Government to pass laws in relation to Aboriginal and Torres Strait Islander peoples. This ensured consistency of laws, as some states had discriminatory laws and were reluctant to change them. Prior to this Aboriginal

Figure 2.13 Voting in the 1967 referendum at a polling booth at Sydney Town Hall. A sweeping majority of Australians voted in favour of the referendum.

ISBN 978-1-108-86281-3 Milgate et al.

and Torres Strait Islander people were not allowed to be included in the national census.

Other successful referendums included amending section 72 so that judges in the High Court and the other federal courts had to retire at age 70. This was the last successful referendum; the next nine proposals were all defeated. The last referendum was held on 6 November 1999 and involved changing Australia to a republic with a president appointed by a two-thirds majority of both Houses of Parliament, which would require **bipartisan** support of the nomination. The proposal was soundly defeated, but the push to make Australia a fully independent nation remains.

bipartisan
having the support of the two major political parties

Review 2.4

1 Using examples, explain how the *Australian Constitution* reflects the concerns of the former colonies.
2 Australia has six states and two territories. Refer to section 121 of the *Constitution* and identify whether this is the maximum number of states that Australia may have.
3 Go online to find the current senators from New South Wales and Tasmania. Using each state's population, calculate how many people a Tasmanian senator represents compared to a New South Wales senator. Assess the implication of this difference.
4 Define the term 'division of power'.
5 Read the article online 'High Court strikes down ACT gay marriage law' (by Lauren Wilson, *The Australian*, 12 December 2013). Discuss the role section 109 of the *Constitution* has in deciding which level of government has 'power' over a certain area.
6 Discuss how the decision in the Tasmanian dam case gave the federal government power to make a law over the environment when this is considered a residual power.
7 In 1999, a referendum for Australia to become a republic failed. Research this referendum online and then take part in a class discussion. Should Australia become a republic?
8 Class activity – Conduct your own 'referendum' (use your class or year level to 'vote').
   a Decide on an issue (e.g. Is NRL better than AFL? Is a Kit Kat a better chocolate bar than a Crunchie?). Create ballot papers with your 'issue'; voters must answer 'yes' or 'no'.
   b Divide the class or year into Australia's six states and two territories. Use the following approximate percentages: New South Wales – 30%, Victoria – 20%, Queensland – 20%, Western Australia – 10%, South Australia – 5%, Tasmania – 5%, Australian Capital Territory – 5%, Northern Territory – 5%.
   c Give each student one ballot paper and tally the votes. Apply points three and four of the referendum rules (note that the territories are only counted as part of the Australia-wide vote) and determine whether your referendum would succeed.

Research 2.1

Investigate section 127 of the *Australian Constitution*. Identify what section 127 stated and when was it altered.

ISBN 978-1-108-86281-3 Milgate et al.

Separation of powers

In 1887 Lord Acton, an English historian, writer and member of the British House of Commons, famously stated: Power tends to corrupt, and absolute power corrupts absolutely.

This well-known quote is often attributed with outlining the fundamental reasoning behind the separation of powers doctrine that underpins modern democracies. It was developed by the eighteenth century French political philosopher Charles de Secondat Montesquieu. He believed that the civil liberties of society were at risk if the key organs of government were controlled by one person or group.

Montesquieu identified these key organs of government as:

- **the legislature** – the law-makers (in Australia this is the parliament: the House of Representatives and the Senate)
- **the executive** – the ministers and government departments who administer the laws made by parliament (in Australia the Governor-General, the prime minister and Cabinet are members of the executive)
- **the judiciary** – the courts which interpret and apply the law.

If one person or group controls all three organs or arms of government, then that person or group has unfettered power and the risk of dictatorship is very real. If the three arms are independent, each acts as a check on the others, ensuring that no branch has absolute power and that **civil liberties** are protected.

civil liberties
basic rights of individuals that are protected by law; for example, freedom of religion and freedom of speech

Australia's founders certainly wanted the doctrine of the separation of powers to apply upon Federation. The first three chapters of the *Constitution* are set out in accordance with the doctrine:

- Chapter I – The Parliament (ss 1–60)
- Chapter II – The Executive (ss 61–70)
- Chapter III – The Judicature (ss–71–80).

In theory, Australia has adopted the doctrine of the separation of powers but, in fact, the *Australian Constitution* only partially realised this because some members of the executive are also members of the legislature; that is, the ministers and the prime minister are members of both the executive and the legislature – the separation of powers does not exist in its pure form in Australia.

The key feature of the separation of powers in Australia in regards the functioning of democracy is that there is a clear distinction between the judiciary and the other arms of government. For a true democracy to operate and in the interests of justice, it is imperative that there be no overlap between the judicial and non-judicial arms of government. Protecting the independence of the judiciary is one of the cornerstones of our democracy. This becomes

Review 2.5

1 Outline the role of the three 'arms' of government. Explain how the separation of powers operates in Australia.
2 Outline the significance of the separation of powers for the functioning of a democracy.

Research 2.2

1 Investigate the concept of mandatory sentencing and discuss how this may come into conflict with the independence of the judiciary when determining punishments. Go online to identify current New South Wales crimes that have mandatory sentencing provisions.
2 Conduct an internet search to identify modern day dictatorships and identify which aspects of their rule breach the separation of powers.

ISBN 978-1-108-86281-3 Milgate et al.

evident when a court makes a decision that is not in accordance with government policy.

Role of the High Court

Chapter III of the *Australian Constitution* is titled 'The Judicature' and it is within this chapter that the judicial system of the Commonwealth is created. Section 71 creates the High Court of Australia and specifies that it must contain one Chief Justice and at least two other judges.

The first sitting of the High Court was on 6 October 1903, with three judges. In 1906 the number of judges was increased to five and in 1912 the number of judges was further increased to its current number, seven.

Section 71 also allows the Commonwealth Parliament to create other courts. Over time, parliament has created the Federal Court, the Family Court and the Federal Circuit Court of Australia, which are all under federal jurisdiction.

Section 72 outlines how High Court judges are appointed, and as a result of a successful referendum in 1977, specifies that they must retire when they reach the age of 70. Most High Court judges come from the bench of the state Supreme Courts or the Federal Court. They are chosen by the 'Governor-General in Council', which essentially means they are chosen by the government of the day. While most sittings are in Canberra, cases can be heard in the other capital cities and even by video link if it is warranted.

High Court jurisdiction

The High Court has both original and appellate jurisdiction. The **original jurisdiction** of the High Court is outlined in sections 75 and 76.

original jurisdiction
the ability or power of a court to hear a case in the first instance

Section 75

In all matters –

(i) arising under any treaty;
(ii) affecting consuls or other representatives of other countries;
(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
(iv) between States, or between residents of different States, or between a State and a resident of another State;
(v) in which a writ of **mandamus** or **prohibition** or an **injunction** is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.

Section 76

The Parliament may make laws conferring original jurisdiction on the High Court in any matter –

(i) arising under this *Constitution*, or involving its interpretation;
(ii) arising under any laws made by the Parliament;
(iii) of Admiralty and maritime jurisdiction;
(iv) relating to the same subject matter claimed under the laws of different States.

Cases that come under original jurisdiction begin in the High Court itself. Matters relating to the interpretation of the *Constitution* fall under section 76(i), and this role of the High Court has, at times, had an enormous influence on determining the division of power between the states and the Commonwealth.

mandamus
a court order compelling a government official or organisation to perform a particular task

prohibition
a court order that forbids a lower level court from hearing or taking further action in a case or matter

injunction
a court order requiring an individual or organisation to perform, or (more commonly) not to perform, a particular action

As community conditions, standards and attitudes evolve, they should be reflected in the views and decisions of the judiciary. This is another way in which the law maintains its relevance, effectiveness and acceptance by the community.

When a case concerning the interpretation of the *Constitution* comes before the High Court,

ISBN 978-1-108-86281-3

generally all seven judges hear and decide the matter (in some cases, a panel of five of the judges decides the case). This ensures a final decision, even though decisions need not be unanimous. The High Court is the highest court in the Australian judicial system and, since 1986, there are no other avenues of appeal available. Prior to this time, appeals from the Australian judicial system could go to the Privy Council in England for final determination, however the *Australia Act 1986* (Cth) severed this judicial link with England.

The influence of the High Court: Interpreting the *Constitution*

While the High Court has various roles, such as determining whether a particular body has the jurisdiction to exercise judicial power, one of its fundamental duties is to make final determinations about how the *Constitution* is to be interpreted. Invariably, the High Court's interpretation of the *Constitution* involves stipulating what areas the Commonwealth can legislate on and what areas belong to the states. In association with such decisions, the High Court makes statements on how each level of government can use its powers and outlines any limits on such powers. For example, in the Tasmanian Dam case, the High Court said in *obiter dicta* that the Commonwealth can only use the external affairs power when entering legitimate international treaties or conventions. In other words, the Commonwealth Government could not enter a treaty with another country simply to gain legitimacy to override a state law that it disagreed with. Initially High Court decisions favoured the states but, over time, a broader approach to interpreting the *Constitution* has seen a shift in the legislative balance between the states and the Commonwealth. The 'In Court' cases below are examples of the High Court exercising its original jurisdiction to interpret the *Constitution*.

In Court

***Love v Commonwealth of Australia* [2020] HCA 3**

In February 2020, the High Court of Australia – in a 4 to 3 decision – held that indigenous people cannot be considered to be 'aliens' even if they were born overseas and do not have Australian citizenship. The case was brought by lawyers on behalf of two Aboriginal men, Brendan Thoms and Daniel Love, both who were born overseas but have indigenous heritage. Both men live in Australia and – due to their criminal convictions – faced deportation to the country of their birth under the *Migration Act 1958* (Cth).

Justice James Edelman noted this about the Aboriginal men's claim:

> The sense of identity that ties Aboriginal people to Australia is an underlying fundamental truth that cannot be altered or deemed not to exist by legislation.

Justice Virginia Bell determined that an indigenous person cannot be considered to be an alien because 'an Aboriginal Australian cannot be said to belong to another place'.

In his article, 'The High Court has widened the horizon on what it is to be indigenous and belong to Australia' (*ABC News*, 15 February 2020), indigenous commentator, Stan Grant, emphasised the High Court's *obiter dictum* that:

> Indigenous Australians don't enjoy the same political sovereignty as Native Americans or New Zealand Māori.

Grant notes that while Mabo provided Native Title in 1992, how this decision confirmed that indigenous peoples cannot be aliens under the Migration Act 1958 (Cth) had not yet been resolved. The Uluru Statement has called for a constitutional voice to finally acknowledge that 'Aboriginal people have an antiquity, cultural and spiritual connection to this land that no other Australian can have'.

ISBN 978-1-108-86281-3 Milgate et al.

(In Court continued)

***Murphyores Inc Pty Ltd v Commonwealth* [1976] HCA 20 ('Fraser Island case')**

The Murphyores mining company extracted certain minerals from sands on Fraser Island under a lease granted by the Queensland Government. Such a lease was constitutionally valid, and the environmental consequences were also a state concern.

The Commonwealth Government disagreed with the mining project, partly on environmental grounds, but had no constitutional power to shut down the operations on Fraser Island. Instead, the Commonwealth Government relied on one of its legislative powers – specifically, section 51(i) of the *Constitution*, over trade and commerce – to prohibit the export of the minerals. Also, under section 112 of the *Customs Act 1901* (Cth), the Commonwealth Government can prohibit the export of any goods from Australia, either absolutely or unless certain conditions are complied with.

The financial viability of Murphyores' mine relied on being able to export the minerals to overseas markets, so Murphyores took the matter to the High Court. Murphyores argued that the Commonwealth Government had acted outside its constitutional power. However, the High Court noted that – while the effect of using section 51 of the *Constitution* may well be to override a traditional state power – the Commonwealth Government was within its rights to prohibit the export of the minerals. The motivation for the Commonwealth's use of the power (e.g. a concern about the environmental effects of the mine) was irrelevant.

Figure 2.14 A dingo on the site that was to be mined on Fraser Island, situated off the south-east coast of Queensland. Fraser Island is now a World Heritage site.

***R v Brislan* [1935] HCA 78**

In 1935, Dulcie Williams was convicted of receiving messages by 'wireless telegraphy' without proper authorisation. Williams was receiving the messages via a 'wireless broadcasting receiving set' (that is, a radio). In the appeal, it was argued that the Commonwealth had acted *ultra vires* by charging her under the *Wireless Telegraphy Act 1905* (Cth) (now repealed). It was argued that the section of the Act Williams was charged under does not extend to radio sets. Furthermore, Williams argued that if the section had extended to radio sets, it would have been invalid anyway because section 51(v) of the *Australian Constitution* covers 'postal, telegraphic, telephonic and other like services' but not broadcasting.

The High Court ruled that 'upon its true interpretation' the Commonwealth is able to legislate about any broadcasting services. Consequently, it has been accepted that the Commonwealth has constitutional power to make laws about new developments in communications technology, and is thus responsible for the roll-out of the National Broadband Network.

***Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 ('citizenship seven case')**

While challenges to parliamentarians' eligibility have been a feature of Australian politics for over 50 years, the crisis that emerged in 2017 once again shone a spotlight on the binding nature of the specific wording of the *Australian Constitution* (in this case, section 44 – see earlier in this chapter).

ISBN 978-1-108-86281-3 Milgate et al.

In Court (continued)

In 1950, Henry William Crittenden took legal action in the High Court against Gordon Anderson (the successful candidate for the seat of Kingsford Smith) on the grounds that since Anderson was a Catholic he would be under allegiance to a foreign power, namely the Vatican. Crittenden lost the case and was ordered to pay costs. The court ruled that excluding Catholics from public office would breach section 116 of the *Constitution* as it would, in effect, place a religious test on any person applying for public office.

A series of disclosures throughout 2017 highlighted that many members of parliament had dual citizenship. Some parliamentarians were completely unaware of this as often their 'citizenship' was automatically inherited from parents and grandparents when they were born. The 'citizenship seven' case was actually a number of cases heard in the one sitting by the High Court to clarify the situation.

In October 2017, the High Court handed down a unanimous decision on its interpretation of section 44 of the *Constitution*. This section provides that a person will be disqualified from parliament if they are a dual citizen unless they have taken 'all steps that are reasonably required' to renounce any other citizenship than Australian. On the ABC's *Q&A*, then Prime Minister Malcolm Turnbull stated:

> 'The reality is that the courts adopted a very literal meaning of section 44.1 … Yes, I think the section 44.1 should be amended but how it should be amended is something that is going to be considered by the joint standing committee on electoral matters. But in the meantime, we have to live with the section as it is and as the High Court has interpreted it.'

Even the Deputy Prime Minister, Barnaby Joyce, was deemed to be ineligible to sit in parliament and had to recontest his seat late in a by-election in December 2017, after relinquishing his New Zealand citizenship that he had unknowingly inherited from his father. (Joyce won the by-election, although in February 2018 he resigned his ministerial and leadership roles following events unrelated to section 44.)

In an attempt to restore public confidence in the parliamentary system, all members of parliament had to disclose their family heritage on a register; Turnbull noted, 'The only creatures in Australia that have more of their pedigree published than Australian politicians now are thoroughbred race horses'.

Research 2.3

1. Investigate the outcome for each of the 'citizenship seven'.
2. Divide the class into pairs and choose one month from the last year. View the summary of High Court decisions for each year as outlined in the monthly bulletins. Each pair is to select one case and prepare a presentation that includes:
   - **a** an outline of a case 'handed down' by the High Court
   - **b** a brief overview of the facts of the case and the decision.

ISBN 978-1-108-86281-3 Milgate et al.

In Court

***Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1**

This case involved four businesses (STA Travel, Carsales, AusDog and the Trading Post) sponsoring links on Google that would appear when certain key words were entered – specifically, if you used Google to search for the name of a company that was in competition with, for example, STA Travel, then a link to STA Travel would appear prominently, rather than a link to the rival company. The aim of the sponsored links was to divert web traffic away from rivals. Some people wrongly assumed that the 'results' of their searches were organic but in fact they were sponsored links.

The High Court held Google responsible for the misleading and deceptive conduct of the four businesses, which means that Google is no different from any other medium that hosts advertisements. In *obiter dicta*, the court noted that if Google (or any publisher) is aware that material is misleading or deceptive, they can be held liable as per section 251 of the *Australian Consumer Law*.

Appeals to the High Court from lower courts

Section 73 outlines the appellate jurisdiction of the High Court. It stipulates that the High Court has jurisdiction to 'hear and determine all judgments' from any cases emanating from:

- the High Court exercising its original jurisdiction
- any Federal Court exercising federal jurisdiction
- the Supreme Court of any state.

Section 73 also states that 'the judgment of the High Court in all such cases shall be final and conclusive'. Currently, all appeal cases must be granted **special leave** before the case will be heard by the High Court. Chapter 4 of the *High Court Rules 2004*, which became effective on 1 January 2005, deals with the practice and procedure of the High Court in its appellate jurisdiction.

special leave
where the High Court grants approval for the case to come before it in its appellate jurisdiction

Generally, appeals relate to **questions of law**, or a matter that is of such significance as to warrant the attention of the High Court, or a dispute between the opinions of various courts that requires a final adjudication. The workload of the High Court has built up over the decades and there are numerous examples of the High Court deciding matters in its appellate jurisdiction.

question of law
a disputed legal contention that is left for the judge to decide; for example, whether certain evidence is admissible

Judicial review

The system of judicial review involves review of the actions of a government official or department by a court of law. Generally, the system involves investigating the legality of a decision or action. The High Court exercises judicial review whenever it makes a decision about whether a particular law is constitutionally valid or not. It has almost unlimited jurisdiction to review Commonwealth administrative decisions.

The Federal Court undertakes most judicial reviews by applying the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It is important to understand that this Act applies strict rules and does not give the Federal Court the power to review a decision on its merits. Appeals can go to the High Court, by leave.

A far more effective and efficient way for individuals to appeal the decision of a government official or body is through non-judicial review of administrative action in the Administrative Appeals Tribunal, which has jurisdiction to review the merits, that is, decide the case again. As it states on its website:

> The AAT aims to provide fair, impartial, high quality and prompt review with as little formality and technicality as possible.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 2.15 This map attempts to represent the language, social or nation groups of Aboriginal Australia. It shows only the general locations of larger groupings of people, which may include clans, dialects or individual languages in a group. It used published resources from 1988–1994 and is not intended to be exact, nor the boundaries fixed. It is not suitable for native title or other land claims. David R. Horton (creator), © Aboriginal Studies Press, AIATSIS, 1996. No reproduction without permission. To purchase a print version, visit the AIATSIS website.

ISBN 978-1-108-86281-3 Milgate et al.

ISBN 978-1-108-86281-3

Courts other than federal courts may also review decisions on the merits, if they have statutory authority to do so.

Generally, judicial review involves the court with appropriate jurisdiction investigating whether a government official or department has acted *ultra vires*, or whether he, she or it has followed the rules of natural justice (procedural fairness). These concepts are covered in the HSC course.

2.6 Aboriginal and Torres Strait Islander peoples' customary laws

Aboriginal and Torres Strait Islander peoples have the oldest living cultures in the world. For tens of thousands of years, Aboriginal and Torres Strait Islander peoples have occupied this continent as many different societies with diverse cultural relationships linking them to their own particular lands. More than 200 distinct languages, and countless dialects of them, were in use when European colonisation began. While people in some communities continue to speak their own languages, many others are seeking to record and revive threatened ones. Aboriginal and Torres Strait Islander peoples retain their connection to their traditional lands regardless of where they live.

There is growing evidence that Aboriginal and Torres Strait Islander peoples had sophisticated systems of agriculture, domesticated plants, irrigation, and harvesting and storing processes. These systems varied between different Aboriginal and Torres Strait Islander communities across the continent and were dependent on local conditions and seasons.

There is no single system of Aboriginal and Torres Strait Islander law. The separate Aboriginal and Torres Strait Islander communities developed their own laws, but there were also common aspects among groups. There is still much we are learning about Aboriginal and Torres Strait Islander law prior to colonisation. Aboriginal and Torres Strait Islander law is based on tradition, ritual and socially acceptable conduct. For this reason, it is known in Australia's current Western system as '**customary law**'.

customary law
principles and procedures that have developed through general usage according to the customs of a people or nation, or groups of nations, and are treated as obligatory

A main difference between Aboriginal and Torres Strait Islander customary law and the British legal tradition can be seen in the area of land ownership. The right to possess property is a key principle of English and European law; but to many Aboriginal and Torres Strait Islander peoples, land is not 'owned' in the same way as under European law. Instead, people are custodians of the land, looking after it for future generations. This is not to say that there were not defined areas of land occupied by various groups. This collective guardianship is a key feature of customary law; however, the lack of tangible ownership is one reason why the British people felt that they could settle and impose British property law in Australia. The British considered Australia to be an unoccupied land, as they could not see things like fences that indicated land ownership in their system. The British incorrectly declared the land ***terra nullius***, a Latin expression meaning 'land belonging to no one'.

terra nullius
(Latin) 'land belonging to no-one'; the idea and legal concept that when the first Europeans came to Australia, the land was owned by no-one and thus was open to settlement; this concept has been judged to be legally invalid

Although today federal and state legislation and the common law govern Australia, many Aboriginal and Torres Strait Islander peoples still follow their own customary law as well.

Diversity of Aboriginal and Torres Strait Islander societies

Different Aboriginal and Torres Strait Islander groups have their own variations of customary law. Australia is a large land mass and, as a result, different languages and modes of conduct developed. However, the similarities in customary law outweigh the differences.

For example, under traditional law, the majority of Aboriginal and Torres Strait Islander communities will generally see that disputes are not restricted to individuals. The resolution of the dispute, involving negotiation, mediation and conciliation, will involve everyone in the community. There are also offences that are not recognised by non-customary law but are punishable under traditional law. Examples include

ISBN 978-1-108-86281-3 Milgate et al.

insulting an **elder** and the singing of sacred songs in public. These are offences in most Aboriginal and Torres Strait Islander societies, regardless of where they are located in Australia.

elders
older men and women of recognised wisdom and authority, who are the keepers of traditional knowledge within Aboriginal and Torres Strait Islander communities; they are responsible for such things as initiations and the handing down of punishments when community laws are broken

The spiritual nature of Aboriginal and Torres Strait Islander customary law

The Dreaming is the basis of much Aboriginal peoples law. The Dreaming is the history of Aboriginal peoples: their creation and teaching stories. It explains how the land, animals, plants and sky were created and has a very strong religious element.

The Dreaming
the source of Aboriginal peoples customary law

Due to the secrecy that covers many of the traditional laws, and the cultural role played by oral history in contrast to written documentation, it is hard to describe these laws and their links to The Dreaming. In addition, laws will differ from community to community.

However, it can be agreed that law and religion are very closely related, and that many laws have evolved from The Dreaming and are concerned with the treatment of the land and those who live on it.

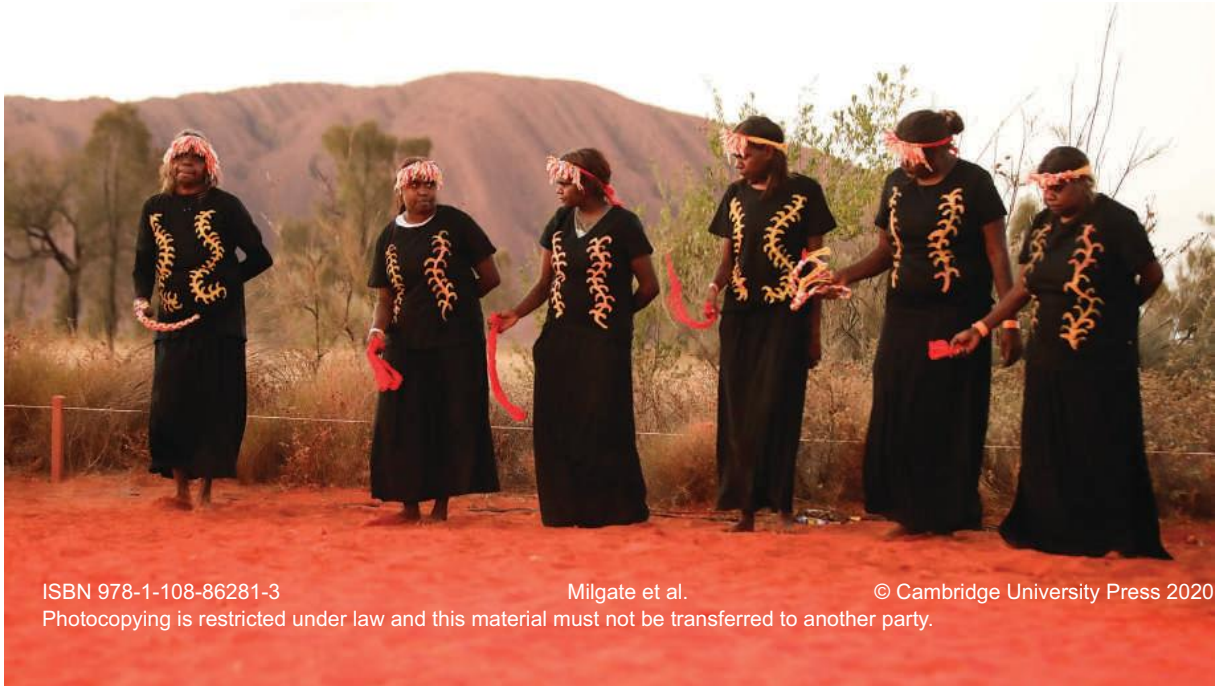
Since 1788, many Aboriginal and Torres Strait Islander peoples have lived under two legal systems: the common law system derived from Britain and Aboriginal and Torres Strait Islander customary law. As more than two-thirds of Aboriginal and Torres Strait Islanders live in remote areas, they are more likely to use customary law to settle a dispute.

The significance of land and bodies of water to Aboriginal and Torres Strait Islander societies

The idea of individual land ownership is alien to Aboriginal and Torres Strait Islander thought. Being a member of a group means that a person is able to live on and use the resources of certain lands. Thus, the land belongs to the group and loss of this land means losing the group's culture and history. In the same way, Aboriginal and Torres Strait Islander peoples have links with the sea, lakes, rivers and all bodies of water. These are not owned by individuals, but are cared for by the group under customary law.

Each group has distinct responsibilities governing the way that they look after their land and bodies of water. These responsibilities are tied into their traditional laws and the stories and rituals that pass on these laws and responsibilities. Failure to follow the traditional laws can be seen as a failure to show respect for the land and traditional values.

Figure 2.16 On 27 October 2019, a celebration was held at sunset to mark the closure of the tourist walking track up to the summit of Uluru in the Northern Territory. The Anganu, Uluru's traditional owners, lobbied for the closure of the track because it undermined the landmark's spiritual significance.



Ritual and oral traditions within Aboriginal and Torres Strait Islander societies

Aboriginal and Torres Strait Islander law is part of everyday life. The law is an integral part of the values, customs and ethics of Aboriginal and Torres Strait Islander peoples and has developed over many thousands of years. Most laws relate to marriage, child-rearing, religion, family and **kinship**. Customary laws have been passed from generation to generation by word of mouth and through ritual. Stories, songs and dances are used to help people remember the laws of their group. Different people in the group know different laws. For example, women have knowledge of some laws that they pass on to girls at a certain age.

kinship
family relationships, including all extended family relationships; an important part of Aboriginal and Torres Strait Islander cultures and values, which dictate how all people in the group behave towards each other

During ceremonial meetings at communal gathering places, laws are passed on by, and to, the appropriate people and reinforced often through dance and storytelling. Many of these ceremonies are sacred and people from outside the community are not permitted to participate nor, in some instances, watch. The stories have been handed down for thousands of years and explain concepts such as the creation of all things, why events happen, tribal boundaries, family relationships, cultural practices and forbidden acts.

Dispute resolution within Aboriginal and Torres Strait Islander societies

When customary laws are broken or disputes arise within traditional Aboriginal and Torres Strait Islander groups, the family and the community are involved. Discussions or meetings, rather than formal judicial processes, would be held during ceremonial times. Elders and influential members of the community might meet with those in conflict and use discussion and dialogue in an attempt to settle the dispute.

Relationships and their maintenance are very important in Aboriginal and Torres Strait Islander communities. It is through these relationships that people are able to pass on and follow traditional laws. As a result, **mediation** has an important role in dispute resolution.

mediation
a form of alternative dispute resolution designed to help two (or more) parties, in the presence of a neutral third party, to reach an agreement

Enforcement and sanction within Aboriginal and Torres Strait Islander societies

It is expected that everyone in the community will follow and reinforce the traditional laws. In traditional societies, order is maintained through self-regulation and consensus among family heads. Elders play an important role in guiding decisions related to enforcing the law, intervening as necessary.

Offences under traditional law may be breaches of sacred law or offences against property or persons. There is not always a clear line between these categories. Where sacred law has been broken, elders are often directly involved in applying **sanctions**.

sanction
a penalty imposed on those who break the law, usually in the form of a fine or punishment

Sanctions vary from place to place. The relatives of the wronged party, ceremonial leaders, or both may be involved in the punishment, the form of which may be determined through negotiations and/or kinship relationships. For the most serious offences, elders may need to ensure that the punishment is appropriately carried out and restraint is exercised.

Punishments range from ridicule and shaming to exile, spearing or death. Punishment by death is much less frequent today than in it was in the past, possibly because of conflict with Australian law. The justification for physical punishments such as spearing or beatings is sometimes expressed to 'restore balance' for the parties and their families.

The relevance of customary law today

In the past 20 years, there has been greater legal recognition of Aboriginal and Torres Strait Islanders' rights as the traditional landholders of Australia. Many aspects of customary law are embodied in Australian law today. The practice of sustainable development, for example, is the basis for current

ISBN 978-1-108-86281-3 Milgate et al.

environmental laws. Conciliation and mediation are increasingly used to resolve disputes in criminal, consumer and employment law.

Customary laws are also sometimes taken into account when an Aboriginal and Torres Strait Islander person is charged with a crime. For example, where an act has been done because Aboriginal customary law requires it, but the act amounts to an offence under Australian law, this may be raised in **mitigation** of the offence. Evidence that a criminal offence was provoked by the victim's breaking customary law may also be a mitigating factor, and evidence that an offender is to receive traditional punishment may be submitted in the modifying of a sentence.

mitigation
making the severity of an offence or a sentence milder or less severe

In some places where there are a large number of people living a traditional lifestyle, elders will be consulted by those involved in maintaining and enforcing the law. However, there is much debate about the role of customary law in prosecuting, defending and punishing offenders, and those in the legal system are always wary of being accused of unfairness if everyone is not treated equally by the law. As a result, legislatures have been reluctant to formally incorporate customary laws into Australian law.

Review 2.6

1 Describe the importance of tradition in Aboriginal and Torres Strait Islander customary law.
2 Discuss the different relationships that Europeans and Aboriginal and Torres Strait Islander peoples have with the land.
3 Outline why it is not possible to refer to a uniform Aboriginal and Torres Strait Islander customary law.
4 Identify what the laws of Aboriginal and Torres Strait Islander peoples have in common.
5 Explain some ways in which customary law is relevant to the Australian contemporary legal system.
6 Using examples, describe where customary law has been incorporated into the Australian legal system.

Research 2.4

Go to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) website and complete the following activities.

1 Identify who provides this website and what type of information it contains.
2 Explain the importance of The Dreaming to Aboriginal peoples.
3 Describe the different ways that Aboriginal and Torres Strait Islander peoples reflect their history and culture.
4 Discuss how this history and culture is shared in modern day Australia.

2.7 International law

States and sovereignty: The differences between domestic and international law

Each country has laws for its own people, known as **domestic law**. A country can make these laws because it is an autonomous (independent) state that has sovereignty (meaning the authority to rule itself).

domestic law
the law of a state

A state, in the legal sense, is an independent entity that is recognised by other states on an international basis. In order to be a state, a place must have:

- a defined territory
- a permanent population
- an effective government
- the capacity to enter into international negotiations.

ISBN 978-1-108-86281-3 Milgate et al.

Sovereignty means the state has authority to make rules for its population and power to enforce these rules. The term 'state' can refer to a political division within a Federation, such as New South Wales or Tasmania, or (in an international context) to an autonomous state such as a nation.

International law governs the relationships between nation states. International law enables states to participate in trade and commerce and provides mechanisms for the maintenance of peace and security and the reduction of conflict. International law also covers fundamental human rights, making it illegal to do such things as torture political prisoners or commit genocide.

One of the main criticisms of international law is that it lacks the power to enforce the constraints contained in this law. There are many examples around the world of states breaching international law, especially in the area of human rights. International law could not prevent genocide in Rwanda in the 1990s and has not prevented crimes against humanity committed in the Darfur region of Sudan since 2003 or those of the Syrian civil war (which is still continuing at the time of writing).

In this sense, international law is different from domestic law. States are powerful entities and to force another state to take a particular course of action can have far-reaching implications for the international community. As a result, international law relies on countries consenting to cooperate in the enforcement of these laws.

A further point of difference is that law is adhered to not simply because it can be enforced, but because it is generally accepted by the whole community. As the world is made up of diverse cultures with different values, not all countries will agree with all international laws and may ignore a law if they feel that it is not in their national interest to do so.

However, states are interdependent in many ways and the recognition of this global interdependence, creating a world community, provides one of the motivating forces for following international law.

Sources of international law

The main sources of international law are customs, declarations, treaties, legal decisions and legal writings.

Customary international law

Customary international law is not contained within a written document. Instead it is based on long-established traditions or common practices followed by many states to the point that they are accepted as being fair and right by the international community. For example, customary international law regulating war had been in existence for a long time before The Hague (1989) and Geneva Conventions (1864, 1906, 1929, 1949) explicitly outlined rules governing the conduct of states in conflict such as the manner in which prisoners of war and civilians were to be treated.

This form of international law develops over time, as it requires 'constant and uniform' practice of states in order to be accepted as law. It should be noted that, even if there is constant and uniform practice, it is still not considered law unless the states accept that the practice is binding upon them. This principle is termed ***opinio juris sive necessitatis*** (shortened to *opinio juris*).

opinio juris sive necessitatis
(Latin) 'opinion that an act is necessary by rule of law'; the principle that for the practice of a state to be customary international law, the state must believe that international law requires it

Critics of customary international law point out that it can be difficult to establish that it exists, and the time lag involved in its being accepted as law has rendered it secondary to treaties and conventions as a source of international obligations. The number of nations in existence since the end of World War I (1918) has also grown considerably, so getting consensus has become more problematic. In addition, the rate of change in the world today is rapid and at times requires a more immediate response. For example, what is the most effective means of limiting damage from the economic crisis of 2008? Would customary law or treaties be the more appropriate way of regulating global financial markets?

Most of the laws prohibiting crimes against humanity originated as customary international law. Important examples include the condemnation of slavery and genocide.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 2.17 The International Criminal Court's Assembly of States Parties were held in The Hague, Netherlands, on 2 December 2019.

Declarations

Declarations are international instruments that state and clarify the parties' position on particular issues, but do not impose legally binding provisions that must be followed. A famous example is the *Universal Declaration of Human Rights* (1948) – the first universal statement on the basic principles of human rights. The United Nations Commission on Human Rights was established to draft the declaration following World War II and the Holocaust. Among its chief purposes was to define the terms used in the UN Charter: 'human rights' and 'fundamental freedoms'.

declaration
a formal statement of a party's position on a particular issue; a declaration is not legally binding under international law

In 1948 the declaration was ratified by a proclamation by the United Nations General Assembly. Forty-eight countries voted in favour of it, with none voting against it and only eight abstaining (not voting). The declaration is the basis for two binding UN human rights covenants: the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR). Its principles are contained in other treaties as well.

Treaties

Treaties are the most commonly used source of international law. According to the *Vienna Convention on the Law of Treaties* (1969), a treaty is 'an international agreement concluded between states in written form and governed by international law'. Another way of looking at it is that a treaty is an agreement between legal equals and may cover any sphere of international relations between the parties.

Treaties can be either:

- **bilateral** – between two nations; for example, the *Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation* (the 'Lombok Treaty, 2006'), concerning their common security and respective national security or
- **multilateral** – between many states; for example, the *Charter of the United Nations* (1945), which established the United Nations and its organs and agencies. Each country that is a signatory to this treaty has a seat in the General Assembly and participates in UN processes.

The more states that sign a **treaty**, the more powerful that treaty will be. Treaties are used to make specific laws and to control conduct and cooperation between and within states. A treaty may also establish an international organisation; for example, the *Rome Statute of the International Criminal Court* (2002). There is no set way of making a treaty, but most treaties are made through direct negotiations between states. If all parties involved agree, the treaty will be signed. A document will only become a treaty if all parties have the intention of being bound by its provisions and obligations at the time of signing. The treaty only becomes binding on a state when that state **ratifies** it; that is, confirms that it intends to be bound by the conditions placed on it by the treaty.

treaty
defined by *Vienna Convention on the Law of Treaties* (1969) as 'an international agreement concluded between states in written form and governed by international law'; treaties may also be referred to as conventions or covenants

ratify
to formally confirm that the country intends to be bound by the treaty

For some countries, such as France, treaties that the country has ratified automatically become part of the domestic law. Other countries require

ISBN 978-1-108-86281-3 Milgate et al.

Case Study

Child executions

There are still a handful of countries in the world today that execute offenders for crimes committed when they were under the age of 18.

It is evident that child executions breach international treaties. Article 6 of the *International Covenant on Civil and Political Rights* (1966) says that a 'sentence of death shall not be imposed for crimes committed by persons below 18 years of age'.

Article 37 of the *United Nations Convention on the Rights of the Child* (1989) provides that 'neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age'.

In *Roper v Simmons* (2005) 543 US 551, the US Supreme Court found that executing offenders who were minors when they committed the crime violates the Eighth Amendment, which prohibits 'cruel and unusual punishments'. In 1989, the same court had held that it was within the US Constitution to execute 16- and 17-year-old offenders, but it found that standards of decency had evolved since the US Constitution had been written. There was now a national consensus that death is disproportionate punishment for juveniles. In addition to state legislation and practice, the court also considered international trends.

Bodies, including the Inter-American Commission on Human Rights and Amnesty International, believe that 'the exclusion of child offenders from the death penalty is now so widely accepted in law and practice that it has become a rule of customary international law'.

However, the practice continues in some parts of the world with Amnesty International recording the execution of 145 juvenile offenders in 10 different countries since 1990, with six occurring in 2017 and eight in 2018.

domestic legislation to be passed in order for the treaty to be implemented into their law. In other cases, whether domestic legislation is required will depend on the type of treaty. In Australia, human rights treaties such the *International Covenant on Civil and Political Rights* (1966) have been ratified through the passing of a number of pieces of legislation such as the *Sex Discrimination Act 1984* (Cth).

Legal decisions

The International Court of Justice (ICJ), which is part of the **United Nations (UN)**, is the judicial body that deals with disputes between states. Many treaties designate the ICJ as the means of resolving disputes that arise under the treaty.

United Nations (UN)
a world organisation dedicated to world peace and the sovereignty and equality of all its members

Stare decisis (or precedent) does not apply to decisions of the ICJ. According to Article 59 of the *Statute of the International Court of Justice*, a decision of this court only binds the parties to the particular dispute. However, the court considers past rulings in its decisions, and ICJ decisions may help to shape the content of treaties.

There are other international courts and tribunals whose judgments contribute to establishing international law. The International Criminal Court (ICC) and the European Court of Human Rights (ECHR) are two examples. The ICC was set up to prosecute the most serious crimes concerning the worldwide community; the ECHR is a regional court that rules on violations of the *European Convention on Human Rights*. Specialised courts have also been set up for particular purposes and timeframes such as to deal with war crimes committed during a specific conflict. Examples of this type of court are the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

ISBN 978-1-108-86281-3 Milgate et al.

Legal writings

Due to the changing international political landscape and the developing nature of international law, the writings of respected international lawyers, judges and academics have an important part to play in guiding decision-making and treaty formation. Along with judicial decisions, scholarly writings are mentioned in Article 38(1)(d) of the Statute of the ICJ as a means of determining the rules of international law. Scholarly legal writings may be drawn upon for the purpose of interpreting treaties or determining their application in international disputes.

Governments may also seek the advice of experts on matters of international law. For example, in 2007 the Sydney Panel of Independent International Legal Experts provided advice to the Australian Government on whether the legality of Japan's 'scientific' whaling program could be challenged under the Antarctic Treaty System, the *International Convention for the Regulation of Whaling* (1946) and two other treaties. Although commercial whaling has been prohibited since 1986 for all members of the International Whaling Commission, Japan has relied on an exemption in the whaling treaty that permits killing whales for scientific research.

Review 2.7

1. Explain two different ways that the word 'state' can be used.
2. Identify what is meant by the term 'international law'. Outline the different ways in which international law is made.
3. Outline some of the strengths and weaknesses of the enforcement of international law.

International organisations

The United Nations

The United Nations (UN) is the chief organisation involved in international law. The *Charter of the United Nations* established it in 1945. At its first meetings, 51 countries were represented; in 2019, there were 193 members. The UN's main objectives are to maintain global peace and security; to develop good relations between states based on recognition of equal rights and each state's right to govern its own political, economic and social development; and to promote cooperation in solving international

Figure 2.18 Ambassadors to the UN from six European countries announce a joint statement following a UN Security Council meeting on North Korean issues on 4 December 2019.

ISBN 978-1-108-86281-3 Milgate et al.

problems. The UN has been central to the protection of human rights and to developing a legal framework to address terrorism, drug trafficking, the clearing of landmines, and protection of the environment. It has also been active in concrete efforts to fight disease, reduce poverty, provide emergency relief in natural disasters, and many other humanitarian operations.

Video

The UN's International Law Commission is the body primarily responsible for codifying and developing international law. The UN General Assembly's Legal Committee (Sixth Committee) receives the Commission's reports and considers its recommendations. It may then organise a conference to draw up a convention based on those recommendations that the member states vote upon.

Critics of the UN believe that reform is necessary for its continued relevance. State sovereignty often poses a challenge to the authority of the UN, especially in situations involving peace and security. It has also been suggested that the structure of the Security Council should be re-examined (this will be discussed later). As the UN has no powers to make states enact its resolutions into domestic law or to follow a particular course of action, its effectiveness is very much dependent on the political will of states.

The General Assembly

The **General Assembly** is made up of representatives from all member states and is the main forum for multilateral discussion on all international matters covered by the UN Charter. It discusses and makes recommendations on the operation of the UN, on conflicts between states, and on practical questions regarding political cooperation, human rights and international law. It appoints the non-permanent members of the Security Council and oversees the UN budget. It has established a number of committees, commissions and working groups for particular purposes. The General Assembly meets every year and can meet more often if required.

General Assembly
the main body of the United Nations, made up of all of the member states

The Security Council

The **Security Council** is the most powerful part of the UN. It is the executive of the UN and has the final say about the security and peacekeeping activities of the General Assembly. The Security Council consists of five permanent members: the United Kingdom, the United States, Russia, China and France (countries that were victorious in World War II). There are also 10 non-permanent members who serve for two years each. Australia has been a member of the UN Security Council on five occasions: 1946–1947, 1956–1957, 1973–1974, 1985–1986 and 2013–2014.

Security Council
the arm of the United Nations responsible for maintaining world peace and security

Under the Charter of the UN, the Security Council has primary responsibility for maintaining international peace and security. As such, it is able to investigate disputes that could lead to conflict. It can issue economic sanctions against nation-states to persuade them to change their policies, or to prevent or stop aggression. It can also send 'peacekeeping' troops from member states into areas where there is conflict, to separate opposing forces and to reduce tension. It may also authorise collective military action. Security Council resolutions require a unanimous vote of all five permanent members of the Security Council. If one of the permanent members votes against the resolution then it is not carried. This is called the 'veto power' and is considered one of the fundamental weaknesses of the current structure of the Security Council. For example, in 2004, the Security Council held continuing discussions to address the humanitarian crisis in the Darfur region of Sudan. There, Arab militias with Sudanese Government backing were engaged in a horrific campaign of forcible relocation of certain groups ('ethnic cleansing') involving rape, murder and torture. China and Russia, which had significant oil interests in Sudan, threatened to veto any Security Council resolution involving economic sanctions. Resolution 1564, passed in September, disappointed many human rights groups due to the absence of stronger measures such as an immediate oil embargo and targeted sanctions against government officials. Currently (2019), the UN has imposed economic sanctions on North Korea as it has been increasing its nuclear testing. These sanctions include bans on such things as coal exports and limiting the number of North Koreans who can work in foreign countries.

A criticism of the Security Council is that, having been set up over 60 years ago, it does not reflect a broad spectrum of cultural values evident in the world today. For example, it could be argued that the inclusion of a

ISBN 978-1-108-86281-3 Milgate et al.

Muslim nation as a permanent member would make the Security Council a more representative body.

The other main organs of the UN are the Economic and Social Council, the Trusteeship Council, the Secretariat and the International Court of Justice (discussed below).

Courts and tribunals

The International Court of Justice

The International Court of Justice (ICJ) is the primary judicial body of the United Nations. It was established in 1945 and its principal activities are to settle disputes submitted to it by states and to give advisory opinions on legal questions submitted by the General Assembly, the Security Council, or other bodies as permitted by the General Assembly. The ICJ can only hear disputes if the nations involved accept the jurisdiction of the court.

The court may rule on two separate types of cases. The first type is legal disputes (contentious issues) between states, on which the court produces binding rulings. For example, Australia initiated action against Japan and whaling in the ICJ. The court ruled that Japan had to cease whaling in Southern Ocean waters.

The second type of case is advisory proceedings, in which the General Assembly or the Security Council requests the court's opinion on any legal question. Other UN organs may request advisory opinions, but only with respect to their own activities. Advisory opinions often concern particular controversies between states, although they do not have to do so.

Cases heard by the ICJ can be seen at its website.

Intergovernmental organisations

Intergovernmental organisations (IGOs) are organised groups of states, established to pursue mutual interests in a wide variety of areas. Many IGOs are subsidiary agencies of the UN; others have been formed to make collective decisions about international issues such as refugees, tariffs or wealth. The International Labour Organization is a UN agency whose aim is to ensure the safe and fair treatment of workers.

Regional organisations also play an important role in international decision-making. For example, the European Union is an economic and political partnership of European nations that have agreed to cooperate for the common good. It has regulatory powers covering areas such as human rights, the environment, economic policies and trade.

Non-government organisations

Non-government organisations (NGOs) are associations based on common interests and aims, and which have no connection with any government.

Legal Links

For more information about the United Nations bodies, view the United Nations' website.

Review 2.8

1 Identify why the United Nations was established.
2 Describe the functions of the UN General Assembly.
3 Explain the importance of the UN Security Council.
4 Outline the role of the International Court of Justice. Discuss its limitations.

Research 2.5

View the United Nations' website. Choose one of the issues that the United Nations deals with (e.g. human rights) and answer the following questions.

1 Investigate and explain some of the recent initiatives taken by the United Nations in this area.
2 Outline any problems that you see the United Nations facing as it undertakes these initiatives.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 2.19 The Prime Minister of Russia, Dmitry Medvedev, speaks at the International Labour Organization Conference on 11 June 2019 in Geneva, Switzerland.

They contribute in a wide range of areas, from world peace, disaster relief and environmental protection to promoting education and alleviating poverty. They do this by informing the public and lobbying governments to take action on issues of concern. Examples of international NGOs include the Red Cross, Greenpeace and World Vision.

Well-known human rights NGO is Amnesty International, a 'global movement of over seven million people committed to defending those who are denied justice or freedom'. It is independent of any national government; that is, it does not rely on funding from any national government. It campaigns on a wide range of issues, including the rights of women, refugees and indigenous peoples, regulation of the global sale of weapons, and the abolition of torture and the death penalty.

Relevance of international law to Australian law

As discussed earlier, in some countries ratification of a treaty automatically makes it part of that country's domestic law. This is not the case in Australia.

For some treaties, new legislation may be required to implement it in Australian law. For others, existing federal or state/territory legislation is sufficient (in other words, domestic law is already satisfying the terms of the convention).

To pass new legislation implementing a treaty, the federal government may rely on the external affairs power in section 51(xxix) of the *Constitution*. It may also rely on other powers such as the trade and commerce power in section 51(i) if the subject matter involves shipping.

International law does not dictate the way in which Australia implements the obligations it has

ISBN 978-1-108-86281-3 Milgate et al.

under treaties. The preferred method of giving effect to most treaty obligations is by incorporating the actual text of the treaty provisions into domestic legislation. For example, the *Space Activities Act 1998* (Cth) contains provisions from several UN treaties regulating the exploration and use of outer space.

Treaties also influence Australian law in the development of the common law, in judicial review of decisions, and in the judicial interpretation of statutes.

Examples of human rights treaties that have some of their provisions reflected in state or territory and/or federal legislation include:

- *International Covenant on Civil and Political Rights* (1966) – see, for example, *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld)
- *United Nations Convention on the Rights of the Child* (1989) – see, for example, *Family Law Act 1975* (Cth), in particular section 67ZC
- *Convention on the Elimination of All Forms of Discrimination against Women* (1979) – *Sex Discrimination Act 1984* (Cth)
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) – Division 274 of the *Criminal Code Act 1995* (Cth).

Review 2.9

1 Discuss the limitations of international law.
2 Identify and outline the role of some of the main organisations that influence international law.

Figure 2.20 A group of Sri Lankan Women rights activists held banners in silent protest in Colombo on February 19, 2020. The group was protesting against grievous sexual assault, abuse and rape cases that have been reported but yet to be investigated. Earlier that year, it was reported that 142 rapes, 42 serious sexual offenses, and 54 child abuse cases happened around the country within the first month of this year.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- The *Australian Constitution* took shape during the Federation process.
- The constitutional division of powers outlines the responsibilities of the Commonwealth and the states by reference to concurrent, exclusive and residual powers.
- The High Court has the ultimate responsibility for interpreting the *Australian Constitution*.
- The High Court is the final court of appeal in Australia (its appellate jurisdiction) but it also has original jurisdiction for some matters, notably constitutional law.
- The *Australian Constitution* indicates how the separation of powers operates in Australia. It is important to note that only the judiciary is truly independent in Australia.
- The separation of powers ensures that individual rights and the democratic system are protected.
- The law in Australia, prior to European settlement, was customary law based on Aboriginal and Torres Strait Islander traditions, rituals and acceptable conduct.
- Customary law is still relevant in Australia today and elements of it have been incorporated into dispute resolution procedures.
- Contemporary Australian law is based on English common law and has been adapted over time to suit modern Australian society.
- The *Australian Constitution* sets out the fundamental rules of the Australian legal and political systems, including the roles of the state governments and the federal government. It shows the division of powers among the levels of government to make laws.
- Parliament has the power to make changes to these laws as long as the correct processes are followed.
- The doctrine of precedent is an element of common law that requires judges to follow rulings made in previous court cases, unless they are inconsistent with a higher court's decision or are wrong in law.
- Australia is recognised internationally as a sovereign state with the authority to make its own laws.
- Australia also takes part in international law-making through its membership of the United Nations and by being a signatory of international treaties.

Questions

Multiple-choice questions

1 What section of the *Australian Constitution* outlines the referendum process for amending the *Constitution*?
- **a** section 51
- **b** section 73
- **c** section 109
- **d** section 128

2 When is a binding precedent set?
- **a** A binding precedent is set when a precedent is established by a higher court.
- **b** A binding precedent is set when a judge has determined that the facts of a case are similar to another case.
- **c** A binding precedent is set when a judge accepts the advice from a judge in a higher court.
- **d** A binding precedent is set when parliament passes a law about a case.

3 A government minister contacts a judge in the Federal Court and directs her to make a decision that is favourable to the government's interests. Why would this decision be overturned by the legal system?
- **a** It offends the division of powers.
- **b** It offends the separation of powers.
- **c** It would be *ultra vires.*
- **d** It is not allowed under the referendum provisions of section 128.

4 What is the main purpose of equity?
- **a** The main purpose of equity is to achieve justice.
- **b** The main purpose of equity is to achieve fairness.
- **c** The main purpose of equity is to achieve equality.
- **d** The main purpose of equity is to achieve damages.

ISBN 978-1-108-86281-3 Milgate et al.

5 Which United Nations body is primarily responsible for codifying and developing international law?
   a UN Security Council
   b General Assembly's Legal Committee
   c International Law Commission
   d International Court of Justice

Short-answer questions

1 Describe the different 'checks and balances' provided by the *Australian Constitution*.
2 Explain the difference between the 'division of power' and the 'separation of powers' under the *Constitution*.
3 Use examples to describe the various roles of the High Court.
4 Explain the difference between common law and statute law. Analyse their relationship.
5 Describe the distinguishing features of Aboriginal and Torres Strait Islander customary law.
6 Discuss the relationship between the government and the whole parliament when it comes to making new laws or amending current laws.
7 Critically analyse the ways that Aboriginal and Torres Strait Islander customary law has been, and can be, incorporated into the contemporary Australian legal system.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter 3
Classification of law

Chapter objectives

In this chapter, students will:

- identify and apply legal concepts and terminology
- describe the key features and operation of the Australian and international legal systems
- discuss the effectiveness of the legal system in dealing with relevant issues
- explain the relationship between the legal system and society
- describe the role of the law in conflict resolution and its ability to respond to and initiate change
- locate, select and organise legal information from a variety of sources
- communicate legal information by using well-structured responses.

Relevant law

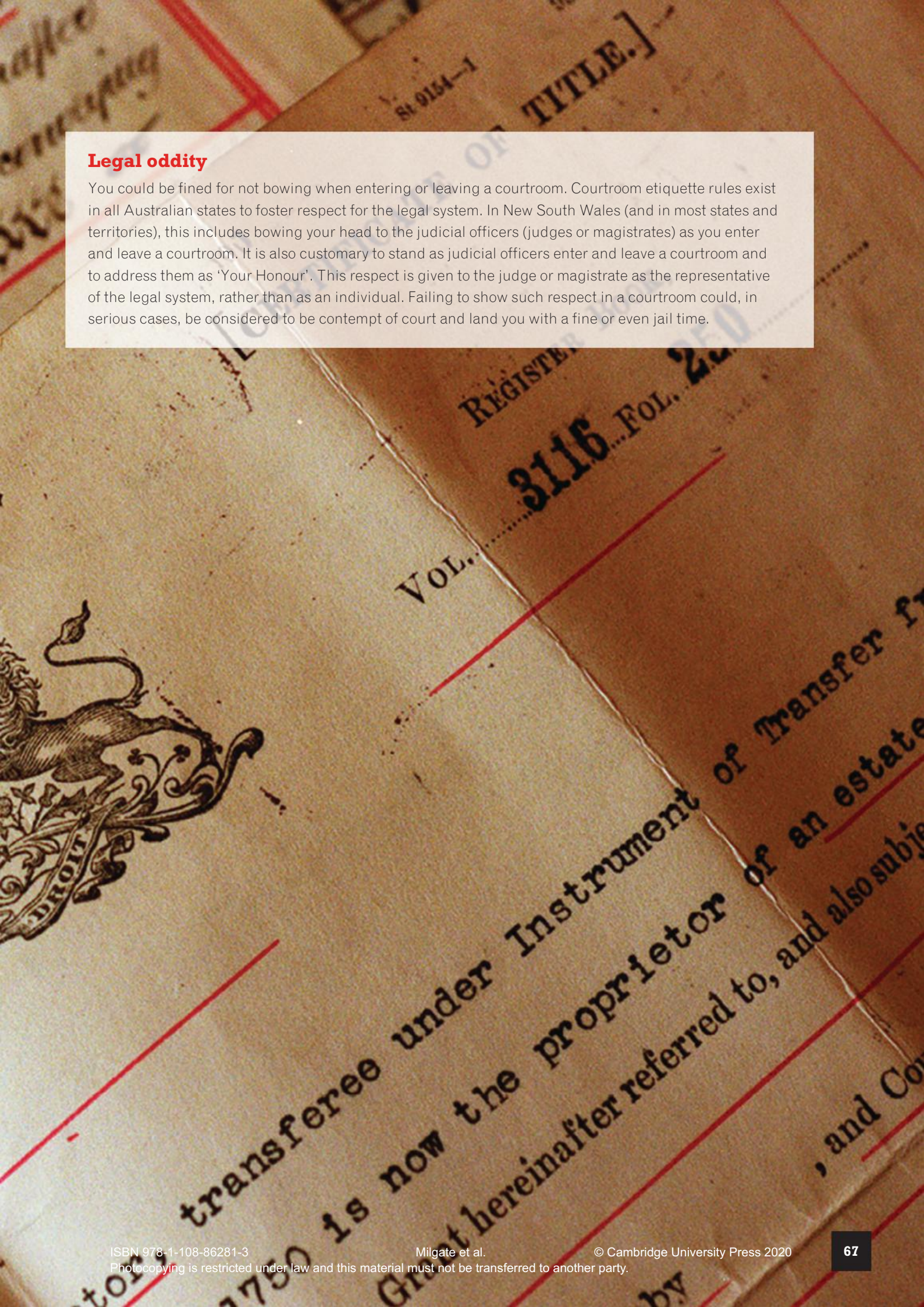
IMPORTANT LEGISLATION

Commonwealth of Australia Constitution Act 1900 (UK)
Crimes Act 1900 (ACT)
Crimes Act 1900 (NSW)
Judiciary Act 1903 (Cth)
Criminal Code 2002 (ACT)

SIGNIFICANT CASES

Donoghue v Stevenson [1932] AC 562
Roach v Electoral Commissioner [2007] HCA 43
Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; *Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45

ISBN 978-1-108-86281-3 Milgate et al.



Legal oddity

You could be fined for not bowing when entering or leaving a courtroom. Courtroom etiquette rules exist in all Australian states to foster respect for the legal system. In New South Wales (and in most states and territories), this includes bowing your head to the judicial officers (judges or magistrates) as you enter and leave a courtroom. It is also customary to stand as judicial officers enter and leave a courtroom and to address them as 'Your Honour'. This respect is given to the judge or magistrate as the representative of the legal system, rather than as an individual. Failing to show such respect in a courtroom could, in serious cases, be considered to be contempt of court and land you with a fine or even jail time.

ISBN 978-1-108-86281-3

3.1 Public law

There are many different ways of classifying law. One is to separate the law into two main categories: **public law** and **private law**.

public law
the body of law governing relationships between individuals and the state, and the structure and operation of government itself; for example, criminal, administrative and constitutional law

private law
the body of law governing relationships between individuals; for example, contract law, torts, family law and property law

Public law deals with the powers and obligations of government and citizens, and the relationships between persons and the state. Three main areas of public law are criminal, administrative and constitutional law.

Criminal law

Criminal law is the body of rules under which certain acts or omissions are punished by the state. The function of criminal law is to maintain public safety and order for the whole of society. The state is responsible for criminal law because a criminal offence is considered to be an offence against the whole community – even if only one individual is affected. This is because a criminal offence is seen to damage the moral order of society; that is, the safety of people and property.

In Australia, criminal law is the responsibility of each state and territory. The actions and punishments covered by criminal law are the same, or similar, in all the states and territories, as it would be too confusing for everyone involved if what was a major crime in one state was not in another. The way the criminal justice system operates is also similar in the states and territories.

Figure 3.1a Detective Chief Inspector Wayne Hoffman speaks to the media at a press conference on August 8, 2017, as guns previously seized from criminals are seen behind him.

Figure 3.1 On 13 November 2019, police officers arrest a man (right) who is suspected of looting as bushfires impacted houses and farmland near the small town of Glenreagh in New South Wales.

ISBN 978-1-108-86281-3 Milgate et al.

Legal Links

The following Acts are available in full online:
- *Crimes Act 1900* (ACT)
- *Crimes Act 1900* (NSW)
- *Criminal Code 2002* (ACT).

In New South Wales, the main criminal statute is the *Crimes Act 1900* (NSW). The Australian Capital Territory has its own *Crimes Act 1900* (ACT) and the *Criminal Code 2002* (ACT). This code is the result of the Australian Capital Territory adopting provisions of the Model Criminal Code, a cooperative project between the Commonwealth, state and territory governments to develop more uniform legislation.

Over the years, parts of these Acts have been reviewed and changed to reflect changes in society. For example, the Crimes Acts have been amended to cover automobile and computer crimes. As with all areas of law, sections of Acts will always lag behind changes in society due to the speed of change and the slower procedures and processes involved in changing laws. For this reason, changes to law tend to be reactive rather than proactive.

Administrative law

Administrative law looks after government powers and the decisions of government organisations. It is based on the English model. Administrative law exists to ensure the accountability of the administrative decisions and actions made by the government and its departments.

Administrative law cannot be used to challenge all government dealings; for example, policy decisions and the giving of advice. An example of a decision that cannot be challenged is an increase in taxes. However, the actions of the government departments that administer policy decisions can be challenged under administrative law. In this way, a taxpayer could challenge his or her tax assessment under administrative law, on certain specific grounds.

In Australia, administrative law is complicated due to the different levels of government. An individual must be aware of which government body was responsible for the action before they can challenge it.

A person can seek a review of a decision made by a government agency in three ways. These ways are:

- **Internal review** – When a member or officer of an agency has made a decision, that decision can be reviewed by someone else within the agency. Sometimes there are formal mechanisms laying down set procedures for seeking an internal review; if this is not the case, a person can simply request that a decision be reconsidered.
- **External review** – This is a more formal system, where a person or body outside the agency (such as the Administrative Appeals Tribunal) reviews the merits of a decision made by an agency.
- **Judicial review** – Only courts can provide judicial review of administrative decisions. The only area a court can consider is whether a decision was lawfully, fairly and rationally made. The High Court has the power, under the *Australian Constitution*, to give specified remedies against unlawful action by federal government officers. Similarly, in section 39B of the *Judiciary Act 1903* (Cth), parliament gave similar jurisdiction to the Federal Court.

The avenue of review taken depends on the nature of the complaint and whether the complaint is made against a federal or state decision. Government departments place information about appealing decisions on their websites. In New South Wales and in the Australian Capital Territory, appeals against government decisions are heard by, respectively, the NSW Civil and Administrative Tribunal and the ACT Civil and Administrative Tribunal.

Constitutional law

Constitutional law is the branch of public law that focuses on the rules governing the executive, legislative and judicial functions of government. In Australia, legislative power is divided between the Commonwealth and the states, as the *Australian Constitution* has given the Commonwealth Parliament power to make laws with respect to particular areas (e.g. defence). The *Australian Constitution* also specifies that Commonwealth law prevails when there are inconsistencies between state and Commonwealth legislation.

If a law violates the rules in the *Australian Constitution*, the case must go to the High Court of Australia. The High Court has the role of deciding cases of special federal significance, such as

ISBN 978-1-108-86281-3 Milgate et al.

In Court

***Roach v Electoral Commissioner* [2007] HCA 43**

This case challenged the constitutionality of a statute. Before the 2006 amendment of the *Commonwealth Electoral Act 1918* (Cth), prisoners serving a sentence of less than three years were entitled to vote in elections. The 2006 amendments took away the right to vote for all prisoners serving a sentence.

Vickie Lee Roach, a serving prisoner, took the case to the High Court on the ground that the Act as amended was unconstitutional. Her team of lawyers argued that the new law breached her implied constitutional freedoms of political participation and political communication. After hearing the case, the majority of the court found the amended law to be invalid, but accepted the validity of the previous law, which banned prisoners from voting if they were serving a term of three years or more.

***Re Canavan; Re Ludlam; Re Waters; Re Roberts* [No 2]; *Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45**

In 2017, the High Court heard the high-profile case of the 'citizenship seven'. The High Court had to determine whether several politicians who had dual citizenship should be allowed to remain as serving members of parliament. This was discussed in an 'In Court' box in Chapter 2.

challenges to the constitutional validity of laws. Procedures in the High Court are similar to those of other courts in that they are very formal and the two sides argue their cases, usually represented by highly respected barristers. However, the procedures in the High Court differ in the following ways:

- cases in the High Court are heard by one or more judges (called justices); cases involving interpretation of the *Australian Constitution* and those of great public importance are heard by all seven justices
- decisions are not given at the end of the hearing; they are only delivered after much deliberation
- each justice makes an independent decision on cases; when a decision is not unanimous, the majority decision prevails
- High Court decisions are binding on all courts in Australia.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 10–12 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 3.1

1. Outline the differences between private law and public law.
2. Assess why it is important for Australia's states and territories to have similar criminal laws.
3. Describe the role of administrative law. Outline how an administrative decision of a government body can be challenged.
4. Identify the courts that can decide questions of constitutional law. What types of questions are included in this category?

ISBN 978-1-108-86281-3 Milgate et al.

3.2 Private law

Private law regulates the relationships between persons, companies and organisations. Rights are protected by both statute and common law. When seeking to bring court action against an individual for infringement of one's private rights, it must be in a court exercising **civil jurisdiction**; the action is known as a civil proceeding. Three major areas of civil law are contract law, tort law and property law.

civil jurisdiction
the power of a court to hear matters involving disputes between private individuals and to award civil remedies

Contract law

A contract is an agreement, or promise, between two or more parties that is recognised by law. Contract law is concerned with the recognition of this agreement and the actions taken to enforce it.

When one of the parties to a contract believes that all or part of the contract has been breached, he or she can bring a legal action in a civil court. **Damages** are most often the common law remedy available for breach of contract. Damages are viewed as a substitute for performance of the contract; that is, for the other party doing what he or she agreed to do by signing the contract. Thus, damages are designed to put the **plaintiff** in the position he or she would have been in if the contract had been performed properly; that is, to compensate him or her. The amount of compensatory damages is intended to provide the plaintiff with the benefits that he or she would have had if the defendant had kept the agreement. Damages are not intended to punish the defendant.

damages
monetary compensation for harm or loss suffered

plaintiff
the person who initiates a civil action

The plaintiff may also seek one of the following remedies:

- an **injunction** – this is an order usually directing a party not to do something (e.g. ordering the defendant to cease the conduct breaching the contract); in some cases, an injunction may require the party to do something (e.g. require a telephone customer to remove wiring that he or she installed and that was not authorised by the telephone company)
- **specific performance** – this is an order in which the court specifies the way in which the breaching party is to perform the contract; specific performance is only ordered if the amount of damages provides insufficient compensation.

injunction
a court order requiring an individual or organisation to perform, or (more commonly) not to perform, a particular action

specific performance
an order requiring the defendant to perform the acts that the contract obliged him or her to perform

In each instance, civil court case procedures are followed; that is, the offended party must argue that

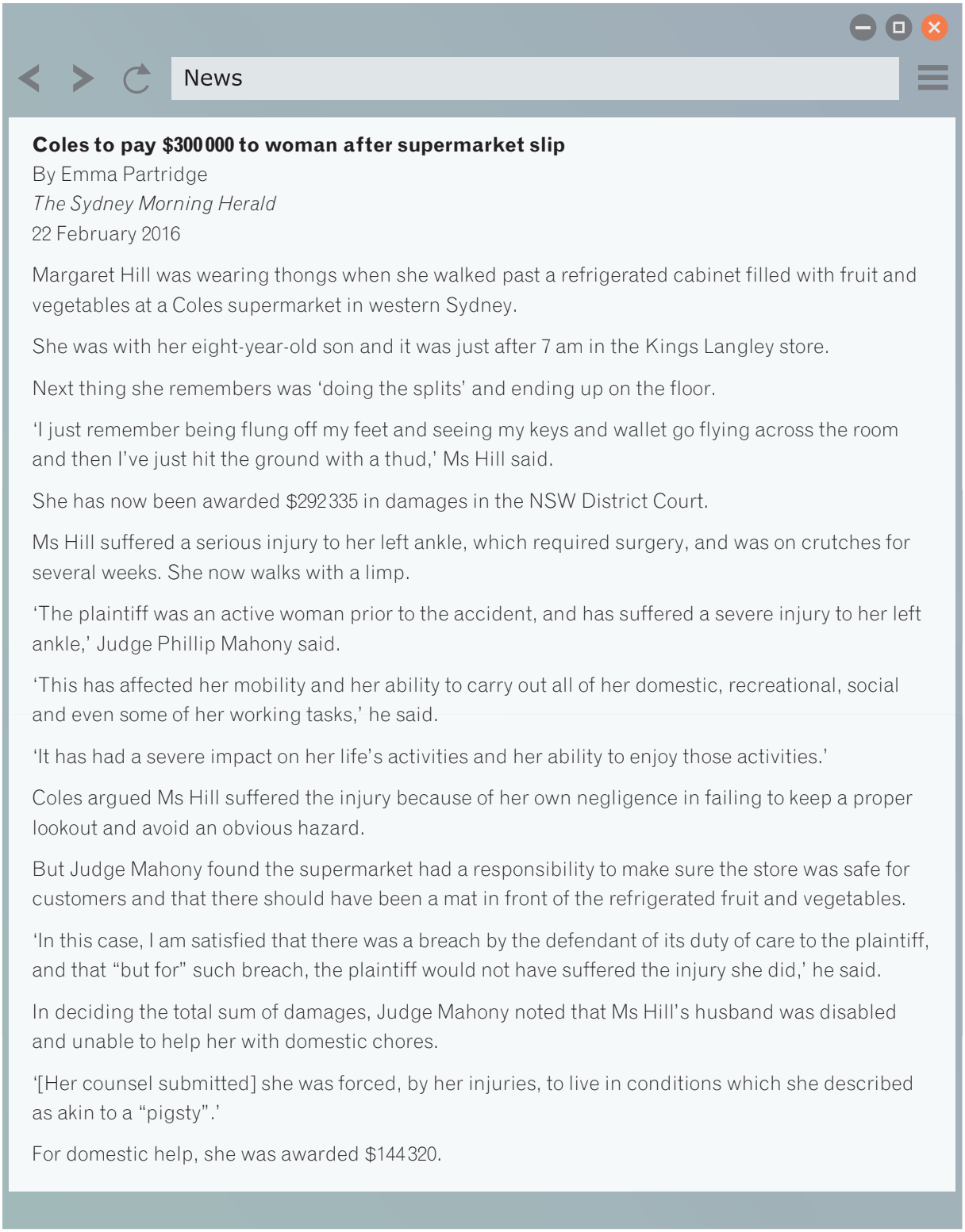
Figure 3.2 Former Channel 10 newsreader, Jessica Rowe, with her husband, Peter Overton, and legal representatives outside the New South Wales Supreme Court. Rowe and Channel Ten were in court over a contractual dispute.

a breach of contract has occurred. The level of court where the case is heard depends on the amount of damages sought.

Tort law

Torts are 'civil wrongs'. The word 'tort' comes from the French word meaning 'wrong'. Tort cases deal with situations in which someone (or an organisation) has done something to interfere with the rights of someone else. Another way of putting it is that a tort occurs when someone breaches or fails to fulfil a duty that he or she owes to someone.

Breach of contract is also a civil wrong. Where there is a contract or agreement, there is already a



Coles to pay $300 000 to woman after supermarket slip

By Emma Partridge

The Sydney Morning Herald

22 February 2016

Margaret Hill was wearing thongs when she walked past a refrigerated cabinet filled with fruit and vegetables at a Coles supermarket in western Sydney.

She was with her eight-year-old son and it was just after 7 am in the Kings Langley store.

Next thing she remembers was 'doing the splits' and ending up on the floor.

'I just remember being flung off my feet and seeing my keys and wallet go flying across the room and then I've just hit the ground with a thud,' Ms Hill said.

She has now been awarded $292 335 in damages in the NSW District Court.

Ms Hill suffered a serious injury to her left ankle, which required surgery, and was on crutches for several weeks. She now walks with a limp.

'The plaintiff was an active woman prior to the accident, and has suffered a severe injury to her left ankle,' Judge Phillip Mahony said.

'This has affected her mobility and her ability to carry out all of her domestic, recreational, social and even some of her working tasks,' he said.

'It has had a severe impact on her life's activities and her ability to enjoy those activities.'

Coles argued Ms Hill suffered the injury because of her own negligence in failing to keep a proper lookout and avoid an obvious hazard.

But Judge Mahony found the supermarket had a responsibility to make sure the store was safe for customers and that there should have been a mat in front of the refrigerated fruit and vegetables.

'In this case, I am satisfied that there was a breach by the defendant of its duty of care to the plaintiff, and that "but for" such breach, the plaintiff would not have suffered the injury she did,' he said.

In deciding the total sum of damages, Judge Mahony noted that Ms Hill's husband was disabled and unable to help her with domestic chores.

'[Her counsel submitted] she was forced, by her injuries, to live in conditions which she described as akin to a "pigsty".'

For domestic help, she was awarded $144 320.

ISBN 978-1-108-86281-3 Milgate et al.

legal relationship between the parties at the time of the wrong; whereas in torts, there is no legal relationship prior to the wrong. The law of torts tries to restore the plaintiff to the position he or she was in before the wrong was committed. For example, someone who slipped on the floor of a supermarket might sue the supermarket for medical costs.

All torts entitle the alleged victim to take legal action against the alleged perpetrator in a civil court and claim compensation. However, court action can be expensive and time-consuming, so it is important that plaintiffs consider this when deciding whether a wrongdoing is worth bringing a case. This issue is illustrated in the following news article.

In 2015, in a high-profile (and expensive and lengthy) case, the actor Rebel Wilson successfully sued Bauer Media for defamation; Wilson claimed that articles published by Bauer Media about her led to her losing work opportunities. Wilson was awarded more than $4.7 million in compensation, which was the largest defamation damages payout ever ordered by an Australian court. However,

Figure 3.3 Rebel Wilson outside the Supreme Court of Victoria ahead of her defamation trial against the magazine publisher, Bauer Media.

Bauer Media appealed the decision and the Court of Appeal ordered Wilson to pay back $4.1 million of those damages and 80% of the magazine publisher's legal costs. The court found that 'there was no basis in the evidence for making any award of damages for economic loss'. The actor's legal team took this decision to the High Court who upheld the decision made by the Court of Appeal.

There are many different types of torts, all of which are regulated by statute and common law. Torts arise from different types of activity and include:

- negligence
- nuisance – public and private
- trespass (on land)
- false imprisonment
- defamation.

The case that established the modern tort of negligence and that clearly shows the difference between tort law and contract law is 'the snail in the bottle' case (*Donoghue v Stevenson* [1932] AC 562) (see 'In Court' below).

Property law

Property law is a wide area of law that governs relations involving things and interests that can be owned and that have a commercial value. These include objects capable of being possessed physically, but also less tangible interests such as shares in a company. The products of creative effort – including text, images, designs, inventions, computer programs and other intangible objects – are protected by statute and common law governing **intellectual property**.

intellectual property
intangible property that has commercial value and can be protected by law; for example, text, images, designs, inventions and computer programs

One of the most important types of property dealt with under property law is real property. Real property is actual land and anything attached to that land, as opposed to personal property, which includes everything else.

Property rights are legal rights to possess, use or benefit from property. A violation of such rights often involves breaking the terms of a contract. Legal action for breaches of property law can take place in either the criminal court or civil court, depending on the offending action.

ISBN 978-1-108-86281-3 Milgate et al.

In Court

Donoghue v Stevenson [1932] AC 562

A friend bought May Donoghue some ginger beer in a dark glass bottle, which prevented Donoghue from seeing the contents. Some ginger beer was poured into a glass for her, which she drank. When the ginger beer was poured into the glass, a decomposing snail came out of the bottle. This made Donoghue feel quite ill, and later she suffered from severe gastroenteritis. She sued David Stevenson (the respondent), who was the manufacturer of the ginger beer.

This case was an appeal by Donoghue, the plaintiff in the original decision. The defendant's appeal had succeeded; Donoghue then appealed to the House of Lords.

Donoghue alleged that Stevenson had failed in his duty of care to provide:

- a system of working his business that would prevent snails from getting into ginger beer bottles
- an efficient system of inspection of the bottles before they were sold to consumers, including clear bottles that would make it easier to inspect the bottles.

The court held that a manufacturer is under a legal duty to the consumer to take reasonable care that the article will not cause injury to health.

Lord Atkin, one of the presiding judges, referred to the precedent case of *Heaven v Pender* (1883) 11 QBD 503, which established that 'under certain circumstances, one man may owe a duty to another, even though there is no contract between them'. However, Lord Atkin went further than the narrow decision in the *Heaven case*, citing *obiter dicta* (comments other than the main legal tenant of the case) of the dissenting judge, Brett MR, who extended the notion of a duty of care to anyone in a position where failing to use 'care and skill in his conduct … would cause danger of injury'.

Until *Donoghue v Stevenson*, individuals had no rights against suppliers with whom they didn't have a contract. As Donoghue did not actually buy the ginger beer and, thus, had no contractual relationship with the manufacturer, in previous times she would not have been able to sue.

Donoghue v Stevenson became a landmark decision and formed the basis of the tort of negligence worldwide. This occurred not only because of the judgment relating to non-contractual duty of care but also because of Lord Atkin's 'neighbour principle':

> [T]here must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances … The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. 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 that are called in question.

Review 3.2

1. Describe contract law and what it is concerned with.
2. Outline the types of remedies that can be sought by the plaintiff if a contract is breached.
3. Describe tort law. Outline the types of activities that tort law seeks to address.
4. Identify the different types of property that are protected by property law.

ISBN 978-1-108-86281-3 Milgate et al.

3.3 Criminal and civil court procedures

There are many differences between criminal and civil law court cases. Before discussing criminal and civil court procedures in more depth, it is necessary to be familiar with some of the key differences and the relevant terminology.

There can be an overlap between criminal and civil law. The victim in a case that has been heard in a criminal court may also wish to gain compensation for injuries caused by the defendant. They can, therefore, take the case to a civil court as well. In both cases, the adversarial system of trial will be used to decide the legal outcome. That is, representatives of the parties involved will put forward both sides of the case to a judge or magistrate, and sometimes to a **jury**. The judge or magistrate will consider the evidence and make a decision in favour of one of the parties.

jury
a group of people who listen to all of the evidence in a court case and decide on the verdict

Criminal procedure

Criminal law proceedings are the legal processes in which a person accused of a crime is prosecuted. If a person is found guilty of a crime, usually a conviction and punishment is handed down, such as a fine or imprisonment. The two main types of criminal hearings are summary hearings and trial by jury. The type of hearing depends on the seriousness of the offence the accused is alleged to have committed; that is, whether it is a summary or an indictable offence.

Summary offences are relatively minor and include certain traffic offences and offensive behaviour. They are heard and decided by a magistrate or judge without a jury.

Indictable offences are serious criminal offences and may be heard by a judge and a jury. Crimes in this category include murder, sexual assault and malicious wounding.

TABLE 3.1 Key differences between criminal and civil court proceedings

	Criminal	Civil
People	A **prosecutor** and a **defendant**	A plaintiff and a defendant
Who brings the case to court	**The state**	An individual or organisation
Onus to prove the case	On the prosecutor	On the plaintiff
Standard of proof	The prosecutor must prove the case **beyond reasonable doubt**. (This is a higher standard of proof than is required in civil cases.)	The plaintiff must meet the **balance of probabilities**. (This is a lower standard of proof than is needed in criminal cases.)

prosecutor
the person formally conducting legal proceedings against someone accused of a criminal offence; the prosecutor acts on behalf of the state or the Crown

defendant
the person who is accused of a crime or a civil wrong; in a criminal case, the defendant is also referred to as 'the accused'

the state
a term that is used to refer to the government and the people that it governs

onus
the burden or duty of proving a case to a court

standard of proof
the degree or level of proof required for the plaintiff (in a civil case) or the prosecution (in a criminal case) to prove their case

beyond reasonable doubt
the standard of proof required in a criminal case for the prosecution (the state) to obtain a conviction against the accused

balance of probabilities
the standard of proof required in a civil case for a plaintiff to succeed in proving the case against the defendant

ISBN 978-1-108-86281-3 Milgate et al.

Figure 3.4 Police officers collect eyewitness accounts near the scene of a knife rampage in Sydney on 13 August 2019.

Legislation has been passed to allow some indictable offences to be prosecuted summarily (that is, as summary proceedings) in the Local Court (NSW) or Magistrates Court (ACT). These offences involve crimes that have a penalty of less than 10 years' jail time. The defendant and the magistrate must agree for an indictable crime to be prosecuted summarily.

In New South Wales, the police may prosecute summary matters in the Local Court. Not only do the police investigate crimes and arrest suspects, but they also have specially trained police officers, called police prosecutors, who represent the state in court. The Office of the Director of Public Prosecutions (DPP), who employ lawyers who represent the DPP in court, prosecutes serious crimes. In the Australian Capital Territory, the DPP is responsible for prosecuting all criminal matters in both the Magistrates Court and the Supreme Court.

The accused, known as 'the defendant', will usually employ a lawyer to represent him or her. Some people may choose to represent themselves, depending on the seriousness of the charges. The case that the accused puts forward is called 'the defence'.

Before an accused person can be tried for an indictable offence, there must be a committal hearing. To have the matter put before a jury, the prosecutor must convince the magistrate that there is sufficient evidence that the accused has committed the indictable offence.

Trials of indictable matters take place in the District Court or Supreme Court in New South Wales (depending on the seriousness of the offence) and in the Supreme Court in the Australian Capital Territory. Criminal trials are heard before a jury of 12 people, unless the accused elects to have his or her case heard before a judge alone. The jury's job is to consider whether there is enough evidence to convict the accused. The judge presides over the case, advising the jury and dealing with questions of law. The jury considers the evidence provided in court and makes decisions on issues of fact on the basis of this evidence.

In both New South Wales and the Australian Capital Territory, the jury must come to a common verdict. In New South Wales, juries used to have to reach an unanimous verdict (all jurors agree) but in 2006, new legislation allowed for the following:

- if there are 12 jurors and if after at least eight hours they cannot all agree, then the verdict is allowed to be agreed on by 11 jurors or
- if there are 11 jurors and after at least eight hours they cannot all agree, the verdict can be agreed on by 10 jurors.

ISBN 978-1-108-86281-3 Milgate et al.

Criminal trial process

At the start of a trial, the indictment is read to the accused, who may plead guilty or not guilty. The prosecution begins with an opening address, setting out the facts of the case and the evidence that they will present to prove the defendant's guilt.

Each side then calls witnesses and 'examines' them by asking them questions. This is called the **examination in chief**. Its purpose, for the prosecution, is to establish facts to prove their case. For the defence, its purpose is to disprove the prosecution's case. **Cross-examination** allows each side to examine the witnesses of its opponent, to question the opponent's version of the facts or a witness's **credibility**.

examination in chief
questioning of a witness by the barrister who called that witness

cross-examination
questioning of a witness called by the other side to produce information relevant to one's case or to call the witness's credibility into question

credibility
trustworthiness, reliability, believability

After all the evidence has been given, each side gives a closing address where they sum up their case. This final speech draws together the evidence and provides an argument for that side's position. A closing address may also answer arguments that could be made by the other side. The judge then 'sums up' the case and instructs the jury (if applicable) on how to go about the task of reaching a verdict. The jury goes to another room to deliberate until a verdict is reached. If the jury returns a verdict of 'guilty', sentencing occurs either at that time, or at a later date determined by the court.

Figure 3.5 A Suffolk Superior Court judge sentenced a drain company owner (Kevin Otto) to two years in jail for failing to take safety precautions at a job site where a trench collapse killed two of his workers in 2016.

Burden and standard of proof in criminal cases

In criminal cases, the defendant is presumed to be innocent until proven guilty. The **burden of proof** (i.e. the onus) rests on the prosecution, which must prove beyond reasonable doubt that the accused has committed the offence with which he or she is charged. The prosecution needs to convince the judge/jury to find the defendant guilty of committing the crime. It is the job of the defence to disprove the prosecution's case and to provide evidence to show the innocence of their client.

burden of proof
the responsibility of a party to prove a case in court

The standard of proof is the level of proof required for the party that has the burden of proof to succeed. In a criminal case, the standard of proof is 'beyond reasonable doubt'. This means that to return a guilty verdict, no more than one jury member can have any doubt that the crime was committed by the accused.

Hearings in the different courts

Local and Magistrates' Courts

The Local Court or Magistrates' Court deals with most criminal cases. These courts do not have juries and judges. Rather, a magistrate determines each case. Matters are generally handled quickly, efficiently and cost-effectively.

In the Local Court and Magistrates' Court, the proceedings are less formal than in the higher courts (e.g. lawyers and magistrates do not wear traditional robes). Also, it is solicitors rather than barristers who carry out most of the legal work. In these lower courts, many defendants choose to represent themselves and so argue their case without the help of a lawyer.

Coronial inquests

A coronial inquest occurs when there is an unnatural death or an unexplained fire or explosion. The

ISBN 978-1-108-86281-3 Milgate et al.

proceedings are more inquisitorial than in normal court proceedings, as the coroner's office gathers all of the evidence. If there is evidence that a serious crime has been committed, the coroner will recommend that an indictment be issued and the accused will be tried in a court of law in the usual way.

Review 3.3

1. Identify the differences and similarities between civil and criminal court cases.
2. Outline the differences between an indictable offence and a summary offence.
3. Describe the task of the prosecution in a criminal trial and how the prosecution goes about carrying out this task.
4. Compare and contrast the roles of the prosecution and the defence in a criminal trial.
5. Describe the role played by a jury and how members of a jury are selected.
6. Describe a coronial inquest.
7. Outline the ways in which children who are charged with a crime are protected. Account for this protection. Assess if you think this protection is reasonable.

Research 3.1

View the NSW Department of Justice's website.

1. Identify who hosts this website and why it was set up.
2. View the 'Courts and tribunals' section of the site. Imagine you are doing work experience at the local primary school and have to teach a Year 6 class about the local court. Develop an internet activity based on the information on the website.

Children's Court hearings

Most charges against people under 18 years of age are heard in a special Children's Court hearing. Children charged with a crime are treated differently by the legal system, as children are considered to have a lower level of responsibility than adults. Conviction by a Children's Court, even for a serious crime, has less severe consequences than conviction in an ordinary criminal court.

Cases before the Children's Court are usually heard before a magistrate who specialises in children's cases and who takes reasonable measures to ensure the child understands the proceedings. Cases at the Children's Court are heard in a closed court, which means the public are not allowed to attend. If journalists are present, they are not permitted to publish the identity of the offender. In New South Wales, if the child is under 16 years of age, no conviction is recorded.

Civil procedure

Civil proceedings are court actions that occur due to disputes between individuals. Civil proceedings are initiated by individuals or organisations, rather than the state. Civil proceedings manage matters such as breach of contract, property disputes and negligence. The person who brought the civil action, called 'the plaintiff', begins proceedings by issuing a statement of claim or a summons to 'the defendant', who is the individual or organisation that committed the breach or wrong.

The process in a civil claim

A statement of claim outlines the facts of a dispute and the parties involved in the dispute. There are strict rules for the way in which a statement of claim must be 'served' on the defendant. As discussed in Chapter 2, which court has the jurisdiction (i.e. authority) to decide a civil matter depends on the type of claim and the monetary amount involved.

The documents that the defendant and plaintiff exchange and file with the court (these documents set out the issues to be decided by the court) are called **pleadings**. Therefore, the statement of claim or originating application is the first pleading in the sequence of the case. There may be many pleadings,

ISBN 978-1-108-86281-3 Milgate et al.

alternating between the parties, over the course of a case.

pleadings
written statements of the parties to a civil dispute that set out the issues to be decided by the court

The defendant responds with a statement of defence. This statement may deny or challenge the plaintiff's allegations, or admit them but plead additional facts to counter the effect of admitting to them. A defendant may also file a counterclaim against the plaintiff.

At this stage, the parties can obtain more information about each other's arguments through a process called 'discovery'. This process allows each party to obtain information to assist them to respond to the other party's claims and allegations. Interrogatories are written questions submitted to the other party, which must be answered. They must be relevant to a matter in question. At this point, many civil disputes are resolved as a settlement can be agreed on. In most cases, legal practitioners prepare the documents, as they have an understanding of the processes and can give appropriate and timely advice on legal matters.

If a dispute cannot be settled, the matter is referred to trial. During a trial, each side has the right to produce evidence, call witnesses and carry out cross-examinations. When both sides have presented all their evidence, the judge makes a ruling. If the plaintiff is successful, the judge determines the amount of relief (or compensation) to be given to the plaintiff by the defendant. This compensation usually takes the form of damages in a monetary form or an injunction, which is a court order prohibiting specified activities. Sometimes a specific performance is required under the judgment.

Burden and standard of proof in civil cases

In a civil case, the burden of proof is on the injured party (the plaintiff) to prove his or her allegations. The rules of civil procedure give the defendant the chance to provide evidence that rebuts the case made by the plaintiff. To disprove a statement or evidence presented by another is generally referred to as a rebuttal.

In civil cases, the standard of proof is 'on the balance of probabilities'. This means that the plaintiff, who has the burden of proof, must prove that it was more probable than not that he or she suffered injury or loss because of the defendant's actions or that 'his or her claim is correct in law'.

Understanding criminal and civil cases

There are a number of ways in which you can gain a better understanding and appreciation of the operation of criminal and civil law. This can be done by completing the following tasks.

- **Compiling a media file** – Keeping a record of specific cases that are reported in the media is an excellent method for building a sound understanding of criminal and civil cases. To help you record and summarise your findings, a 'media file proforma' is provided on the Cambridge GO website. It is recommended that you print a number of copies of this proforma, make notes specific to each case and attach them to each article you collect.
- **Reading about cases online** – Accessing cases online is one of the most time-efficient ways of collecting information about criminal and civil cases. Two reliable websites to visit are NSW Caselaw and the Australasian Legal

Review 3.4

1. Draw a diagram that shows the steps taken in civil legal action.
2. Describe how you would decide whether or not to make a personal injury claim for negligence that resulted in medical bills of $100 000. Identify the court that would hear this case.
3. Outline the facts that might be sought in a case involving a debt that was not paid.
4. Discuss if it is more difficult to prove a case in criminal law or civil law. Explain your answer.
5. With a classmate, create a poster that shows as many civil wrongs and criminal acts as you can. Draw up a table that lists these wrongs and acts and the respective courts in which cases about these wrongdoings would be heard.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 3.6 Nathan Carman arriving at the US District Court for his federal civil trial in Providence, Rhode Island, on 21 August 2019. Carman supplied a detailed written account to insurers of his sunken vessel, which was admitted into evidence in the pitched dispute over his $85 000 claim for the loss of his boat. Carman told authorities he had been drifting in a life raft for a week when he was rescued about 115 miles off Martha's Vineyard by a passing freighter on 25 September 2016. His mother, Linda, who was alone with him on the boat, is presumed dead. Carman is at the centre of investigations into the deaths of his mother and his grandfather, who was shot in his Connecticut home in 2013. Carman has not been charged criminally.

Information Institute (AustLII). These sites have information about rulings on a wide variety of court cases.

- **Observation** – Observing a court case in action is an important way of reinforcing and extending your knowledge of criminal and civil law. The NSW Department of Justice website lists all the courts in New South Wales, and information about Australian Capital Territory courts can be found on the ACT Courts and Tribunals website. Students can visit most courts that are open to the public. However, if a school group is thinking about attending a court hearing, it is important to contact the court to ensure that correct protocols and etiquette are followed.

Personnel

Court cases involve a number of participants. Some of these people play an official legal role in the court proceedings, while others play an unofficial role. The official and unofficial participants of most court cases are outlined next.

Judges and magistrates

Judges and magistrates preside over court cases: they make sure the rules are followed and that the trial is fair. These officials are legally qualified professionals with a great deal of experience in the law.

Judges sit in intermediate and superior courts (District and Supreme Courts) and adjudicate cases. The judge makes decisions about points of law and gives instructions to the jury to make sure that they understand the proceedings and the evidence presented. The judge is required to hand down sentences and rulings. In civil cases, the judge sits without a jury and therefore is responsible for the final decision.

A magistrate is in charge of a lower court. After hearing both sides of the case, a magistrate

ISBN 978-1-108-86281-3 Milgate et al.

decides whether a person is guilty or innocent. A magistrate decides on the punishment in criminal cases, and the amount of money awarded in civil cases.

Magistrates refer very serious criminal offences to the District Court (in NSW) or to the Supreme Court (in the ACT). Magistrates hear some indictable matters to determine whether they should go to trial. If there is enough evidence to establish a ***prima facie*** case, and thus justify the expense of a trial, the case is referred to a higher court.

prima facie
(Latin) 'on the face'; at first sight, having sufficient evidence established against a defendant to warrant a trial in a higher court of law

Judge's associate

A judge's associate is a confidential secretary to the judge and performs clerical duties for the court in which the judge is presiding. Judges' associates usually have a law degree.

Tipstaff

A tipstaff supports the judge in matters of procedure and organisation when court is in session. When court is not in session, a tipstaff may provide research and administrative support.

Barristers and solicitors

People seeking legal advice usually contact a solicitor first. Solicitors give legal advice to people on a wide range of legal issues. Solicitors have completed a law degree and have carried out relevant work experience to achieve their qualification.

Solicitors may work in a number of practice areas. Some of the main areas solicitors work in are family law, conveyancing for real estate transactions, and the preparation of wills and contracts. Traditionally, only barristers can represent parties in court. Solicitors usually prepare a brief for a barrister when a case must go before a court, as well as doing research and providing legal advice. However, in the Local Court or Magistrates' Court, it is more common to see solicitors appearing on behalf of clients. For each state and territory, there are separate associations for solicitors and barristers, and in New South Wales, barristers and solicitors are issued different practising certificates.

Barristers often specialise in one area of law (e.g. family law), which allows them to develop a depth of knowledge and expertise in the area.

A solicitor will generally approach a barrister on behalf of their client. The barrister will then represent the client in either a criminal or civil court proceeding. Barristers have two main roles in court proceedings:

- to provide legal advice on the likely outcome of a court case, based on the facts provided to them by their client; this allows the client to decide which course of action is best
- to present their client's case in court.

Witness

A witness gives evidence regarding the case in court. Both parties can call witnesses to support their claims. A witness cannot enter the courtroom until his or her name is called. Once called, the witness must take the stand and swear an oath or make an affirmation to tell the truth.


Video

Court officer

A court officer is responsible for the court lists and calls witnesses into the courtroom. He or she administers the oath or affirmation, ensures the public are seated in the right area, and announces the arrival and departure of the judge(s). A court officer communicates questions from jurors to the judge and passes documents from the bar table to the judge's associate: the associate then gives these documents to the judge, jury or to witnesses. A court officer also advises the judge's associate when the jury is ready to return a verdict, operates audio-visual equipment where necessary, gives instructions to the jury, answers questions from jurors, and manages the jury room and the comfort of the jurors.

Court reporter

All court proceedings must be recorded. This recording may be written (in shorthand or using a shorthand machine) or it may be in an audio and/or visual format. A transcript of the proceedings is an accurate written record of what has been said in the courtroom.

Corrective services officer

In a criminal case, a corrective services officer, who also escorts the accused to and from the courtroom, guards the accused.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 3.7 On 20 June 2019 in Madrid, Spain, the former Spanish Government Minister of Defence, María Dolores de Cospedal (fourth from the left), arrives at court to testify as a witness in the trial of the destruction of the computers of the former treasurer of the People's Party, Luis Bárcenas.

Review 3.5

1. Outline the role of a judge or magistrate in court proceedings.
2. Identify the types of legal representation available to a person who is having legal problems.
3. Describe the roles of the judge and the jury in a court case.

Jury

A jury is a panel of citizens who consider the evidence presented and decide on questions raised in a case. Their job can be described as 'fact-finding'; a jury's decision is called a verdict. The members of a jury are ordinary people, randomly selected from the jury list, which is compiled from the electoral roll. In most cases, a criminal trial involves a jury of 12 people. Civil cases may be heard by a judge alone or sometimes (in NSW) with a jury of four people.

Before a court case begins, members of the jury are sworn in. In a criminal trial, both the prosecution and the defence are entitled to challenge the selection of individual jurors, or the panel as a whole. 'Challenges for cause' must have a reason; for example, the person is not qualified to serve on a jury, they are ineligible or disqualified, or they are suspected of bias. Both sides also have the right to a certain number of 'peremptory challenges' of prospective jurors, without having

ISBN 978-1-108-86281-3 Milgate et al.

to give a reason. However, the only thing they know in advance about the jurors is their names, so peremptory challenges are usually based on nothing more than the juror's name or appearance (e.g. age, gender, race, clothing or physique).

Plaintiffs and defendants

The person who brings a civil action against someone else is called the plaintiff. The person who must defend his or her actions is called the defendant. In a criminal trial, the defendant is the person accused of the crime, and there is no plaintiff.

Media

Journalists often attend high-profile court cases to report on them. Generally, representatives from the media sit in the media gallery or wait outside the court to interview people.

Figure 3.8 The media often publicise stories which are topical, or that they believe are in the public interest.

3.4 Common and civil law systems

Many countries have a system of law that is based on the common and civil principles of law, or a combination of both.

Civil law has its origins in Roman law. It is a codified system that uses a set of rules (known as the code of law) that are applied and interpreted by judges. This form of legal system is still used in many countries.

Common law, on the other hand, was developed by custom. It began long before there were any written laws but continued to be applied by courts long after written laws came into use.

The main difference between the two systems of law is that in civil law, judges apply the rules in the code of law to the various cases before them; whereas in common law, the rules are derived in part from specific court rulings.

In countries that have a legal system based on common law, the term 'civil law' refers to the area of law that governs relationships between private individuals (which differs from criminal law).

Civil law systems in other countries

The term 'civil law' can be confusing. Within Australia's legal system, civil law means private law; that is, disputes between individuals. However, the term is also used to describe the legal systems of countries that have developed from the Roman law system and not the English common law system; for example, France, Germany and Italy.

Whereas common law countries like Australia have an adversarial system, civil law countries usually have an inquisitorial system. This means that the judge collects the evidence for both sides in a dispute and so is actively involved in the fact-finding task.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- There are two main categories of law: public law and private law. There are differences in the ways that infringements of public and private law are dealt with by the courts.
- Public law deals with the interactions between people and the state. Public law includes criminal, administrative and constitutional law.
- The *Australian Constitution* sets out the foundational rules of the Australian Government. Constitutional law governs any changes made to these rules.
- Private law governs the relationships between individuals or between individuals and organisations or companies. Private law includes contract, tort and property law.
- Which court hears a case depends on the severity of the crime in criminal cases and the amount of damages sought in civil cases. Cases involving issues of equity are mainly considered by the Supreme Court.
- Criminal and civil court procedures are different in a number of ways. In a criminal trial, the burden of proof is on the prosecution. In a civil matter, the burden of proof is on the plaintiff.
- The standard of proof in a criminal trial is beyond reasonable doubt. In a civil hearing, the standard of proof is on the balance of probabilities.
- Contemporary Australian law is based on English common law. Many other countries use the civil law system, which is based on a statutory code rather than on precedence.

Questions

Multiple-choice questions

1 Why is criminal law prosecuted by the state rather than by individual citizens?
   - **a** Victims of crime are usually unable to afford legal representation.
   - **b** Crime is considered a wrong against us all and thus a matter of public law.
   - **c** Crime is often due to government decisions or policy and the state must take responsibility for it.
   - **d** It is a matter of organisation and thus is a subset of administrative law.

2 What is the main purpose of administrative law?
   - **a** The main purpose of administrative law is to achieve justice in civil cases.
   - **b** The main purpose of administrative law is to ensure government decisions are fair.
   - **c** The main purpose of administrative law is to allow people to bring criminal charges against government departments.
   - **d** The main purpose of administrative law is to allow people to receive damages in civil cases.

3 What is the High Court's role in relation to the laws made by parliament?
   - **a** The High Court decides whether laws are consistent with the *Australian Constitution*.
   - **b** The High Court exercises veto power, if necessary, when a Bill comes before parliament.
   - **c** The High Court ensures that laws are consistent with international treaties that Australia has signed.
   - **d** The High Court advises the minor political parties on how they can get laws passed.

4 What can a plaintiff expect from a successful tort claim?
   - **a** A plaintiff can expect compensation from the defendant in the form of damages.
   - **b** A plaintiff can expect compensation from the state.
   - **c** A plaintiff can expect an injunction to prevent the defendant from approaching the plaintiff's solicitor.
   - **d** A plaintiff can expect an order of specific performance.

ISBN 978-1-108-86281-3 Milgate et al.

5 Which of these statements about the burden and standard of proof is true?
   a The defence in a criminal trial must prove that the defendant is innocent, beyond reasonable doubt.
   b The defendant in a civil trial must prove that the plaintiff's case is flawed, on the balance of probabilities.
   c The plaintiff in a civil trial must prove his or her case on the balance of probabilities.
   d The plaintiff in a civil trial must prove that the defendant is guilty beyond reasonable doubt.

Short-answer questions

1 Outline the main ways that a person can seek a remedy if a government decision is unfair.
2 Assess if many people seek justice if a government decision is unfair.
3 Describe the remedies available when you have a contract for services and the other party fails to do what they agreed to do.
4 Identify tort law.
5 Discuss the notion that tort law has turned us into a society that sues each other when things go wrong.
6 Explain the roles of the prosecution and the defence in a criminal case.
7 Compare and contrast the features of criminal and civil law.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter 4
Law reform

Chapter objectives

In this chapter, students will:

- discuss legal concepts and terminology with respect to law reform
- debate the legal system's ability to address issues in society that may contribute to law reform
- discuss the relationship that exists between the legal system and the society in which it operates
- discuss the place of the law in addressing and responding to change
- identify and assess the conditions in society that contribute to law reform
- describe and evaluate the role and operation of agencies and agents involved in law reform.

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Marriage Act 1961 (Cth)
Law Reform Commission Act 1967 (NSW)
Family Law Act 1975 (Cth)
Jury Act 1977 (NSW)
Property (Relationships) Act 1984 (NSW)
Australian Law Reform Commission Act 1996 (Cth)
Young Offenders Act 1997 (NSW)
Crimes (Forensic Procedures) Act 2000 (NSW)
Succession Act 2006 (NSW)
Crimes (Domestic and Personal Violence) Act 2007 (NSW)

ISBN 978-1-108-86281-3

Legal oddity

In June 2010, a man was given a 30-day jail sentence for blowing bubble gum! A magistrate found the man was 'in contempt of court' when he blew the bubble inside the courtroom. After spending 12 hours in jail, the man's lawyer lodged an appeal with the Supreme Court and he was released on bail. The Supreme Court found the magistrate had not followed procedural fairness requirements and the sentence was overturned.

ISBN 978-1-108-86281-3

4.1 What is law reform?

Australian society is constantly evolving and changing. Given the speed at which social values change, the law can sometimes seem anachronistic, or slow to respond. The saying often quoted is 'society moves ahead and the law limps behind'.

As suggested in previous chapters, the law needs to be dynamic for the community to respect and follow it. But mere change is not enough to constitute 'reform'. As the Hon. Justice Michael Kirby, a former member of the High Court bench, wrote:

> In our language, the word 'reform' tends to connote an improvement, an advance: not just for change, a change for the better. (M.D. Kirby, *Reform the Law: Essays on the renewal of the Australian legal system* (Oxford University Press, Melbourne, 1983), p. 7)

Changes to laws should not only recognise the changes taking place in society, but should also reflect the changes that have produced better circumstances for significant portions of society, as well as providing protections against harm.

However, law reform is not always smooth or easy, as not all members of society may agree with particular changes to the law or see the need for them. The extent of disagreement often depends on the conditions that gave rise to law reform: in other words, on what is driving the need to reform the law.

This chapter examines the conditions that give rise to law reform, and the agents and mechanisms that can bring it about once the reform needed has been identified.

4.2 Conditions that give rise to law reform

Changing social values

Social values are standards or principles that guide people in their thinking about aspects of their society and are underpinned by beliefs about right and wrong. Social values are not necessarily the same as individual values, but they both influence and are influenced by individuals' judgment. Both individual and social values and ethics are shaped by various cultural factors, often including religion.

social values
ethical standards that guide people in their thinking about aspects of their society

When the majority of people within a society hold similar views about an issue, the views can be said to reflect **public morality**. The law must reflect the social values of the majority of the community if it is to stay relevant and be assured of a high rate of compliance. As Australia is a diverse multicultural society, it can sometimes be difficult to gauge if there is anything approaching consensus on an issue.

public morality
standards of behaviour generally agreed upon by the community

The problem for law-makers is that public morality is not static; it continues to evolve. These changing social values are an impetus for law reform. There are many examples of legislation that have been introduced, repealed or amended after courts have handed down decisions. Judicial decisions are one way in which legislators and others recognise that the existing law no longer reflects the community's social values. In most cases, as indicated above, the law usually lags behind changes in social values. This is not always a negative feature of the law, as deliberate and well-thought-out changes to our laws take time.

The following example demonstrates how law reform has been a direct response to changing social values.

Example: Same-sex relationships

Many of Australia's social values have been influenced by its Christian traditions, including the belief that the family is one of the cornerstones of a stable society. Part of this traditional belief has been the understanding that a family must have a mother and a father in a heterosexual relationship that has been recognised formally by a religious ceremony and legally by marriage legislation – currently the *Marriage Act 1961* (Cth).

Over the past 40 years, the idea of what constitutes a family has evolved to the point where the definition above no longer reflects the social values of a

ISBN 978-1-108-86281-3 Milgate et al.

significant number of Australians. Moreover, many Australians in same-sex relationships were living together without the legal protections afforded to people living in heterosexual relationships. This meant that they had few rights – especially property rights – if the relationship ended.

In 1984, the NSW Government passed the *De Facto Relationships Act 1984* (NSW), which established certain rights for people living in **de facto relationships**. At this time, there were calls to recognise same-sex couples in the same way. After some impassioned speeches in both Houses of Parliament in New South Wales, the *De Facto Relationships Act 1984* (NSW) was amended to include same-sex couples and was renamed the *Property (Relationships) Act 1984* (NSW). (For people separating now, these matters are dealt with under the *Family Law Act 1975* (Cth); this Act now deals with matters regarding property and children in relation to de facto couples as well as married couples.)

de facto relationship
(Latin) 'existing in fact'; a relationship between two adults who are not married but are living together as a couple

Figure 4.1 Australians voted in favour of marriage equality via a postal survey. On 9 December 2017, the *Marriage Act 1961* (Cth) was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). The amending Act revised the definition of marriage to 'the union of two people to the exclusion of all others, voluntarily entered into for life'. Therefore, the right to marry in Australia is no longer determined by sex or gender.

Under the *De Facto Relationships Act 1984* (NSW), factors for a court to consider when determining whether a couple are in a de facto relationship include the duration of the relationship, how long they have lived together, whether it is a sexual relationship, and their financial dependence or interdependence. Importantly, these factors also include the degree of mutual commitment to a shared bond and whether they are publicly recognised as a couple. This Act gave couples in these relationships certain property rights, and recognised the legitimacy and value of their relationship.

Further legislative change occurred with the *Property (Relationships) Legislation Amendment Act 1999* (NSW), which amended 25 other Acts whose provisions excluded same-sex couples. For example, it amended the *Probate and Administration Act 1898* (NSW) to give a de facto spouse of a person who died without a will the same rights as a husband or wife with respect to the deceased person's **estate**. The *Succession Act 2006* (NSW) now covers this, as the *Wills, Probate and Administration (Amendment) Act 1989* (NSW) has been repealed.

estate
all of the property that a person leaves upon death

In 2008, the Rudd government acted on the Australian Human Rights Commission's report, *Same-Sex: Same Entitlements*, and conducted an audit of Commonwealth legislation to remove discrimination and to enable same-sex couples and their children to be recognised by Commonwealth law. These changes were legislated to ensure that Australia remains a fair and just community by allowing same-sex couples and their families to enjoy the same entitlements as opposite-sex de facto couples. The legislation that enacted these changes are the:

- *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth)
- *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth).

This legislation removed discrimination from 85 pieces of federal legislation in areas such as taxation, superannuation, social security, the Pharmaceutical Benefits Scheme (PBS), Medicare safety nets and

ISBN 978-1-108-86281-3 Milgate et al.

aged care. It also amended legislation that did not recognise same-sex couples for the purposes of child support, immigration, veterans affairs and citizenship.

Over the past few years, there has been much debate about amending the *Marriage Act 1961* (Cth) to allow same-sex couples to marry. The Turnbull government had pledged to hold a plebiscite on this issue in 2016 – a plebiscite is when Australians on the electoral roll vote directly on a particular issue. The Labor Party advocated that parliament should act to amend the Marriage Act given, they argued, that the majority of Australians supported the change. Following unsuccessful attempts to pass legislation allowing a plebiscite, in 2017 the federal government took a new approach to assessing popular opinion: the Australian Marriage Law Postal Survey. The Australian Bureau of Statistics, rather than the Australian Electoral Commission, ran this survey. While everyone on the federal electoral roll received the survey, voting on the matter was not compulsory. The vote was 61.1% in favour of same-sex marriage. As a result, in December 2017 the Marriage Act was amended to change the definition of marriage to 'the union of two people' who meet all the other requirements of the Act. This ended a 40-year struggle for full equality of the rights of same-sex couples.

Case Study

Whose social values should prevail?

In the United States state of California in May 2008, same-sex marriages were recognised when the Supreme Court of California ruled that legislation banning same-sex marriages was discriminatory and violated the state's Constitution. After this decision, in California, many same-sex couples legitimised their relationships in the eyes of the law through marriage.

In November 2008, Californian voters overturned the Supreme Court's ruling by agreeing, via a referendum, to change the state's Constitution in a ballot called 'Proposition 8'. In an article titled, 'California bans same-sex marriage', the BBC reported that, 'The referendum called for the California constitution to be amended by adding the phrase: "Only marriage between a man and a woman is valid or recognised in California." ' The state's Attorney-General has stated that the marriages conducted after the court ruling remain valid.

More recently on 26 June 2015, the Supreme Court of the United States legalised same-sex marriage in a decision that applies nationwide (*Obergefell v Hodges*). The court held that the Fourteenth Amendment of the US Constitution requires states to offer same-sex marriage and to recognise same-sex marriages performed in another jurisdiction.

Public morality is not clear-cut on this issue in the United States even if the law supports marriage equality. There are certain sections of the American public that are opposed to any such changes.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 10–12 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 4.1

1 Outline the sequence of events that led to the reform of the *Marriage Act 1961* (Cth) in 2017. Recall what the reform accomplished.
2 Identify other types of social change that might lead to law reform and how the reform might be accomplished.

ISBN 978-1-108-86281-3 Milgate et al.

New concepts of justice

When the law is unable to deliver just outcomes to individuals and the community, there may be a need for law reform. For example, if criminal law is failing victims, the community and/or the accused, new concepts of justice may need to be formulated.

Example: Abolition of capital punishment

In the past, **capital punishment** for particular murder offences was seen as the most effective way of dealing with the most heinous crimes. This punishment was a case of society delivering pure retribution for a crime: 'a life for a life'. It was also suggested that capital punishment provided a strong deterrent to those who might commit murder. However, in a significant number of homicides, the offender and the victim knew each other and many involved extreme breakdowns of family relationships. Many murderers could be described as one-time killers who are unlikely to re-offend. When capital punishment was abolished in each of the Australian states, the murder rate remained relatively unchanged, suggesting this punishment had little effect as a deterrent.

capital punishment
the practice of sentencing a person to death by judicial process; also referred to as the 'death penalty'

Not only does executing a person completely remove the possibility of rehabilitation, but there are also very strong arguments that capital punishment violates prohibitions of cruel, inhuman and degrading punishments in international human rights treaties. In addition, where capital punishment exists, it is imposed more often on poor, uneducated and otherwise vulnerable people. There is also the risk of killing an innocent person who has been wrongly convicted.

These moral arguments and practical considerations shifted social attitudes about capital punishment and it is no longer permitted in any Australian jurisdiction. Due to a greater emphasis on rehabilitation as a means of achieving justice, and the recognition that capital punishment is not an effective deterrent, this method of punishment no longer serves the community's purposes.

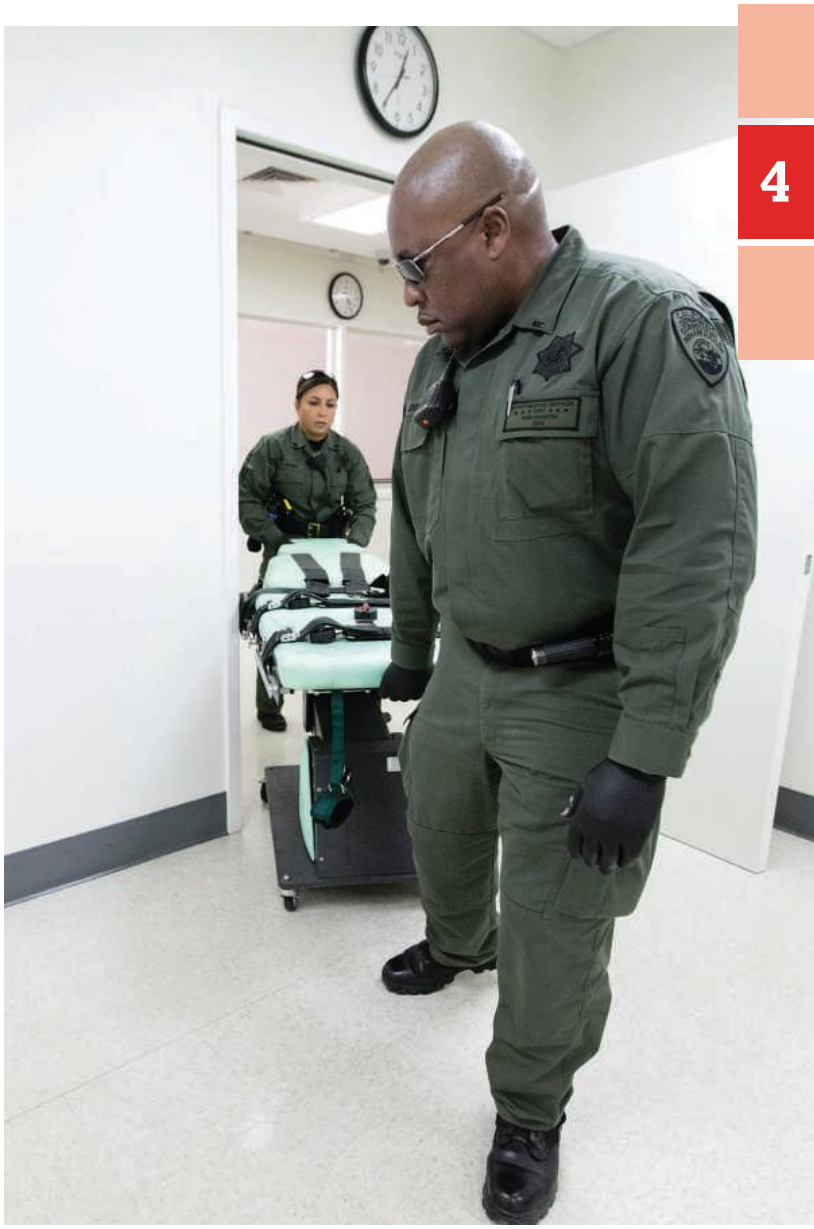


Figure 4.2 In this photo provided by the California Department of Corrections and Rehabilitation, staff members dismantle the lethal injection facility at San Quentin State Prison in California, on 13 March 2019. California Governor, Gavin Newsom, has announced a moratorium on California's death penalty. California has 737 people on death row, the largest death-row population in the United States.

Example: Youth Justice Conferences

Another notable example of a change in the way the law punishes offenders is the introduction of **Youth Justice Conferences**, which were established by the *Young Offenders Act 1997* (NSW). (This is discussed in more detail in Chapter 9.) Youth Justice Conferences try to divert young, first-time offenders away from the court system – and help these young

ISBN 978-1-108-86281-3 Milgate et al.

offenders avoid getting a criminal record. The aim of these conferences is to act as a 'circuit breaker' in a young person's behaviour trajectory. A conference may be attended by members of the community, the offender's family, the victim and their family, and relevant professionals (e.g. a social worker).

Youth Justice Conferences have enjoyed support from the community as they have achieved positive results for young, first-time offenders. Some people have argued that these conferences should be used for a wider range of offences because attending a conferences makes a young person consider the consequences of their actions, especially the harm they have caused the victim.

Youth Justice Conference
a meeting of all the people who may be affected by a crime committed by a young offender; used to help the offender to accept responsibility for their actions while avoiding the court system

Other law reform initiatives that involve new procedures to deal with offenders include circle sentencing for Aboriginal and Torres Strait Islander offenders, the New South Wales Drug Court, and the enforcement of parenting orders in the Family Court. These reforms are attempts to deal with issues that the current laws were failing to address.

Example: Sexual assault court

There has also been some speculation over the years about the introduction of a specialist court to deal with sexual assault matters. This has been put forward because of a new depth of understanding about sexual assault, including:

- a recognition that victims should be dealt with sensitivity during the legal process
- a better understanding of the context of sexual assault and what that means with respect to the physical collection of evidence from victims
- the recognition of the complexity of the task of proving that consent was not given.

Our legal system is based on an adversarial system in which witnesses for the prosecution can be subject to robust questioning by the defence. This is considered to be an important part of ensuring people are not wrongly convicted. However, being a witness can be a traumatic experience for victims of sexual assault as it involves re-telling their experiences and rebutting questions about their credibility. There is a concern that such questioning may deter victims from reporting a crime. It is a challenge to find the balance between ensuring the accused can pursue a defence fairly, while avoiding re-victimising a victim. A specialist court may be better placed to achieve this.

Example: Combating domestic violence

Overview

Domestic violence is different from violence perpetrated on the street, in schools or in the workplace. The Domestic Violence Resource Centre defines domestic violence as:

> Domestic and family violence is when someone intentionally uses violence, threats, force or intimidation to control or manipulate a partner, former partner or family member.

Domestic violence can manifest sexually, physically, verbally or financially and in most cases causes psychological harm to the victim. Victims of domestic violence are usually isolated socially and often stay in abusive relationships for many reasons, including fear of reprisal.

In the past, victims of domestic violence had to report incidences of violence to the local police. In many cases, the victim was told that domestic violence was a private matter more appropriately sorted out within the family. Research has indicated that the initial response of the police to a victim's report of domestic violence determines whether that victim proceeds further with the complaint.

The victim also had to rely on assault provisions under the relevant criminal legislation. Not only were there often delays in bringing the matter to court, but the necessity of proving the charge beyond reasonable doubt could also be a high hurdle when the evidence was essentially one person's word against another's. Victims of domestic violence had inadequate protection under the law and it was clear that the legislation was not sufficient.

ISBN 978-1-108-86281-3 Milgate et al.

Legislation

In New South Wales, the *Crimes (Domestic Violence) Amendment Act 1982* (NSW) inserted new provisions into the *Crimes Act 1900* (NSW), introducing the concept of an **Apprehended Domestic Violence Order** (ADVO). Victims can obtain ADVOs through the Local Court or the police. The court must be satisfied 'on the balance of probabilities' that the person has reasonable grounds for fear – a lower standard of proof than 'beyond reasonable doubt'. An ADVO can be tailored to suit the victim's situation; for example, it can forbid the accused from coming close to the victim's children, residence, place of work or another specified place that the victim frequents. It is a criminal offence to breach an ADVO, but the ADVO is not itself a criminal conviction.

Apprehended Domestic Violence Order
a court order used for the protection of a person involved in an intimate, spousal or de facto relationship

As the community's understanding of the perpetrators and circumstances of domestic violence developed, significant law reform continued to unfold. Some of these developments include:

- The *Crimes (Domestic Violence) Amendment Act 1993* (NSW) allows police to apply for interim ADVOs after hours by telephone, and has made it an offence to 'stalk' or 'intimidate' a person.
- The *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) distinguishes between orders taken out for domestic violence and those relating to 'personal violence' in other situations (e.g. disputes between neighbours). In addition, this Act introduced the requirement that police officers record in writing why they did not proceed with criminal charges for a breach of an ADVO.
- Amendments to the *Bail Act 2013* (NSW) have removed the presumption that bail will be granted for perpetrators of domestic violence and for those who have breached an ADVO, where the defendant has a history of violence.
- Amendments to the *Firearms Act 1996* (NSW) allow police to seize any firearms present when called to the scene of a domestic violence incident.
- Amendments to the *Crimes Act 1990* (NSW) in 2018 introduced a new offence of strangulation with a lower proof threshold.

After 30 years of amendments to various legislation, especially to the *Crimes Act 1990* (NSW), it was felt that the crime of domestic violence deserved a stand-alone Act of parliament. Hence, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) was passed and took effect in 2008.

This Act repealed Part 15A of the *Crimes Act 1990* (NSW), which dealt with apprehended violence orders, and re-enacted those provisions as a new Act, with some modifications and additional provisions. It was also felt that domestic violence was treated as a lesser crime, hidden in the *Crimes Act 1990* (NSW). Under the new Act, a person may be charged with a 'domestic violence offence'. While the acts constituting such an offence are not new, being charged with the criminal acts under the new name has significant implications for bail, the offender's criminal record, and any future convictions.

Figure 4.3 A protester at the Women's March on 20 January 2019 in Sydney. The Women's March event aims to draw attention to the domestic violence perpetrated against women in Australia and to drive cultural change.

ISBN 978-1-108-86281-3

Under section 38, an ADVO made to protect an adult must automatically include any children living with that adult, unless sufficient reasons are given as to why the children should not be protected by the ADVO.

Additional domestic violence initiatives

Governments around Australia have recognised that there is still room for improvement in the way they tackle domestic violence. To this day, on average, one woman is killed each week in Australia as a result of domestic violence. New approaches to justice continue to be implemented to complement the legislative provisions in place to protect victims. Since 2015, the following initiatives have been introduced:

- in domestic violence cases in New South Wales, women and children can give evidence via audio or video link
- police officers have the power to collect video and photographic evidence at the time of responding to incidents of domestic violence.

The 2019 federal budget committed $328 million to domestic violence support, including the counselling service 1800RESPECT, training for community frontline workers, and specific support and prevention strategies for Aboriginal and Torres Strait Islander communities. State government funding is even more significant in this area: in 2017, the Victorian Government allocated $1.9 billion to implement recommendations of the Royal Commission into Family Violence, while the NSW Government has committed over $300 million to family violence support services.

Figure 4.3a A woman and child stand for a minute's silence against domestic violence in Hyde Park during the Sydney International Women's Day march on March 7, 2020.

ISBN 978-1-108-86281-3 Milgate et al.

New technology

Advances in technology always put the law under pressure to remain current. New technology contributes to changes that may be either radical and sweeping or subtle and incremental. For instance, the invention of the petrol-powered motor vehicle changed the way people in industrialised countries lived over the course of the twentieth century, and required the introduction of new laws for safety, ownership and licensing, and (eventually) environmental protection.

The development of life-support devices and treatments since the 1960s has meant that the legal definition of death had to be changed. As it is now possible to keep a person's heart and lungs operating for a significant period of time, but with no brain function, most jurisdictions now define death as the irreversible cessation of all functions of the entire brain, rather than just referring to the cessation of respiration and heartbeat.

More recently, the progress made in 'birth technologies' has also seen changes made to laws at both state and federal levels to resolve issues about parentage, inheritance and financial maintenance. As children can now be conceived from donated biological material, the law had to clarify and differentiate biological rights and obligations from 'social' rights and obligations deriving from the family roles and relationships in which people actually live.

The use of DNA evidence in criminal matters has led to convictions where previously, without other physical evidence, there would have been no conviction. As technology has improved, so have the chances of solving 'cold cases'. In New South Wales, there are more than 400 unsolved homicides, dating back as far as 1975. Because DNA is very stable over a significant period, biological material collected can be used decades later to create DNA profiles for analysis. Many cold cases are being reopened for police investigation, with DNA evidence and analysis being a key factor.

The *Crimes (Forensic Procedures) Act 2000* (NSW) was introduced to set guidelines for the DNA testing of criminal suspects. The Act sets out who may be tested and who may order the test, as well as detailed requirements for how the procedures may be conducted. The manner in which a DNA sample is obtained can determine its admissibility in court. In 2007, several amendments to this Act took place. Among other changes, section 11 was revised to allow DNA samples to be collected from suspects in an increased range of offences, which include some indictable offences and a number of summary offences.

Another major change concerns the period of time that a suspect's DNA material can be kept for **forensic** use. Under the *Crimes (Forensic Procedures) Act 2000* (NSW) prior to the 2007 amendments, DNA material had to be destroyed after 12 months if the criminal case against the person did not proceed. However, under the amended section 88(2)(c), where DNA has been collected from a suspect who ends up being convicted of a different crime as a result of an investigation of the same acts, the DNA material does not have to be destroyed.

forensic
relating to the detection and investigation of crime

Such provisions are intended to increase conviction rates. However, some have argued that without sufficient legislative protections relating to the use of this technology, there could be an erosion of the rights of accused persons. For example, the wait time for the results of a DNA test can be up to 180 days. This raises serious issues if the prosecution case is dependent on that evidence, especially if the accused has been refused bail.

To speed up the process, in 2008 the NSW Government decided to outsource some DNA testing to private laboratories. Such delegation of responsibility generally requires further safeguards to ensure the privacy, confidentiality and integrity of the testing procedures. However, in 2010 delays had not improved despite the state government saying that resources had been boosted in this area. In 2011, 67 innocent people spent an average of 239 days in custody before being exonerated by the District Court. Such delays are still a challenge for the criminal justice system in most states in Australia today.

The Law Society of NSW has a criminal law committee that believes delays in DNA analysis are still common. The committee has predicted that the adverse impact on the criminal justice system caused by backlogs at the laboratory will worsen.

ISBN 978-1-108-86281-3 Milgate et al.

Example: Identity theft

In more recent years there has been an increase in what is known as '**identity theft**' or 'identity **fraud**'. With the development of more sophisticated computers, scanning devices and software applications, this type of crime has become easier. It is also attractive, as it can yield significant rewards with a high probability of not being caught.

identity theft
obtaining or using the identity of another person in order to commit a range of fraudulent activities, usually to obtain financial gain

fraud
a dishonest act, done intentionally in order to deceive

Identity theft has the potential to cause immediate financial loss as well as damage to a victim's credit rating and reputation. It can also be psychologically distressing to know that someone else is using your identity to engage in serious criminal activities. Those activities could include using credit card numbers; fraudulently obtaining loans, government benefits or employment benefits; evading the payment of taxes; money laundering; drug smuggling; people smuggling; or stalking or intimidating someone.

The theft or assumption of another person's identity – or the use of his or her personal information – is not itself a criminal offence under Australian federal law, or in most states (except in South Australia and Queensland, which enacted legislation specifically criminalising identity theft in 2003 and 2007, respectively). Rather, it is what is done with the stolen identity that could be considered to be criminal conduct. Because assuming another person's identity is often a preparatory step in the commission of offences such as fraud or theft, such offences can be used to prosecute the identity theft. However, that requires the prosecution to prove the associated offence.

It can be difficult to adapt specific theft, fraud and forgery offences to fit the facts of identity crime. Most existing legislation, including the Model Criminal Code referred to in Chapter 3, requires at least proof that the accused had the intent to use the information to obtain a financial benefit. However, identities can be assumed for other reasons; for

Review 4.2

1 Identify some of the challenges new technologies can create for the criminal justice system. Assess how law reform has attempted to mitigate these challenges.
2 Outline some scientific advances (other than DNA testing) that have led, or may lead, to legislative changes. Construct a list of some of the factors that need to be considered or balanced when making changes.

Research 4.1

Using the internet, research the types of criminal activities that can be carried out under the following topics:

- terrorism
- unlawful immigration
- fraud involving email and the internet
- dissemination of obscene materials electronically
- funds transfer fraud
- health benefits fraud
- social security fraud.

However, please be careful to only access legitimate websites as these topics are fraught with the possibility of inappropriate material being presented online.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 4.4 In 2007, Denver Police officers mistakenly arrested Stephen Tendell for identity theft. In actuality, he was the victim of identity theft.

example, to cross national borders for the purposes of organised crime or terrorism.

Law reform in this area could include enacting state and federal legislation that creates one or more general identity crime offences. In 2008, this was the recommendation of the Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General. The model offences could include making, supplying or using information about a person that is capable of being used to identify him or her; possessing such information with intent to commit or facilitate an indictable offence; and possessing equipment to create such information.

Legislative provisions for identity theft in New South Wales

Section 192E of the *Crimes Act 1900* (NSW) is the provision most directly relevant to identity theft.

Subsection(1) states:

> A person who, by any deception, dishonestly:
> a) obtains property belonging to another, or
> b) obtains any financial advantage or causes any financial disadvantage,
> is guilty of the offence of fraud.
> Maximum penalty: Imprisonment for 10 years.

Section 192E is contained in the new Part 4AA, which deals with fraud. Also enacted were Part 4AB, which deals with identity offences specifically, and Part 4AC, which deals with money laundering. Specific sections within these parts defined such terms as 'deception', 'obtaining financial advantage or causing financial disadvantage' and 'identification information'.

Other sections in these parts of the *Crimes Act 1900* (NSW) that could be used to prosecute identity crime include:

- dealing with identification information (s 192J)
- possession of identification information (s 192K)
- possession of equipment to make identification documents or things (s 192L)
- intention to defraud by false or misleading statement (s 192G)
- intention to defraud by destroying or concealing accounting records (s 192F).

Unauthorised access to and modification of computer data are covered in Part 6 of the *Crimes Act 1900* (NSW), and these also might be used to prosecute identity crime.

ISBN 978-1-108-86281-3 Milgate et al.

4.3 Agencies of reform

As discussed, there are various reasons why the law may become dated or no longer able to regulate society in a fair and just manner. The extent to which the law may need to be reformed is usually investigated and reported on by one or more of the following organisations or groups.

Law reform commissions

Law reform commissions have been established by various parliaments within their own jurisdictions to report on matters referred to them under what is called the **terms of reference** for a particular inquiry. The reports may contain recommendations for ways to modernise or simplify the law, or to eliminate defects.

terms of reference
a set of guidelines used to define the purpose and scope of an inquiry

An essential feature of law reform commissions is that they are independent of the parliament that established them. This is important because political interference in the research and reporting process can skew the findings. It has also been said that when a government provides the terms of reference for an inquiry into an area of law reform, it should not already know the answer. In other words, the government should not know what the end result or recommendations will be.

For the purposes of our area of study, the two law reform commissions to be examined are the Australian Law Reform Commission and the NSW Law Reform Commission.

Australian Law Reform Commission

The Australian Law Reform Commission (ALRC) was established in 1975 and operates under the *Australian Law Reform Commission Act 1996* (Cth). It is an independent statutory body (i.e. it was established by an Act of parliament).

The main role of the ALRC is to review Commonwealth laws relevant to matters referred to it by the Attorney-General, to conduct inquiries into areas of law reform in these areas, and to advise the government on how the law can be changed to meet current needs. The ALRC also works to bring about **harmonisation** of Commonwealth, state and territory laws where possible. The ALRC must ensure that laws, proposals and recommendations do not trespass on personal rights and are consistent with Australia's international obligations, particularly in the area of human rights.

harmonisation
agreement among the laws of different jurisdictions

An inquiry involves a process of research and consultation. Once the ALRC has completed an inquiry and report, it makes recommendations to the federal government through the Attorney-General. The government can accept all or some of the recommendations or can ignore the report altogether. Sometimes the political climate at the time may determine whether the ALRC's recommendations become enacted into law.

In its annual reports, the ALRC publishes a summary of the implementation status of its recommendations. More than 80% of the ALRC's recommendations have been either substantially or partially implemented by the government. Some of the areas of law recently examined by the ALRC are the federal laws affecting **elder abuse**, the family law system, and the incarceration rates of Aboriginal and Torres Strait Islander peoples.

elder abuse
an act or failure to act to the disadvantage of an older person occurring in a relationship of trust

NSW Law Reform Commission

The NSW Law Reform Commission was set up under the *Law Reform Commission Act 1967* (NSW). It was the first of its kind in Australia. It has a similar role to that of the ALRC, but at the state level: to consider the laws of New South Wales with a view to eliminating aspects of the law that are out-of-date, unnecessary, too complex, or defective. The commission's role includes consolidating overlapping legislation, hence simplifying the law. The NSW Government refers issues to the commission for investigation as to what, if any, law reform is necessary. In its research, the commission will generally consult with the public.

ISBN 978-1-108-86281-3 Milgate et al.

Example: Unanimous vs majority jury decisions

In 2005, the NSW Law Reform Commission investigated changing the requirement that verdicts by juries be unanimous to verdicts being majority decisions of 11 or 10 jurors. Prior to this inquiry, research in 2002 by the NSW Bureau of Crime Statistics and Research showed that 8% of trials in the District Court between 1998 and 2001 resulted in a **hung jury**. This research also showed that in over 90% of these hung juries, the vote was 7–5 or 8–4. Given these statistics, there did not appear to be a strong basis for changing the system. There were not many cases in which a jury was unable to return a verdict because of one juror. Other arguments put forward in favour of majority verdicts were that they would make verdicts quicker and easier, would create less pressure on jurors, and would be consistent with most other Australian jurisdictions.

hung jury
a jury that is unable to reach agreement

Arguments put forward for retaining unanimous jury verdicts included:

- unanimity accords with the principle of 'beyond reasonable doubt'; arguably, if one or two jurors are not confident that the accused is guilty, that is enough to constitute reasonable doubt
- unanimity allows for greater deliberation of the issues
- juries may disagree for good reasons
- unanimity promotes community confidence in the justice system
- unanimity is consistent with the requirement of unanimity in trials for Commonwealth offences
- the number of hung juries is relatively small.

In its conclusions, the commission stated:

> We believe that until a comprehensive study is conducted in New South Wales to determine the existing practices in New South Wales jury trials, and what improvements need to be made, no major overhaul of the jury system should be attempted … The facts are that we simply do not know enough about how actual juries really deliberate and why they reach the decisions they do … Until more information is uncovered as to the problems that need to be addressed, the introduction of majority verdicts would be of limited value.

Despite this advice, the NSW Government passed the *Jury Amendment (Verdicts) Act 2006* (NSW). It amends the *Jury Act 1977* (NSW) to allow majority verdicts of 11–1 or 10–1 after a reasonable time for deliberation has passed (not less than eight hours) and where the court is satisfied that it is unlikely the jury will reach a unanimous verdict.

This case study, although historical, clearly illustrates that the changes may have been politically motivated, rather than to reform a law that was not working. An appeal to the 'law and order' vote has been a common feature of the political landscape since the late 1980s in New South Wales. A reason given for the introduction of the law was to protect the victims of crime from the anguish of a lengthy retrial. The extent to which this law will compromise the right of the accused to a trial with the highest standard of proof remains to be seen.

The extent to which New South Wales adopts recommendations of the NSW Law Reform Commission usually depends on economic and political considerations at the time. Further, the work of law reform commissions may provide evidence-based advice for governments that can be ignored subject to the political agenda of the government.

Parliamentary committees

Parliamentary committees can be established by both Houses of Parliament. For example, at the federal level, the House of Representatives and/or the Senate may not have sufficient time in parliamentary sitting sessions to discuss issues that arise from a particular piece of legislation. There may be flaws in the effectiveness of a law or the legislation may be particularly complex, requiring greater scrutiny. Committees scrutinise government activity, including policy and administrative decisions, and oversee the expenditure of public money.

ISBN 978-1-108-86281-3 Milgate et al.

Research 4.2

View the website of the Australasian Legal Information Institute (AustLII) and select one of the NSW Law Reform Commission's completed reports. Provide a brief outline of the following:

1 the purpose of the report
2 the findings of the report.

Ask your teacher for some assistance as you review the report you have chosen.

Figure 4.5 Natural Disasters Minister, David Littleproud, during question time in the House of Representatives in Canberra on 18 September 2019. The Coalition government announced an inquiry into the family law system in 2019.

A vote is usually taken to take something to committee. A committee may involve only senators or only members of the House of Representatives. A 'joint committee' has both members and senators.

A 'standing committee' is a committee that is permanent during the life of the body that appointed it. Standing committees inquire into and report on matters referred to them by the Senate or House of Representatives, including estimates of expenditure, Bills, and the performance of departments allocated to them. An example of such a committee is the Senate Standing Committee on Finance and Public Administration.

'Select committees' are small committees appointed for a particular purpose, or a once-only task.

Once a committee has been asked to undertake an inquiry, the terms of reference are drawn up. Members of the public and experts in a field may be asked to give submissions. The committee hears witnesses, examines evidence and formulates conclusions. The media usually attends and reports on committee proceedings.

As the hearings are conducted in public, every submission is recorded in **Hansard** and is available on the internet. At the end of an inquiry, the committee writes and **tables** a report in parliament.

Hansard
a full account of what is said in parliament or in parliamentary inquiries; named after the English printer, T. C. Hansard (1776–1833), who first printed a parliamentary transcript

table
to place on the table for discussion

The media

One of the hallmarks of a sound working democracy is a 'free' and 'fair' press. This means that the government is not able to influence what is reported and how it is reported, so stories that reach the public are an accurate account of what is really happening. Another essential feature of a working democracy is diversity of media ownership to dilute the influence

ISBN 978-1-108-86281-3 Milgate et al.

of individuals or media companies that may have a particular ideological view to push.

Because of their large audience and geographical reach, current affairs programs like the ABC's *7.30 Report* are able to interview important political figures, such as the prime minister, state premiers and cabinet ministers, about contentious issues. Keeping citizens informed allows members of the public to apply pressure on governments to address injustice, incompetence or corruption. Thus, the media can be a powerful vehicle for holding governments accountable.

The effectiveness of non-legal mechanisms in influencing law reform can depend on the politics of the day. For example, an issue that affects voters in a hotly contested electorate, or an electorate that is part of the government's key support base, is more likely to be addressed than one that affects voters in a safe seat. If votes in an electorate do not pose a threat to seats in parliament, then the issue may be ignored in the hope that it will eventually fade from public attention.

The modern media can promote law reform simply by reporting the stories of individuals who suffer discrimination, persecution or financial loss due to a poorly framed law. For example, the plight of victims of sexual assault has received significant attention by all forms of mass media over the past few years. The resulting law reform recognised that sexual assault is a 'special crime', which cannot be treated as all other crimes and requires additional legal responses. This will be examined in detail in Chapter 5.

Figure 4.6 *The Australian* newspaper on 21 October 2019. Media outlets across Australia ran blacked-out front pages as part of a campaign calling for reforms to protect public-interest journalism in Australia. The Right to Know coalition – made up of Australia's top media companies and industry organisations – advocates for stronger protections for media freedom following moves by successive federal governments to penalise whistleblowing and, in some cases, to criminalise journalism. The campaign followed raids on the ABC's Sydney headquarters and the home of a News Corp journalist in June 2019.

Non-government organisations

Non-government organisations (NGOs) are are independent of governments. They are under no obligation to conform to any government policy and therefore can be a source of objective information about various issues around the world. This is particularly important for people who live in countries with repressive governments that restrict freedom of speech.

According to Ball and Dunn, the common characteristics of NGOs are:

- NGOs are formed voluntarily by individuals
- NGOs are independent of government
- NGOs are not for private personal gain or profit; money generated goes towards the goals of the organisation, though it may also be used to produce information and pay for expenses such as utilities, publications and paid employees
- the aim of NGOs is to improve people's circumstances and prospects, within the scope of their mission. (C. Ball and L. Dunn, *Non-Governmental Organisations in the Commonwealth: Guidelines for Good Policy and Practice*, The Commonwealth Foundation, London, 1994.)

ISBN 978-1-108-86281-3 Milgate et al.

NGOs can work with governments where there are shared goals.

As a mechanism for law reform, the effectiveness of NGOs can vary. Some NGOs, such as Amnesty International and Greenpeace, have developed a formidable reputation in their pursuit of goals such as human rights and combatting environmental threats. Consequently, they now have the resources and the tactics, developed over many years, to put pressure on government.

However, due to NGOs' independent status, governments and other institutions can ignore them and continue to carry out practices that are contrary to the NGOs' goals. The Royal Society for the Prevention of Cruelty to Animals (RSPCA) has campaigned for an end to live animal exports to other countries, but the Australian Government is reluctant to stop this profitable trade.

Lobby groups

A lobby group is an organised group of people who try to influence government ministers or other members of parliament to advance their social or political agenda. The goal may be to change the law, to keep a particular, existing law, or to introduce new laws.

Lobby groups target members of parliament, parliamentary committees, the media and the public as well as governmental inquiries. They may do this by writing letters, requesting a meeting with a representative or senator, making policy submissions, writing letters to the editor or calling talkback radio. A lobby group may also be a NGO, an industry group or other interest group.

For example, the Lone Fathers Association of Australia has been a strong advocate for 'shared equal parenting'. This association is a national peak body for separated parents and states on its website that it is a non-sexist, non-sectarian, non-profit and self-help educational and welfare organisation devoted to the interests of lone fathers and their children, as well as their friends, extended family and carers. Membership is open to all separated parents – with the proviso that members must be willing to help financially support their children. Thirty-five per cent of the association's membership are women.

Amendments made to the *Family Law Act 1975* (Cth) in 2006 were intended to encourage the use of non-court-based services to deal with relationship difficulties and separation, and to ensure that children have meaningful relationships with both parents after a separation or divorce. A number of organisations – including the Women's Community Shelters, the Family Law Director of Legal Aid NSW, and the Women's Legal Service NSW – made submissions to a state inquiry into the effects of the amendments, expressing concern that they not only subordinated children's best interests to the interests of the parents, but also offered reduced protections for victims of family violence. A former Chief Justice of the Family Court, Alastair

Figure 4.7 Former Sex Discrimination Commissioner, Pru Goward, speaking at the Lone Fathers Association Australia national conference at Parliament House in Canberra on 23 June 2005.

ISBN 978-1-108-86281-3 Milgate et al.

Review 4.3

1 Compare and contrast the aims and methods of the following law reform agencies:
   - **a** law reform commissions and lobby groups
   - **b** parliamentary committees and law reform commissions
   - **c** lobby groups and the media
   - **d** lobby groups and non-government organisations.

2 Identify ways individuals can contribute to an inquiry by a law reform commission or a parliamentary committee on an issue that concerns them.

Nicholson, commented that the amendments were 'ill-researched, unduly influenced by fathers' groups and did little to reform family law'.

Further reform to the *Family Law Act 1975* (Cth), to attempt to address the adverse fall-out of the previous reforms, came into effect in June 2012. Lobby groups can be important agents of law reform as long as some groups' interests are not favoured over others simply because they are better organised and can more effectively articulate their views.

4.4 Mechanisms of law reform

The mechanisms of law reform are the 'machinery' that actually brings about changes. These include judicial and legislative branches of government and international organisations.

Courts

The manner in which courts make law through **precedent** (as outlined in Chapter 2) can be considered to be a means of law reform. Precedents made in higher courts clarify what the law should be in cases where the law is in an early stage of development or where there is a need to clarify the meaning of words contained in legislation.

precedent
a judgment that is authority for a legal principle and that provides guidance for deciding cases that have similar facts

Sometimes, matters come before a court before they have been considered by parliament. However, courts do not consciously set out to reform the law. The role of judges is to apply the law to the situation presented to them, and as such, law reform in the courts comes about in an *ad hoc* or piecemeal way. Although changes to the law do occur because of judicial decisions, they do so over an extended period of time.

Even so, it is well recognised that courts, especially the High Court of Australia, have delivered and will continue to deliver decisions that revolutionise the legal landscape in Australia. An obvious example is the 1992 Mabo decision (*Mabo v Queensland* (No 2) [1992] HCA 23) declaring that native title still existed within Australia and that the concept of *terra nullius* was a legal lie perpetuated by the British at the time of settlement.

Parliaments

Parliaments today are the institution where most law reform is realised. The process of changing the law occurs through the passage of Bills.

However, the impetus for this type of change usually comes from other sources: namely the conditions that lead to law reform and the agents of reform. Detailed knowledge of the subject matter is often required to report and comment accurately on areas where reform is needed, and parliamentarians' expertise does not always extend to this level.

The parliament is still a place, though, where proposed laws are debated. This can be a rigorous and intense process, especially if a proposed law is controversial or is a radical departure from previous laws. If a political party holds government, it obviously has a greater chance of its Bills being passed. A Bill's fate, however, may depend on which party or parties hold the **balance of power** in the Senate or, in New South Wales, in the Legislative Council.

balance of power
the power held by the political party whose vote is needed to pass legislation; under the Westminster system of government in Australia, usually determined in the upper House of Parliament

ISBN 978-1-108-86281-3 Milgate et al.

Figure 4.8 The High Court of Australia.

Political parties present their policies to the voters before each election, and if voted into power they are expected to fulfil these promises. For example, the Labor Party, under former leader Kevin Rudd, campaigned in 2007 with the promise of repealing John Howard's 'WorkChoices' legislation. By the end of 2008, the Rudd government had introduced new workplace relations legislation that abolished some of the harsher elements of WorkChoices. In 2012, the Gillard government, being a minority government, had to make many compromises with the Greens Party and independent members of parliament to pass legislation through parliament. In contrast, the commanding majority of the Baird Liberal NSW Government (2016) makes the passage of legislation a smoother process.

As parliament is the branch of government that makes law, it will continue to be the main mechanism by which major law reform will be carried out.

Amending Acts

Parliament must pass another Act to amend an existing Act. For example, the *Crimes (Forensic Procedures) Amendment Act 2007* (NSW), which changed several sections of the *Crimes (Forensic Procedures) Act 2000* (NSW), was enacted and came into force through normal parliamentary procedures. However, you will not find it in the current statutes of New South Wales, because it has been repealed. Indeed, section 4(1) of the Act states that 'this Act is repealed on the day following the day on which all of the provisions of this Act have commenced'. What's going on? Amending Acts are passed for a very specific purpose: to amend another piece of legislation. Once this is done, they are often no longer needed, though they must contain a provision to guard against their purpose being 'undone' when they are repealed. Section 4(2) of the *Crimes (Forensic Procedures) Amendment Act 2007* (NSW) states that 'the repeal of this Act does not … affect any amendment made by this Act'. The function of an amending Act is just that: to amend. The Act that it amends is called the 'principal Act'. View some amending Acts, and previous versions of principal Acts, by choosing 'historical notes' or 'Acts (as made)' in an online legislation database.

Lists of 'consolidated Acts' and 'in force legislation' will contain Acts that are currently in force; that is, that have not been repealed.

United Nations

The United Nations is the chief organisation involved in international law; it is the primary mechanism in the evolution and reform of the law governing states. The role of the United Nations in the development and implementation of international treaties was outlined in Chapter 2. The effectiveness of the United Nations in promoting peace and security around the world via international law is discussed in more detail in Chapter 2. Law reform may take place when Australia implements a treaty by passing domestic legislation that takes account of its international obligations.

ISBN 978-1-108-86281-3 Milgate et al.

Intergovernmental organisations

As mentioned in Chapter 2, many intergovernmental organisations are subsidiaries of the United Nations. These bodies are established to meet and decide upon certain international issues (e.g. refugees, tariffs and wealth). To this extent, they contribute to international law reform on a global and on a regional scale through the promotion and development of multilateral and bilateral treaties.

Other agencies

Other agencies of law reform are:

- Royal Commissions
- the NSW coroner
- the Office of the NSW Ombudsman
- the Australian Human Rights Commission.

For more information about the role these agencies play in law reform in Australia, visit the agencies' websites.

Review 4.4

1 Define 'precedents' and identify their role in court decisions.
2 Outline the process for amending a principal Act.
3 Identify the role of the United Nations.

ISBN 978-1-108-86281-3

Chapter summary

- Law reform is the process of changing the law to make it more current, to correct defects, simplify it and to remedy injustice.
- The conditions that give rise to law reform are changing social conditions, new concepts of justice and new technology.
- The law must reflect social values if it is to stay relevant and to ensure a high rate of compliance.
- When the law fails to deliver just outcomes to individuals or groups within the community, it may mean that new concepts of justice are needed.
- The rate of technological change in the world today has put the law under significant pressure to stay current. The law must change to accommodate new possibilities.
- Law reform commissions have been established by various parliaments within their own jurisdictions to report on matters referred to them. These commissions are independent of the government and submit recommendations that the government can implement fully, partially or not at all.
- Parliamentary committees are established by both Houses of Parliament to examine ways of addressing flaws in legislation, to look at how to simplify the effectiveness of a law, or to examine more closely legislation that is particularly complex. It could also be the case that developments within society warrant greater attention from the legislature and therefore a committee is set up.
- The media influence law reform by keeping citizens informed and holding governments accountable.
- Non-government organisations are organisations that are independent of governments. Their aim is to influence governments to make changes that will improve people's lives.
- The primary mechanisms of law reform are the courts and parliaments. The United Nations can be a mechanism of law reform in Australia through the country's participation in international treaties.

Questions

Multiple-choice questions

1 Which of the following statements is the most correct way to describe public morality?
   - **a** Public morality is a shared set of religious beliefs.
   - **b** Public morality refers to the crimes committed against the community.
   - **c** Public morality refers to the similar values and beliefs held by the majority of the community at a particular point in time.
   - **d** Public morality is the shared set of beliefs held by the Australian Parliament.

2 Law reform is necessary at times, because technology is advancing so fast. Which of the following is an area in which the law has had to change due to technological change?
   - **a** identity theft
   - **b** same-sex relationships
   - **c** collection of DNA evidence
   - **d** all of the above

3 Law reform commissions have been set up by parliaments to investigate which areas of the law need to be reformed. Which of the following determines the scope of their investigation?
   - **a** ministers' directions to the law reform commission
   - **b** terms of reference
   - **c** public opinion
   - **d** media commentary

4 Which of the following is not an agent of law reform?
   - **a** the media
   - **b** the Queen
   - **c** superior courts
   - **d** lobby groups

ISBN 978-1-108-86281-3 Milgate et al.

5 What could citizens do about a federal law that explicitly discriminates against naturalised citizens who were born overseas?
   a form a law reform commission at the local level
   b bring defamation proceedings against TV or radio stations that run programs on that law
   c call talkback radio stations and form a lobby group to pressure parliament
   d lobby the state Supreme Court

Short-answer questions

1 Explain why changing social conditions contribute to the need for law reform.
2 Explain, using examples, how and why the law has lagged behind technology.
3 Discuss the reasons why Australia no longer imposes capital punishment for murder.
4 Describe the extent to which the law has improved its response to domestic violence.
5 Outline some of the problems that have arisen with the advancement of DNA evidence.
6 Explain why identity crime can be difficult to prosecute.
7 Explain how the United Nations can be a vehicle for law reform in Australia.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter 5
Law reform in action

Chapter objectives

In this chapter, students will:

- identify and apply legal concepts and terminology
- discuss the effectiveness of the legal system in addressing issues
- investigate the interrelationship between the legal system and society
- discuss the role of law in encouraging cooperation and resolving conflict
- discuss the role of law in initiating and responding to change
- locate, select and organise legal information from a variety of sources, including legislation, cases, media reports, international instruments and documents
- account for differing perspectives and interpretations of legal information and issues
- communicate legal information using well-structured responses.

ISBN 978-1-108-86281-3 Milgate et al.

Legal oddity

In New South Wales, drivers must take care not to splash a person waiting for a bus with water or mud. Under the *Road Rules 2014* (NSW), splashing a bus commuter can cost drivers up to $2200! All other pedestrians are fair game – although you might get a few nasty words shouted at you!

ISBN 978-1-108-86281-3

Topic 1

Law reform and native title

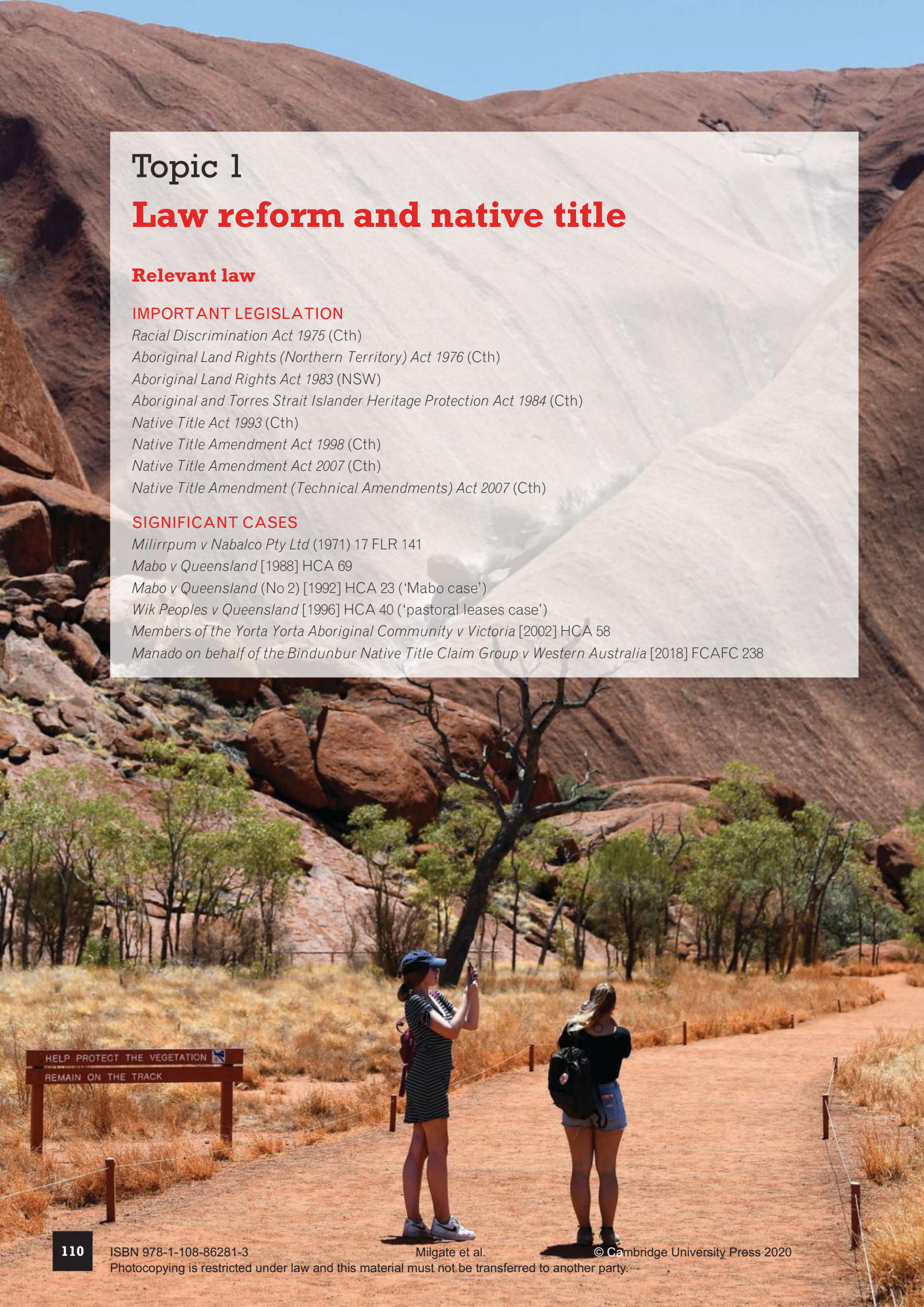
Relevant law

IMPORTANT LEGISLATION

Racial Discrimination Act 1975 (Cth)
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
Aboriginal Land Rights Act 1983 (NSW)
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
Native Title Act 1993 (Cth)
Native Title Amendment Act 1998 (Cth)
Native Title Amendment Act 2007 (Cth)
Native Title Amendment (Technical Amendments) Act 2007 (Cth)

SIGNIFICANT CASES

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
Mabo v Queensland [1988] HCA 69
Mabo v Queensland (No 2) [1992] HCA 23 ('Mabo case')
Wik Peoples v Queensland [1996] HCA 40 ('pastoral leases case')
Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58
Manado on behalf of the Bindunbur Native Title Claim Group v Western Australia [2018] FCAFC 238



ISBN 978-1-108-86281-3 Milgate et al.

5.1 Conditions that led to law reform relating to native title

In basic terms, **native title** refers to the ownership of and accessibility rights to land by the original inhabitants. In Australia it has a legal significance as a right to an area of land, claimed by peoples whose ancestors were the original inhabitants before European settlement and who can prove that they have had a continuous association with that land. It is a contentious topic in Australian law as, traditionally, Aboriginal and Torres Strait Islander peoples did not believe in individual ownership of land but that everyone owned the land. Thus, the concept of native title has meant that Aboriginal and Torres Strait Islander peoples have had to develop a new mind set in regards to property ownership so as to retain access to traditional lands.

native title
the right of Aboriginal and Torres Strait Islander peoples to their traditional lands

In fact, the term 'native title' has such significance that the High Court used it when they recognised Aboriginal and Torres Strait Islander people's property rights in *Mabo v Queensland (No 2)* [1992] HCA 23 ('Mabo case'). The Mabo decision was the first legal recognition that the Aboriginal and Torres Strait Islander peoples of Australia had a system of law and ownership of their lands that existed long before European occupation and settlement. This recognition overthrew the idea of ***terra nullius***, and subsequent cases have led to efforts to enshrine native title in legislation.

terra nullius
(Latin) 'land belonging to noone'; the idea and legal concept that when the first Europeans came to Australia, the land was owned by noone and was therefore open to settlement; this concept has been judged to be legally invalid

History of government policy

Aboriginal and Torres Strait Islander peoples have inhabited the Australian continent for the past 50000 years, living a sometimes **nomadic** lifestyle. Although they did not use legal documents or written laws, it is undisputed that Aboriginal and Torres Strait Islander peoples used oral law, customs and traditions to maintain order and control behaviour. Tribal elders employed negotiation, discussion, rulings and sanctions when it came to unacceptable behaviour. Traditional Aboriginal and Torres Strait Islander societies were, and still are, rule-governed.

nomadic
a term used to describe people who tend to travel and change settlements frequently

It is clear from the map in Chapter 2 that Aboriginal and Torres Strait Islander peoples lived in distinct cultural and language groups; it is not accurate to categorise Aboriginal and Torres Strait Islander peoples as belonging to a single cultural group. In 1788, when the First Fleet arrived, the belief at the time was that Aboriginal and Torres Strait Islander peoples were 'savages', with no concept of land ownership. There were no obvious fences, landlords, tenants or farms, and no signs to indicate ownership; therefore, the British Government declared the land *terra nullius*.

Figure 5.1 An engraving from *The Illustrated London News*, no. 2581, 6 October 1888.

ISBN 978-1-108-86281-3

TABLE 5.1 Government policies and their effects on Aboriginal and Torres Strait Islander peoples

Policy or law	Effect
Dispossession/dispersal (1788–1800s)	
Since Aboriginal and Torres Strait Islander peoples were not recognised as citizens, it was not a criminal offence to hunt, shoot and kill them. The general belief was that Aboriginal and Torres Strait Islander peoples would eventually 'die out'. **Martial law** in New South Wales (1816) Martial law in Tasmania (1824)	Massive reduction in Aboriginal and Torres Strait Islander population. Traditional Aboriginal and Torres Strait Islander people's areas were converted to farming lands. Aboriginal and Torres Strait Islander peoples could be shot on sight if armed with spears, or even if they were unarmed and within a certain distance of houses or settlements. Settlers were authorised to shoot Aboriginal and Torres Strait Islander peoples.
Protection (1869–1909)	
Aboriginal Protection Act 1869 (Vic) *Aborigines Protection Act 1909* (NSW)	These Acts gave wide powers to the Board for the Protection of Aborigines, which governed where Aboriginal and Torres Strait Islander peoples could live and work, what jobs they could do, and who they could marry and associate with. The powers of the board under the New South Wales Act were similarly wide, and included the power to remove children from homes to be placed in missions. This was the beginning of the Stolen Generations.
Assimilation and integration (1900–1962)	
By this time, Aboriginal and Torres Strait Islander peoples were a long way from 'dying out'; there was a policy shift to 'Europeanise' them so that they would leave behind their language, culture, artefacts and traditions, and become 'similar' to Europeans.	The European majority attempted to teach the Aboriginal and Torres Strait Islander population to be 'white'. This was met with both submission and resistance.
Nationality and Citizenship Act 1948 (Cth)	Aboriginal and Torres Strait Islander peoples became Australian citizens, along with everyone else, but not all states gave them full rights (e.g. the right to vote in Commonwealth elections).
In the 1940s 'exemption certificates' or 'citizenship certificates' were given to some Aboriginal and Torres Strait Islander peoples by some states.	Effectively, these certificates meant the holders were 'not Aboriginal'. The certificates had strict conditions (e.g. certificate holders had to live a 'European lifestyle') and could be revoked without warning.
1962 amendments to the *Commonwealth Electoral Act 1918* (Cth)	The 1962 amendments gave the right to vote in Commonwealth elections to all Aboriginal and Torres Strait Islander peoples in states that had not already provided this right.

ISBN 978-1-108-86281-3 Milgate et al.

TABLE 5.1 Government policies and their effects on Aboriginal and Torres Strait Islander peoples

Policy or law	Effect
Reconciliation (1967–)	
1967 referendum amending the *Australian Constitution*	The phrase 'other than the Aboriginal race in any state' was removed from section 51(xxvi) of the *Australian Constitution*, giving the Commonwealth Government the power to make laws specifically for the benefit of Aboriginal and Torres Strait Islander peoples. Section 127 – which provided that Aboriginal and Torres Strait Islander peoples were not counted as part of the population for census purposes – was deleted.
Report, 'Creating a Nation for All of Us' (2011), presented to the Prime Minister in 2012	The final report from an expert panel recommends that the *Constitution* be amended to recognise Aboriginal and Torres Strait Islander peoples.

The colonial laws and policies developed in relation to Aboriginal and Torres Strait Islander peoples did not serve their interests, but were suited to the white colonists' interests. Some examples of these laws and policies can be seen in Table 5.1.

dispossession
the removal or expulsion of people from their traditional lands

martial law
law enforced by the military over civilian affairs; overrides civilian law

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 10–12 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 5.1

1. Write a meaning for 'native title'.
2. Identify the Latin term that means 'land belonging to noone'. Outline why the British Government operated as though the land in Australia had no ownership.
3. Describe the legal systems of Aboriginal and Torres Strait Islander peoples prior to 1788.
4. Describe the three main policies of Australian governments in relation to Aboriginal and Torres Strait Islander peoples from 1788 to 1967. List one effect of each policy.
5. For the *Australian Constitution* to recognise Aboriginal and Torres Strait Islander peoples, it has to be amended. Using your legal knowledge, outline the processes required to change the *Constitution*.

ISBN 978-1-108-86281-3 Milgate et al.

5.2 Operation of the legal system relating to native title

Part of the rich and diverse cultural heritage of Aboriginal and Torres Strait Islander peoples was a well-developed structure of laws that governed their relationships with one another, and with the land. All of this changed with European settlement. It would take 200 years for this system to be formally recognised.

The doctrine of *terra nullius* in Australia

The term *terra nullius* means 'land belonging to no one'. As a common law concept, it refers not only to uninhabited territory, but also to territory that has no recognisable system of law, or social or political organisation. Under the 'doctrine of reception', when uninhabited land was colonised by Britain and no other system of law was apparent, then English law would dominate.

Over the course of a few decades, the perception that the country had very few inhabitants, and that they had no political or legal organisation and, thus, no sovereignty, led to the legal fiction justifying British possession and the imposition of British law. Although Governor Arthur Phillip was under orders to establish friendly relations with the Aboriginal and Torres Strait Islander peoples and did make serious efforts in this area, language and cultural barriers meant that negotiations had limited success. *Terra nullius*, as a justification for British policy, was evident by 1835 when explorer John Batman attempted to lease land from the Aboriginal and Torres Strait Islander peoples in the area around the Yarra River in what is now Victoria. Batman negotiated a treaty for the transfer of the land in exchange for tools, weapons, food and blankets. Shortly thereafter, Governor Richard Bourke declared the treaty null and void, on the basis that New South Wales – which at the time extended from Cape York in the north to Wilson's Promontory in the south and nearly as far west as the current border of Western Australia – belonged to the Crown, not to the Aboriginal and Torres Strait Islander peoples.

The concept of *terra nullius* has had a vast impact on the Aboriginal and Torres Strait Islander peoples. Their treatment by the colonists, which involved loss of land, loss of culture and forced dispersal, has led to considerable social problems. This will be discussed in more detail later in the course. By the 1840s, for example, most Aboriginal people in Tasmania had been killed, had died from introduced diseases, or had been forcibly relocated.

The concept of *terra nullius* has also had an enormous impact on native title claims (that is the right to claim ownership of traditional lands and waters). Any Aboriginal or Torres Strait Islander community that has tried to claim native title has had to prove that they are the traditional owners of the land and have an ongoing connection with it. As the land was considered empty prior to British settlement, it also meant that the settlers could take possession of most of the arable land with government approval – which entailed driving off anyone else who might be living on this land at the time. Thus the quandary arises, if the traditional owners of the land have been forced off their land (in some cases, 200 years ago), how then do they prove a continuing connection with this land under Aboriginal law and custom?

The legal status of Aboriginal and Torres Strait Islander peoples up to 1967

The doctrine of *terra nullius* meant that in the eyes of the law Aboriginal and Torres Strait Islander peoples did not exist as citizens. The criminal laws did not protect Aboriginal and Torres Strait Islander peoples and, throughout the first half of the nineteenth century, government policies tended to accept violence as a way of dealing with conflicts. One of the most significant and tragic events of the 1800s occurred in New South Wales at Myall Creek, near Bingara. In June 1838, a group of Aboriginal peoples who had set up camp on a cattle station were brutally attacked and killed by a group of white men (11 convicts and one free man), who claimed they were acting in retaliation for the theft of cattle. Twenty-eight Aboriginal men, women and children were slaughtered.

The Governor of New South Wales, Sir George Gipps, ordered a police investigation into the massacre. This was the first time that the British colonial administration had taken a decision to apply the criminal law on behalf of Aboriginal and Torres Strait Islander peoples. Initially, the 11 convicts were found not guilty of the crime; however, a subsequent retrial sent seven men to their death by hanging. Because of these consequences, further massacres of Aboriginal and Torres Strait Islander peoples went unreported.

ISBN 978-1-108-86281-3 Milgate et al.

Until the 1967 referendum, there were two references to Aboriginal and Torres Strait Islander peoples in the *Constitution*: section 51(xxvi) and section 127. Section 127 excluded Aboriginal and Torres Strait Islander peoples from the census. Section 51(xxvi) enabled the Commonwealth to make laws in respect of 'people of any race for whom it is deemed necessary to make special laws' but excluded 'the aboriginal race' from this power; this effectively reserved the responsibility for Aboriginal and Torres Strait Islander peoples affairs to state governments. Since there were no federal laws governing the welfare of Aboriginal and Torres Strait Islander peoples, different states interpreted their rights and legal status in various ways, resulting in inconsistencies and inhumanity.

Many people incorrectly believe that the 1967 referendum gave Aboriginal and Torres Strait Islander peoples the right to vote. However, the right to vote in Commonwealth elections had been extended to all Aboriginal and Torres Strait Islander peoples who did not already have this right under the laws of their state – namely, those in Western Australia and Queensland – by amendments in 1962 to the (Cth). The right to vote in state elections had been achieved in all states by 1965. By contrast, most Australians had been able to vote in federal and state elections since 1911.

Nor did the referendum grant citizenship to Aboriginal and Torres Strait Islander people: most of the federal and state laws discriminating against them had been repealed by 1967. Over 90% of the population voted 'yes' on the amendments to the *Constitution*. Section 51(xxvi) was amended to allow the federal government to legislate for Aboriginal and Torres Strait Islander peoples and to override any discriminatory state laws. Section 127 was deleted. From this point on, Aboriginal affairs became a federal issue, and Aboriginal and Torres Strait Islander peoples were counted in the census.

The development of native title

Native title claims in the Northern Territory

In 1963, Yolngu people from the Gove Peninsula, in eastern Arnhem Land, sent a bark petition to the Commonwealth Government protesting the removal of some 300 hectares of land for bauxite mining without their permission. The petition failed to move the federal government to recognise the rights of the Yolngu people and hence the 'Gove land rights case' (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141) commenced in the Northern Territory Supreme Court in 1971. In his ruling, Justice Blackburn stated that if the Yolngu people did have any type of native title rights, they would have been extinguished under common law. Thus, the doctrine of *terra nullius* prevailed and they could not prevent mining on the land. Three years after the unsuccessful Yolngu petition, members of the Gurindji people walked off the job at two cattle stations in the Northern Territory, protesting against poor working conditions and pay. Their action was also a protest against dispossession of their traditional lands by **pastoralists**.

pastoralists
farmers raising sheep or cattle, usually on large areas of land

Figure 5.2 Bill Onus, the President of the Victorian Aborigines Advancement League, taking part in a march related to the 1967 Australian referendum.

ISBN 978-1-108-86281-3

In 1972, the Australian Labor Party, led by Gough Whitlam, was elected after 23 years in opposition. That year, the government responded to the failed Gove land rights case by establishing the Department of Aboriginal Affairs. A Royal Commission into Aboriginal land rights was established, under Justice Edward Woodward, who as a barrister had acted for the Yolngu people in the case. Following the commission's findings, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was drafted. This legislation established a process for traditional owners to claim various parcels of land that were listed as available.

Mabo cases

Between 1985 and 1992, Eddie Mabo and four other men from the Murray Islands challenged the Queensland Government in two cases in the High Court of Australia: *Mabo v Queensland* [1988] HCA 69 and *Mabo v Queensland (No 2)* [1992] HCA 23.

The first case questioned the validity of a state law that attempted to abolish native title by asserting state ownership of the islands off the coast of Queensland. The High Court held that the Queensland Act was inconsistent with the *Racial Discrimination Act 1975* (Cth), because under it, the Meriam people's right to own property would be limited to a greater extent than that of other members of the community. Under the Constitution, federal law prevails where there is a conflict between state and federal laws.

The second case, now known as the Mabo case, concerned the Meriam people's right to occupy and control Murray Island (Mer). Although Eddie Mabo and one of his fellow plaintiffs died during the course of the case, in May 1992, the High Court ruled (by six judges to one) that Australia was not *terra nullius* and that the Meriam people clearly held native title to their land.

The High Court's decision in the Mabo case gave Australian law the doctrine of native title. The court recognised the traditional rights of the Meriam people to the eastern Torres Strait islands, and also held that native title existed for all Aboriginal and Torres Strait Islander peoples in Australia before European contact. To make clearer the legal position of landholders and the processes that must be followed in claiming native title, the federal government passed the *Native Title Act 1993* (Cth).

The Mabo case and the ensuing legislation significantly changed the legal status of Aboriginal and Torres Strait Islander peoples in relation to native title and gave some people access to parcels of land throughout Australia to practise their traditional way of life. It did not allow Aboriginal and Torres Strait Islander peoples to 'own' land, as this could, thereby, restrict current owners' access to that land. In December 1993, during the passage of the Native Title Bill through parliament, Prime Minister Paul Keating said:

> [T]oday, as a nation, we take a major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians. We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent, the standing they are owed as seminal contributors to our national life and culture: as workers, soldiers, explorers, artists, sportsmen and women – as a defining element in the character of this nation – and the standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture.

Growing recognition of native title in some countries

Native title means the right of Aboriginal and Torres Strait Islander peoples to live on their land and use it for traditional purposes. Throughout the world, there has been growing recognition of the rights of First Nations peoples to their own lands. Hunting and fishing rights and land ownership rights have been returned to many First Nations groups in different countries.

There has also been a move to give greater self-determination to First Nations groups. Self-determination means the right of First Nations peoples to control the use of their traditional lands, as well as the local economy and social policy. Māori in New Zealand, Inuit in Greenland and

ISBN 978-1-108-86281-3 Milgate et al.

Review 5.2

1 Outline the legal status of Aboriginal and Torres Strait Islander peoples prior to 1967.
2 In regards to the recognition of Aboriginal and Torres Strait Islander peoples, recall the changes that occurred between 1967 and 1993. Analyse why these changes occurred.
3 Describe how the Yolngu people's native title claim was resolved in court. Recall how the newly elected Whitlam government responded to this decision.
4 Explain the importance of the 1992 Mabo decision for the legal status of Aboriginal and Torres Strait Islander peoples.
5 Evaluate the importance of the statement made by Prime Minister Paul Keating in 1993 on the passing of the *Native Title Act 1993* (Cth).

Legal Links

The Australian Institute of Aboriginal and Torres Strait Islander Studies publishes independent research on native title. This research is available on the institute's website.

Canada, and Aboriginal and Torres Strait Islander peoples are three groups who have been given greater recognition in terms of native title and self-determination in their own countries.

Figure 5.3 New Zealand is a good example of the integration of indigenous culture.

5.3 Agencies of law reform relating to native title

When claiming traditional ownership of land, Aboriginal and Torres Strait Islander groups must have their claims legally validated. The only courts that can make this determination are the Federal Court and the High Court. Initial claims are brought to the National Native Title Tribunal (NNTT), but this body cannot make legal decisions about native title; it can only carry out research and make recommendations.

Claimants may obtain one of three types of determination:

- unopposed determination (if the application is uncontested)
- consented determination (if the parties involved reach an agreement through mediation)
- litigated determination (the application is contested in a court of law, and a judge makes a decision).

ISBN 978-1-108-86281-3

Legal Links

The Federal Court of Australia's website provides information about the processes involved in claiming native title and judgments on native title cases.

High Court

With respect to native title claims, the High Court of Australia has the same role as it does with any other legal case: as a court that hears appeals about decisions made in other courts of Australia. It cannot show sympathy or favouritism, or be swayed by public opinion when hearing these cases.

Initial claims of native title made by Aboriginal and Torres Strait Islander peoples are brought before the NNTT, which investigates and mediates them. The Federal Court of Australia will make the determination on whether native title exists. Any appeal against a determination is made to a full sitting of the Federal Court and then to the High Court of Australia. Thus, the High Court acts as a court of last resort in determining whether native title exists in claims made about certain geographical places in Australia.

Mabo case

The Mabo case is important because it led to the introduction of native title legislation. It is also significant because it gave recognition to the Aboriginal and Torres Strait Islanders inhabitants of Australia.

In this case, the High Court recognised the existence of native title for a group of Murray Islanders in the Torres Strait. Eddie Mabo argued that they could prove uninterrupted occupancy of traditional lands, and that the state legislation annexing the islands did not extinguish their pre-existing rights to it.

The case required the High Court to consider the legality of the declaration of *terra nullius*. The court ruled that the islanders were the traditional owners of the land and that they had the right to possess and occupy the islands and enjoy use of their traditional lands. The High Court also established guidelines for future claims of native title. These guidelines included the provision of compensation where the federal government took the native title rights back.

Because of the Mabo decision, the federal government enacted the *Native Title Act 1993* (Cth). The Act has the purpose of:

- providing for native title recognition and protection
- establishing methods and standards by which future dealings that affect native title may proceed
- establishing a process for resolving native title claims and validating past grants of property interests that may be thrown into doubt because of the recognition of native title.

The Act stopped short of defining native title and created the Native Title Tribunal to determine the validity of native title claims. If native titleholders are unable to reclaim their lands and thus exercise their rights, the tribunal determines the compensation to be paid.

Wik case

The Mabo decision and the *Native Title Act 1993* (Cth) resulted in other Aboriginal and Torres Strait Islander groups attempting to reclaim land. The Wik and the Thayorre people launched a case against the Queensland Government in 1996, claiming native title rights to land that was being used by pastoralists, under pastoral leases. Under a pastoral lease, the government owns the land but the farmers have exclusive right to use it. The Federal Court ruled that the existence of pastoral leases extinguished the right to native title. This decision was appealed to the High Court, which ruled that the Wik and Thayorre people were entitled to their traditional lands. The court found that pastoral leases and native title could co-exist but that when conflict arose, the pastoral leases would prevail (*Wik Peoples v Queensland* [1996] HCA 40).

While the Wik decision did not grant automatic title over Crown land, it caused concern among pastoralists and mining companies that they would have to enter into lengthy negotiations with

ISBN 978-1-108-86281-3 Milgate et al.

Aboriginal and Torres Strait Islander peoples over access to and use of land. In response to this concern in rural Australia, the federal government enacted the *Native Title Amendment Act 1998* (Cth), which amended the *Native Title Act 1993* (Cth) and introduced some additional changes. There was much debate in parliament over this Act before it was passed. While the government had a large majority in the House of Representatives, it did not enjoy as much support in the Senate.

The main provisions of the Act are as follows:

- It extinguished native title over any land that was considered privately owned prior to 1 January 1994.
- When native title exists alongside a pastoral lease, the pastoralist is allowed to use the land for primary production without having to consult people who have native title interests.
- Tough tests were imposed to determine the right to native title. At least one member of the claimants must prove a continuous link with the traditional lands.

Yorta Yorta case

The Yorta Yorta people are Aboriginal people whose traditional lands are located in northeast Victoria. They applied to the Native Title Tribunal for determination of native title in respect of public land and water in February 1994. The Yorta Yorta Aboriginal community claimed that some areas of state forests and waterways in northern Victoria and southern New South Wales were their traditional lands. The Native Title Registrar, who assesses claimants' applications to the Tribunal, accepted their application in May 1994. The application was under mediation from September 1994 until May 1995, and then referred to the Federal Court.

The Federal Court dismissed the claim. Justice Olney found that, as the Yorta Yorta people had stopped occupying their traditional lands in the nineteenth century the evidence did not support the claim. He said, 'The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs.'

The Yorta Yorta people appealed this decision but the Full Court of the Federal Court upheld Justice Olney's findings.

Figure 5.4 Francis Firebrace poses for a photograph during the London Sorry Day event at the Embankment on 25 May 2006 in London, England. Francis Firebrace of the Yorta Yorta people is a storyteller, inspirational speaker, performer and artist.

The Yorta Yorta then appealed to the High Court (*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58). They claimed that the previous judgments had been wrong in requiring them to prove continuous observance of traditional laws and customs in relation to land. The High Court handed down its decision in December 2002 and upheld the decision of the Federal Court by a majority of five to two.

In its decision, the High Court examined the phrase 'traditional laws and customs', and considered what was required for proving continuous observance of these laws and customs.

ISBN 978-1-108-86281-3 Milgate et al.

In its decision, which was to influence future native title claims, the court held that claimants seeking to prove native title must establish that there has been an acknowledgment and observance of customs and laws on a substantially uninterrupted basis since the arrival of British sovereignty. The fact that these laws and customs have been passed down orally is not sufficient; claimants must show that their way of life is influenced by these traditions. In this way, the High Court decision clarified the law with respect to the evidence necessary to prove native title.

Recent cases

There have been other significant cases and amendments that have strengthened Aboriginal and Torres Strait Islander peoples rights in the area of native title in Australia. In 2001, the case of *Yarmirr v Northern Territory* (2001) 208 CLR 1 determined that native title rights of the Croker Island community included free access to the sea and seabed, the first time that rights involving waters had been allowed.

In *Bennell v Western Australia* [2006] FCA 1243, the judge ruled that native title existed within an area in and around Perth. This was the first time native title was recognised over a capital city and its surroundings. A subsequent appeal, *Bodney v Bennell* [2008] FCAFC 63, lessened the impact of this judgment.

Native title cases take a long time to be determined. This can be seen in the case of *Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2017] FCA 136. The claim first came to the Federal Court's notice in 2013, with a hearing starting in September 2015 and a decision made in late 2017. Not all parties involved in the claim were happy with the decision and appeals were made against the decision. However, in one of the last decisions of 2018, the full Federal Court handed down its judgment in favour of the Bindunbur and Jabirr Jabirr/Ngumbarl native title claim groups over land near Broome (*Manado on behalf of the Bindunbur Native Title Claim Group v Western Australia* [2018] FCAFC 238). The whole legal process was time-consuming, expensive and wearying for all involved.

Review 5.3

1. Define 'native title' and 'self-determination'. Identify which Aboriginal and Torres Strait Islander groups have gained greater recognition in these areas.
2. Assess the significance of the Mabo decision.
3. Describe the impact of the Wik case.
4. Providing examples, explain how a government might respond to the following scenarios:
   - **a** a court decision whose outcomes or likely consequences the government supports
   - **b** a court decision whose consequences are as yet unclear
   - **c** the concerns of groups within society about a court decision.
5. Describe the native title claim of the Yorta Yorta community.
6. Outline the legal history of the Yorta Yorta claim to native title.
7. Explain why the Yorta Yorta native title claim was denied.
8. Discuss how the Yorta Yorta decision may affect other native title claims.

Research 5.1

Read online the article, 'Native title rights, regulations and licences: The Torres Strait Sea Claim' (*The Conversation*, 8 August 2013). Compare the Torres Strait Sea Claim to the original Mabo case.

1. Summarise the three important preliminary points discussed in the article.
2. Describe how previous cases have paved the way for the Torres Strait Sea Claim case.

ISBN 978-1-108-86281-3 Milgate et al.

National Native Title Tribunal

The National Native Title Tribunal (NNTT) is a federal government agency set up under the *Native Title Act 1993* (Cth). Under the direction of the Federal Court of Australia, it mediates claims for native title.

The aim of the NNTT is to help resolve native title issues. The tribunal plays a variety of roles; for example, it may act as an arbitrator if the people involved are unable to come to agreement about proposed developments. It also helps in the negotiation of other sorts of agreements such as those for Aboriginal and Torres Strait Islander peoples land use. If requested, the tribunal will aid people who are negotiating proposed developments (future acts) such as mining. It is not a court and does not decide whether native title exists.

The process of proving native title can be slow and expensive. In the period between the establishment of the NNTT and 31 December 2011, 200 applications were submitted and 175 determinations were made. Of the 175 determinations:

- 134 were that native title exists over all or part of the area
- 41 were that native title does not exist.

Parliament

Parliament's role in recognising native title is to enact legislation to protect the property rights of Aboriginal and Torres Strait Islander peoples.

Public pressure and lobbying by interested parties have seen new laws regarding native title introduced in Australia. As mentioned above, the *Native Title Act 1993* (Cth) was enacted in response to lobbying by Aboriginal and Torres Strait Islander communities for statutory law reflecting the Mabo case, but also lobbying by the mining and pastoral sectors concerned about potential claims of native title on their land.

Members of parliament, as representatives of their constituents, also have a role to play in introducing and encouraging discussion and debate about issues that concern all Australians. In this way parliament is able to address issues of equity and justice.

In 2008, the then Prime Minister, Kevin Rudd, apologised to Aboriginal and Torres Strait Islander peoples for past injustices inflicted on them. Speaking in the House of Representatives in Canberra on 13 February 2008, Rudd said the parliament apologised for laws and policies which had 'inflicted profound grief, suffering and loss on these, our fellow Australians'. Actions such as these by politicians and parliament are a way of bringing about social, if not legal, change.

Video

State legislation

As discussed, the Mabo and Wik decisions led to Commonwealth legislation in the area of native title and self-determination for Aboriginal and Torres Strait Islander peoples. State legislation has also been enacted to give rights to and protect the interests of Aboriginal and Torres Strait Islander peoples. The *National Parks and Wildlife Act 1974* (NSW) provides for the protection of places and relics which are of significance to Aboriginal culture. Under this Act, it is an offence to knowingly destroy, disturb or remove these objects or to destroy, deface or damage these places.

The *Aboriginal Land Rights Act 1983* (NSW) recognises that:

- land was traditionally owned and occupied by Aboriginal people
- land has spiritual, social, cultural and economic significance to Aboriginal people
- it is appropriate to acknowledge the importance of land to Aboriginal people
- government decisions made in the past have had a negative effect on Aboriginal land ownership.

This Act established a system of land councils. The NSW Aboriginal Land Council has the power to make

Legal Links

More information about the NNTT can be found on the tribunal's website.

ISBN 978-1-108-86281-3 Milgate et al.

claims on Crown land, approve or reject agreements to allow mining on Aboriginal land, conciliate disputes, and advise the state government on land rights. The Act provided for the ownership of reserve land to be transferred to the Aboriginal people, through a local council or the state Land Council, but in fact, only a small percentage of land has been transferred. Section 28 of the Act provided for 7.5% of land tax in New South Wales to be paid to the state Aboriginal Land Council to meet administrative costs and to finance land purchases and future development, but this ceased in 1998 due to a 'sunset clause' in the Act, and section 28 was repealed in 2001.

The Act also permits local Land Councils to negotiate agreements with the owners of land to give Aboriginal and Torres Strait Islander peoples access for the purpose of hunting, fishing or gathering.

Figure 5.5 Kevin Rudd's apology to the Stolen Generations on 13 February 2008 was streamed across Australia.

Federal legislation

Federal parliament has enacted legislation to protect all parties involved in, and affected by, native title claims. As discussed above, the *Native Title Act 1993* (Cth) was the Australian Government's response to the High Court's Mabo decision. The Act provides for native title to be recognised and integrated into the land title system. However, if state or territory laws can function concurrently with the Act, then the Commonwealth Government is not allowed to interfere with their operation.

The Howard federal government responded to the High Court's Wik decision with the *Native Title Amendment Act 1998* (Cth). The amendments incorporated the High Court's decision that native title rights could co-exist on land held by pastoral leaseholders. The same government amended the legislation by the *Native Title Amendment Act 2007* (Cth) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth). These changes also allowed for Township Leases. This is where the Australian Government and the traditional owners in a township negotiate for a town to be leased for between 40–99 years. The Office of Town Leases oversees the leases and processes. The effects of the 2007 changes were intended to improve the overall efficiency of the processes involved in claiming native title. Commonwealth legislation has also been enacted to provide some Aboriginal and Torres Strait Islander people's rights over bodies of water. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is used to protect areas of water and of land that have cultural significance for Aboriginal and Torres Strait Islander peoples.

More recent changes

The *Native Title Amendment Act 2007* (Cth) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) were passed by the Howard government in 2007 to bring efficiency to the native title process by speeding up determinations. The *Native Title Act 1993* (Cth) was further amended by the Rudd government with the *Native Title Amendment Act 2009* (Cth), which allowed both the court and the tribunal to mediate. The court is also allowed to refer an application to another 'appropriate person or body' to mediate. More amendments came with

ISBN 978-1-108-86281-3 Milgate et al.

the *Native Title Amendment Act (No 1) 2010* (Cth). It sets up a process for dealing with the construction of public housing and some other public facilities.

The *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) was passed to provide greater clarification and give greater validity and enforceability to Aboriginal and Torres Strait Islander land use agreements. Students are advised to check for updates that are more recent on a regular basis as part of their studies for this subject.

Native title as a collective right

A collective right is one that is claimed and shared by a group of people. Native title is a collective right, as it cannot be claimed by an individual, only by a group (e.g. the Wik people). All members of the group share the rights that are gained.

However, despite native title being a collective right, an individual can bring a claim before the courts, as seen in the Mabo case. As the individual is acting on behalf of the group, all members of the community that he or she represents will share the rights gained.

5.4 Effectiveness of law reform relating to native title

As discussed, there has been progress in the area of law reform relating to native title; however, this progress has been relatively slow. Due to the very nature of the law, all stakeholders involved in (and affected by) native title claims must be considered when proposing and enacting new legislation and, as such, the *Native Title Act 1993* (Cth) and its amendments recognise not only the rights of the traditional owners, but also those of current landholders.

Although one of the biggest legal steps forward was the overturning of the concept of *terra nullius* in the Mabo case, the initial use of *terra nullius* by the British has continued to be a major obstacle for those communities making native title claims; consider the Yorta Yorta people's claim for their traditional lands in Victoria. The court cases took eight years and the claim was eventually denied. The basis of the High Court's determination was that the Yorta Yorta could not prove a recent history of traditional ownership of this land. The main reason that they could not prove this history of ownership was because, when the British took over this land, they excluded the Yorta Yorta community. This is a problem faced by other Aboriginal and Torres Strait Islander communities in claiming traditional ownership.

It is undeniable that major steps have been taken with respect to native title, by both the judicial and legislative branches of government. However, those interested in reform are also faced with the fact that the law protects the property rights of people who themselves had nothing to do with colonial dispossession, but whose interests are at odds with native title claims. In addition, legal progress is very slow; for example, in 1996 the Yaegl people lodged a claim over land around the mouth of the Clarence River. Further claims were lodged in 1998 and 2011 over adjoining lands. When native title was finally awarded in 2015 many of the original claimants had died.

Future progress is likely to depend on the articulation and maintenance of new concepts of justice, and sustained public commitment to electing governments that will legislate for those aims. As can be seen above, the federal parliament does make ongoing amendments to current legislation regarding land rights.

Review 5.4

1. Draw a timeline showing the recognition of native title rights and self-determination for Aboriginal and Torres Strait Islander peoples in general and in New South Wales in particular.
2. Outline the major legislation governing native title at the federal and state levels.
3. Describe the major federal and state legislation that protects places and objects of cultural significance for Aboriginal and Torres Strait Islander peoples.
4. Assess in what way native title is a collective right.

ISBN 978-1-108-86281-3 Milgate et al.

Topic 1 summary

- 'Native title' is the right of Aboriginal and Torres Strait Islander people' to an area of land with which they have an ongoing association.
- The concept of *terra nullius* was used to justify the implementation of British law and the dispossession of Aboriginal and Torres Strait Islander peoples.
- The 1967 referendum amended the *Australian Constitution* to allow the Commonwealth to legislate for Aboriginal and Torres Strait Islander peoples, and to allow them to be counted in the census.
- The Mabo case was a significant High Court decision that abolished *terra nullius* and led to the federal government passing the *Native Title Act 1993* (Cth).
- Further state and federal legislation and court decisions have been instrumental in law reform in the area of native title.

Topic 1 questions

Multiple-choice questions

1 British policies towards Aboriginal and Torres Strait Islander peoples were based on which of the following?
   - **a** colonial conquest, then attempts at assimilation
   - **b** mediation
   - **c** native title
   - **d** implied rights contained in the *Australian Constitution*

2 What was the effect of the 1967 amendments to the *Australian Constitution*?
   - **a** The amendments gave Aboriginal and Torres Strait Islander peoples the right to vote.
   - **b** The amendments allowed the Commonwealth to make laws for Aboriginal and Torres Strait Islander peoples and allowed them to be counted in the census.
   - **c** The amendments gave Aboriginal and Torres Strait Islander peoples native title.
   - **d** The amendments gave Australian citizenship to all Aboriginal and Torres Strait Islander peoples in New South Wales and Victoria.

3 Which of the following statements is true of the Wik decision?
   - **a** The Wik decision gave Aboriginal and Torres Strait Islander peoples native title over all pastoral land.
   - **b** The High Court held that pastoral leases can co-exist with native title, but where there is a conflict, the pastoral lease takes priority.
   - **c** The Wik decision overturned Mabo.
   - **d** The High Court found that the *Native Title Act 1993* (Cth) was unconstitutional.

4 The aim of the NNTT is:
   - **a** to assist with native title negotiations
   - **b** to determine whether a particular place is *terra nullius*
   - **c** to advise the Federal Court of Australia on native title
   - **d** to hear criminal cases involving Aboriginal and Torres Strait Islander peoples.

5 Which of the following statements is true of native title?
   - **a** Native title can be claimed by an individual.
   - **b** Native title is a collective right shared by a group.
   - **c** Native title is the modern term for *terra nullius*.
   - **d** Native title is contained in section 128 of the *Australian Constitution*.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

1 In your own words, describe the Myall Creek Massacre. Discuss why, in your opinion, this massacre occurred.
2 Describe the role of the NNTT.
3 Identify who Eddie Mabo was. Describe how he changed Aboriginal and Torres Strait Islander peoples' rights.
4 Discuss the relationship between court decisions and subsequent legislation. Explain how law reform relating to native title has taken place so far.
5 Reforms continue to take place in regards to native title. Research and write a brief summary of the more recent changes to the law in regards to native title and community opinion about this issue.

ISBN 978-1-108-86281-3 Milgate et al.

Topic 2

Law reform and sport

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Sports Commission Act 1989 (Cth)
Disability Discrimination Act 1992 (Cth)
Civil Liability Act 2002 (NSW)
Australian Sports Anti-Doping Authority Act 2006 (Cth)
Fair Work Act 2009 (Cth)
Crimes Amendment (Cheating at Gambling) Act 2012 (NSW)

SIGNIFICANT CASES

Darren Kennedy v Narooma Rugby League & Gary Pender (unreported, Bega District Court, 2001)
Gardner v AANA Ltd [2003] FMCA 81
Taylor v Moorabbin Saints Junior Football League & Football Victoria Ltd [2004] VCAT 158
Director of Public Prosecutions (NSW) v Elias [2013] NSWSC 28
Goode v Angland [2017] NSWCA 311
De Belin v Australian Rugby League Commission Limited [2019] FCA 688
Isileli 'Israel' Folau v Rugby Australia Ltd (unreported, Federal Circuit Court, 27 November 2019)

ISBN 978-1-108-86281-3

5.5 Conditions that led to law reform relating to sport

Significant changes have occurred within the Australian sporting landscape over the past few decades. Sport has become an integral part of Australian culture and Australians have performed incredibly well domestically and on the world stage. The rise of professional sport means that athletes such as Sam Kerr, Andrew Bogut and Steve Smith are 'at work' when we watch them play. These athletes are considered employees and their teams or organisations become their employers.

Domestically, intense competition and high stakes surround sports such as rugby league (NRL), rugby union (Rugby AU), Australian Rules (AFL), soccer,basketball and netball. In addition, sports such as tennis, swimming and athletics have also achieved high status globally. Unsurprisingly, Australian sport has become 'big business' and significant prize-money and prestige are the norm. Large corporations are increasingly associating themselves with a team, athlete or competition through **sponsorship** deals that provide significant financial incentives for athletes and teams in exchange for advertising and media exposure. By winning competitions or being associated with highly successful teams, 'sponsors' hope to increase profits and market share.

sponsorship
the support of an individual, event or organisation financially or through the provision of products or services

The pressure on athletes and teams to perform and an apparent 'win at any cost' attitude has led to an increasing range of legal issues in recent times. These issues include, off-field criminal behaviour, gambling on competition matches, harm suffered by athletes during the course of a game, the use of performance-enhancing drugs and player safety as it relates to long-term injuries. These issues are governed by many areas of law whereas, traditionally, the laws and rules of sporting competitions have been strongly influenced by the expression 'what goes on the field, stays on the field'. The need for law reform within Australian sport arises out of changing social, legal and technological factors and will be discussed throughout this chapter.

Criminal law: On-field and off-field behaviour

Criminal law is not excluded from behaviour on a sporting field or considered separate from an athlete's right to compete. The referee and a judiciary who may impose a penalty of suspension from future matches usually reprimand an illegal act, such as a punch thrown during a match. However, in 1985, during a professional Australian Rules match, Hawthorn captain Leigh Matthews struck an opponent in the face, causing the breaking of his opponent's jaw. Days later, Matthews was arrested, charged and convicted of assault and ordered to a pay a $1000 fine. His conviction was eventually overturned on appeal; however, the case illustrates that criminal law is not excluded from the sporting arena.

In addition to changes in the way sport is seen, there have been broader social changes that affect the ways in which sport and the law interact. Gambling on sporting outcomes, in particular, has risen to prominence in recent years. As technology has allowed online betting to flourish, a number of athletes have attempted to influence the outcome of a game in which they are involved for personal gain. In 2010, Ryan Tandy, a NRL player, bet several thousand dollars on a game through his manager and friends, on an aspect of a match in which Tandy was involved (*Director of Public Prosecutions (NSW) v Elias* [2013] NSWSC 28 (1 February 2013)).

In the opening part of the match, Tandy deliberately caused a penalty to enable a situation to arise that may have netted him and his entourage a huge payout. Tandy was found guilty of match fixing and sentenced to community service. Sadly, Tandy died of an apparent drug overdose in 2014. In 2019, AFL player Jaidyn Stephenson was served with the most severe ban for betting on football in the competition's history. The AFL imposed a 10-match ban and a $20 000 fine after Stephenson was caught gambling on games.

More seriously, Rugby League player Jack de Belin was charged with four counts of aggravated sexual assault in company and aggravated sexual assault in company causing actual bodily harm. Large sections of the sporting community called for the suspension of de Belin from all playing duties, despite the presumption of innocence. The governing body, Australian Rugby League Commission (ALRC)

ISBN 978-1-108-86281-3 Milgate et al.

reacted swiftly with the introduction of a policy to suspend players from playing in the NRL competition if charged with a criminal offence carrying a jail sentence of over 11 years. The policy enforced the standing down of a player until the matter has been dealt with by the courts. Players could still receive wages and train with their team. Jack de Belin has become the first player affected by the new rule but challenged the policy in *De Belin v Australian Rugby League Commission Limited* [2019] FCA 688. The court upheld the ALRC's policy and de Belin was prevented from playing in the 2019 NRL season.

As discussed in Chapter 4, law reform can be prompted by the recommendations of specialised law reform bodies or various other agencies or agents, and it can be brought about directly by court decisions and various incidences on and off the sporting field.

Civil law: Breach of contract

Professional athletes are required to sign contracts that legally bind their playing services to a club and competition and govern their off-field behaviour, including their use of social media. In 2019, Wallaby rugby union player, Israel Folau, had his $10 million playing contract dissolved after he wrote a string of social media posts that offended many members of the community. Both his employer, Rugby Australia Limited and sponsors (e.g. Qantas) condemned Folau's comments and beliefs and Folau was released from his playing duties prior to the 2019 World Cup. Rugby AU claimed that part of Folau's contract included a clause that prohibited him from using social media to offend sections of the community and that he was acting against the ARU Code of Conduct.

Under the *Fair Work Act 2009* (Cth) section 772, Folau initiated **civil litigation** and contested his termination at the Fair Work Commission. In December 2019, Rugby Australia and Israel Folau settled their dispute out of court for an undisclosed sum.

Figure 5.6 Professional athletes are required to sign contracts that legally bind their playing services to a club and a competition.

civil litigation
court action brought to remedy a wrong or a breach of contract law

Civil law: Harm suffered in sport

Rules, laws or codes of conduct in contact sports often concern the safety of players. Despite this, amateur and professional players give **express consent** to acts that would constitute the basis for a criminal offence of assault – an **indictable offence** – when done in a non-sporting context. When players participate in various sports, they accept the risk of harm that can occur within the course of the game, when played in accordance with the rules. In contact sports such as rugby league, rugby union and Australian Rules football, players can break bones, be rendered unconscious and, in extreme cases, be injured to the point of quadriplegia. Clubs, leagues or other agencies involved have a duty of care to the participants.

Review 5.5

1. Define the term 'sports law'. List some of the factors that have created the need for law reform.
2. Discuss some of the consequences of sport being 'big business'. Construct a list and rank in order three issues that arise out of the intense desire to win competitions.
3. Evaluate the rights of a sporting body to regulate the behaviour of one of their players' social media behaviour. Outline the outcome of the Folau case.

ISBN 978-1-108-86281-3 Milgate et al.

express consent
consent given directly, either orally or in writing

indictable offence
a serious criminal offence that requires an indictment (a formal, written charge) and a preliminary hearing; it is typically tried before a judge and jury and is subject to greater penalties than non-indictable offences

In 2014, Alex McKinnon, a NRL player, was severely injured in a tackle. He was lifted by a number of defenders and landed on his neck causing a spinal cord injury with permanent effects. Grabbing a person and slamming him to the ground would be the basis of an assault charge if inflicted without consent. However, players give express consent to being tackled in rugby. Nevertheless, they do not give express consent to behaviour that is prohibited by the rules and so McKinnon initially sought compensation through legal channels by suing the opposition club and the sport's governing body. By 2019, McKinnon had resolved his dispute and was employed by a media outlet as a guest commentator after the NRL also raised significant funds to assist in his rehabilitation.

Even in the 'non-professionalised' world of amateur sport, material loss may be considered in the decision about the quantum of damages to award. Athletes have sought damages for loss of wages, in addition to medical expenses, pain and suffering. In 1997, Gary Pender broke Darren Kennedy's jaw in an illegal tackle in an amateur game of rugby league in New South Wales. Kennedy sued both Pender and the Narooma Rugby League Football Club for $40 000 in medical bills. The club's lawyers argued that because the players were volunteers, the club could not be responsible for their conduct.

The New South Wales District Court held that although players were not paid to play the benefits that they derived from the relationship were significant enough to form a relationship of employment and ruled in Kennedy's favour.

While there are criminal compensation schemes for victims, maintained and administered by the state, the compensation sums involved are generally much lower than the amount of financial compensation that a successful plaintiff could receive in damages in a civil case. The maximum compensation available in New South Wales for a victim of a violent crime is $30 000. Since professional athletes can earn hundreds of thousands of dollars a year, victims' compensation is seen as inadequate. When pursued

Figure 5.7 Alex McKinnon presents the Alex McKinnon Cup to Korbin Sims of the St George Illawarra Dragons with trainer, Ben Hornby, on 7 April 2019 in Newcastle.

ISBN 978-1-108-86281-3

as a civil case, direct contact with a person's body without the person's consent is one of the intentional torts of **trespass to the person**.

trespass to the person
a tort involving direct contact with a person's body without that person's consent

Therefore, players have usually chosen to sue other players or clubs for damages and loss of wages through the civil law system. As discussed in Chapter 3, the standard of proof required of the prosecution in a criminal case is 'beyond reasonable doubt'. In a civil case, the plaintiff needs only prove the defendant's liability 'on the balance of probabilities'. This just means that it is more probable than not that the defendant is responsible for the wrong suffered – an easier requirement to satisfy.

Equal opportunity in sport

In 2003, a junior Australian Rules Football league in Victoria banned a 13-year-old from playing in its competition because of her sex. The player, Helen Taylor, along with two other girls aged 14 and 15, challenged the ban. While both the number of girls and women involved in sport and the range of sports open to female players have increased dramatically over the past few decades, there are still some challenges to be addressed, socially and legally.

Taylor's case, in the Victorian Civil and Administrative Tribunal (*Taylor v Moorabbin Saints Junior Football League & Football Victoria Ltd* [2004] VCAT 158), questioned the exclusion of all girls aged 12 or over from competing alongside boys in the junior competitions. Despite anti-discrimination legislation in the various states and territories and at federal level, all Australian jurisdictions contain exceptions allowing exclusions based on sex. The *Equal Opportunity Act 1995* (Vic) permits the exclusion of one sex from a sport if strength, stamina or size is relevant. Post-puberty, the average boy has greater lean body mass than the average girl, and there is an appreciable difference in their performance in sports. The judge's task was to determine at what age there is a lawful reason to separate the boys from the girls. He concluded that the differences are not sufficiently great in the under-14 age group, but they are for the under-15s. So excluding Helen Taylor was unlawful, though not the exclusion of the other two girls. The judge added that it would be preferable if Football Victoria would, instead of excluding girls, give them the choice of whether to participate.

In Court

***Goode v Angland* [2017] NSWCA 311**

In *Goode v Angland* [2017] NSWCA 311, the court considered whether section 5L of the *Civil Liability Act 2002* (NSW) could be relied on as a defence to claims of professional sporting negligence. Goode sustained serious injuries in a fall while he was riding as a professional jockey in 2009. Goode claimed that his injuries were directly caused by the negligence of another jockey, Angland, who he claimed rode in such a manner as to cause interference with his horse.

Ultimately, the court determined that the risk of falling from a horse and being seriously injured is an 'obvious risk' for jockeys. The *Civil Liability Act 2002* (NSW) provides that a person is not liable in negligence where an obvious risk eventuates when participating in a dangerous recreational activity.

Review 5.6

1. Consider the idea that 'what happens on the field, stays on the field'. Assess if this approach is ever appropriate in sport. Discuss with examples.
2. Explain why athletes would pursue civil action rather than criminal action.
3. Describe in what way the case of *Goode v Angland* changed civil claims for compensation.

ISBN 978-1-108-86281-3 Milgate et al.

While the decision was a victory for Helen Taylor, questions remain about its application to other sports, and how great the differences between 'boys' and girls' physical attributes would have to be in other sports in order to justify an exception to the relevant legislation. There are also differences in the legislation of the various states and territories. In New South Wales, the exception to the prohibition of sex discrimination is much less specific and allows female (or male) players to be excluded in any circumstances.

Section 38 of the *Anti-Discrimination Act 1977* (NSW), headed 'Sport', states:

> Nothing in this Part renders unlawful the exclusion of persons of the one sex from participation in any sporting activity not being the coaching of persons engaged in any sporting activity, the administration of any sporting activity or any prescribed sporting activity.

Women's sport began to grow at such a rapid pace that by 2019, seven professional women's sports leagues have been established. Sports such as cricket (WBBL), Australian Rules (WAFL) Soccer (W League) enjoy increased media exposure; however, only 10% of live sports broadcasts are devoted to women's sports, reaching just 36% of the audience of men's sports. Yet approximately 48% of people indicated that they would watch more women's sports if it was more accessible, for example, available on free-to-air TV. Clearly, issues of discrimination and equal opportunity have changed since the early 2000s.

In 2019, highly inappropriate comments were posted on social media when a photo of AFLW player, Tayla Harris, was released across multiple media platforms. Large sections of the community rushed to her defence, but clearly the rise of female athletes as role models and professional athletes does not sit comfortably with some people.

News

Girl power: Measuring the rise of women's sport in Australia

By Monique Perry, Managing Director, Nielsen Media & Sports, and Kayla Ramiscal, Senior Manager, Nielsen Sport

6 March 2019

Today, the 'value' of a sport is primarily based on TV viewership and attendance. For women's sport, it is widely assumed that 'the attendance and viewing is just not there'. While these traditional yardsticks are an important trading currency, our research shows that women's sport has broader engagement, influence and value.

Top-level traditional metrics do not favour women's sports: women's sport makes up just 10% of live sports broadcasts; and with a unique broadcast reach across the keys sports of five million people, it represents just 36% of the audience of men's sport (13.8 million).

But women's sport is growing and this is an indicator of future success. There are now seven professional women's sports leagues, five of which have been established in the past five years. As popularity continues to increase, it's inevitable that both brands and rights holders have questions about audience, engagement, opportunities and return-on-investment attached to women's sport.

Overcoming barriers to engagement is key. Interest in women's leagues and sports is higher when a free-to-air broadcasting strategy has been developed and executed. One-in-two (48%) people say

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

they would watch more women's sport if it was accessible on free-to-air TV or free online. Facebook is the most popular social media channel to follow women's sport (87%), followed by YouTube (56%) and Instagram (43%).

In Australia, Facebook and YouTube are the most popular social media channels for following women's sport.

The Rebel Women's Big Bash (WBBL) and the Women's Australian Rules Football league (AFLW), for example, have attracted large audiences, stand-alone sponsorships and broadcast revenue.

Launched in 2015, the WBBL, a Twenty20 competition, has proved a remarkable success, attracting an early free-to-air partner in Network Ten and title sponsorship from sports retailer, Rebel. In December last year, Rebel renewed its deal for a further three years while in April, Seven acquired the rights to broadcast 23 WBBL games per season for the next six years. Australians' interest in women's cricket now stands at 43%.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

Meanwhile, in Australian rules, the eight-team AFLW staged its inaugural season in 2017. Games in that first season were largely free to attend, while the broadcast strategy revolved around coverage in local markets on the Seven network – mainly the free-to-air digital service 7mate – with further national coverage provided by Fox. Forty-one per cent of Australians are interested in women's Aussie rules.

And let's not forget Suncorp Super Netball, which draws larger audiences across the season than any other women's code and has the largest share of female viewers.

Women's sport has intangible association value. Around eight-in-ten (78%) female sports fans say it is important for sponsors to support women's sport; and 74% say companies involved in sponsoring sport gain in appeal with the audience.

We have already seen a shift in partnerships across women's sport. Existing brand sponsors are expanding their portfolios or switching completely from men's sport to women's. While brands that are new to sponsorship, including Harris Scarfe and Priceline Pharmacy, are coming in at a lower level – often as club sponsors.

Wider societal issues around diversity and equality are also playing into women's sports investment decisions. And there are more opportunities available in this comparatively uncluttered market at a cheaper price. Not to mention the strong positive sentiments towards sponsors who are involved in female sport sponsorship. Female athletes are seen as inspirational, considered role models and positive advocates of healthy body image.

The rate of change in women's sport is one of the most exciting trends in the sports industry right now. At Nielsen, we are committed to integrating women's sport into our current platforms for more accurate and comparable measurement of key metrics. By collaborating with the industry, we also need to develop new inputs including digital, social, net promoter scores and growth indices to provide a more complete picture.

Making sense of what the future holds for women's sport and the opportunities attached to it is fundamental. For rights holders, brands and the media, women's sport represents a chance to develop a new commercial proposition and engage fans in a different way.

Figure 5.8 AFLW Carlton Blues forward, Tayla Harris, speaks in front of messages in support of women's football during a press conference at Ikon Park on 20 March 2019 in Melbourne.

ISBN 978-1-108-86281-3

Research 5.2

Respond to the following questions after referring to the *Anti-Discrimination Act 1977* (NSW).

1. Discrimination based on gender is explicitly prohibited by this Act. Outline other characteristics besides gender that do not justify discrimination, according to the Act.
2. Discuss if any of these characteristics are relevant to discrimination within sport. Describe any situations in which they might be relevant. Discuss.
3. Assess if a person's gender is different in any way from these other characteristics. Justify your response.

5.6 Agencies of law reform relating to sport

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is an independent statutory organisation, established in 1986. It was called the Human Rights and Equal Opportunity Commission before 2008. The AHRC investigates and reports to federal parliament about issues of human rights compliance, resolves discrimination complaints and breaches of human rights, holds public inquiries, provides advice and submissions to parliament, and conducts research into human rights and discrimination issues. These issues cover a broad range of areas such as the provision of goods and services, education, employment and sport.

The AHRC can investigate complaints of discrimination and assist in reaching agreement between a complainant and the organisation or company against which the complaint is made. It does this through **conciliation**, in which it acts as an impartial referee while the parties talk through their concerns and look for solutions.

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes an active role, advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for the parties

In 2001, the All Australia Netball Association (AANA) issued a ban to prevent pregnant women from playing in the national competition. This included the captain of the Adelaide Ravens, Trudy Gardner, who was 15-weeks pregnant at the time. Gardner lodged a complaint with HREOC, claiming discrimination on the grounds of her pregnancy under the *Sex Discrimination Act 1984* (Cth). Gardner and the AANA were unable to resolve the disagreement in that forum and she took them to court, seeking an injunction to allow her to continue to play pending the outcome of her complaint. She missed three games due to the ban, but the Federal Magistrates Court (now called the Federal Circuit Court) granted the interim injunction. Because of missing those three games, Gardner lost match payments and sponsorship.

Gardner successfully sued the Netball Association in 2003 (*Gardner v AANA Ltd* [2003] FMCA 81), seeking damages for distress, pain and suffering, as well as the loss of the match payments and sponsorship money. The Federal Magistrates Court found that the prohibition had breached sections 7 and 22 of the *Sex Discrimination Act 1984* (Cth).

NSW Law Reform Commission

Match-fixing is a term used to describe corrupt behaviour in predetermining the result of any particular sporting event. The sole reason for fixing a match is to guarantee the result so that a bet placed

Research 5.3

View the AHRC's website and research other areas dealt with by the AHRC in relation to sport. You might first try searching the site using the word 'sport'.

ISBN 978-1-108-86281-3 Milgate et al.

on the match would lead to a windfall for a gambler. In 2011, the NSW Law Reform Commission described some reasons why existing common law and statutory offences that might apply in circumstances of match-fixing were inadequate to cover the range of new match-fixing behaviours. For example, in rugby league, bets can now be placed on whether the first scoring play of a game is a penalty goal or a try.

The commission was responding to cases such as that of Ryan Tandy, who played in an NRL match in August 2010 and was found guilty of criminal behaviour because of his actions during the first few minutes of the match. Tandy created a situation that may have led to the opposing team taking a penalty goal in the first few minutes of play. The result of the match overall was of little concern. Prior to this case, 'match-fixing' could be prosecuted under offences that did not use consistent terminology – some focusing on fraud, dishonesty and/or corruption – or that required the person charged to have obtained a benefit or be directly engaged in gambling. Since Tandy did not place a bet on the game in question, but informed others of his intended actions so they could benefit, his defence revolved around this notion that he had not placed a bet on this particular match.

Under existing laws, Tandy may not have had charges laid against him, however, by 2012, the *Crimes Act (Cheating At Gambling) 2012* (NSW) had been enacted. This legislation aimed to outlaw behaviour previously inadequately covered.

Australian Sports Commission

The Australian Sports Commission (ASC) is an Australian Government statutory authority. Established through the *Australian Sports Commission Act 1989* (Cth), the ASC is involved in the operation and development of sport at all levels. It provides advice to the government and funding to national sporting organisations. The Australian Institute for Sport (AIS) is one of its divisions.

Because of the netball ban, the ASC was asked to investigate the issues surrounding pregnant athletes. It hosted the National Forum on Pregnancy in Sport in August 2001, with participants from government, industry and non-government organisations. Its conclusions formed the basis for a set of guidelines for the Australian sporting industry on pregnancy in sport. In addition to clearing the way for pregnant women to continue playing sport, the guidelines offer information and advice to protect sporting clubs. As employers, clubs are concerned to avoid being sued for negligence if a player suffers foreseeable harm to herself or her foetus while engaging in sport.

5.7 Mechanisms of law reform relating to sport

The courts

As discussed in Chapter 4, the courts' role in interpreting legislation as applied to a particular case is to clarify the law's meaning. Where a higher court sets a precedent, it is making a statement about the application of the legislation or common law rule in relation to a set of facts and the way the law should be applied in the future. A court's consideration of a situation and the arguments for and against a claim can reveal unfairness or injustice in the legislation itself.

In 2003, the then federal Sex Discrimination Commissioner, Pru Goward, commented on Gardner's case, saying that it was good to see the courts developing case law around the *Sex Discrimination Act 1984* (Cth). The circumstances of pregnant women continuing to pursue sport at high levels constituted a new application of the anti-discrimination legislation.

Court of Arbitration for Sport

The Court of Arbitration for Sport (CAS) was established in 1984 as part of the International Olympic Committee. It is an international arbitration body established to settle sport-related disputes. Based in Lausanne, Switzerland, it has courts in New York City and Sydney, as well as ad hoc, temporary courts in Olympic host cities. The CAS settles disputes through arbitration, where the parties have agreed to its jurisdiction, and its decisions are binding. It hears two types of dispute:

- commercial, including contract disputes, sponsorship and television rights, as well as civil liability claims such as athletes' accidental injuries during competition
- disciplinary, including drug-related problems, violence on the field and abuse of referees.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 5.9 Sun Yang at a Court of Arbitration for Sport hearing on 15 November 2019 in Montreux, Switzerland.

Disciplinary cases are generally first dealt with by the 'competent sports authorities', for example, the Australian Olympic Committee. Appeals then may go to the CAS. In 2019, Chinese swimmer Sun Yang smashed a vial of his own blood, rendering the sample useless for analysis. Yang claimed the officer taking the sample did not have proper accreditation and that he feared for his own security. The governing body representing World Swimming, FINA, investigated the matter, but appeared to condone Yang's actions and he went unpunished, despite claims in the Australian media that he was a drug cheat and feared being found out through the blood sample.

The World Anti-Doping Agency (WADA) appealed the outcome of the FINA investigation, asking that Sun Yang be banned from competing for a maximum of eight years.

In November 2019 Sun Yang appeared before CAS in an effort to clear his name. Unusual about the event was that it was public and live-streamed. Translation issues were experienced throughout the day.

The February 2020 judgment by three senior judges found Sun Yang guilty of refusing to cooperate with the sample testers and banned him from swimming for a period of eight years, effectively ending his career.

Subsequently, CAS president John Coates defended the integrity of Sun Yang's hearing, saying that the translation issues did not affect the judgment and that the defendant's lawyers could have requested for the case to be heard over a longer period.

Parliaments

As we have seen, matters sometimes come before a court before they have been considered by parliament. When a legal decision reflects new social patterns or attitudes, parliaments may enact, amend or repeal legislation to ensure that the statute law stays current and credible. This often happens after extensive consultation with bodies such as law reform commissions, human rights commissions, or – in the case of sports law – the Australian Sports Commission.

Review 5.7

1 Assess if the law that relates to pregnant athletes should be different from the law that protects equal opportunity for female athletes.

2 **a** Identify the types of matters heard by the Court of Arbitration for Sport.
b Review the Sun Yang case.
c Discuss if CAS should be able to overrule governing bodies like FINA.

3 Discuss whether a fight on a football field is different from a fight on a street corner. Assess whether penalties for fights on a sporting ground should be less than for assaults committed on the street.

ISBN 978-1-108-86281-3 Milgate et al.

5.8 Effectiveness of law reform relating to sport

Contract

Breaches of contract in the sporting world may have different particulars from breaches of contract in other areas of business, but the mechanisms and remedies are not markedly different. The Israel Folau and Jack de Belin cases illustrate the increasingly changing nature of commercial sport relating to human rights and equality as the community demands the highest standards of conduct off the field. However, it is not clear that there is a significant need for law reform in this area.

Harm suffered in sport

Two social factors contributing to players' preference for civil remedies rather than the criminal law are a greater readiness to sue and the professionalisation of sport. While the sums of money involved are relatively large in professional sport, the purpose of **tort law** remains the same: to compensate people for losses or damage suffered because of wrongs done to them. As mentioned, Alex McKinnon sought compensation of up to $10 million to cover his physical and medical needs for his lifetime, as well as the potential loss of income and welfare.

tort law
the body of law that deals with civil wrongs including negligence, defamation, trespass and nuisance

One consequence of widespread recourse to the civil law is fear of lawsuits. For example, schools may decide to phase out contact sports such as the rugby codes if claims by students injured while playing become a common occurrence. Another concern is that players who are seriously hurt in situations where no one is at fault – for example, where a tackle is perfectly within the rules of the game – are just as much in need of financial assistance as those awarded damages, yet insurance coverage may be inadequate for their needs.

Indeed, in 2013 the National Football League (NFL) of the United States settled on a $765 million package to support the 4500 players who were suing the league for damages. The players claimed the NFL had known of the long-term dangers of head collisions, that they had concealed such information from the players and failed to notify them of such dangers during their careers. By 2015, the NRL had introduced new rules whereby players that received head knocks are to be assessed by a doctor and often not allowed to continue the match. This rule is designed to recognise the issue of long-term brain damage to athletes who receive repeated head traumas. However, in 2019 confusion continued to reign over players being allowed to return to the field during match days. NRL player Robbie Farah received a knock to his head during a game and appeared to stumble as he was escorted from the field. He subsequently passed his HIA but was not permitted to re-enter the match, much to his coach's displeasure as his team lost an important match.

Equal opportunity in sport

Local, national and international interest in ensuring women's equality with men in all areas, including participation in sport, has prompted legislation at both state and federal level. Australia is a signatory to the *Convention on the Elimination of All Forms of Discrimination against Women* (1979), and domestic legislation implementing this treaty makes discrimination on the basis of gender unlawful.

In addition, legislation such as the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992* (Cth) protects other groups that have historically been disadvantaged. The work of statutory bodies such as the Australian Human Rights Commission is vital in addressing issues of equal opportunity, and court cases such as Trudy Gardner's have provided further factors for parliaments to think about when drafting legislation. In the course of law reform, parliaments must balance concerns about negligence claims against the need for fairness.

ISBN 978-1-108-86281-3 Milgate et al.

News

'Groundbreaking' discovery in NRL brain disease crisis

The Courier Mail

27 June 2019 Rugby league legend Peter Sterling has revealed he will donate his brain to science after his death due to the increased concerns around concussion in the sport.

A disease linked to repeated concussions in American sport has been found in the brains of two former Australian rugby league players.

The discovery is the first time Chronic Traumatic Encephalopathy – or CTE – has been identified in a NRL athlete.

CTE is a degenerative brain disease that has been found in former players of American football, ice hockey, soccer, rugby union and others exposed to repeated head injury.

Speaking on Macquarie Sports Radio's Halftime with James Willis, Sterling said he wanted to donate his brain as it will help future NRL players.

'This has been an ongoing concern as we learn more in the future. I've said yes to donating my brain to science in the future and I believe it is going to help players in the years to come', he said.

'I'm not scared but I am concerned. The decision to donate my brain was a decision not taken lightly but I think it's important that something like that can help so that we know more and we can take the appropriate steps as that knowledge becomes readily available.'

While the effects and risks of concussion are starting to be more broadly known, Sterling said the NRL has been working in the right direction when it comes to the rules and regulations surrounding head knocks, including the HIA.

'The rules that the NRL has put in place was a stand that they needed to make, as a welfare issue for the players, and to err on the side of caution', he said.

'The NRL was doing the right thing by their players and legally as well so that we don't go down the same route as the NFL, so, fortunately, those protocols have changed.'

Researchers and clinicians from the Royal Prince Alfred Hospital, NSW Health and the University of Sydney's Brain and Mind Centre made the discovery in two donated brains from middle-aged former professionals who played more than 150 NRL games over many years.

Research 5.4

1 Read the article ' "Groundbreaking" discovery in NRL brain disease crisis' and answer the following questions.
   a Discuss why a former rugby player would agree to donate his brain to science.
   b Assess if former rugby players should have the right to compensation given they have given express consent in a sport that allows strong physical contact.

2 Evaluate the effectiveness of sports law in dealing with the rights of players to safety and/or compensation for injuries.

ISBN 978-1-108-86281-3 Milgate et al.

Topic 2 summary

- Sports law is a complex combination of tort, criminal and contract law, and both statute and common law.
- Sport has changed dramatically in the past 40 years: it is broadcast nationwide, and major companies spend vast sums of money sponsoring teams and competitions. Gambling on a range of sporting outcomes has become far more widespread.
- Athletes are held responsible for their intentional actions both on and off the sporting field.
- Rules of the games, set down by governing bodies, can be enforced in court, and players may face criminal charges or civil action for harm inflicted.
- Coaches, referees and administrators may be subject to a claim in negligence for breaching their duty of care.
- Agencies of law reform in sport include the Australian Sports Commission and the Australian Human Rights Commission.

Topic 2 questions

Multiple-choice questions

1 Sports law is:
   - **a** the rules of any particular sporting body.
   - **b** the law made by the Australian Sports Commission.
   - **c** a combination of various statutes, common law judgments and tort law.
   - **d** none of the above.

2 Express consent means:
   - **a** players may do whatever it takes to win a game.
   - **b** what happens on the field stays on the field.
   - **c** players must give consent before they play a game.
   - **d** players accept the possibilities that can occur within the course of a game.

3 Victims of assault on a sporting field usually take legal action through civil courts because:
   - **a** criminal law does not apply on the sporting field.
   - **b** victims' compensation is inadequate for professional athletes.
   - **c** there is usually not enough evidence to prosecute a criminal case.
   - **d** witness statements from players cannot be accepted in courts.

4 The *Anti-Discrimination Act 1977* (NSW) gives an exception to the prohibition of sex discrimination for which participants in sporting activities?
   - **a** coaches
   - **b** players
   - **c** administrators
   - **d** all of the above

5 The case of Trudy Gardner demonstrates:
   - **a** a conflict between sporting rules and anti-discrimination laws.
   - **b** how sporting bodies are subject to legal action.
   - **c** the ability of individuals to challenge decisions in courts.
   - **d** all of the above.

Short-answer questions

1 Outline the changes in attitudes to sport that have occurred over the past few decades. List some of the consequences of these changes.

2 Explain the importance of the law in governing on-field behaviour in contact sports.

3 Explain how contract law relates to professional athletes and clubs. Describe what can happen if a contract is breached.

4 Assess why victims of violence on the sporting field do not report the offence to police.

5 Explain the link between the NFL, NRL and Rugby Australia in terms of HIA and concussions. Discuss if governing bodies should take such precautions.

ISBN 978-1-108-86281-3 Milgate et al.

Topic 3

Law reform and sexual assault

Relevant law

IMPORTANT LEGISLATION

Criminal Procedure Act 1986 (NSW)
Criminal Procedure Amendment (Sexual Offence Case Management) Act 2005 (NSW)
Criminal Procedure Amendment (Evidence) Act 2005 (NSW)
Criminal Procedure Further Amendment (Evidence) Act 2005 (NSW)
Crimes Amendment (Consent – Sexual Assault Offences) Act 2007 (NSW)

SIGNIFICANT CASES

R v Anon ('gang-rape case')
R v MM [2002] NSWCCA 58
R v MC [2009] VSCA 122
R v MAK [2005] QCA 57
R v BS & MS ('gang-rape trial')

ISBN 978-1-108-86281-3

5.9 Conditions that led to law reform relating to sexual assault

One of the central aims of the criminal justice system is to prosecute criminal offenders on behalf of the victims and the community. Throughout the process, there is a tension between the rights of the accused and the interests of individuals and the community; getting this balance right is a constant challenge for the state.

There has been significant law reform in relation to **sexual assault** offences over the past decade. This has been motivated by perceptions that the criminal justice system was failing to deliver justice for sexual assault victims and just outcomes for the community.

sexual assault
a general term for criminal offences involving unwanted sexual contact; acts include unwanted touching or groping, indecent acts of other kinds, and rape

Current statistics allude to the shocking extent of sexual assault and sexual violence experienced by (mainly) women in Australia. According to the Australian Bureau of Statistics (ABS), the sexual assault victimisation rate in 2019 was 105 victims per 100 000 people. The ABS also revealed that persons aged 19 years and under account for approximately 60% of all victims of sexual assault.

Women are more affected than men by sexual assault and sexual violence. One in five women will experience sexual violence in their lifetime compared to one in 20 men, according to the Australian Government's 2018 report, *Family, Domestic and Sexual Violence in Australia*.

Sexual offences are the least-reported crimes in New South Wales. As found by the Australian Law Reform Commission (ALRC), this under-reporting makes it difficult for the legal system to respond to this type of crime. In its 2010 report, *Family Violence: A National Legal Response*, the ALRC stated:

> Understanding that sexual assault is under-reported is crucial background when considering the response of the criminal justice system. The vast majority of incidents of sexual assault do not come to the attention of the legal system. The problem is exacerbated in the family violence context. Therefore, an important part of the law reform focus should be on measures that might promote reporting and challenge community attitudes to sexual assault that continue to reinforce its invisibility.

Under-reporting is hard to gauge so only estimates can be used in approximating the incidents of sexual assault in homes and the broader community. Organisations such as Rape and Domestic Violence Services Australia and Australia's National Research Organisation for Women's Safety are sources of information about the rate of domestic and sexual violence against women. The ABS also periodically conducts a 'Personal Safety Survey'. Figure 5.10 illustrates the results from the 2016 survey, which was conducted from November 2016 to May 2017.

Under-reporting can be attributed to several factors. Many victims do not report sexual assault because they believe they would not win a court case or that it will be too much trouble, or they cannot face it emotionally. Compounding this is the fact that in 70% or more of cases, the victim knows the offender. In addition to this, there is no established system for addressing the 'multiple needs' of some victims, including translation, mental health support, accommodation and counselling.

The Director of Public Prosecutions will generally prosecute if there are prospects of a conviction and it is in the public interest. Where the victim knows the attacker – which is the case in the majority of reported sexual assault cases – much of the case relies on one person's word against another's unless there is convincing physical evidence. Advocates for victims of sexual assault argue that cases that involve a stranger are more likely to proceed, because it is easier to establish that the sex was not consensual, the assaults are often more severe, and there is more likely to be strong physical evidence.

Physical evidence often poses another major obstacle in prosecuting sexual assault cases. Victims of sexual assault generally need to be physically examined and questioned in detail to obtain evidence that can be used in court – many victims consider this process to be too traumatic.

ISBN 978-1-108-86281-3 Milgate et al.

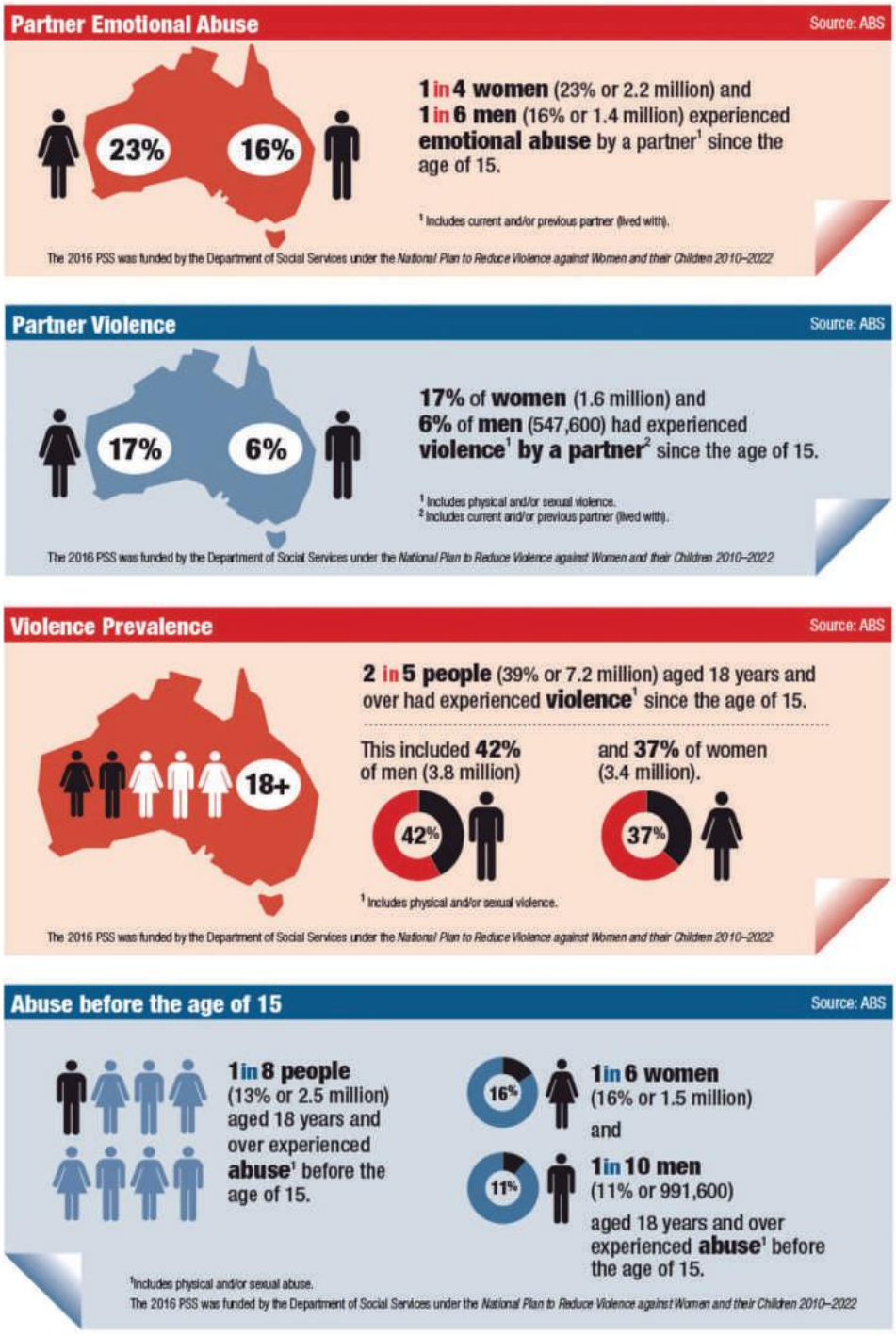


Figure 5.10 Research from the 2016 Australian Bureau of Statistics Personal Safety Survey and the Australian Institute of Criminology shows that both men and women in Australia experience substantial levels of violence. Domestic and sexual violence is overwhelmingly committed by men against women.
Source: ABS

In addition, there has been a lack of state resources provided to doctors who work in sexual assault services. In September 2018, the International Association of Forensic Nurses announced that the Sexual Assault Nurse Examiner (SANE) Education Guidelines had been updated. These guidelines help sexual assault nurse examiners meet the medicolegal needs of those who have been affected by sexual violence, including individual patients, families, communities and systems.

ISBN 978-1-108-86281-3 Milgate et al.

Although there have been improvements in this area, victims still must go through a difficult ordeal to ensure sufficient physical evidence is obtained to strengthen prospects of a successful prosecution.

Because of these and other factors, a formal complaint of a sexual offence has a low likelihood of leading to a formal investigation, and even when there is an investigation it probably won't result in a trial. The ABS's 2016 national Personal Safety Survey reported that approximately 20% of women who had experienced sexual violence by a male offender had reported the violence to the police. Again, this figure is hard to accurately quantify.

> In New South Wales, the number of sexual offences reported to police exceeded the number of proven charges by about 10 to one … Approximately 8% of sexual offences committed against children and 10% of recorded sexual offences against adults reported to police are ultimately proven at court.
>
> Jacqueline Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System', *92 Contemporary Issues in Crime and Justice* (January 2006), NSW Bureau of Crime Statistics and Research.

Given the estimates of the number of unreported incidents, this conviction rate represents a small proportion of the incidents that are occurring. It is worth asking why this is the case, especially when compared to other categories of crime.

5.10 Agencies of law reform relating to sexual assault

Criminal Justice Sexual Offences Taskforce

The Criminal Justice Sexual Offences Taskforce was established in 2004 by the New South Wales Attorney-General to investigate issues relating to sexual assault and the prosecution of these crimes. Its task was to advise the Attorney-General on how the criminal justice system could become more responsive to victims of sexual assault without undermining the right of the accused to receive a fair trial.

The taskforce had input from a broad cross-section of government and non-government organisations, in an effort to obtain various viewpoints on the criminal justice system. It produced 70 recommendations. Because of its report, new legislation was passed from 2005, some of which is discussed below. In conjunction with the taskforce investigation, the NSW Government also asked the Australian Institute of Criminology (AIC) to investigate whether giving evidence via closed-circuit TV altered the impact of the evidence as it was received; that is, whether it was likely to reduce the empathy the jury might have for the victim or the accused. The AIC found that there was no real difference in jury responses. These findings went some way to convincing the government that this could be a reliable mode of delivering evidence for traumatised victims who did not want to be in the same room as the accused.

As a result, since 2015, victims of sexual assault have been able to give evidence via closed-circuit TV, with the victim speaking to a camera, which is shown on a screen in the court. This means that the victim does not have to go into the courtroom to give evidence. Further, if there is an aborted trial, a hung jury or a retrial, the recording from the first trial can be re-used, saving the

Review 5.8

1 Outline some reasons for the low percentage of sexual crimes reported to the police.
2 Discuss some of the difficulties in proving a sexual assault case when the victim knows the attacker.
3 Discuss why specific training is important for doctors and nurses who deal with sexual assault victims.

ISBN 978-1-108-86281-3 Milgate et al.

Legal Links

For more information, view the website of Rape and Domestic Violence Services Australia.

victim from giving evidence a second time. The law says that in a following trial the 'best copy' of the evidence-in-chief and cross-examination can be used. This may be a written transcript, an audio recording or a video recording. Such changes attempt to reduce further traumatisation of the victim in these trials.

Rape and Domestic Violence Services Australia

Rape and Domestic Violence Services Australia is at the forefront of reforms to the way sexual assault matters are dealt within the criminal justice system. The organisation provides support services, undertakes research, and links to other bodies in Australia. It provides support and counselling for anyone who has experienced sexual violence.

Figure 5.11 Rape and Domestic Violence Services Australia is a support and referral service for victims of sexual violence; its services are available 24-hours a day via telephone or online.

NSW Bar Association

The NSW Bar Association, the professional organisation for barristers in the state, has rewritten its own rules for the cross-examination of alleged victims of sexual assault. Questions that belittle, confuse or mislead victims are banned. Attacks on the victim, it is hoped, will now not be permitted in the courtroom.

The media

Criminal cases involving sexual assault have received significant media attention over the past decade. The media's influence on public opinion, law organisations and governments has resulted in changes that improve the treatment of victims of serious sexual assault crimes in court. Victims being forced to recount their experience over and over, and defence counsel badgering victims in cross-examination to call their credibility into question, have been graphically portrayed by the media and have

Figure 5.12 Noriyuki Yamaguchi (right) and his lawyer attend a press conference in Tokyo, Japan, on 18 December 2019. Yamaguchi is a former journalist who was accused of raping fellow journalist, Shiori Itō , in one of the most high-profile cases of the #MeToo movement in Japan. A Tokyo court awarded 3.3 million yen ($30000) in damages to Itō.

ISBN 978-1-108-86281-3 Milgate et al.

Research 5.5

On the internet, find some or all of the following articles:

- Adele Horin, 'One in four women suffer sexual violence: Study', *The Sydney Morning Herald*, 3 August 2011
- Adele Horin, 'Slut Walk turns apathy into action on sex attacks', *The Sydney Morning Herald*, 13 June 2011
- Stephanie Anderson, 'Sexual assault: How common is it in Australia?', *SBS*, 17 July 2015 (updated 23 August 2015)
- Michaela Whitbourn, 'Plan unveiled to "strengthen" sexual consent laws in NSW', *The Sydney Morning Herald*, October 2019.

1 Read these articles and comment on the complexity of the sexual assault issue and the difficulty in ensuring justice is achieved.

2 Outline the criticisms made of the criminal justice system in these articles. Identify and discuss some reforms that could improve the effectiveness of sexual assault laws.

horrified the public and many in the legal profession. Frequently, however, the positive outcomes have been accompanied by less desirable ones, such as the rights of the accused being accorded a low importance, and a readiness to exploit the prejudices of some segments of the public.

5.11 Mechanisms of law reform relating to sexual assault

Parliament

There have been many Acts passed by the New South Wales Parliament over the past few years to usher in reform in sexual assault matters. Some of the key legislation is:

- *Criminal Procedure Amendment (Sexual Offence Case Management) Act 2005* (NSW): This Act amended the *Criminal Procedure Act 1986* (NSW) to provide that a pre-trial order made by a judge in proceedings relating to a sexual offence is binding on whatever judge presides at the trial. Rulings on the admissibility of evidence by a judge other than the trial judge need to be binding on the trial judge, so that delays in the commencement of criminal proceedings are minimised. The legislation was designed to minimise the stress and trauma on **complainants** giving evidence, who had to prepare themselves to give evidence every time a trial was scheduled and rescheduled.

complainant
a person making a formal complaint in a court of law

- *Criminal Procedure Amendment (Evidence) Act 2005* (NSW): This Act amended the *Criminal Procedure Act 1986* (NSW) to allow a transcript or recording of a complainant's evidence in any retrial. If the evidence is admitted in a retrial, the complainant cannot be forced to give further evidence unless she or he decides to do so.
- *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW): Certain provisions of this Act were designed to ensure that improper questions were not put to complainants during cross-examination. It also provided for evidence to be given ***in camera*** (privately) and for support people to be close to a complainant when they are giving evidence. The Act also introduced a new section into the *Criminal Procedure Act 1986* (NSW) to prevent an unrepresented accused from cross-examining the complainant.
- *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW): A person's lack of **consent** and knowledge that a person is not consenting are elements of sexual assault offences such as rape. If someone is under the influence of alcohol or drugs, they may not have the capacity to give consent. In court, an accused will be examined by the prosecution on what steps he or she took to ensure that there was consent. The *Crimes Act 1900* (NSW) was amended to place the onus on the defendant

ISBN 978-1-108-86281-3 Milgate et al.

to prove there was consent; in the past the prosecution had this responsibility.

In 2019, there are calls to further amend the laws of consent concerning sexual assault after the NSW Law Reform Commission tabled a report. One recommendation in the report was that a person does not consent to sex if they do not 'say or do anything' to communicate consent. This is aimed to protect the rights of victims who may, in the words of the commission, 'freeze' in fear. Concerns about the efficacy of existing consent laws were triggered by the Lazarus case (see the 'News' box below).

in camera
(Latin) 'privately'; only specified persons (e.g. a judge) can be present during the testimony or proceeding

consent
free and voluntary agreement by a rational person who is able to understand and make a decision about the matter to which he or she agrees

News

Plan unveiled to 'strengthen' sexual consent laws in New South Wales
By Michaela Whitbourn
The Sydney Morning Herald
21 October 2019

New South Wales would follow the lead of Victoria and Tasmania in amending sexual assault laws to clarify that a person does not consent to sex if they do not 'say or do anything' to communicate consent, under a plan designed to ensure a person who 'freezes' in fear is not mistaken for a willing participant.

The NSW Law Reform Commission published a series of draft proposals late on Friday, which it says will strengthen and simplify the 'highly complex and controversial' law of sexual consent, following almost 150 formal submissions and 1800 responses to an online survey.

Its proposals were welcomed by the peak bodies lobbying for the changes, including Domestic Violence NSW, but have already provoked debate among criminal defence advocates and the Australian Lawyers Alliance, which accused the commission of caving in to lobby group pressure.

The Berejiklian government commissioned the review of consent laws in May last year following the high-profile acquittal in 2017 of Luke Lazarus, who was accused of raping an 18-year old woman, Saxon Mullins, in an alleyway behind his father's Kings Cross nightclub in 2013.

The New South Wales Court of Appeal found the District Court judge who acquitted Mr Lazarus after a retrial failed to comply with a statutory requirement that she consider the steps Mr Lazarus took to ascertain consent. However, it left his acquittal in place on the basis that a third trial would be 'oppressive' in the circumstances.

Among the submissions to the review was a controversial proposal by the NSW Bar Association to water down sexual assault laws by removing or reducing criminal sanctions for offenders who had an honest but mistaken and unreasonable belief a person was consenting to sex. The commission did not endorse this proposal.

In a centrepiece reform, it proposed changes to bring New South Wales into line with Tasmania and Victoria, where the criminal law states explicitly that a person does not consent to sex if they do not 'say or do anything' to 'communicate' or 'indicate' consent.

The new law would recognise that 'a person who "freezes" out of fear and is unable to communicate does not consent', the commission said.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

It said the objectives behind the 'communicative model of consent' already underpinned New South Wales law, as in Victoria and Tasmania, but it sought to 'strengthen' this with the proposed changes.

The commission also suggested new interpretive principles be included in the state's Crimes Act, including that 'every person has a fundamental right to choose whether or not to participate in a sexual activity'; 'a person's consent to a sexual activity should not be presumed'; and 'sexual activity should involve ongoing and mutual communication'.

Domestic Violence NSW chief executive Joanne Yates said the 'improved definitions of consent' were a 'really positive' step and the proposed interpretive principles were 'very, very important … to have enshrined in the Crimes Act'.

Ms Yates said, 'we would hope that the people and organisations that are still interested in this issue will … resubmit to the Law Reform Commission's [review] process' to ensure the changes were 'finally enshrined' in New South Wales law.

Submissions on the draft proposals are open until 18 November, and will inform the final report.

Under the existing law in New South Wales, a person consents to sex if they 'freely and voluntarily' agree to it, and a similar definition applies in Victoria and Tasmania.

The Crimes Act already sets out a number of circumstances in which consent is not present, including if the person is 'substantially intoxicated by alcohol or any drug'.

The existing law says a person who does not offer physical resistance to sexual activity 'is not, by reason only of that fact, to be regarded as consenting'. This would be expanded to refer to verbal resistance.

Community Legal Centres NSW, the peak body for legal centres in the state, said in its submission to the review that adopting the Victorian and Tasmanian changes would remove ambiguity in the current law 'by making immediately clear that active communication is a core element of consent'.

But critics have suggested the changes have little practical effect and may introduce uncertainty.

Australian Lawyers Alliance national criminal justice spokesman Greg Barns said, 'the reform proposals look awfully like a case of the commission caving into media and lobby group pressure'.

'The NSW Bar proposal is fair, workable and accords with common sense. It is a pity the commission has not adopted it. The communicative model of consent is not based on reality and will lead to injustice,' Mr Barns said.

The Office of the NSW Director of Public Prosecutions said in its submission that there was 'no particular advantage' in adopting the Victorian or Tasmanian law and public education campaigns to 'dispel "rape myths" and reduce sexual violence generally … would have a greater impact'.

Experts have previously said that it is not clear that changing the law would have resulted in a different outcome in the Lazarus case.

The courts

While recommendations of the Criminal Justice Sexual Offences Taskforce have changed the manner in which judges and the courts deal with matters of serious sexual assaults, these changes have largely been brought about as a result of legislation. Changes in social attitudes regarding sex crimes will doubtless lead to future court decisions rethinking

ISBN 978-1-108-86281-3

the law or looking at criminal law issues in the area of sexual assault in a way that leads to law reform.

Judges in cases where a guilty verdict was returned have handed down some severe penalties, both to send a message of general deterrence to the community and to reflect the severity of the offences. For example, Bilal Skaf, who was convicted as the ringleader in a series of gang rapes in Sydney in 2000, received a sentence of 55 years' imprisonment, with a 40-year non-parole period (this was reduced on appeal).

It has been suggested that specialist courts for sexual offences would lessen the trauma suffered by victims when giving evidence and would improve conviction rates. Such courts could have appropriate technology (e.g. closed-circuit TV) and relevant facilities (e.g. separate entrances for defendants and victims) and be staffed by specially trained judges and prosecutors.

5.12 Effectiveness of law reform relating to sexual assault

As discussed, the low reporting rates for sexual crimes and the low number of offenders successfully prosecuted are serious concerns for the NSW Government and for the community at large. The legislation passed from 2005 onwards has attempted to address these problems. The chief task of this legislation is to ensure that the court process, while protecting the right of accused people to a fair trial, does not further traumatise victims.

Changes to the law of consent made in late 2007 may deliver a significant shift in outcomes for complainants. In the vast majority of matters, where the complainant knows the accused, a reversal of the onus of proof of consent may make it more difficult for the accused to deny criminal responsibility. What remains questionable is the extent to which the 'reasonable grounds' requirement for believing that there was consent will unfairly prejudice juries against defendants.

The changes to the NSW Barristers' Rules about questioning sexual assault victims can only be a good thing. It is also a sign that the publicity and pressure exerted by the various agencies of law reform have prompted defence lawyers to rethink their conduct in future cases.

State governments have implemented at least two-thirds of the 70 recommendations from

Figure 5.13 Badrinath Singh and Asha Devi, the parents of a girl, 'Nirbhaya', who was gang-raped and murdered on 16 December 2012 in Delhi, India. Four of the six perpetrators were given the death penalty and, after having their appeals rejected, executed in March 2020.

ISBN 978-1-108-86281-3 Milgate et al.

the Criminal Justice Sexual Offences Taskforce, including:

- trying to address delays in sexual assault matters coming to court; the District Court has introduced mandatory timetables
- closing court when victims are giving evidence
- allowing complainants to use remote witness facilities in 78 locations across the state
- requiring judges to disallow improper cross-examination questions.

Finally, continuing efforts to educate the public are equally important. Sexual assault crimes are crimes of violence, and certain beliefs about gender in our society need to be articulated and challenged if these crimes are to be properly addressed by the criminal justice system. A NSW Bureau of Crime Statistics and Research report stated that:

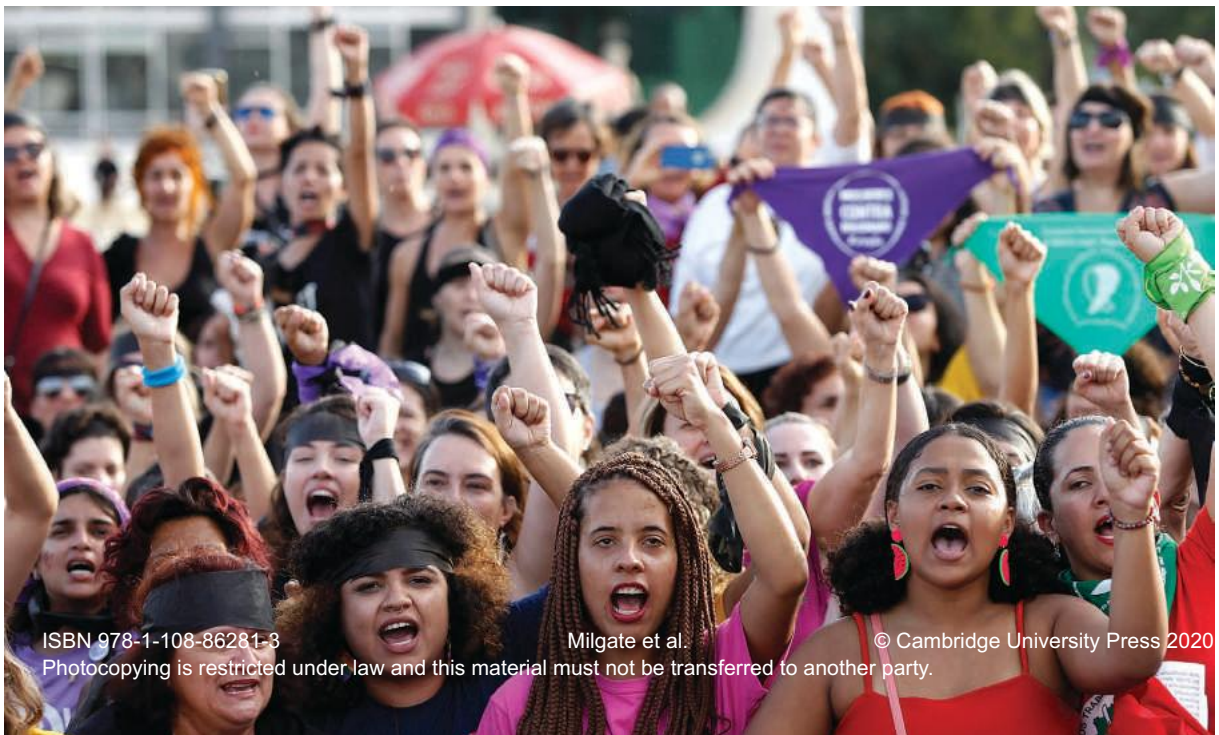
> In nine out of 10 cases of sexual assault reported to NSW Police, however, the victim and offender already know each other. In many cases they are partners or former partners. … [T]he capacity of the police to lay charges and clear the offence in these circumstances depends greatly on whether the victim is willing to give evidence and whether there is any corroborating evidence, such as injury to the victim.

Continuing education and reforms to the criminal justice system will be necessary to improve reporting and collection of evidence to assist in more successful prosecutions, while balancing the rights of the accused with those of the victim and the community.

Review 5.9

1. Identify how the New South Wales Parliament has addressed the need for reform in the area of sexual assault crimes. Give examples.
2. Describe other agencies that have had a role in bringing about changes to the way sexual assault trials are conducted. Classify each of these agencies with respect to their function and purpose within the legal system.
3. Outline some of the changes to sexual assault law that have taken place.
4. Discuss how success in this area could be measured. Give examples.

Figure 5.14 On 13 December 2019, in Brasilia, Brazil, people protest against the increase of sexual violence in Brazil.



Topic 3 summary

- There has been significant law reform relating to sexual assault over the past decade, prompted by the failure of the criminal justice system to deliver justice to victims.
- Sexual assault is a crime with one of the lowest conviction rates in New South Wales due to investigation failures, delays in cases, a lack of resources and a lack of information provided to victims.
- Law reform agencies that work in the area of sexual assault include parliamentary inquiries (e.g. the Criminal Justice Sexual Offence Taskforce), non-government organisations (e.g. Rape and Domestic Violence Services Australia) and professional organisations.
- The media have been influential in putting pressure on governments to reform the laws relating to sexual assault.

Topic 3 questions

Multiple-choice questions

1 Which of the following was **not** a reason to reform the law in the area of sexual assault?
   - **a** a low rate of reported sexual offences
   - **b** a low rate of convictions
   - **c** the poor level of service to victims in terms of information and resources
   - **d** the media was insufficiently interested in sexual assault cases

2 The Criminal Justice Sexual Offence Taskforce set up in 2004 has brought about which of the following changes?
   - **a** legislation to improve procedures for giving evidence
   - **b** legislation requiring judgments to reflect public opinion about sexual offenders
   - **c** a greater number of sexual offences being reported
   - **d** a statutory requirement that the media report cases with greater understanding of the law

3 The NSW Government asked the Australian Institute of Criminology to investigate whether giving evidence via closed-circuit TV altered the way in which the evidence was received; that is, whether it affected juries' empathy for the victim or the accused. Which of the following best reflects the Institute's findings?
   - **a** Juries were more likely to favour the accused.
   - **b** Juries were more likely to favour the victim.
   - **c** There was no difference in jury responses.
   - **d** Closed-circuit TV evidence was more likely to permit the presentation of graphic evidence.

4 The *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) changed the *Crimes Act 1900* (NSW) with respect to consent. Which of the following is correct?
   - **a** Documentary evidence is needed to establish consent.
   - **b** The onus of proof of consent has been reversed.
   - **c** Partial consent may be established.
   - **d** None of the above.

5 The *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) made which of the following changes to the *Criminal Procedure Act 1986* (NSW)?
   - **a** Hearsay evidence can now be admitted to prove that the complainant consented to sexual intercourse.
   - **b** It prohibited the cross-examination of victims by an accused person representing himself.
   - **c** It allows a transcript or recording of a complainant's evidence in any retrial.
   - **d** It reaffirmed the right of an unrepresented accused to cross-examine the alleged victim.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

1 Outline the main issues that prompted law reform in the area of sexual assault.
2 Discuss the changes to the law of consent from the perspective of the victim and the accused.
3 Identify and describe the role of some non-legal measures in addressing the effectiveness of the law in dealing with sexual assault.
4 Describe at least three reforms to the law relating to sexual assault.
5 Assess the effectiveness of law reform in addressing the issues around sexual assault.

ISBN 978-1-108-86281-3 Milgate et al.

Topic 4

Young drivers and the law

IMPORTANT LEGISLATION AND TREATIES

Crimes Act 1900 (NSW)
Children (Criminal Proceedings) Act 1987 (NSW)
Children (Detention Centres) Act 1987 (NSW)
Road Transport Legislation Amendment (Car Hoons) Act 2008 (NSW)
Road Transport Act 2013 (NSW)
Road Transport (Driver Licensing) Regulation 2017 (NSW)

SIGNIFICANT CASES

TG v R [2010] NSWCCA 28
SBF v R [2009] NSWCCA 231

ISBN 978-1-108-86281-3 Milgate et al.

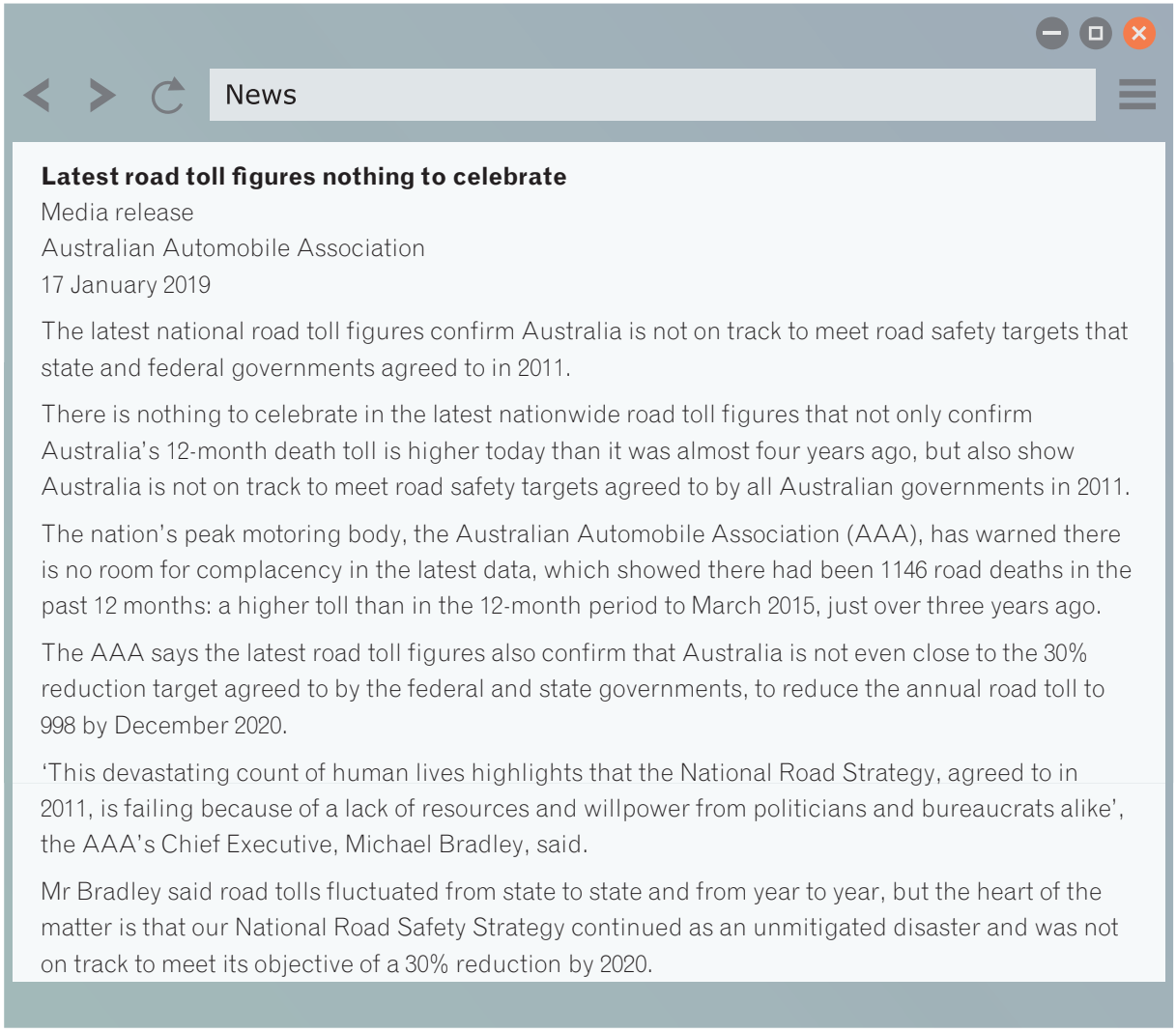
5.13 Conditions that led to law reform relating to young drivers

For most Australian young people aged 16–25, learning to drive a car and gaining a licence to drive without adult supervision is considered to be a rite of passage. Being able to drive means freedom from parents, public transport and a general sense of not having to rely on others to go places. However, the ability to drive a vehicle without adult supervision carries enormous responsibilities, and is subject to frequent legislative changes.

When speaking to older generations of drivers, many can recite stories about going to the nearest police station and doing a driving test with a police officer and being granted a licence with very little fuss. No photo identification, written tests or logbooks were required in those times. More recently, drivers could obtain a learners permit at 16 years and nine months and then could practise their driving with relatives or instructors. During the 1980s, a person could be granted a provisional licence (P-plates) on their seventeenth birthday if they passed a practical and written test. After one year on P-plates, drivers were automatically granted a C-class licence.

However, in recent years, there have been a number of tragic accidents, media and public criticism of young drivers and new restrictions have been placed on provisional drivers. The reasons for these restrictions are summarised in the following points:

- P-plate drivers are four times more likely than drivers with other licences to be involved in fatal accidents.
- Drivers aged under 26 make up 15% of licence holders but are involved in 36% of road fatalities.
- One P-plate driver dies in New South Wales every six days.
- 17 P-plate drivers crash every day.



ISBN 978-1-108-86281-3

- Crashes cause 66% of deaths among 17 to 20-year-olds.
- Speed is a contributing factor in 80% of crashes.
- Twenty-five per cent of P-plate drivers admit speeding 'most of or all the time'.
- In their first year of driving, 33% of drivers crash.
- Restricting red P-plate drivers to one passenger saves 18 lives a year.

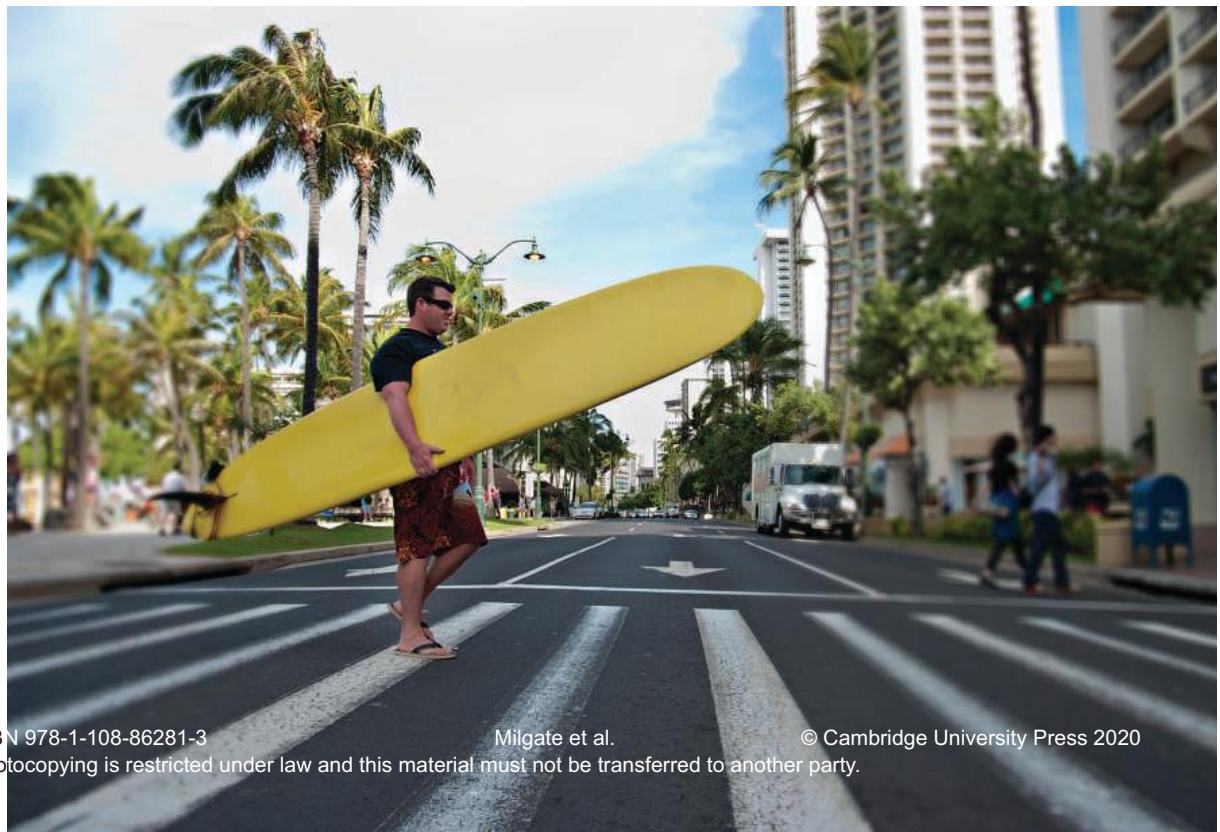
Over the past few years, obtaining a driver licence has become more time-consuming, and there are now more restrictions on driver behaviour. All states and territories in Australia have a uniform driver licence system: in all of them, a **C-class licence** (a car licence) allows a driver to drive a car, utility, light truck or van provided it is not heavier than 4.5 tonnes. However, as state governments have legislative responsibility for the administration of drivers, laws regarding driver behaviour vary. While most states allow 16-year-olds to learn to drive a vehicle or motorcycle under the supervision of a fully licensed driver, there are subtle variations in learner driver supervision requirements, speeds and the number of passengers allowable. For example, learner drivers in New South Wales must record 120 hours of driving with at least 20 of these hours being at night. Learner drivers in New South Wales may drive to a 90 km/h maximum, but South Australia allows 100 km/h. Many states do not restrict the number of passengers P-plate drivers can carry, but in New South Wales, P1 drivers are restricted to one passenger between the hours of 11 pm and 5 am. In Western Australia, P-plate drivers cannot drive between midnight and 5 am, except for work or family reasons.

C-class licence
'C' stands for car; an unrestricted driver licence often known as a 'black' or 'full' licence in terms of restrictions on speed, mobile phone use, passengers carried and blood alcohol readings

The responsiveness of the legal system

In 1970, 1309 people were killed on the roads in New South Wales. This is not the highest figure in absolute terms since records have been kept – records started in 1908 – but by dividing the population of the state by the number of fatalities, a figure of 28.98 fatalities per 100 000 persons was recorded. By 2006, the road toll had fallen dramatically: to 496, a figure of 7.23 fatalities per 100 000. While the annual road toll has hovered around this figure since the 1990s, laws and restrictions for young drivers in New South Wales are continually changing to try to minimise fatalities and injuries on our roads.

Figure 5.15 Laws and restrictions for young drivers in New South Wales are continually changing to try to minimise fatalities and injuries on our roads.



ISBN 978-1-108-86281-3 Milgate et al.

In 2006, two car accidents occurred that both caused multiple fatalities. The first accident was a horrific motor accident on the New South Wales north coast. The second accident was in Sydney's south. Both young drivers received jail sentences for their actions.

In Court

***TG v R* [2010] NSWCCA 28**

In 2006, 17-year-old driver TG was driving late at night with four of his mates in the car from Byron Bay to Lismore, on the New South Wales north coast. The driver was speeding, driving at 115 km/h in an 80 km/h zone, and was overtaking another vehicle on a wet road. He lost control of his vehicle on a bend and collided with a tree, killing all four of his passengers. TG suffered minor injuries.

TG was charged with four counts of dangerous driving occasioning death. He was sentenced to four years' jail with a two-year non-parole period. Following the accident, the NSW Government implemented new restrictions on provisional licences, making it illegal for P1 drivers to carry more than one underage passenger between 11 pm and 5 am. Judge Charters noted that this change may not be enough to prevent further deaths.

Legal Links

Search online for the article, 'Four teenagers killed in car crash' (*The Sydney Morning Herald*, 23 October 2006), which goes into detail about the accident near Byron Bay. The other accident occurred just two weeks after the Byron Bay crash. SBF was a 17-year-old driver who also lost control of his vehicle, causing the death of both his passengers.

In Court

***SBF v R* [2009] NSWCCA 231**

On 7 November 2006, when SBF was 17 years old, he drove a vehicle at high speed, resulting in the death of two young persons, MA and DF, and the serious injury to a third young person, KL. On 8 May 2008, SBF pleaded guilty and was sentenced (on 8 August 2008) to seven years and 10 months' imprisonment with a non-parole period of four years and three months.

SBF appealed this District Court decision. There were four grounds of appeal, including that the sentencing judge erred in his assessment of the aggravating features of the offences and that the sentence was manifestly excessive. The Court of Criminal Appeal referred to what the sentencing judge said at the time of the decision in August 2008, including the following:

> These offences are of course extremely serious. This case is yet another example of young people failing to heed the warnings regarding the dangers of speed, whilst driving motor vehicles. There was on the part of the offender, and it is so conceded by his learned counsel, a complete abandonment of responsibility. As a result of this appalling incident of driving, two young men have lost their lives and another young woman has been seriously and permanently impaired. The grief and loss consequent upon these deaths and injury can barely be imagined but some idea can be gained from the victim impact material.

The three judges dismissed all four grounds of appeal and upheld the sentence imposed in August 2008.

ISBN 978-1-108-86281-3 Milgate et al.

Review 5.10

1. Compare and contrast the two cases in the 'In court' boxes (*TG v R* [2010] NSWCCA 28 and *SBF v R* [2009] NSWCCA 231). Suggest reasons for the higher sentence in the *SBF v R* case, despite the accident having caused fewer deaths.
2. After reading the article, 'Four teenagers killed in car crash', describe your understanding of the terms 'justice', 'law' and 'society' in relation to this motor vehicle accident.
3. Read the media article, 'Latest road toll figures nothing to celebrate'. Explain two of the key reasons why road fatalities in Australia have increased.

5.14 Agencies of law reform relating to young drivers

Roads and Maritime Services and Transport for NSW (TfNSW) (called the 'NSW Roads and Maritime Services Authority' (RMS) prior to 1 December 2019) administers laws relating to New South Wales drivers under the *Road Transport Act 2013* (NSW) and the *Road Transport (Driver Licensing) Regulation 2017* (NSW). These legal instruments set out a multitude of restrictions on driver behaviour and penalties for infringements.

There are severe penalties for driving recklessly, both legally and socially. Under the *Crimes Act 1900* (NSW), reckless drivers can go to jail. Accidents also change the lives of victims' families as they deal with the loss of, or serious injury to, loved ones. The law tries to satisfy society's desire to see offenders punished for breaching the law by driving a vehicle irresponsibly.

VicRoads is the statutory authority that administers laws relating to drivers in Victoria. VicRoads aims to reduce the number and severity of road crashes and road trauma incidents, assists in the development of the road transport system, and minimises the impact of roads and traffic on society. VicRoads' powers arise from the *Transport Integration Act 2010* (Vic), the *Road Management Act 2004* (Vic) and the *Road Safety Act 1986* (Vic). In Queensland, the Department of Transport and Main Roads administers the law for drivers under the *Transport Operations (Road Use Management) Act 1995* (Qld). Each of these agencies is also concerned with changing the law to lower the road toll and ensure that all drivers are safe on Australian roads. Each agency has its own mechanisms, but they each have similar law reform objectives.

5.15 Mechanisms of law reform relating to young drivers

The *Road Transport (Driver Licensing) Regulation 2017* (NSW) outlines a **graduated licensing system**. This system allows young drivers to move through three stages of competency, from supervised learning to unsupervised driving. At stage 1, 16-year-olds can obtain a learner's licence (L-plates) after passing a multiple-choice test. They must then complete 120 hours of driving that is supervised by someone with a full Australian driver licence. This driving must be recorded in a logbook (or digitally recorded) and verified by the person who supervised the driving. At stage 2, when they are 17, drivers can sit a test to obtain their **P1** licence (red provisional licence) (P-plates). At 18, drivers can progress to a **P2** (green provisional licence) after passing a 'hazard perception test'. In New South Wales, this system has been changed on numerous occasions.

Review 5.11

1. Account for the increasing complexity of restrictions on learner drivers since the 1980s.
2. Outline some similarities and differences between the states in relation to P-plate and C-class licences.
3. Outline the relationship between law, justice and society in relation to learner drivers.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 5.16 Learner and provisional licence holders must display the appropriate plates on the car when they are driving.

graduated licensing system
a licensing system in which drivers pass through stages leading up to the granting of a full C-class licence

P1
red provisional plates

P2
green provisional plates

The restrictions for young drivers as at November 2019 are summarised below. These restrictions have been changed significantly in response to pressure from the media, the public and the families of victims who lost their lives in horrific crashes. Despite New South Wales introducing a zero-alcohol limit for all P-plate drivers in 2004 (this already applied to L-plate drivers), crashes involving alcohol are still occurring.

A summary of restrictions on L-plate and P-plate drivers

In New South Wales, L-plate and P-plate drivers are subject to the following restrictions:

- **Speed:** L-plate drivers must not exceed 90 km/h; P1 drivers must not exceed 90 km/h; P2 drivers must not exceed 100 km/h. Any L-plate or P-plate driver caught speeding (either by exceeding these limits or exceeding a marked limit) will be fined, given four demerit points, and will lose their licence for three months.
- **Mobile phones:** All mobile phone use while driving is banned for L-plate and P1 drivers.
- **Passenger restrictions:** P1 (red) drivers under the age of 25 may only carry one passenger under the age of 21 between 11 pm and 5 am; a breach of this rule will incur a loss of three demerit points – a fine may be also be awarded.
- **Vehicle restrictions**: P1 and P2 drivers are not allowed to drive a range of six-cylinder vehicles known as 'high performance' vehicles.
- **Logbooks:** Learner drivers must log 120 hours of supervised driving in a logbook. A person with a full Australian driver licence or a driving instructor must sign each entry. At least 20 hours of driving must be at night.
- **Progression:** Drivers must pass a hazard perception test to progress from a P1 (red) licence to a P2 (green) licence.
- **Alcohol and drugs:** L-plate, P1 and P2 drivers may not record any blood-alcohol reading above zero or drive under the influence of drugs.

The development and reform of law as a reflection of society

In response to accidents, the NSW Government made several key amendments to the legislation governing young drivers. In 2007, the graduated licensing system was amended to include 150 hours of supervised driving experience for L-platers (later amended to 120 hours). This was the beginning of a logbook system: all hours driven were to be recorded and verified by the supervising driver. The intention was to increase drivers' experience, which would improve their skills and so avoid tragedies. According to the TfNSW, drivers can reduce their chances of being in a car accident by 30% by increasing the number of supervised driving hours they complete.

However, according to law academic, Bronwyn Naylor, critics of the logbook system argue that drivers from disadvantaged backgrounds were being treated unfairly:

ISBN 978-1-108-86281-3 Milgate et al.

Figure 5.17 On 4 January 1966, the first person to be issued with a P-plate at the Motor Transport Department in Roseberry was Lesley Armstrong of Bardwell Park.

> Magistrate Stephanie Tonkin in Townsville has been increasingly concerned about the number of young people – Aboriginal and non-Aboriginal – coming before her prosecuted for driving without a licence. The introduction of the 100 hours requirement [in Queensland] makes it even more difficult to ever achieve a full licence. Her colleagues in other states also point to increasing numbers of marginalised families unable to provide the supervised driving required, whose teenage children are simply driving unlicensed.
>
> 'L-plates, Logbooks and Losing out: Regulating for safety – or creating new criminals?' (*Alternative Law Journal*, vol. 32, no. 2, 2010)

In New South Wales, Aboriginal and Torres Strait Islander people are twice as likely to be killed or injured in a car crash compared with non-indigenous people. According to a TfNSW study, the problems learner drivers most often identify are 'the licensed driver helping often didn't have time to help me go driving' (33%); 'sometimes I couldn't find a licensed driver to teach/help me' (27%); and 'I couldn't afford a driving instructor' (23%).

By 2015, the TfNSW had responded by supporting Aboriginal and Torres Strait Islander communities around the state in 18 places, including Orange, Bourke, Lake Cargelligo and Moree. In these places, 445 young drivers have been enrolled in programs, resulting in 164 provisional licences being issued and 17 C-class licences. A total of $5 million over five years has been provided to make roads in and around Aboriginal and Torres Strait Islander communities safer.

ISBN 978-1-108-86281-3 Milgate et al.

Restricted P1 Provisional licence for selected areas west of the Newell Highway

Under 25-year-old learner drivers living in Brewarrina, Walgett, Bourke, Broken Hill, Balranald and Hay can now apply for a restricted P1 provisional licence so they can drive to work, an educational institution and medical appointments. Learners in these areas will be able to apply for the restricted P1 provisional licence after they have completed 50 hours of on-road supervised driving (including at least 10 hours of night driving), with these hours recorded in their logbooks.

Source: NSW Centre for Road Safety

The importance of the rule of law

The TfNSW claimed it had caught 32 learner drivers falsifying logbooks in 2010, compared with 189 in 2009 and 84 in 2008. Victorian and Queensland departments reported similar figures over the last four years, with similar reasons given for attempting to disobey the law. Despite the apparent ease of falsifying logbooks, asking parents to 'bump up' the hours behind the wheel so as to speed up the process of gaining a provisional licence clearly demonstrates a lack of respect for, and understanding of, the rule of law. The intention of the legislation is to improve the experience, knowledge and skill of learner drivers in order to reduce the road toll and save lives and prevent injuries on our roads.

In response to the falsifying of paper logbooks, the TfNSW introduced a digital logbook app called L2P. The digital logbook is designed for the latest generation of learner drivers. It features a countdown to motivate learners, real-time tracking and recording of driving sessions plus an online educational platform with demonstrations presented as video clips.

Legal Links

The *Newcastle Herald* article 'Fudging the logbook' (by Jeff Corbett, 12 July 2011) explains the response some people have had to the logbook system. Find this article online.

5.16 Effectiveness of law reform relating to young drivers

In 2007, just 48 hours after the passing of legislation restricting the number of passengers P1 drivers are allowed to carry, a young female passenger was killed in Sydney's Royal National Park. A 19-year-old learner driver lost control of his vehicle on a bend, killing 17-year-old Kim O'Brien and injuring another three passengers. The tragedy highlights the intention of the legislation relating to the numbers of passengers: it restricts P1 drivers under the age of 25 to carrying no more than one passenger who is under the age of 21 between 11 pm and 5 am.

In February 2012, a 23-year-old woman and the tow-truck operator who came to her aid were killed in an horrific accident. Sarah Frazer's car broke down near Mittagong, on the New South Wales Southern Highlands, and needed to be towed. Both Sarah and the tow-truck operator who came to her aid were killed when they were hit by a passing vehicle. A Road Safety Group (http://www.sarahgroup.org) was started by Sarah Frazer's father. In May 2012, he presented a petition to the New South Wales Parliament calling for a change to the National Road Rules. The petition had 23000 signatures. One of the changes the petition called for was the introduction of a 'move over and slow down' law.

Slow down, move over and given space: A road rule has changed

The trial of a rule that required motorists to slow down to 40 km/h when passing stationary emergency vehicles with flashing blue or red lights has been completed. A review of the trial, which included community feedback, has resulted in a change to the road rules.

ISBN 978-1-108-86281-3 Milgate et al.

This rule has been changed to improve the safety of emergency services personnel, tow-truck operators and breakdown assistance providers working on the road, as well as the people they are helping. The changes also make it safer on higher speed roads where the time and distance required to reduce speed to 40 km/h is the greatest. The changes to the rule commenced on 26 September 2019.

Source: NSW Centre for Road Safety

Street or drag racing and 'anti-hoon' legislation

Another behaviour associated with young drivers is 'drag' or street racing. The use of suburban roads for racing cars has had fatal consequences on many occasions. This 'hoon' (antisocial) behaviour has been outlawed since 1999 through the *Road Transport (Safety and Traffic Management) Act 1999* (NSW) the *Road Transport Legislation Amendment (Car Hoons) Act 2008* (NSW), and subsequently by the *Road Transport Act 2013* (NSW) because of the danger it poses to both drivers and the public. Under the legislation, a court can impose a fine for a first offence of $3300, and can impose a fine of $3300 and/or nine months' imprisonment for a second or subsequent offence. A 12-month automatic disqualification applies to those convicted of this offence.

A 'burn-out' – intentionally spinning the wheels of a vehicle at high revs to burn the rubber of the tyres, creating smoke and a distinctive smell – is also considered to be 'hoon' behaviour. The risk of cars becoming out-of-control is high, which is why burn-outs are outlawed. An 'aggravated burnout' is also an offence; this covers a hoon driver's mates who willingly participate in, urge others to participate in, photograph or film to promote, or organise hoon activity. The maximum court-imposed fine for a first offence is $3300; it is $3300 and/or nine months' imprisonment for a second or subsequent offence. A 12-month automatic disqualification applies to those convicted of this offence.

Figure 5.18 Four teenagers were killed in a single-vehicle crash on June 7, 2020 in Townsville.

Figure 5.19 Burn-out tyre marks in Murchison in Western Australia.

Despite the penalties for these offences, street racing continues to create problems for police, victims, families and the public.

Discussions about deaths caused by street racing, as opposed to those caused by driving dangerously, involve comparing the harm that a driver may cause to members of the public or

ISBN 978-1-108-86281-3 Milgate et al.

Review 5.12

1 Discuss the mandatory 120 hours of supervised driving for learners.
2 Explain the statement 'logbook requirements only create more criminals'.
3 Evaluate the effectiveness of law reform in relation to young drivers; refer to the accident in Sydney's Royal National Park and the death of Sarah Frazer.

innocent bystanders in various situations. It seems obvious that the risks posed by street racing are higher than those posed by general incidents of speeding and driver inexperience. The fine – $3300 – can seem a very small price to pay compared with the price TG and SBF paid: incarceration for a number of years.

The importance of driving unsupervised for many young Australians has not changed since the 1950s. Driving remains a rite of passage for many teenagers, but it clearly carries important legal and social responsibilities. There are severe consequences for those who blatantly disregard both the law and the lives of others, and prosecutions can result in incarceration for drivers – not to mention the wrath and pain of the families of victims lost in senseless car accidents.

Getting a C-Class licence now requires significant time behind the wheel and significant financial costs. Many families from lower-income groups claim the costs prohibit their children from accessing private transport.

Research 5.6

1 Find online the article, 'Street race death horrifies NSW minister' (*News*, 7 August 2012). Outline the minister's response to the street racing accident.
2 Explain the importance of driving within the speed limit.
3 Choose an act of reckless driving (e.g. driving under the influence, street racing) and research it. List the penalties for the offence and explain the dangers involved.

Review 5.13

1 Compare the fines and penalties for street racing with those of speeding and mobile phone use while driving. Do you think the penalties are justified? Give reasons to support your opinion.
2 'Police should not be able to confiscate vehicles under any circumstances.' Research the legislation about the confiscation of vehicles and discuss the key issues surrounding the role of the state in governing driver behaviour.

ISBN 978-1-108-86281-3 Milgate et al.

Topic 4 summary

- A number of tragic accidents, as well as media and public criticisms of young drivers, and new restrictions placed on provisional drivers, have made obtaining a licence a lengthy and expensive process.
- The Roads and Maritime Services and Transport for NSW administers New South Wales drivers under the *Road Transport (Driver Licensing) Regulation 2017* (NSW) and the *Road Transport Legislation Amendment (Car Hoons) Act 2008* (NSW).
- The *Road Transport (Driver Licensing) Regulation 2017* (NSW) outlines a graduated licensing system.
- Support has been provided for members of disadvantaged communities to access driver licences.
- Despite the penalties and the law, street or drag racing and 'hooning' are still activities that some young drivers participate in.
- Gaining a C-class licence requires a large amount of supervised driving time, which may help the young driver, but is a burden on families, especially ones with lower incomes.

Topic 4 questions

Multiple-choice questions

1 Legislation governing C-class licences:
   a is uniform across the country.
   b varies from state to state.
   c only varies on speed-related matters.
   d only varies on passenger restrictions.

2 A key difference between red (P1) and green (P2) provisional licences is:
   a P2 drivers have no limits related to how many passengers they can carry.
   b P2 drivers have a 0.02 blood-alcohol restriction.
   c P1 drivers aren't required to display plates.
   d P2 drivers can drive at a higher speed limit than P1 drivers.

3 Approximately how many hours did learner drivers of the 1970s complete before driving unsupervised?
   a 120
   b no number specified
   c 20
   d 50

4 What proportion of P-plate drivers report speeding 'most or all the time'?
   a 10%
   b 25%
   c 90%
   d 100%

5 Zero-alcohol readings for all L, P1 and P2 drivers came into force in which year?
   a 2006
   b 2010
   c 2004
   d 1970

Short-answer questions

1 Outline the process for gaining a C-class licence in New South Wales.
2 List two examples of legislation governing driver behaviour.
3 Describe the difference between a P1 and a P2 licence.
4 Discuss the four-time increase in required learner driver hours since the 1970s.
5 Evaluate the law as it relates to young drivers and their rights to a driver licence.

ISBN 978-1-108-86281-3 Milgate et al.

Part II
The individual and the law

30% of course time

Principal focus

Students investigate the way in which the law impacts on individuals by referring to legal and non-legal institutions, laws and media reports.

Themes and challenges

The themes and challenges covered in Part II include:

- the relationship between justice, law and society
- the relationship between rights and responsibilities
- balancing the rights of individuals with the needs of the state
- the role of the law in regulating technology
- the effectiveness of legal mechanisms for achieving justice for individuals and society.

Chapters in this part

ISBN 978-1-108-86281-3

Chapter 6
Your rights and responsibilities

Chapter objectives

In this chapter, students will:

- investigate the effects of legal and non-legal institutions on individuals
- explore the relationship between rights and responsibilities in various contexts
- discuss the necessary balance between the rights of individuals and of the state
- evaluate the effectiveness of legal instruments for achieving justice for both individuals and society
- identify and apply appropriate legal terms and concepts.

Relevant law

IMPORTANT LEGISLATION

Defence Act 1903 (Cth)
Racial Discrimination Act 1975 (Cth)
Summary Offences Act 1988 (NSW)
Education Act 1990 (NSW)
Local Government Act 1993 (NSW)
Smoke-free Environment Act 2000 (NSW)
Local Government (General) Regulation 2005 (NSW)
Smoke-free Environment Regulation 2016 (NSW)

SIGNIFICANT CASES

Donoghue v Stevenson [1932] AC 562
Eatock v Bolt [2011] FCA 1103
Hanssen v Peninsula Private Hospital [2012] VSC
Lange v Australian Broadcasting Corporation (1997) HCA 25
Dietrich v R [1992] HCA 57
Rush v Nationwide News Pty Ltd (No 7) [2019] FCA 496

ISBN 978-1-108-86281-3 Milgate et al.

Legal oddity

Make sure you are walking on the right side of the road – literally. Under the *Road Rules 2014* (NSW), a pedestrian can be fined $220 for not facing oncoming traffic when walking on the road (unless it is impracticable to do so).

ISBN 978-1-108-86281-3

6.1 What are rights and responsibilities?

Rights are entitlements that people have by legal or moral authority. Rights refer to a way that people should be treated. In most cases, this treatment must be fair, respectful and equal. If you have a right to something, others are legally or morally prohibited from taking it from you. A person has a right to do something or possess something as a result of simply being human; hence, the expression 'human rights'. For example, students with disabilities have the right to attend a public school in an area in which they live. The 'local' high school (under the *Disability Discrimination Act 1992* (Cth)) must treat students with disabilities in the same way as all other students.

rights
legal or moral entitlements or permissions

Responsibilities are legal or moral obligations that a person may have to another person; to a group; or to the state, society or other people generally. There are responsibilities to act in particular ways, as well as responsibilities to refrain from certain acts. For example, a parent has both legal and moral responsibility to take care of his or her children, and all persons have a responsibility not to commit criminal and **tortious** acts. States, groups, organisations, corporations and societies have responsibilities, just as individuals do.

responsibilities
legal or moral obligations to others

tortious
wrongful; constituting a tort or breach of duty to others

Rights and responsibilities are related in some ways. Where citizens have particular rights, the state has a responsibility to protect those rights and ensure that individuals, groups or the state itself does not violate them. Where the members of a group have a legal responsibility to do something, the group has a right to expect it. For example, school principals have the responsibility to allow a disabled student the right to attend the local school by arranging wheelchair access, teacher support and training.

Legal basis of rights

For a right to have a legal basis, it must be protected by law and thus be enforceable. In Australia, legal rights are derived through our *Constitution*, statute and common law.

Australian Constitution

Our *Constitution* sets out two types of rights: express and implied. **Express rights** such as section 116 give us the right to freedom of religion. Such rights stop future governments from banning a religion or forcing citizens to follow any one religion. **Implied rights** such as the right to freedom of speech need to be 'read between the lines' and are not expressly written in to the *Constitution*.

express rights
civil and political rights that are clearly and absolutely outlined in the *Australian Constitution*

implied rights
civil and political rights that can be inferred from the *Australian Constitution*, rather than being expressly stated

Statute

Examples of rights protected by statute are the rights not to be excluded or restricted based on race or ethnic origin and physical or mental disability. These rights are contained in the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992* (Cth). For example, an employer would not be able to dismiss an employee because he or she was from a certain racial group. Nor would a political party be able to refuse to allow someone to join because of his or her ethnic origin.

Common law

Other rights have their origins in common law; that is, by decisions of the courts and judges. For example, in *Dietrich v R* [1992] HCA 57, the High Court ruled that individuals have the right to a fair trial, which includes legal representation paid by the state in serious criminal trials.

Legal basis of responsibilities

As stated above, where someone has a right, someone else has a corresponding responsibility.

ISBN 978-1-108-86281-3 Milgate et al.

Statute

Legal responsibilities are also called 'obligations' or 'duties'. An example of a statutory obligation is parents' duty to send their children to school or to arrange for their children to be home schooled. Another is the duty of the state to ensure that every child has the best possible education and to provide public schools. These duties are contained in Acts such as the *Education Act 1990* (NSW) and are based on the principle, stated in section 4 of the Act, that every child has the right to an education.

Common law

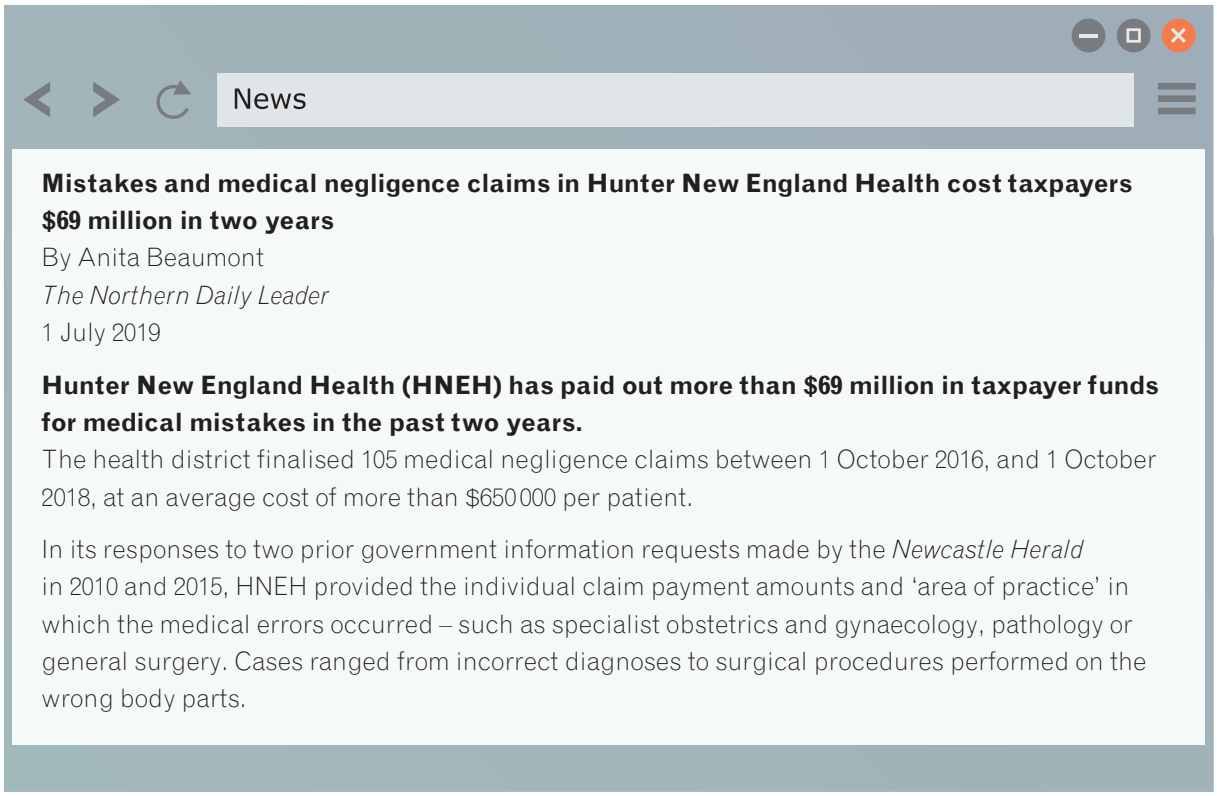
Other legal responsibilities are based on common law such as the duty of care. As expressed in *Donoghue v Stevenson* [1932] AC 562, a duty of care is owed to all persons who are likely to be 'closely and directly affected' by your behaviour. In short, a supplier, such as a soft drink manufacturer, must take care to ensure their products do not injure or harm their consumers.

In another context, there is a duty of care from doctors to their patients. Any breach of the duty of care, resulting in harm that could be foreseen, entitles the person harmed to bring an action for **negligence**. In *Hanssen v Peninsula Private Hospital* [2012] VSC, the parents of a boy severely handicapped during childbirth sued a hospital for negligence. The case was settled and the family received millions of dollars in damages. More recently in the Hunter region of New South Wales, the local area health service made payments of up to $69 million dollars to over 100 patients.

negligence
carelessness; a tort that involves breach of a duty of care resulting in harm that could be foreseen

Figure 6.1 All children have the right to access an education.

ISBN 978-1-108-86231-3 Milgate et al.



Mistakes and medical negligence claims in Hunter New England Health cost taxpayers $69 million in two years

By Anita Beaumont

The Northern Daily Leader

1 July 2019

Hunter New England Health (HNEH) has paid out more than $69 million in taxpayer funds for medical mistakes in the past two years.

The health district finalised 105 medical negligence claims between 1 October 2016, and 1 October 2018, at an average cost of more than $650 000 per patient.

In its responses to two prior government information requests made by the *Newcastle Herald* in 2010 and 2015, HNEH provided the individual claim payment amounts and 'area of practice' in which the medical errors occurred – such as specialist obstetrics and gynaecology, pathology or general surgery. Cases ranged from incorrect diagnoses to surgical procedures performed on the wrong body parts.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 13–14 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 6.1

1. Explain the difference between rights and responsibilities and describe how they are related.
2. Describe how a right can gain legal basis.
3. Identify other terms used to describe legal responsibilities.
4. Use the news article, 'Mistakes and medical negligence claims in Hunter New England Health cost taxpayers $69 million in two years', to assess the extent to which patients have a right to compensation for incidents that occurred during a hospital stay. Assess the role of media in protecting individual rights.

6.2 The nature of individual rights

The distinction between moral and legal rights

Legal rights outlined above fall under categories based on our *Constitution*, statutes and common laws. By contrast, moral rights may be argued from different viewpoints, and may or may not be upheld by those that have responsibility in respect of the right. For example, most of us would expect the right to fidelity when in a relationship but it is not a breach of statutory, common or constitutional law for people to engage in extra-marital affairs. Therefore, while an act of infidelity may be immoral, it is not illegal.

While moral rights and responsibilities may have binding force for everyone, only those who believe that they are binding are likely to behave accordingly and

ISBN 978-1-108-86281-3 Milgate et al.

Figure 6.2 Labor senator Penny Wong (left), same-sex marriage Ambassador Magda Szubanski (centre) and former Labor opposition leader Bill Shorten (right) celebrate after the Same-sex Marriage Bill passed the Federal Parliament in Canberra on 7 December 2017.

try to persuade others to do so. In other words, moral rights and responsibilities are not enforceable. While many laws have been passed because they agree with the moral views of most people in a community, and are complied with for similar reasons, the law is sometimes slow to change to reflect changes in social attitudes and public morality. The same-sex marriage debate is a good example. Polling by Galaxy Research (2009–2012) found that 64% of survey respondents agreed with changing the *Marriage Act 1961* (Cth) and allowing same-sex couples the right to matrimony. However, it was not until after the formal Australian Marriage Law Postal Survey in 2017 that the government enacted legislation giving people in same-sex relationships the same marriage rights as people in heterosexual relationships.

Video

A Bill of Rights?

Protections provided by Bills of Rights

Countries including the United States, the United Kingdom and New Zealand have a document known as a **Bill of Rights**. Such a document sets out specifically what individuals are entitled to expect of their government. Australia is the only Western democracy that does not have one.

Bill of Rights
a statement of basic human rights and privileges

Although the United Kingdom has no single constitutional document, the English *Bill of Rights of 1689* sets out a few fundamental rights and is still in force today. However, it is limited in its scope and deals mainly with succession to the throne and the way in which English law was to be adopted in its colonies (see section 6.4: The rights of Indigenous peoples, regarding the 'doctrine of reception'). As one of the 47 member countries of the Council of Europe, the United Kingdom is a party to the *European Convention on Human Rights* (1953) and is bound by it. The United Kingdom introduced the *Human Rights Act 1998* (UK) to give further legal effect to the rights contained in this convention.

In the United States, the *Bill of Rights*, ratified in 1791, consists of the first 10 amendments to the Constitution and contains fundamental rights of individuals in private life, in the criminal justice process and with respect to the government generally.

New Zealand's *Bill of Rights Act 1990* (NZ) contains civil, democratic and human rights, including freedom from discrimination and freedoms from government intrusions into individuals' lives.

Table 6.1 shows some examples of rights contained in bills of rights.

ISBN 978-1-108-86281-3 Milgate et al.

TABLE 6.1 Examples of rights enshrined in a Bill of Rights

New Zealand: *Bill of Rights Act 1990* (NZ)	United States: *Bill of Rights* (1791)	European Union: *European Convention on Human Rights* (1953)
The right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment (s 9)	Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted (Amendment VIII)	No one shall be subjected to torture or to inhuman or degrading treatment or punishment (Article 3)
The right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference [and] the right to freedom of expression (ss 13 and 14)	Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press (Amendment I)	The right to freedom of thought, conscience, and religion (Article 9); freedom of expression [including] freedom to hold opinions and to receive and impart information and ideas without interference (Article 10)
Everyone who is arrested … shall be informed … of the reason for it; and … shall have [and be informed of] the right to consult and instruct a lawyer … to be released if the arrest or detention is not lawful … to be charged [and brought to court] promptly or to be released, and [not to be a witness against himself] (s 23)	No person shall be held to answer for a capital … crime … unless on a presentment or indictment of a Grand Jury … nor … compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law (Amendment V) The right to a speedy and public trial by … jury … to be informed of the nature and cause of the accusation … to have [a lawyer] (Amendment VI)	Right to a fair trial … Everyone charged with a criminal offence shall be presumed innocent until proved guilty [and] has the following minimum rights: to be informed promptly … of the nature and cause of the accusation against him; to have adequate time and facilities for the preparation of his defence; [to have a lawyer]; to have … witnesses on his behalf under the same conditions as witnesses against him (Article 6)

Research 6.1

View online the US *Bill of Rights* (the first 10 amendments to the US Constitution). Choose three rights that are contained in the US *Bill of Rights*.

1. Summarise each of these three rights in your own words.
2. For each of these three rights, explain why it was considered important enough to be included in the US *Bill of Rights*.
3. Assess whether these considerations are still relevant today and justify your response.

Review 6.2

1. Make a list of five rights and corresponding responsibilities.
2. Using an example, describe the difference between legal and moral rights.
3. 'Citizens have the right to end their own lives if they are terminally ill.' Discuss the legal and moral issues arising from this idea.

ISBN 978-1-108-86281-3 Milgate et al.

TABLE 6.2 Arguments for and against a Bill of Rights in Australia

For	Against
Australian law gives insufficient protection to fundamental freedoms, and a Bill of Rights would enshrine those rights	Statutes and the common law already protect rights
A Bill of Rights would make our current laws more cohesive and accessible, rather than being 'locked up' in past judgments and statutes	A Bill of Rights makes little practical difference in the protection of rights
We are becoming increasingly internationalised and need to be aware of international laws; a Bill of Rights would bring Australia in line with other countries	Enabling judges to strike down laws made by parliament that are inconsistent with a Bill of Rights would be undemocratic
A Bill of Rights would allow Australia to meet its international obligations more effectively	Rights written in a Bill of Rights can become outdated very quickly in a rapidly changing world
A Bill of Rights would protect the rights of minorities	A Bill of Rights would actually restrict rights, because once defined, a right is limited by the words in which it is expressed
The High Court's interpretation of 'implied rights' in the Constitution is too limited: we need a document explicitly setting out our rights.	The judiciary would become too political if there were a Bill of Rights.

Arguments for and against an Australian Bill of Rights

In Australia, a Bill of Rights has never existed, as the authors of our *Constitution* believed that citizens' rights would be protected by decisions of the courts or by various statutes made as the need arose. The *Australian Constitution* does set out a number of express rights, including the right to religious freedom (s 116) and the right to trial by jury (s 80). However, the debate over the need for explicit constitutional protection for a broader range of human rights has featured in Australian political dialogue since the 1890s and continues today. Some of the arguments for and against a Bill of Rights are summarised in Table 6.2.

6.3 Individuals' rights and responsibilities in relation to the state

Conflicts between rights and responsibilities

In June 2019, the Australian Federal Police (AFP) raided the offices of the Australian Broadcasting Corporation (ABC) to investigate potential criminal behaviour by two journalists, Sam Clark and Dan Oakes. The AFP claimed that the journalists had illegally obtained information to use in a story about the behaviour of Australian Special Forces in Afghanistan between 2009 and 2013. This incident clearly highlights a conflict between the rights of journalists to know and publish about the activities of Australian Special Forces and the responsibilities

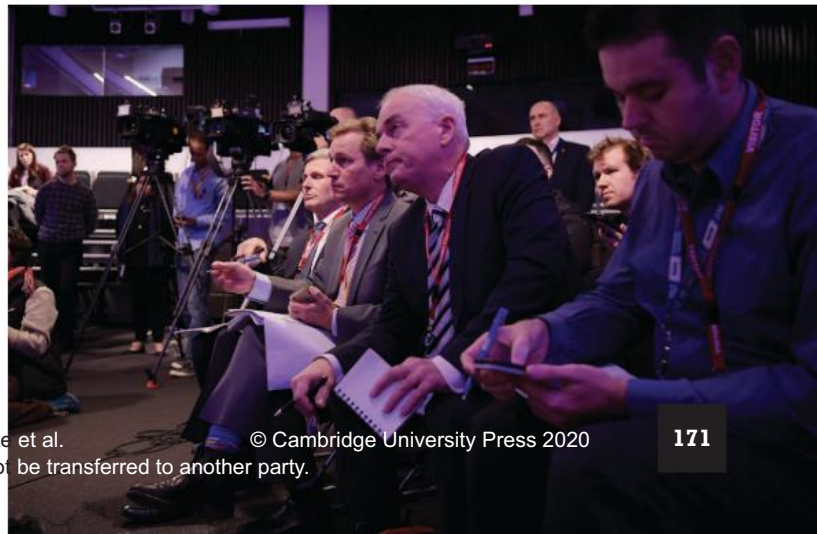


Figure 6.3 Journalists listen to Australian Federal Police (AFP) Deputy Commissioner, Neil Gaughan, speak to the media on 6 June 2019 in Canberra. AFP officers raided the home of News Corp journalist, Annika Smethurst, over a story about a leaked plan for greater powers to spy on Australians. This was followed by a raid at the Australian Broadcasting Corporation's (ABC) head office in Sydney; ABC journalists were investigating alleged unlawful killings carried out in Afghanistan by members of Australian Special Forces.

News

AFP raid on ABC reveals investigative journalism being put in same category as criminality

By John Lyons, the ABC's head of investigative journalism
ABC News
15 July 2019

On 1 April, the Australian Federal Police (AFP) wrote an extraordinary letter, which could signal a dramatic change in how the media is viewed in this country: it wanted the fingerprints of two senior journalists.

Fingerprints? Given the date of the letter – sent two months before the AFP's 6 June raid on the ABC's Sydney headquarters – the two journalists could have been excused for thinking that this was some sort of April Fool's joke by their colleagues.

But the letter was serious and had arrived in the email inbox of the two journalists and stated that the AFP was 'requesting your consent to a forensic procedure being the copying of your finger and palm prints'.

The investigation came to prominence on 5 June when armed AFP officers raided the ABC's Sydney headquarters and sorted through 9214 documents and emails, which they hoped would help them build their case against the journalists, particularly Oakes.

Throughout 2019, a significant media campaign, 'your right to know', began in opposition to the federal government's push for continued secrecy around the operations of military operations.

of the government represented by the AFP to keep information about military operations a secret for the protection of citizens. It is the first time in history that journalists in Australia have been targeted as suspects in relation to three alleged offences. One under section 79(6) of the *Crimes Act 1914* (Cth) concerning 'the receipt of prescribed information', one under section 73A(2) of the *Defence Act 1903* (Cth) concerning 'unlawfully obtaining information', and another under section 132 1(1) of the *Criminal Code Act 1995* (Cth).

These developments appear to be part of a new climate in which journalists and their sources of information, sometimes referred to as whistle-blowers, are targeted and News Corp journalist Anneke Smethurst's home was also raided just 24 hours before the ABC raid. Smethurst, who wrote a story about Australia's intelligence agencies, which the AFP argued, was not for public broadcast.

State interference with personal liberties

Less seriously, authorities in the United States have been issuing fines of US$85 to pedestrians who walk and send text messages at the same time. In Forth Worth, New Jersey, there have been 23 minor accidents between cars and pedestrians and three people have been killed because of not paying attention to traffic as they were using their phones while walking.

In Australia, about 30% of pedestrians use a hand-held device while crossing the road. Following recent reports in New South Wales and Victoria of an increase in the number of distracted pedestrians being injured or killed, there are now calls to explicitly outlaw people from using their phones while walking. Is this an invasion of our personal liberties or does the state have the responsibility to outlaw such behaviour?

ISBN 978-1-108-86281-3 Milgate et al.

News

Pedestrian Council of Australia calls for $200 fines for crossing the road while on your phone, wearing noise-cancelling headphones

By Ben Jaffrey
Muswellbrook Chronicle
4 July 2019

The Pedestrian Council of Australia (PDA) is pushing for legislation to be introduced to deter people from using their phones while crossing the road.

PDA chairman Harold Scruby wants to see pedestrians hit with a $200 fine if they use their devices or noise-cancelling headphones as they cross a street.

'We want a special penalty which would be called "cross road while distracted",' Mr Scruby said.

'There'd be a penalty for the use of any device while crossing the road.'

He added, 'We've spent 8–10 years advertising, now it's time for enforcement.'

An observational study, conducted by NRMA in Sydney, found that 36% of pedestrians crossed the road while distracted by their smartphone or wearing earphones.

The findings were released in NRMA's pedestrian safety report, *Look Up*.

It also found 7.5% of pedestrians crossed the road illegally and 3.4% crossed illegally while using their smartphone or wearing earphones.

Mr Scruby said with such a high number of pedestrians being distracted by their devices, a penalty needed to be introduced to minimise the chance of accidents.

'A lot of people say if they [pedestrians] are going to be stupid, it's their problem but the fact is the cost of road trauma per annum is about $30 billion and much of that is pedestrian trauma,' Mr Scruby said.

Mr Scruby added, 'At the moment there's no stopping people wearing noise-cancelling headphones and stepping out on pedestrian crossing or a green light without looking, listening, stopping, thinking.'

'They're in la la land. They're not aware of the imminent danger surrounding them.'

Mr Scruby also said the $200 fine was a sufficient penalty.

'If you park your car and go five minutes over on a parking meter, it's about $110 [fine] where there's no potential for harm so why wouldn't you have a considerable amount more for this,' he said.

ISBN 978-1-108-86281-3

Review 6.3

1 Identify one further argument for and against an Australian Bill of Rights. Justify if you think Australia needs a Bill of Rights or not.
2 Discuss the rights of a government to ban:
   a access to information about military operations.
   b the use of mobile phones while walking in public.
   c passengers from carrying water and other liquids on an aircraft.
3 Read the news article, 'AFP raid on ABC reveals investigative journalism being put in same category as criminality'. Outline the reasons why the AFP raided the ABC's offices. Assess the extent to which this raid challenges our rights to know about military operations.
4 Read the news article, 'Pedestrian Council of Australia calls for $200 fines for crossing the road while on your phone, wearing noise-cancelling headphones'. Outline the reasons why any law-making body is likely to be unsuccessful in outlawing the use of hand-held devices. Research if any countries ban pedestrians using hand-held devices such as phones. Discuss with a partner whether the government needs to outlaw pedestrians using hand-held devices.

It's a free world?

As discussed, the *Australian Constitution* does not contain a Bill of Rights. It does expressly protect a few rights of individuals. These are:

- section 80: the right to a trial by jury
- section 116: freedom of religion
- section 117: the right not to be discriminated against on the basis of one's state of residence.

In addition, Australia is a party to seven core international human rights treaties. The right to freedom of opinion and expression is contained in Articles 19 and 20 of the *International Covenant on Civil and Political Rights* (1966).

In 2009, social commentator Andrew Bolt was brought to account over comments he made about 'light-skinned' Aboriginal and Torres Strait Islander peoples. Bolt claimed that many such people falsely claimed to be Indigenous so they could claim welfare payments from the government. In 2011, a group of 'fair-skinned' indigenous people led by Pat Eatock successfully sued Andrew Bolt in the Federal Court. Bolt and his publishers were forced to publish an apology over the incident.

Section 18C of the *Racial Discrimination Act 1975* (Cth) became known as the 'Bolt laws'. Prior to the 2013 federal election, one of the federal Coalition's promises was to repeal this. They felt that commentators like Andrew Bolt did have a right to express their opinions on race in a general sense and that Andrew Bolt's loss demonstrated the loss of the right of free speech. By 2018, federal law-makers had decided to not proceed with the alteration of section 18C of the *Racial Discrimination Act 1975* (Cth).

Freedom of religion

Nonetheless, throughout 2019, the issue of religious expression and discrimination re-emerged through the behaviour of Australian Rugby player, Israel Folau. Folau was stood down as a player for posting messages on his Instagram account claiming that certain people were destined to 'go to hell' if they didn't follow Christianity. This issue highlights two main arguments: first, Folau claimed he had a right to

Figure 6.4 Israel Folau looks on as his solicitor, George Haros, reads a statement outside the Federal Court in Melbourne on 2 December 2019.

ISBN 978-1-108-86281-3 Milgate et al.

News

Israel Folau offered to apologise over anti-gay Instagram post, court documents reveal

By David Mark, senior national sport reporter
ABC News
26 September 2019

Former Wallabies star Israel Folau offered to publicly apologise over his anti-gay social media post warning homosexuals would go to hell, court documents have revealed.

In addition, the sacked rugby union international admitted he had breached the Rugby Australia Code of Conduct.

The fresh information came in documents lodged by Rugby Australia outlining its defence in its Federal Circuit Court case against Folau.

Folau is suing Rugby Australia and Rugby NSW for unlawful termination of his $5.7 million contract.

Folau is also demanding his job back, an apology from Rugby Australia and Rugby NSW and compensation, which was previously claimed to be worth about $5 million.

Rugby Australia is arguing that Folau was responsible for a high-level breach of its Code of Conduct over the posts.

The court documents also said Folau could not argue that 'Rugby Australia or Rugby NSW terminated his employment for reasons that included his religion or his political opinion'.

say what he wished as a follower of Christianity and second, Folau challenged his dismissal under section 72 of the *Fair Work Act 2009* (Cth), claiming his employer does not have the right to release him from his $10 million contract.

Folau claimed he had rights as a man of religion and that he was expressing his beliefs. He claimed he genuinely believed that sinners were destined for hell and that he was the victim of discrimination by those who disagreed with his views. The federal government responded by introducing the Religious Freedom Bills (the collective name for three draft Bills: the Religious Discrimination Bill 2019 (Cth), the Religious Discrimination (Consequential Amendments) Bill 2019 (Cth) and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth)) that aim to protect individuals such as Folau from avoiding scrutiny and persecution for publicly announcing their views and risk being sacked from their jobs. In December 2019, Rugby Australia and Israel Folau settled their dispute out of court for an undisclosed sum.

Review 6.4

1. Explain the difference between an 'express right' and an 'implied right'.
2. Outline the rights expressly guaranteed by the *Australian Constitution*.
3. Discuss if Australians have a right to freedom of expression. Justify your response. Refer to media stories about the Israel Folau case.
4. Research the Religious Freedom Bills and discuss the implications of such Bills being enacted.

ISBN 978-1-108-86281-3 Milgate et al.

Defamation

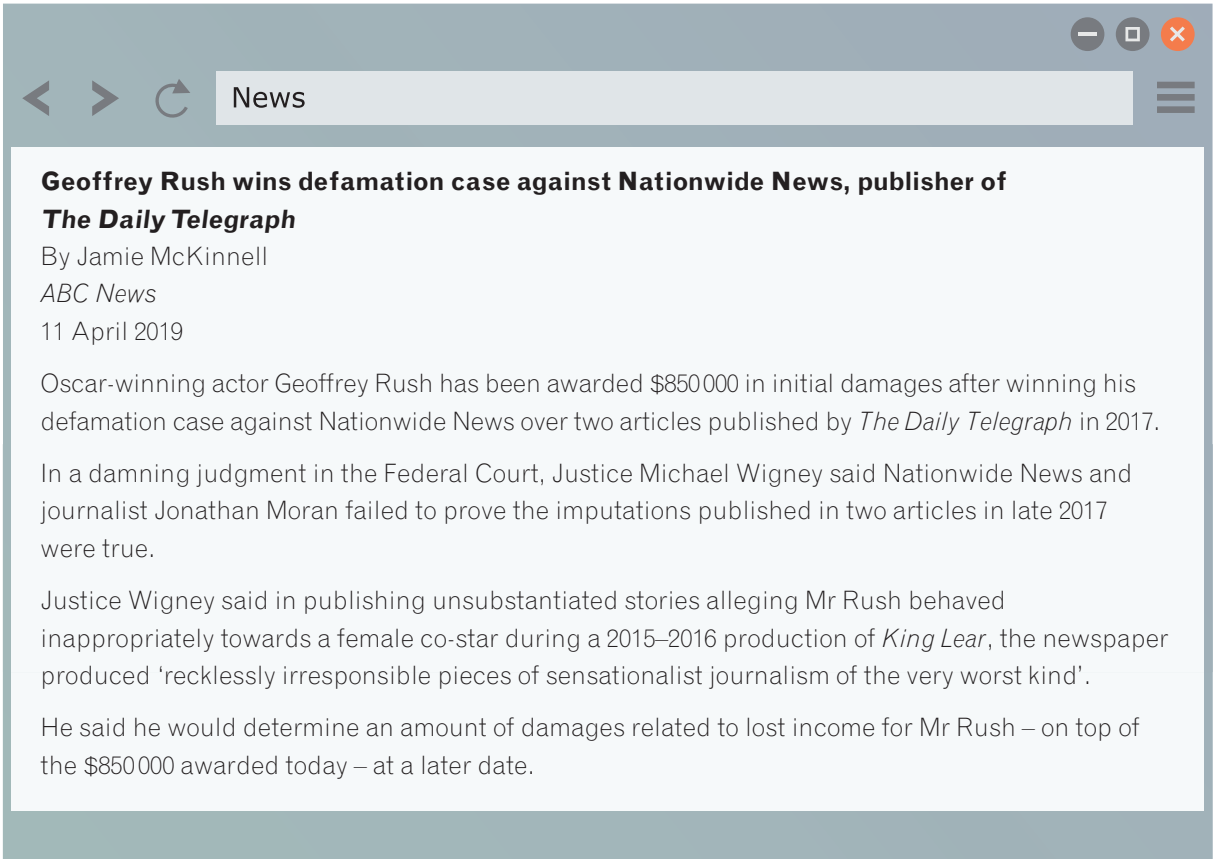
Another factor complicating the exercise of freedom of expression is the risk of **defamation**. To what extent can you criticise your teacher, friend or boss, and possibly hurt his or her reputation? What legal rights and responsibilities do you have as the speaker or writer? In addition, how well does the law work to protect reputations on the one hand and free speech on the other?

defamation
the act of making statements or suggestions that cause damage to a person's reputation in the community

You are legally protected from being sued if:

- what you say is true
- it is your honest opinion, not a statement of fact, on a matter of public interest, and the facts on which the opinion is based are clearly stated or
- you have a legal, social or moral duty to communicate something to a person and the person has a corresponding duty to hear or read it.

Even if you were taken to court and successfully used one of the three defences listed above, it may cost you a significant sum in legal fees. Consider the case of actor Geoffrey Rush below.



Geoffrey Rush wins defamation case against Nationwide News, publisher of *The Daily Telegraph*

By Jamie McKinnell
ABC News
11 April 2019

Oscar-winning actor Geoffrey Rush has been awarded $850 000 in initial damages after winning his defamation case against Nationwide News over two articles published by *The Daily Telegraph* in 2017.

In a damning judgment in the Federal Court, Justice Michael Wigney said Nationwide News and journalist Jonathan Moran failed to prove the imputations published in two articles in late 2017 were true.

Justice Wigney said in publishing unsubstantiated stories alleging Mr Rush behaved inappropriately towards a female co-star during a 2015–2016 production of *King Lear*, the newspaper produced 'recklessly irresponsible pieces of sensationalist journalism of the very worst kind'.

He said he would determine an amount of damages related to lost income for Mr Rush – on top of the $850 000 awarded today – at a later date.

Review 6.5

1 Read the news article, 'Geoffrey Rush wins defamation case against Nationwide News, publisher of *The Daily Telegraph*' and answer the following questions.
   - **a** Outline the reason Mr Rush was suing Nationwide News for defamation. Identify the argument Nationwide News used in contesting this defamation case.
   - **b** Evaluate the current laws on defamation. Outline the responsibilities you have when you talk about someone else.

2 Search online for the case *Lange v Australian Broadcasting Corporation* [1997] HCA 25. Explain the importance of this case to defamation law.

ISBN 978-1-108-86281-3 Milgate et al.

6.4 International protection of rights

As discussed in Chapter 2, international law can be made through the formation of treaties between two or more nations. Treaties become binding on the citizens of an individual nation either automatically upon ratification, if the treaty is **self-executing**, or once the nation has passed domestic legislation to implement the treaty as part of its own laws. In Australia, treaties must be implemented through domestic legislation in order to become binding.

self-executing
(of a treaty) automatically becoming binding on a state party to the treaty as soon as the treaty has been ratified

Declarations are different from treaties in that they simply state the parties' intentions; they express the international community's aspirations with respect to an area of human rights. They are generally developed through the United Nations (UN) or other international organisations, such as subsidiary bodies of the UN or the World Trade Organization, and while they are not legally binding, they are morally binding and influential in setting standards for the protection of rights. *The Universal Declaration of Human Rights* (1948) is an important declaration of the rights to which all humans are entitled. The following extract summarises what the UN is trying to achieve internationally (the full text can be viewed online).

The Universal Declaration of Human Rights

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

Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

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

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

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 11.

1 Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2 No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 15.

1 Everyone has the right to a nationality.

2 No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality

Figure 6.5 Recipients of the UN Human Rights Awards at the General Assembly commemorative meeting in New York, in December 2018. The occasion was the seventieth anniversary of the signing of *The Universal Declaration of Human Rights*.

ISBN 978-1-108-86281-3

Limitations of international law in protecting rights

Parties to international law are nation-states, not individuals, and international law requires the full participation and cooperation of nation-states in order to function effectively. Some states may occasionally or frequently choose to ignore declarations, treaties and UN resolutions, just as some citizens choose to ignore the laws of their state. The consequences for nation-states, however, are seldom as immediate or certain as they are for individuals who ignore the law.

Rights are something thought to be possessed not only by individuals but also by peoples or nations. **Self-determination** is a key right of peoples. It means the right of a group to determine their own political status (how they want to be recognised) and to pursue their own economic, social and cultural development. Self-determination is enshrined in the UN's Charter, as well as in the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966). Article 15 of *The Universal Declaration of Human Rights* (1948) expresses this right in terms of all individuals' right to a nationality.

self-determination
the right of people to determine their political status or how they will be governed based on territory or national grouping

The UN Charter, Chapter 1, Article 1, Part 2 includes self-determination as one of the purposes or goals of the United Nations:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Self-determination is a constant theme in international politics; for example, the Basque independence movement in Spain and that of the Tamil Tigers in Sri Lanka. In some cases, the United Nations has intervened. In other cases, sometimes because of individual member states' reluctance to become involved in high-risk conflicts where their own interests are at stake, there has been no UN action.

One place where the UN has intervened, with limited success, has been in Syria, due to increasing conflict and violence against civilians. In 2012, the UN intervened in an attempt to quell violence and civil unrest. The United Nations Supervision Mission in Syria lasted 90 days and was suspended due to increasing levels of violence and an inability to broker a ceasefire between the warring factions.

The rights of Aboriginal and Torres Strait Islander peoples

The question of whether peoples who want independence from a colonial power have a right to such independence may be addressed from a general viewpoint but also considered in the context of the particular historical facts of a place. The United Nations declared a decade for World Indigenous Rights from 1995 to 2004. The United Nations hoped to promote the rights, languages and cultures of all indigenous peoples and to draft a Charter of Indigenous Human Rights.

As we saw in Chapters 2 and 5, Australian Aboriginal and Torres Strait Islander peoples have faced serious challenges to their **political autonomy** since European settlement. Their laws were radically different from British laws and were not considered to constitute a system of law at all. The 'doctrine of reception' mandated that uninhabited land colonised by Britain would be subject to English law – despite the vastly different languages, cultures, beliefs and traditions of the people who actually inhabited the land.

political autonomy
self-determination, independence

One way in which self-determination is demonstrated in Aboriginal and Torres Strait Islander communities is using customary law rather than the English common law. Circle sentencing is an example of tribal law in practice.

Circle sentencing

Circle sentencing courts have been established in several locations in New South Wales, the Australian Capital Territory and Western Australia. Their introduction is based on Canadian experience

ISBN 978-1-108-86281-3 Milgate et al.

Figure 6.6 An earth oven is dug up at Hyde Park on 13 July 2019 in Sydney, Australia. NAIDOC Week celebrations are held across Australia each year to celebrate the history, culture and achievements of Aboriginal and Torres Strait Islander peoples.

with indigenous communities and has the goal of preventing crime, supporting victims and giving indigenous people greater involvement in the criminal justice system. Sentences are more likely to be meaningful for the offender if imposed by authorities within his or her own culture.

Circle sentencing works in the following way. When an accused person in a criminal trial has pleaded guilty or been found guilty, and is a member of an Aboriginal and Torres Strait Islander community, the magistrate travels to the accused's community for the purpose of sentencing. The magistrate and other persons sit in a circle, talk through the issue and come to a suitable sentence. The offender, the victim and their families form part of the group, as well as respected members of the local Aboriginal and Torres Strait Islander community.

By 2018, debate continued as to the effectiveness of the program with some arguing the root cause of Aboriginal and Torres Strait Islander peoples offending were drug and alcohol issues and that the sentencing itself did not reduce recidivism. However, supporters of circle sentencing include Magistrate Claire Girotto, who presides over a number of local courts such as Dubbo, Walgett and Wellington. There have been 75 circles in Walgett since the sentencing option was rolled out in 2006. In more than 25 circles, Magistrate Claire Girotto had only witnessed one re-offender and praised the success of the program.

Review 6.6

1 Identify the purposes of *The Universal Declaration of Human Rights* (1948).
2 Suggest some possible ways rights are enforced and how they could be more effectively enforced.

Research 6.2

Search online for the article, 'Does circle sentencing reduce recidivism and keep indigenous offenders out of jail? A study will find out' (by Claudia Jambor, *ABC News*, 10 February 2019).

1 Outline the aims of circle sentencing.
2 Discuss the role of circle sentencing in small towns throughout New South Wales.
3 Discuss if Aboriginal and Torres Strait Islander offenders have a right to different sentencing procedures.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- Rights and responsibilities are contained in our *Constitution* and in statute and common law.
- Moral rights are not enforceable by law and therefore cannot be upheld in a court of law.
- Australia is the only Western democracy that does not have a Bill of Rights.
- The rights and responsibilities of individuals and the state have varied over time and have included measures that significantly limit people's rights.
- The *Australian Constitution* expressly protects individual rights.
- The High Court has recently defined an implied right to freedom of political communication.
- International efforts to articulate and protect rights are contained in numerous conventions, treaties and declarations. It is often difficult to enforce these international instruments, as some states do not recognise these agreements or have not incorporated these rights into their domestic legislation.
- The right to self-determination is an internationally recognised right.

Questions

Multiple-choice questions

1 How are legal rights protected?
- **a** Legal rights are protected by statute law alone.
- **b** Legal rights are protected by common law alone.
- **c** Legal rights are protected by both statute and common law.
- **d** Legal rights are protected by ethics and religious customs.

2 Which of these statements about moral rights is true?
- **a** Moral rights have no legal basis.
- **b** Moral rights can be enforced.
- **c** Moral rights are the same as legal rights.
- **d** None of the above statements are true.

3 Which of these statements about a Bill of Rights is true?
- **a** Every state in the world has a Bill of Rights.
- **b** Only the United Nations can draft a Bill of Rights.
- **c** A Bill of Rights is a document setting out the rights of individual citizens.
- **d** A Bill of Rights is part of the *Australian Constitution*.

4 Which of these statements about defamation is false?
You are legally protected from being sued if:
- **a** what you say is true
- **b** it is your honest opinion, not a statement of fact, on a matter of public interest, and the facts on which the opinion is based are clearly stated
- **c** what you say is only posted on social media
- **d** you have a legal, social or moral duty to communicate something to a person and the person has a corresponding duty to hear or read it.

5 How is the right to freedom of speech protected?
- **a** The right to freedom of speech is protected by statute.
- **b** The right to freedom of speech is protected by common law.
- **c** The right to freedom of speech is protected by both common and statute law.
- **d** The right to freedom of speech is not protected by either statute or common law.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

1 List two examples of how rights are protected by statute and common law in Australia.
2 Using examples, describe the difference between moral rights and legal rights.
3 Discuss to what extent journalists are in conflict with governments and their responsibilities to protect citizens and how it might best be resolved.
4 Explain the concept of circle sentencing and why it might be effective.
5 Explain the reasons for constructing declarations of rights. Outline some examples of such declarations.
6 Outline other rights that are not expressly contained in the *Australian Constitution* but are enjoyed by Australians as a result of statutory or common law.
7 Discuss how defamation poses a threat to individuals' free expression. Describe the defences available to someone who has critical things to say about a political figure.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter 7
Resolving disputes

Chapter objectives

In this chapter, students will:

- investigate the roles of various law enforcement agencies
- discuss various methods of dispute resolution between individuals
- investigate formal and informal methods of dispute resolution between individuals and the state
- assess the effectiveness of legal and non-legal instruments in resolving disputes between individuals and the state
- compare and contrast individuals' disputes with other individuals and with the state
- identify the difference between formal and informal methods of challenging state power as the state attempts to enforce rights
- identify and apply appropriate legal terms and concepts.

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Crimes Act 1914 (Cth)
Income Tax Assessment Act 1936 (Cth)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Australian Human Rights Commission Act 1986 (Cth)
Privacy Act 1988 (Cth)
Criminal Code Act 1995 (Cth)
Residential Parks Act 1998 (NSW)
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
Trees (Disputes Between Neighbours) Act 2006 (NSW)
Coroners Act 2009 (NSW)
Government Information (Public Access) Act 2009 (NSW)

SIGNIFICANT CASES

Toonen v Australia, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)
Croome v Tasmania [1997] HCA 5
R v Christopher Michael Dawson [2018]
Hacienda Caravan Park Pty Ltd v Howarde [2016] NSWCATAP 1

ISBN 978-1-108-86281-3

Legal oddity

A woman in Brisbane received an anonymous letter from a neighbour in 2018 complaining about the moaning and shouting coming from her house. The woman is the full-time carer of her son who has autism. The letter stated that the police had been called to visit the premises and the police had then informed the complainant that one of the occupants in the home had a mental illness. The letter went on to say that, although they were sympathetic to the situation, the noise was disturbing and it would be appreciated if less time was spent in the garden.

ISBN 978-1-108-86281-3

7.1 Law enforcement agencies

There are a number of **law enforcement agencies** that have an important role in upholding statutes at state and federal levels. There are legal restrictions placed on these law enforcement agencies, in order to protect members of society from an abuse of power.

law enforcement agencies
those bodies that have the role of enforcing the law; they are created by Acts of parliament and include the police and some government departments

The police

State and territory police

Under the *Australian Constitution*, state governments are responsible for providing police services. The police service of each Australian state and territory is responsible for upholding the law, preventing and investigating crime, and providing community protection. In addition, police services manage emergency incidents, enforce road and traffic rules, and deal with missing persons reports.

The *Law Enforcement (Police Responsibilities) Act 2002* (NSW) sets out the laws NSW Police officers must obey when they perform these duties. For example, to ensure that evidence is collected correctly and thus is able to be used by the prosecution in a court case, the police are guided by this Act, which covers:

- the powers of police officers to stop, search and detain people
- the powers of police officers to enter and search premises, and to seize property
- the powers of police officers to arrest, detain and question suspects
- the way in which suspects and others are to be treated by police officers.

Each state and territory in Australia has its own police force. The NSW Police Force is primarily concerned with enforcing criminal law, particularly those offences contained in the *Crimes Act 1900* (NSW) (e.g. homicide, manslaughter and sexual assault). More recently, legislation – such as the *Crimes (Criminal Organisations Control) Act 2012* (NSW) – has been introduced to help the state police combat the rise of bikie gangs and terrorist activities.

Other aspects of state policing include assisting with mediation in family and neighbourhood disputes, particularly those involving domestic violence. The application and enforcement of Domestic and Personal **Apprehended Violence Orders** (AVOs) restricting the movements of some individuals in relation to others is another part of the job of the **state police**.

Apprehended Violence Order
a court order to protect a person who fears violence or harassment from a particular person; in New South Wales, Apprehended Personal Violence Orders prohibit violence between members of the public and Apprehended Domestic Violence Orders prohibit violence between family members

state police
law enforcement agencies with state-wide jurisdiction

Figure 7.1 The powers of police officers to stop, search and detain people are defined in the *Law Enforcement (Police Responsibilities) Act 2002* (NSW).

ISBN 978-1-108-86281-3 Milgate et al.

A recent issue for state policing is the use of sniffer dogs for drug detection at music festivals attended mostly by 18–25 year olds. Following the deaths of six young festival goers over a two-year period, a coronial inquiry in November 2019 recommended the trialling of pill-testing and an end to the use of sniffer dogs and strip-searching suspects, which could intimidate users into ingesting dangerous doses in panic. Pill-testing, on

Coroner's report recommends drug policy overhaul in NSW

By Amanda Lyons

Published by the Royal Australian College of General Practitioners

8 November 2019

The report has recommended trialling pill testing and stopping the use of sniffer dogs and strip searches at music festivals in the state.

'The faces of these young people will remain with me going forward, along with the hope that improvements will be made,' Deputy State Coroner Harriet Grahame told the New South Wales Coroners Court when handing down the findings of her report.

The report is the result of an inquest into the drug-related deaths of six festival-goers between December 2017 and January 2019. Three weeks' of evidence was heard from a large number of witnesses, including medical professionals, festival-goers and music industry representatives.

Ms Grahame stated she had found 'compelling evidence' that pill testing would support behavioural change in young people attending music festivals.

'I am in no doubt whatsoever that there is sufficient evidence to support a drug-checking trial in New South Wales,' she said.

'Drug checking is simply an evidence-based harm-reduction strategy that should be trialled as soon as possible.'

Ms Grahame also suggested the NSW Government give serious consideration to the decriminalisation of small amounts of drugs held for personal use, and that the problem of drug-related harm at music festivals needs to be viewed with 'fresh eyes', with priorities to be reframed from 'reducing drug use, to reducing drug death'.

She was also critical of what she described as a punitive approach to policing at music festivals, recommending the end of widespread strip searches and sniffer dogs for the purposes of drug detection. Ms Grahame believes such tactics may push young people into higher-risk behaviour, such as taking all of their drugs at once to prevent detection and arrest.

'I am of the firm view that there is sound evidence that high-visibly policing and use of drug detection dogs at music festivals is a harmful intervention,' she said.

However, following the report's release, NSW Police Commissioner Mick Fuller issued a statement to counter the suggestion policing methods were 'implicit' in the deaths, arguing that music festivals 'create a concentrated market for drug supply and organised criminal groups'.

Reproduced with permission from The Royal Australian College of General Practitioners from: Lyons A. 'Coroner's report recommends drug policy overhaul in NSW'. newsGP. 8 November 2018. Available at www1.racgp.org.au/newsgp/professional/a-need-for-fresh-eyes-coroner-s-report-recommends

ISBN 978-1-108-86281-3 Milgate et al.

the other hand, would allow the potential user to have the contents of the drug tested to check whether there are harmful substances present. While this would not help the habitual drug user, this non-judgmental stance may result in better decision-making for those who never usually take drugs. The six young people who died were not thought to be habitual drug users, and so they and their friends did not know the risks and safe dosage of the drugs. Controversy raged over the revelations that children as young as 12 were being made to 'strip and squat' to check for drug possession. The NSW Police Force responded by stating that if festival goers didn't take drugs to festivals, they would have nothing to fear or worry about sniffer dogs and being searched, under section 146 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

Federal police

The **Australian Federal Police** (AFP) is responsible for enforcing federal law and criminal law where crimes cross state boundaries. A key role is the prevention and detection of crimes within Australia against Commonwealth law. In certain circumstances, police may also deal with Australians overseas. Crime legislation enforced by the AFP includes the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth). Offences include drug importation and distribution, and crimes relating to Commonwealth entities (e.g. bribery of Commonwealth public officials). The powers of the AFP are set out in the *Australian Federal Police Act 1979* (Cth).

Figure 7.2 In July 2019, Australian Federal Police (AFP) Assistant Commissioner, Ian McCartney (right), and NSW Police Assistant Commissioner, Mick Willing (left), address the media over an alleged plot to attack police stations, embassies and defence facilities in Sydney.

Australian Federal Police
the federal police agency of the Commonwealth of Australia, set up to enforce the federal laws and to protect the interests of Australia both domestically and internationally

Significantly, the nature of the AFP and what is required of it have changed since September 11, 2001, when four coordinated terrorist attacks occurred in the United States. The AFP has reacted to a rapidly changing environment, particularly in relation to terrorism and terrorist organisations. There is now a greater focus on international operations.

The new challenges the AFP faces include terrorism, cybercrime, human trafficking and sexual slavery. The AFP may also be involved in the family law process if the Family Court makes specific orders requiring the involvement of the AFP; for example, if the court believes that a child may be taken from Australia. Under sections 65Y and 65Z of the *Family Law Act 1975* (Cth), children involved in family law proceedings must not be removed from Australia. There is a penalty of up to three years' imprisonment for anyone who attempts to do this. As mentioned in Chapter 6, the AFP has recently searched the home Annika Smethurst and the ABC offices in Sydney to search for evidence of criminal activity by journalists.

Chapter 20 also details the AFP's investigations into Mohamed Haneef's alleged role in a terrorist attack in Glasgow, Scotland in 2006. It is not the most glowing of reports as the AFP spent $8 million investigating Dr Haneef, only for him to be found to have been wrongfully arrested. Similarly, Chapter 14 considers the controversy around their cooperation with the Indonesian National Police regarding the arrest and prosecution of the Bali Nine.

Additional law enforcement agencies in Australia

Australian Border Force

The Australian Customs Service was renamed in 2015 to the Australian Border Force (ABF). It was originally known as the Department of Trade and Customs and was the first government department

ISBN 978-1-108-86281-3 Milgate et al.

established in 1901. Approximately 20 million passengers each year move through air and seaports. ABF works closely with the AFP, as well as with the Australian Quarantine and Inspection Service, the Department of Immigration and Citizenship and the Department of Defence, to detect and discourage unlawful movement of goods and people across the border.

The ABF website describes its functions as:

- facilitating the lawful passage of people and goods
- investigations, compliance and enforcement in relation to illicit goods and immigration malpractice
- onshore detention, removals and support to regional processing arrangements.

The ABF employs more than 5500 people in Australia and overseas, has a fleet of sea patrol vessels, and uses two aerial surveillance planes for surveillance of borders. The key areas of concern for the ABF are:

- immigration – ensuring that passengers are moving legally across borders
- quarantine – monitoring and confiscating goods harmful to animal and human life
- family law – enforcing court orders and preventing parents from illegally removing their children from Australia
- law enforcement.

A high priority is the protection of the Australian community by intercepting illegal drugs and firearms. The ABF uses sophisticated techniques to identify suspicious aircraft, vessels, cargo, postal items and travellers. The techniques include intelligence analysis as well as the use of detector dogs and computer technology.

In June 2019, the Australian Federal Police made one of the largest drug seizures in the country's history. Approximately 1.2 tonnes of illicit drugs were seized in Sydney with an estimated street value of $1.2 billion.

Australian Criminal Intelligence Commission

The *Australian Crime Commission Act 2002* (Cth) established the Australian Crime Commission (ACC), which, in July 2016, merged with CrimTrac to become the Australian Criminal Intelligence Commission (ACIC). It works at a national level with other federal, state and territory agencies

Figure 7.3 Ali al-Amin, a Lebanese father whose ex-wife allegedly tried to abduct their children, talks to the press as he leaves the court in Baabda, Lebanon on 20 April 2016. A Lebanese judge said he will release on bail an Australian woman and four journalists accused of abducting her children from their Lebanese father after he dropped charges against them.

to combat serious and organised crime. In New South Wales, the *Australian Crime Commission (New South Wales) Act 2003* (NSW) was passed to enable the full operation of the ACC in New South Wales. Similar legislation was passed in the other states and territories, effectively bringing the *Australian Crime Commission Act 2002* (Cth) into state or territory law. All arms of intelligence gathering and law enforcement were thereby brought together to unify the fight against serious, organised criminal activity.

The ACIC has a number of important functions, involving both intelligence and investigative roles:

- collecting and analysing criminal intelligence data
- giving advice about National Criminal Intelligence Priorities (NCIPs) to the ACC Board
- managing criminal intelligence systems such as the Australian Criminal Intelligence Database
- investigating federally relevant criminal activity and forming task forces; for example, Strike Force Tuno II, a homicide squad established to investigate a string of possibly related murders, attempted murders and suspected murders over a 15-year period. Many other task forces are established as the need arises to tackle serious issues of organised crime, terror and drug importation.

Australian High Tech Crime Centre

The Australian High Tech Crime Centre (AHTCC) is hosted by the AFP and attempts to provide a national approach to technology crime. Its role is to address serious and complex crimes involving computer technology such as online fraud, **mule recruitment**, and offensive and prohibited internet content. 'Technology-enabled crime' includes crimes committed directly against computers and computer systems, and also traditional crimes committed with the use of technology.

mule recruitment
the attempt to procure a person (the 'mule') to receive and deliver illegal funds to criminals abroad or at home without the knowledge of the 'mule'; this is usually done through a fake company and may involve getting an unsuspecting employee to sign a contract and transfer funds on behalf of organised criminals

The first category, detailed in Part 10.7 of the *Criminal Code* (Cth), includes:

- computer intrusions (gaining unauthorised access to data in a computer or computer system)
- unauthorised modification or destruction of data
- denial-of-service attacks (deliberate removal of service)
- creation and distribution of malicious software such as viruses, worms or trojans.

Each state and territory in Australia has its own legislation, similar to the Commonwealth legislation, covering computer-related offences.

Another task of the AHTCC is to police and remove inappropriate and illegal internet content such as child pornography and racially based 'hate' sites. Identity fraud is also a growing criminal activity, especially with the increasing use of social networking sites such as Instagram, Snapchat and Facebook. Identities are usually stolen through 'phishing', whereby email is used to lure unsuspecting computer users to a fake website where they provide their bank account details.

Australian Security Intelligence Organisation

The Australian Security Intelligence Organisation (ASIO) is Australia's national security service, established under the *Australian Security Intelligence Organisation Act 1979* (Cth). It was initially established in 1949 as Australia's security service to guard against activities such as espionage (spying), sabotage, politically motivated violence and attacks on our nation's defence systems. ASIO's main role is to gather information that will help the federal government and other law enforcement agencies, such as the AFP, to prevent and thwart attacks on Australia. ASIO's role is expanding; it employs approximately 1500 people; 75 government departments, police and senior decision-makers use ASIO's information.

Chapter 20 outlines the role of ASIO in the arrest and detention of terror suspect Mohamed Haneef, in which ASIO correctly advised the AFP that Haneef was not a suspect in the 2007 Glasgow Airport bombing and that there was virtually no evidence linking Haneef to this terrorist attack.

ISBN 978-1-108-86281-3 Milgate et al.

Government departments

Some Commonwealth and state government departments have the authority to enforce specific laws. The Australian Tax Office (ATO) has the power to enforce certain laws for the protection and benefit of society. For example, under the *Income Tax Assessment Act 1936* (Cth), the ATO can investigate and prosecute individuals or companies in relation to tax offences.

The main issues relating to income tax involve either the avoidance of tax or the underpayment of tax. In 2018, ATO deputy Commissioner Michael Cranston, his son Adam and daughter Lauren were accused of a $165 million tax fraud.

Other laws administered by the ATO include those governing fringe benefits tax (FBT), the Goods and Services Tax (GST) and superannuation.

In December 2016, the federal government formed a new ministerial department named the Department of Home Affairs. The department 'brings together Australia's federal law enforcement, national and transport security, criminal justice, emergency management, multicultural affairs and immigration and border-related functions and agencies, working together to keep Australia safe.' Source: Australian Government.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 13–14 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

7.2 Disputes between individuals

Disputes between individuals are highly variable in terms of their nature, complexity and seriousness. One of the more common types of disputes between individuals is that of 'neighbourhood' disputes. The *Trees (Disputes Between Neighbours) Act 2006* (NSW) clearly indicates that vegetation is a significant source of conflict among neighbours, disputes can unfortunately become violent and result in tragic circumstances as the media article below would indicate.

Alternative dispute resolution

Going to court can be expensive in terms of both money and time. There has been pressure to provide alternatives to court processes for solving legal disputes. It has been estimated that the average civil case costs $30 000–$40 000, which puts many average wage earners in a precarious position should they lose. Logically, any claim against another party for less than this amount would seem useless, yet the financial cost of loss or damage below this amount may still be significant to the person who suffers it.

Alternative dispute resolution (ADR) uses a variety of methods to resolve disputes between parties without involving court processes. ADR allows the participants not only to save time and money, but also to have more control over proceedings.

alternative dispute resolution
dispute resolution processes, such as mediation, arbitration and conciliation, that do not involve courts

ADR may be as simple as two parties talking through their dispute, or as complex as court-ordered mediation or arbitration. Mediation involves a neutral

Review 7.1

1. Identify what a law enforcement agency is. Explain the role of the police in the legal system.
2. Outline the differences between the roles of state and federal police.
3. Describe a current legal issue or a dispute between groups at either the state or federal level. Outline the main legal arguments on each side of the dispute.
4. Choose two law enforcement agencies and describe the importance of their role. Mention any current media stories or cases before the courts that involve these agencies.

ISBN 978-1-108-86281-3 Milgate et al.

third party who attempts to help the parties come to an agreement. In arbitration, the neutral third party will make a decision that is binding on the parties involved in the dispute. These are discussed below.

Negotiation

Negotiation is discussion between two or more parties with the aim of reaching a mutually beneficial outcome. It involves consideration of the other party's views, and often some degree of compromise. Many parents teach their children negotiating skills and you would probably be surprised at how often you negotiate with friends, teachers and parents. In a legal sense, negotiation is frequently the first stage of resolving a dispute between parties. Negotiation only involves the parties involved and therefore is usually low in cost.

negotiation
any dialogue intended to resolve disputes and/or produce an agreement on further courses of action

Mediation and conciliation

Mediation and **conciliation** are similar procedures and are usually confidential. Both processes involve a neutral and independent third party who helps the parties to negotiate their disagreement and to come to a decision that they both find acceptable.

mediation
a form of alternative dispute resolution designed to help two (or more) parties, in the presence of a neutral third party, to reach an agreement

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes an active role advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for the parties

The mediator does not provide advice on the matters or impose a decision on the parties. The mediator may not have particular expertise in the subject area but will be an expert in the process of mediation. Through his or her negotiation and listening skills, the mediator is able to assist the parties in examining the issues, and the parties will come up with their own solutions to settle the dispute.

In conciliation, the third party also helps the parties to identify the issues, consider alternative options to solve the dispute and reach an agreement. In contrast to a mediator, the conciliator may advise the parties, although he or she does not make a decision for them. A conciliator may be a legal practitioner or professionally qualified in the subject matter of the dispute. He or she will be responsible for managing the process, explaining the rules and acting as an umpire. In conciliation, the parties may also have their own legal advisers.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 7.4 A couple going through the process of divorce may use mediation to settle any disputes.

Community Justice Centres and Conflict Resolution Service

Community Justice Centres (CJCs) aim to resolve disputes through mediation. In NSW, there are six centres, which offer informal and impartial dispute resolution services to government agencies and to all sections of the community. CJCs are funded by the NSW Government and provide their services free of charge.

CJCs deal with disputes within families (including youth conflict), workplaces, neighbourhoods and communities.

CJCs are designed to resolve disputes between members of the same community. As these people usually have an ongoing relationship, it is important that a dispute over something like a fence is resolved as quickly and economically as possible with no long-lasting acrimony. A dispute over an issue such as who is responsible for the repair of a fence can be resolved at a CJC by the parties talking through their dispute with a neutral mediator. It will be more satisfactorily resolved here than in a formal and confrontational courtroom.

In the ACT, the Conflict Resolution Service (CRS) has existed since 1988 as a non-profit organisation to help solve disputes between neighbours. One of the main methods used to solve disputes is mediation. According to the CRS website, 83% of mediated neighbourhood disputes are solved by mutual agreement.

Arbitration

Arbitration is a formal process, in which an independent third party (the arbitrator) is brought in to determine how the dispute is to be resolved. It is useful when the subject matter of the dispute requires an expert and/or when a court-like procedure is desired, but with a greater degree of confidentiality. It is used when a contract specifies arbitration for resolution of any disputes arising, in industrial relations matters, and in tenant and landlord disputes. It has become the preferred procedure in Australia for disputes involving commercial contracts.

arbitration
a form of alternative dispute resolution in which the disputing parties present their cases before an arbitrator, who makes a decision that is binding on the parties

ISBN 978-1-108-86281-3 Milgate et al.

Review 7.2

1 Assess the importance of alternative dispute resolution.
2 Distinguish between the processes of mediation, conciliation and arbitration. Identify where negotiation fits into the dispute resolution process.
3 Discuss why someone might prefer alternative dispute resolution to taking the other party to court.

In 2015, Coles was forced to pay $12 million in compensation to small bread suppliers as a result of arbitration. A dispute between Coles and 4000 small bread suppliers arose out of Coles' claim that it baked fresh bread each day in its retail stores. In fact, Coles only pre-baked bread and stored it on site. By claiming the bread was 'made' in its stores, Coles had made a false and misleading claim to its consumers. The former Victorian premier, Jeff Kennett, was the independent arbiter in the dispute.

Courts

If the individuals involved in a dispute cannot resolve it by way of alternative methods, they will need to take the matter to litigation. One example of a court that deals with disputes between individuals is the NSW Land and Environment Court (LEC).

NSW Land and Environment Court

The NSW Land and Environment Court is a specialist court with a wide jurisdiction. It has the same status in the court hierarchy as the Supreme Court of New South Wales and is responsible for interpreting and enforcing environmental law in New South Wales. Proceedings that can come before the LEC include:

- administrative or merits review: the court re-hears a case that has been decided by a body such as a local council
- civil proceedings arising from a breach or potential breach of the law
- criminal proceedings for environmental offences.

More than 60 New South Wales Acts grant the LEC's jurisdiction. It does not have the power to hear matters outside that statutory jurisdiction. It deals with environmental, development, building and planning disputes, and certain types of native title claims. Alternative dispute resolution is integrated within its procedures.

Among the statutes granting the court jurisdiction is the *Trees (Disputes Between Neighbours) Act 2006* (NSW). This Act allows the court to make judgments on issues involving the removal or pruning of trees and who should pay.

Tribunals

Tribunals offer a less formal and expensive method of dispute resolution than the court system. Individuals do not normally need legal representation – it is often not even permitted – and the person presiding over the tribunal may have specialist expertise rather than specific legal training. Their background should enable them to understand the details of the dispute, and they ensure that the principles of natural justice are applied, so that all the parties have an opportunity to put forward their position, and nobody is disadvantaged.

NSW Civil and Administrative Tribunal

The NSW Civil and Administrative Tribunal (NCAT) was established on 1 January 2014, combining the roles of 22 separate tribunals. NCAT has four main divisions (the Administrative and Equal Opportunity Division, Consumer and Commercial Division, Guardianship Division, and the Occupational Division) and deals with various types of disputes between individuals, as well as between individuals against organisations.

Disputes between individuals are often heard by NCAT's Consumer and Commercial Division; examples include disputes about repairing or replacing the fence between two residential properties, excessive noise or pet ownership within a block of units or townhouses, and appeals from previous judgments. For example, in *Hacienda Caravan Park Pty Ltd v Howarde* [2016] NSWCATAP 1, Howarde disputed a decision made by the Consumer and Commercial Division. This appeal was based around Howarde and his partner being able to

ISBN 978-1-108-86281-3 Milgate et al.

Review 7.3

1 Define alternative dispute resolution. Outline some of the forms it may take. Identify which form of dispute resolution you think would have the most desirable results. Justify your response.
2 If you are having problems with your neighbours, discuss why going to court should be the last step taken.
3 Outline what options there are for settling a dispute with your neighbour. Discuss with reference to the types of disputes that might arise.
4 Describe to what extent the legal system assists in dispute resolution – reference *Hacienda Caravan Park Pty Ltd v Howarde* [2016] NSWCATAP 1.

Research 7.1

View the NSW Caselaw website and search for the case *Bowan v Glanville* [2008] NSWLEC 10.
1 Summarise the dispute between the neighbours.
2 Evaluate the court's judgment.
3 Discuss why the neighbours could not negotiate a settlement without resorting to the Land and Environment Court.

live permanently in a cabin they purchased at the Hacienda Caravan Park. Hacienda attempted to evict Howarde under the *Residential Parks Act 1998* (NSW), on the basis that Howarde had purchased the cabin from another tenant, so he did not have a permanent arrangement with Hacienda and therefore could not live on Hacienda's property. NCAT upheld the appeal.

7.3 Disputes with the state

There are a number of methods by which state power or government decisions and policies can be challenged. Some of these are informal or 'non-legal' methods, and others involve formal legal channels.

Non-legal methods of challenging state power

The media

By writing letters, sending emails, calling television and radio stations or posting status updates on social media sites, citizens are able to inform the community of a decision they think is unfair, unjust or harsh. There have been many instances in which major television and radio networks have taken on a story and caused the state to overturn a decision. Two examples are the cases of Lynette Dawson and Keli Lane.

Lynette Dawson mysteriously disappeared in January 1982, leaving behind two young children. It was alleged that Chris Dawson, her husband, had been conducting an affair with a former student at the time of his wife's disappearance. Chris Dawson denied killing his wife. The NSW Coroner recommended a charge of murder be laid, yet the NSW Director of Public Prosecutions ignored the recommendations, apparently citing the absence of Lynette Dawson's body.

The Australian newspaper, headed by Hedley Thomas and David Murray, along with the family of Lynette Dawson, launched an unprecedented media campaign involving a highly popular podcast series, 'The Teacher's Pet', that detailed the life of Chris Dawson and the circumstances surrounding Lynette's disappearance. In 2001 and 2003, the NSW Coroner found Lynette's husband, Chris Dawson, responsible for her murder.

In a reverse situation, Keli Lane was convicted in 2010 for the 1996 murder of her young child, despite the child's body not being located. Attempts by her lawyers to appeal were all rejected, and Lane subsequently asked journalist Caro Meldrum-Hanna to conduct an investigation. The result was a three-part documentary, *EXPOSED: The Case of Keli Lane*, which broadcast on the ABC in

ISBN 978-1-108-86281-3

September–October 2018. This was followed by calls via social media for people who might have knowledge of events from 1996, such as anyone living in the same apartment block. Again, the investigation continues.

Members of parliament

Members of state and federal parliaments (MPs) are elected by voters to represent a particular area or electorate. For example, former Prime Minister Tony Abbott held the federal seat of Warringah, in Sydney, before being defeated by Zali Steggall in the 2019 federal election.

All citizens within an electorate are able to contact the office of their representative and speak to their MP about an issue that may trouble them. The MP may take this issue back to parliament in Canberra and discuss it with other MPs or the party that is in power.

Some electorates or regions are significantly more affected by certain issues than others. If the Pacific Highway between Sydney and Brisbane were to be widened, residents of towns along this highway could be directly affected. An MP in an affected area might be able to convince his or her party to reconsider an executive or Cabinet decision. However, this issue would clearly be irrelevant to residents of Western Australia.

Members of the public can also contact their federal or state MP, or local councillor, if they feel a government department or agency in that jurisdiction has wronged them. MPs and councillors can help in resolving the dispute so that it does not need to go to court or a tribunal. MPs and councillors rely on being re-elected to their position, so it is in their interest to help their constituents resolve disputes quickly.

Trade unions

Video

Groups of people in various industries unite to form trade unions to protect their rights and conditions of employment. Unions can help to negotiate a workplace agreement containing important provisions about workplace safety, wages and conditions. They will also take action when an employer proposes to change the conditions of work in a way that is detrimental to employees. In Australia, the legislative approach to industrial relations was historically based on conciliation and arbitration. Going on strike is seen as a last resort.

Figure 7.5 Keli Lane leaving Westmead Coroners Court on 15 February 2006.

ISBN 978-1-108-86281-3 Milgate et al.

In the early 1970s, one union, the Builders Labourers Federation, banned workers from worksites so that various sites of heritage value in Sydney were not demolished for the purpose of potential property development. These 'green bans' were highly successful: a small park in Hunters Hill and terrace houses in Victoria Street, Potts Point, still exist today. The historic area of Sydney known as The Rocks was also saved and protected by the actions of unions placing bans on work at proposed demolition sites.

More recently, the Australian Council of Trade Unions (ACTU) ran a campaign against Australia's Free Trade agreement with China. The ACTU is concerned about the loss of jobs to Australians and the possibility of overseas workers being paid less to work in Australia.

Interest groups, including non-government organisations

People can also form groups where they share political values or aims or have a specific goal of challenging a state decision. Individuals can join these groups and engage in activities of various types, or donate money to fund their activities.

GetUp! Action for Australia is an example of a non-government organisation, which according to its website:

> … is an independent, grass-roots community advocacy organisation which aims to build a more progressive Australia by giving everyday Australians the opportunity to get involved and hold politicians accountable on important issues.

The organisation links its 600 000 members through email, Facebook and Twitter, and was actively involved in the fight against Woolworths and its ownership of poker machines in Australia. GetUp! believes that there should be some sort of regulation regarding poker machines to stop people from losing large amounts of money.

Legal methods of challenging power

Challenges to decisions of government or government bodies can also be made on a formal or legal basis.

Internal reviews

In New South Wales, government departments can review their own decisions, procedures or behaviour. Such reviews are very cost-effective, but can be ineffective in terms of practical outcomes if the people conducting the review have been involved with a decision that is not appropriate or incorrect.

An example is that of the Combined Pensioners and Superannuants Association of NSW (CPSA). The organisation promotes the interests of pensioners and low-income retirees. When a booking fee was introduced for country train fares in 2006, the CPSA applied to RailCorp, the state-owned passenger rail system, to see documents related to community consultation. The Minister for Transport claimed that there had been extensive consultation and that it indicated 'overwhelming community support' for the booking fee. Previously, pensioners were entitled to four free rail trips per year.

The CPSA's application was made under the *Freedom of Information Act 1989* (NSW), which has since been repealed and replaced by the *Government Information (Public Access) Act 2009* (NSW). This legislation also gives the right to request changes to personal records that are inaccurate, incomplete

Review 7.4

1 Assess how you would challenge the state if it refused to award you the Higher School Certificate (HSC). Describe the laws and means you would utilise to investigate why you did not receive your HSC.
2 In your dispute with the state about your HSC, identify which of the informal methods of challenging state power would be the most effective and why.

ISBN 978-1-108-86281-3 Milgate et al.

or out of date, and to seek review of a decision not to grant access or to amend records. Other states and territories, and the Commonwealth, have similar **freedom of information** legislation.

freedom of information
the principle that people should be able to have access to information relating to the administration of government decision-making and information held by the government; freedom of information legislation governs the processes of obtaining this information, at state and federal level

The application was denied, so the CPSA requested an internal review. The review found that there had been no community consultation about the booking fee.

External reviews

Reviews of government activities can also be undertaken externally. There are a number of avenues by which an external review can be pursued. These include the following.

Administrative and other tribunals

Administrative and other quasi-judicial tribunals are bodies that review specific administrative decisions of government agencies. They offer a time-efficient, low-cost means of resolving legal disputes and problems. They are different from courts as they have narrow areas of jurisdiction, are less formal, usually do not allow legal representation and are not bound by rules of evidence, and so can take into account a variety of factors in finding a solution.

One tribunal in New South Wales is the NSW Civil and Administrative Tribunal (NCAT), which deals with disputes between consumers and businesses, or tenants and landlords, as well as between individuals. Another is the NSW Administrative Decisions Tribunal, which hears cases involving allegations of discrimination and professional misconduct, and reviews administrative decisions of NSW Government bodies.

The Administrative Decisions Tribunal has six divisions and an appeal panel. The divisions conduct reviews of decisions by government agencies in the following categories:

- the community services sector, including child-care and disability services
- decisions of the Chief Commissioner of State Revenue, many having to do with state taxation
- the professional conduct of legal practitioners and property **conveyancers**
- equal opportunity claims referred to the tribunal by the Anti-Discrimination Board
- retail tenancy and 'unconscionable conduct' claims against retail landlords
- decisions of government agencies under a wide variety of laws (the General Division).

conveyancer
a person who deals professionally with the legal and practical matters involved in the transfer of titles to property when real estate is sold and purchased

The General Division of the Administrative Decisions Tribunal most often deals with applications regarding access to government information, privacy and licensing matters involving firearms, passenger transport and the security building industries.

Figure 7.6 The Combined Pensioners and Superannuants Association of NSW applied to see documents related to the community consultation of the booking fee for country train fares.

ISBN 978-1-108-86281-3 Milgate et al.

Privacy bodies

All individuals have a right to privacy. Most people would agree that it is not a pleasant feeling to know that somebody who is not close to you has access to information about you.

In a broad sense, laws have been enacted at both state and federal level to prevent information about you from being released to companies, government departments or other citizens. Under the *Privacy Act 1988* (Cth) people are entitled to make a complaint if they believe that a Commonwealth Government or private organisation has mishandled their personal information, including health information. There are legal responsibilities that government departments must carry out in the collection and storage of personal information of individuals.

For example, if you have been convicted of a criminal offence, there are limits on how long information about this can be used. The *Criminal Records Act 1991* (NSW) provides that after a person has been crime-free for a certain amount of time, most minor offences are treated as 'spent' convictions. Once a conviction is spent, the person does not have to disclose it to prospective employers, insurance agents, banks and so on. Unauthorised release of information about a person's spent conviction is subject to penalties.

At the state level in New South Wales, the chief Acts protecting privacy are the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW). Persons who feel that their personal information has been misused may either request an internal review or complain to Privacy NSW, established under the state privacy legislation to help people to protect their privacy.

The courts

Law courts at both state and federal level have the power to review administrative decisions and actions. As discussed in Chapter 2, the term 'judicial review' is used to describe a process whereby a court with the relevant jurisdiction can review a decision made by a government department only based on whether the decision was lawfully made. Judicial review does not pronounce on the merits of the decision; that is, whether or not it was a good decision or the right decision in the circumstances.

What is legal can vary depending on the circumstances of each case, but generally, decisions are subject to the following requirements:

- Natural justice: You will study this concept in detail in the HSC course. In this context, natural justice refers to the person affected having the opportunity to be heard and the decision being unbiased.
- The decision must be authorised by the Act under which it was made and must be based only on relevant considerations.
- The decision-maker must have jurisdiction to make the decision.
- The decision must be justified by appropriate evidence.
- The decision-maker must have observed all procedures required by law in making the decision, and there must have been no errors of law.

A person desiring judicial review must have standing; that is, the issue must directly affect him or her. There would be huge costs associated with judicial reviews if any interested persons could order them, whether they were directly affected or not.

If a judicial review finds a decision flawed in one or more ways, the remedies that courts can issue will depend on the nature of the error that was made by the decision-maker. They include:

- **Prohibition** – an order that stops a decision from being made or implemented
- ***Certiorari*** – an order that reverses a decision that has already been made
- **Mandamus** – an order that compels the decision-maker to perform certain types of public duties that have not been performed
- **Injunction** – an order that prohibits the decision-maker from implementing an invalid decision, or compels the performance of a duty in decisions where mandamus is not available.

The Office of the Ombudsman

In 1809, the Swedish Parliament created a new official known as the *Justitieombudsmannen*. This loosely translates as 'citizens' defender' or 'representative of the people'. The Office of the Ombudsman was created by statute in 1974 in New South Wales, and federally in 1977.

ISBN 978-1-108-86281-3 Milgate et al.

The office acts as a formal external control, with legal power to investigate complaints made by citizens. Public sector agencies and some private sector agencies providing public services can use the Ombudsman's office to deal with complaints against them or their officers, for example, RailCorp, Junee Correctional Centre, government and non-government schools, and agencies providing childcare and residential care. The Ombudsman does not have the power to impose any punishment or fine on a government agency or department. He or she can, however, make recommendations to the department in question or to the New South Wales Parliament.

Some of the main areas of complaint received by the office involve:

- delivery of community services
- child abuse and neglect
- the operation of the police force.

Any citizen can make a complaint to the Ombudsman, but it must be in writing. All complaints are taken seriously, but are only followed through if a *prima facie* case exists; that is, if the complaint would raise concern 'on first view'. Such concern could only exist if there were witnesses to an event or if a citizen had very strong and irrefutable evidence.

If a complaint is made in writing, the Ombudsman's office will investigate and assess whether the complaint is justified. If it sees that the complaint is justified, the Ombudsman will make recommendations for rectifying the problem.

New South Wales statutory bodies

Statutory bodies are authorities created by statute for a public purpose. The following statutory bodies can investigate complaints and disputes of certain types.

Anti-Discrimination Board of NSW

The Anti-Discrimination Board of NSW (ADB) is part of the NSW Attorney-General's Department and was established under the *Anti-Discrimination Act 1977* (NSW). Its role is to promote principles and policies of equal opportunity throughout New South Wales to ensure that people are protected from discrimination on the basis of characteristics such as disability, age, race and sex. It advises the government and also provides an inquiry service to inform people about their rights and responsibilities under anti-discrimination laws. The ADB will investigate and conciliate complaints when action is necessary. It has the power to issue fines for behaviour that violates anti-discrimination laws.

Figure 7.7 The NSW Ombudsman accepts complaints about the operation of the NSW Police Force.

ISBN 978-1-108-86281-3 Migate et al.

News

Preventing the deaths of children in NSW: latest report released

Ombudsman New South Wales – media release

24 June 2019

Nearly 1000 children died in New South Wales in the two-years 2016–2017, according to a report tabled in parliament today by Michael Barnes, NSW Ombudsman and Convenor of the NSW Child Death Review Team.

The *Biennial Report of the Deaths of Children in New South Wales: 2016 and 2017* examines the deaths of 981 children and found that 731 of them died from natural causes and 185 died from injuries. Of the unnatural deaths, two-thirds (119) involved unintentional injury and 66 were due to intentional injury, either suicide (54) or abuse (12).

'The loss of a child is devastating for families, and communities, and the focus of my office and the Child Death Review Team is to reduce the likelihood of these deaths by examining the causes and circumstances and making preventative recommendations', Mr Barnes said.

'It is encouraging that the number and rate of deaths of children in New South Wales has continued to decline. Over the 15 years to 2017, the mortality rate for children aged 0–17 years declined from 41 deaths per 100 000 children in 2003, to 30 deaths per 100 000 in 2017', Mr Barnes said. 'However, it is important to acknowledge that this improvement has not been uniform.

Children living in the most disadvantaged areas of the state and in remote areas have higher mortality rates than those living in the least disadvantaged areas and in major cities.

'It is also disturbing that the mortality rate for Aboriginal and Torres Strait Islander children is still twice that of non-Indigenous children', Mr Barnes said.

'Deaths as a result of injury continue to account for almost one in five child deaths. These injuries are mostly unintentional – for example, transport fatalities and drowning deaths – but in the main, they are preventable.'

Commissions of inquiry

Commissions of inquiry are set up to investigate serious matters at both state and federal level. They are not judicial proceedings but fact-finding exercises. Royal Commissions are commissions of inquiry with particularly strong powers with respect to calling witnesses. In the past, such inquiries have investigated issues such as Aboriginal deaths in custody (Commonwealth, 1987) and corruption in the NSW Police Force (NSW, 1995). More recently, there has been a Royal Commission into Institutional Responses to Child Sexual Abuse (Commonwealth, 2015).

Commissions of inquiry do not have the power to prosecute offenders. At the end of an inquiry, the commission will produce a report containing recommendations, which may include recommending criminal prosecution of individuals. The government may decide to act on the commission's recommendations: a number of police officers were sent to jail as a result of the NSW Royal Commission. However, it has been argued that the inquiry into Aboriginal deaths in custody has failed to produce significant improvements in the conditions leading to these deaths.

ISBN 978-1-108-86281-3

Independent Commission Against Corruption

While the Ombudsman has the power to investigate complaints made by the public, the Independent Commission Against Corruption (ICAC) has greater power. The *Independent Commission Against Corruption Act 1988* (NSW) created the ICAC as an independent statutory body to investigate alleged corruption in government. ICAC attempts to protect the interests of the public, prevent breaches of public trust and influence the behaviour of public officials.

Some examples of corrupt behaviour include bribery, fraud and theft. ICAC has the power to investigate the activities of private citizens if such behaviour affects the proper administration of public offices.

ICAC has the authority to ask the police service to assist in its investigations, and is therefore able to search for and seize evidence where it sees fit. It does not have the power to prosecute offenders (that is the job of the Director of Public Prosecutions). At the end of an investigation it can report to parliament that corrupt behaviour has occurred, who committed it and what further action should be taken. If a citizen feels that he or she has been wrongfully accused of corruption, he or she may seek judicial review in the New South Wales Supreme Court.

During 2014, ICAC conducted a major investigation into New South Wales politicians and their alleged corrupt conduct. Eddie Obeid and Joe Tripodi were found to be corrupt over dealings involving the leases of cafes at Circular Quay in Sydney. In 2016, the Supreme Court justice Robert Beech-Jones said 'no penalty other than imprisonment is appropriate' for the corrupt former Labor minister. He imposed a maximum sentence of five years with a non-parole period of three years.

Many other high-profile and former high-profile politicians, some of who were Ministers of the Crown, were investigated for corrupt conduct with much of the proceedings being covered by major media outlets and sources. Another investigation in 2017 found serious corrupt conduct by Obeid and Tripodi, along with Gilbert Brown and Anthony Kelly, in relation to Australian Water Holdings Pty Ltd.

National and international bodies

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is a national government body under the responsibility of the Federal Attorney-General. It was formerly called the Human Rights and Equal

Review 7.5

1. Explain the process of internal review of a government agency's decision. Discuss what the potential problems are with internal review.
2. Explain the function of freedom of information legislation.
3. Describe the role administrative tribunals and other tribunals play in settling legal disputes. Give an example.
4. Outline the ways in which people's privacy is protected in New South Wales.
5. Discuss what judicial review is and how it differs from review of the merits of a decision.
6. Outline the role of an ombudsman. Using a recent example from the media, explain how the NSW Ombudsman is limited in solving issues such as domestic violence.
7. Explain the importance of natural justice as the state attempts to enforce laws.

Research 7.2

Find the website of the Anti-Discrimination Board of NSW (ADB). On the ADB's website, choose Resources from the menu. From the left-hand menu select 'Equal Time Newsletter' and then 'Back issues' to look through their past newsletters. Alternatively, on the left-hand menu, you can select and go through 'Conciliation reports'. Select two cases and evaluate the effectiveness of the ADB in bringing about just outcomes in these cases. You should aim to include a case that has been dismissed by the ADB.

ISBN 978-1-108-86281-3 Milgate et al.

Opportunity Commission, and was established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth); it is now called the *Australian Human Rights Commission Act 1986* (Cth).

As detailed in Chapter 5, the AHRC plays a key part in ensuring that we live in a tolerant, equitable and democratic society. It provides information through public education programs aimed at the community, government and business sectors. It also holds public inquiries, advises parliament, conducts research and investigates discrimination complaints.

The United Nations

International treaties and declarations containing key principles of human rights include:

- *The Universal Declaration of Human Rights* (1948)
- *International Convention on the Elimination of All Forms of Racial Discrimination* (1965)
- *International Covenant on Civil and Political Rights* (1966)
- *International Covenant on Economic, Social and Cultural Rights* (1966)
- *Convention on the Elimination of All Forms of Discrimination against Women* (1979)
- *United Nations Convention on the Rights of the Child* (1989).

Human rights bodies under the umbrella of the United Nations include the Commission on Human Rights, now known as the Human Rights Council, whose state members discuss and debate human rights concerns. There are also committees that monitor each of the conventions listed above, and that can rule on individual complaints relating only to a single convention. The UN Human Rights Committee is one of these. It rules on individual complaints pertaining only to the *International Covenant on Civil and Political Rights* (1966) (ICCPR). State signatories to the First Optional Protocol to the ICCPR have agreed that their citizens can seek an opinion from the Committee regarding breaches of the ICCPR.

In 1991, a Tasmanian man, Nicholas Toonen, complained to the Committee that certain sections of Tasmania's Criminal Code criminalised his sexual orientation. In the case *Toonen v Australia* (1994), it was argued that the Tasmanian legislation breached Articles 2, 17 and 26 of the ICCPR; namely, the right to privacy and the right to equal treatment before the law. The Human Rights Committee ruled that the Tasmanian law constituted a violation of individuals' privacy under Article 17 and that Tasmania should amend its criminal code.

The federal government responded by enacting the *Human Rights (Sexual Conduct) Act 1994* (Cth) to override the offending sections of the *Criminal Code Act 1924* (Tas). Nonetheless, Tasmania was reluctant to change its laws. It took a High Court decision (*Croome v Tasmania* [1997] HCA 5), which held that Tasmania's law was inconsistent with the Commonwealth Act, to force an amendment to the Criminal Code.

Figure 7.8 On 18 December 2019, the UN High Commissioner for Human Rights, Michelle Bachelet Jeria, attended an update on the human rights situation in Venezuela at the UN's offices in Geneva, Switzerland.

Research 7.3

1. Investigate the provisions of the six human rights treaties listed above.
2. Briefly summarise the purpose of each of these treaties.
3. Compare and contrast the rights in the *International Covenant on Civil and Political Rights* (1966) with the rights in the *International Covenant on Economic, Social and Cultural Rights* (1966).

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- Law enforcement agencies at the local, state and federal levels have the task of enforcing laws and rights within their jurisdiction. Australian law enforcement agencies include state and federal police, ASIO, Australian Customs and Border Protection Service, the Australian Criminal Intelligence Commission and the Australian High Tech Crime Centre.
- The nature of policing has changed dramatically since 2001 in relation to terrorism, cybercrime and border protection. Police are governed by *Law Enforcement (Police Responsibilities) Act 2002* (NSW)
- Disputes between individuals can be resolved using various legal (formal) and non-legal (informal) methods.
- Disputes between individuals and the state can be resolved using formal and informal methods. The state does not have unlimited or arbitrary power.
- The Australian Human Rights Commission and the Anti-Discrimination Board of NSW carry out vital roles in enforcing legislation that protects rights.
- Cases such as *Toonen v Australia* illustrate the ongoing need for law reform in relation to human rights and their enforcement.

Questions

Multiple-choice questions

1 State and federal police officers:
   - **a** make and enforce laws.
   - **b** enforce laws.
   - **c** investigate criminal laws in New South Wales.
   - **d** do none of the above.

2 The AFP's role has:
   - **a** changed dramatically since 2001.
   - **b** remained unchanged since 1901.
   - **c** been modified by NSW Police.
   - **d** been seconded by ASIO.

3 When disputing parties present their cases to an independent person who makes a decision that is legally binding, the process is known as:
   - **a** negotiation.
   - **b** mediation.
   - **c** arbitration.
   - **d** all of the above.

4 Non-legal methods of challenging state power include:
   - **a** media, trade unions and interest groups.
   - **b** trade unions, internal review, courts.
   - **c** members of parliament, trade unions and media.
   - **d** internal and external review and media.

5 Statutory bodies include:
   - **a** the ADB, the AHRC and ICAC.
   - **b** Amnesty International, the ADB and the ABC.
   - **c** the ADB, the AFP and the media.
   - **d** the ABC, the ADB and the ATO.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

1 Outline the roles of the Australian Human Rights Commission and the Anti-Discrimination Board of NSW. Explain why individuals and the state require such bodies.
2 Describe the role of at least three law enforcement agencies that operate in New South Wales.
3 Explain how the role of one law enforcement agency has changed since 2001.
4 Discuss why an independent and neutral third party is part of the mediation and conciliation process.
5 Research and evaluate the Dawson case in which law enforcement has allegedly failed to bring a perpetrator to justice.
6 Identify and describe a recent dispute between individuals that has been solved through mediation, arbitration or negotiation.
7 Assess the Australian Human Rights Commission, the Anti-Discrimination Board of NSW or Independent Commission Against Corruption. Discuss if we need such bodies.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter 8
Contemporary issue: The individual and technology

Chapter objectives

In this chapter, students will:

- investigate the way in which the law impacts the relationship between individuals and technology in cyberspace
- identify the key features of the relationship between individuals and technology in cyberspace
- describe how individuals relate in cyberspace to other individuals, institutions, organisations, corporations and governments
- investigate the nature of the relationship between individuals, the legal system and cyberspace
- discuss the effectiveness of the legal system in addressing issues that relate to individuals in cyberspace.

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Crimes Act 1914 (Cth)
Copyright Act 1968 (Cth)
Racial Discrimination Act 1975 (Cth)
Privacy Act 1988 (Cth)
Criminal Code Act 1995 (Cth)
Racial Hatred Act 1995 (Cth)
Communications Decency Act 1996 (US)
Cybercrime Act 2001 (Cth)
Spam Act 2003 (Cth)
Competition and Consumer Act 2010 (Cth)
Copyright Amendment (Online Infringement) Act 2015 (Cth)
Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Cth)
General Data Protection Regulation (EU) 2016/679

SIGNIFICANT CASES

Reno v American Civil Liberties Union, 521 US 844 (1997)
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63
United States of America v Ivanov (2001) 175 F Supp 2d 367
Department of Internal Affairs v Atkinson (High Court of New Zealand, 19 December 2008)

ISBN 978-1-108-86281-3

Legal oddity

While technology has made many aspects of our life simpler, when technology goes awry there can be significant legal consequences for people in the community. A Melbourne commuter discovered this in 2013 when his 'myki' transport card would not 'touch on' before his train journey. An employee told him to fix the issue at the other end, but in the interim, a security officer issued him a fine for not having a ticket. The commuter successfully fought the fine, but technological issues with the myki card continue and many other people have been issued on-the-spot fines.

ISBN 978-1-108-86281-3 Milgate et al.

8.1 The impacts of technology on the individual

The impact of technology on the individual is one of the most important issues that we all face today. This is especially the case concerning **digital technology**. In the twenty-first century, we have become very dependent on the internet across all realms of human activity including communication, business, and education. We have all become participants in this digital revolution and it has changed the way we think, communicate and interact.

In the 1990s when the **internet** started, there was a mood of optimism about the potential of what some called the 'information superhighway.' Some commentators envisaged a techno-utopian future, which would benefit all of humankind. In the 2000s, as the internet increased its global reach, the global internet platforms such as Google, Facebook, Amazon and Apple, emerged and grew to become the biggest businesses in history with enormous economic power and political influence. All of this change has put pressure on both domestic and international legal systems.

By 2020, it was clear that timely, effective and well-focused legal responses to the digital revolution are needed to ensure that technology serves humanity and is not used to enslave it. To chart the best course into the future we need to understand the history of digital revolution and how the law has responded to it.

digital technology
computerised devices, connected to the internet, that are used to generate, store and process data

internet
a global network of interconnected computer networks that allows users to obtain and share information in a number of ways

The internet

One of the most important and interesting technological developments, particularly in terms of the law, has been the creation of the internet. By 2020, there were approximately five billion internet users and this number is increasing every day. As a result, digital technology and cyberspace are major areas of interest for citizens and law-makers all over the world.

During the global coronavirus pandemic in 2020, the internet played a crucial role in everyday life and even in people's survival. While in lock-down, people used the internet to order essential items such as food and clothing, and to stay connected with their friends and family.

The jurisdiction of cyberspace

Nearly three decades after the novelist William Gibson coined the term **cyberspace** in his 1982 story 'Burning Chrome', the internet has become so widely available that it has forever changed our lives. Cyberspace is the global online virtual world created by the interconnection of millions of computers on the internet. By the third decade of the twenty-first century, cyberspace touched just about every aspect of our lives. Increasingly, our online and

Figure 8.1 The term 'cyberspace' was coined by the American-Canadian science fiction writer, William Gibson, in 1982, in his short story 'Burning Chrome'. This was well before the internet existed as we know it today. The term and the concept were later popularised in Gibson's debut novel, *Neuromancer*.

Legal Links

For up-to-date statistics relating to the internet, see the 'Internet Live Stats' website.

ISBN 978-1-108-86281-3 Milgate et al.

offline lives are merging. Like any other new area of human activity, there is a need for law applicable to cyberspace. Currently, no government or court can claim cyberspace as its exclusive jurisdiction. Its global nature poses particular challenges for the law.

cyberspace
the 'environment' in which electronic communication occurs; the culture of the internet

The nature of cyberspace

There are at least three distinctive features of cyberspace that pose unique challenges for legal regulation:

- **Cyberspace facilitates anonymity**. The internet has made it much easier for persons to distribute information and messages anonymously or using a pseudonym. Web-based email services and many online discussion forums allow you to create a user name and hide your identity if you wish. While domain names are identifiers for computers on the internet, and the IP number (physical address) of the computer being used can usually be determined, there is software that can be used to encrypt internet activity or to hide identifying information about where a website originated. This feature of cyberspace has certain advantages for individuals' privacy, but it also provides opportunities for cybercriminals.
- **Cyberspace facilitates creativity**. The computers connected to the internet do not just retrieve information as a television receives programs from a network; they also permit information and services to be created and supplied. They can be used to create software programs that improve their performance or enhance or change their role. This feature makes the internet unlike any other electrical device or network that has ever been developed.
- **Cyberspace is global**. The internet went from being a collection of networks in the United States to being a global system. Cyberspace lacks national boundaries. Like-minded people can communicate with each other and join online communities regardless of where they live in the world. However, the negative side to the lack of national boundaries is that it is difficult for a nation-state to control what goes on within its territorial borders, if those activities are also taking place in cyberspace.

Approaches to rights in cyberspace

Laissez-faire approach to rights

Some internet commentators advocate a ***laissez-faire*** approach to information, which means they do not think it should be regulated in any way. They argue that individuals are capable of determining the quality of internet content and that governments should not intervene in the 'marketplace of ideas'. One of the organisations taking this line is the Electronic Frontier Foundation, which was founded in 1990 with the primary goals of defending free speech, privacy and consumer rights.

laissez-faire
(French) 'allow to do'; may be used in a broad sense of minimal government intervention in most aspects of society

Review 8.1

1 Outline some of the positive aspects of the global nature of cyberspace.
2 Outline some of the drawbacks of cyberspace, especially with respect to the enactment and enforcement of laws.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 13–14 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 8.2 On 1 February 2011, during the Arab Spring, protestors gathered in Tahrir Square in Cairo, Egypt. With the eventual failure of the Arab Spring, the Supreme Council of Armed Forces, which was the governing group in Egypt, (from Mubarak's departure at the start of the revolution, to the start of Morsi's term as president in June 2012) enforced strict controls over the internet and especially social media in a bid to prevent further dissent.

Interventionist approach to rights

Other commentators argue it is appropriate for governments to ensure that the law deals with online phenomena such as race hatred and revenge pornography, and to ensure reasonable quality overall. These advocates do not trust the marketplace of ideas. They advocate a more active role for governments in regulating quality on the internet, involving:

- enacting legislation and/or international treaties
- imposing obligations on ISPs to block certain content
- strengthening enforcement agencies.

Other methods of improving the quality of information rely on the active involvement of online communities and of key actors and stakeholders, including governments, parents, teachers, software companies and other businesses. Governments would need to take a leadership role, but would also need to give the other agents considerable freedom and scope. Some of the ideas include:

- the establishment of national or international bodies for the accreditation of websites
- greater use of reputation and industry ratings systems, as used by YouTube, eBay and iTunes
- greater use of brands and labels ('trust marks')

Research 8.1

Source online John Barlow's article, 'A Declaration of the Independence of Cyberspace' (8 February 1996).

1 Outline the key points of Barlow's article.

2 Discuss Barlow's assertion that governments should keep out of cyberspace.

ISBN 978-1-108-86281-3 Milgate et al.

- government funding of internet awareness and digital media literacy skill classes in schools
- search engine filtering
- encouragement of social norms; for example, as Wikipedia has done with respect to the requirement of a 'neutral point of view' in all of its content.

In most cases, law can only set minimum standards. Making laws in relation to cyberspace is very difficult, as there is a dearth of international agreements. Most of the laws regarding cyberspace are national laws that are tied to local values. Limits on national law enforcement remain despite the global nature of the internet.

8.2 Legal implications

Even in cases where jurisdiction is clear, there are difficulties with enforcement of the law in cyberspace. Criminal and civil wrongs in cyberspace can sometimes be classified into the familiar categories, but they may also take on new characteristics. Some of the areas of law concerning cyberspace are as follows.

Cybercrimes

Hacking

Hacking is unauthorised access to data held in a computer or computer system, changing the data, interfering with electronic communication between computers, or impairing the security, reliability or function of stored electronic data. A person may engage in hacking out of curiosity, for monetary gain, to alter data for some other reason or to maliciously spread a virus. Hacking also has the potential to be used in an act of terrorism.

The *Cybercrime Act 2001* (Cth) amended the *Criminal Code Act 1995* (Cth), as well as the *Crimes Act 1914* (Cth) and several other Commonwealth Acts. It created offences pertaining to computers, data and the internet, now contained in the *Criminal Code Act 1995* (Cth). As these are federal offences, there must be a 'Commonwealth connecting factor'; for example, the computers are owned or operated by the federal government, the data is held by the federal government or the offender's actions are carried out via a 'telecommunications network' – which includes the internet.

In Court

***United States of America v Alexey Ivanov* (2001) 175 F Supp 2d 367**

In November 2000, Alexey Ivanov and his colleague, Vasiliy Gorshkov, were arrested in Seattle, United States, and charged with conspiracy, fraud, hacking and extortion. Ivanov is a Russian computer whiz who earned his living hacking the computer networks of US companies. He set up a company that could supposedly give companies protection from hackers. Ivanov offered his services to companies but only after he had secretly hacked into their network. If a company refused his 'offer of help', he would send them a blunt email threatening to delete all their email files or publish all their credit card information online. Ivanov and Gorshkov tried to extort money from many US companies and they had a database of an estimated 50 000 credit cards.

The obvious difficulty in dealing with hackers like this is that they are based in foreign countries. Also, there is no international law or mechanism that is effective in bringing them to justice. Often, governments have to act unilaterally to deal with hackers and, in this case, that is exactly what happened. Before their arrest, the pair was lured to a fake job interview in Seattle. At the 'interview', they were asked to demonstrate their skills. The Federal Bureau of Investigation (FBI) monitored their keystrokes and was able to discover their passwords. After the interview, the FBI counter-hacked Ivanov's company network in Russia and gathered all the evidence they needed to charge him. Gorshkov was sentenced to three years' jail and had to pay back $692 000 in illegal funds. He later returned to Russia. Ivanov spent three years and eight months in jail and currently owes more than $800 000 in fines.

ISBN 978-1-108-86281-3 Milgate et al.

A hacker may also be charged under state law. For example, in 2001, a company that set up a computerised sewerage system for Maroochy Shire Council, Queensland, was hacked by an ex-employee, who made one million litres of raw sewage run into public parks and creeks in the Sunshine Coast area. He was convicted on various charges stemming from his breach of section 408D of the *Criminal Code 1899* (Qld), which prohibits unauthorised use of identification information for the purpose of committing an indictable offence. The legislation is not specifically about computer hacking. On appeal convictions on two of the charges were set aside but the sentence of two years' imprisonment remained (*R v Boden* [2002] QCA 164).

Malware

Malware (short for 'malicious software') is software that is designed to damage a computer or network. One of the earliest examples was the Morris worm of 1988 which caused computers to crash by rapidly replicating itself and causing their systems to crash. The creator of the worm was the first person convicted under the United States' legislation, the *Computer Fraud and Abuse Act 1984* (US).

A more recent development has been the use of ransomware, in which access to data on the infected computer is blocked and a ransom payment is demanded for its release. There may also be a threat to publish the data if a payment is not made. Ransomware scams have been increasing since 2012, with some examples including:

- CryptoLocker ($US400 ransom) – 2013
- CryptoWall ($US500 random initially, increasing to $US1000 after seven days) – 2014
- WannaCry ($US300 ransom) – 2017.

Businesses also fall victim to ransomware. For example, at the end of January 2020, Maze ransomware group targetted Bouygues Construction, asking for a ransom equivalent to $US 10 million. The coronavirus pandemic of 2020 also provided opportunities for criminals to use malware. One example was a COVID-19 tracking Android app that promised to track coronavirus cases near the user, but which infected the user's phone with ransomware that demanded large amounts of money.

Internet fraud

Fraud is intentionally misrepresenting or concealing information to deceive or mislead. On the internet, fraud can be carried out in a number of ways and can occur in conjunction with hacking.

A scam is an attempt to obtain money through deception. Many scams, unique to the internet, have developed in recent years. They can function through unsolicited emails, websites promoting

Figure 8.3 The Chief of Police of Jakarta, Indonesia, Gatot Eddy (centre), speaks during a press conference on 26 November 2019. On display are evidence (bottom right) and Chinese and Indonesian suspects (in the background). Dozens of Chinese nationals were arrested in Indonesia over an online scam that defrauded victims out of millions of dollars.

ISBN 978-1-108-86281-3 Milgate et al.

pyramid selling (where people are offered the right to sell a product or service, as well as the right to sell the scheme itself in the same way) and unsolicited advertisements.

Perhaps the best-known email scams are the ones in which the email promises the recipient huge rewards for helping a government, a bank, an organisation or a family in Nigeria (or some other country) out of some legal or financial difficulty. This assistance invariably involves transferring money electronically or supplying bank account details.

Another type of scam is 'phishing', where a person is sent an email apparently from a legitimate institution, such as a bank asking the person for sensitive information, such as their account details. The information is then used to carry out fraudulent activities, or to steal the person's money.

Fraud may also be perpetrated using fake websites. In *Australian Competition and Consumer Commission v Chen* [2002] FCA 1248, the Australian Competition and Consumer Commission sought declarations that foreigner Richard Chen had misled or deceived consumers in breach of the then *Trade Practices Act 1974* (Cth). Chen, an American, did not live in Australia and all of his activity was conducted from the United States. He operated three websites that appeared to be associated with the Sydney Opera House and purported to sell tickets to performances there. The stated price for the tickets was twice the price of genuine ones and consumers never received tickets. The Federal Court granted the declarations, as well as an injunction requiring Chen to remove the websites, take steps to prevent Australian residents from accessing them, and stop operating misleading and deceptive websites.

Spam

Spam is junk mail received electronically. Some spam is harmless, but much of it is malicious and potentially damaging to the recipient. Spam is also known as unsolicited bulk email; that is, email send to large numbers of people that the recipients have not asked for or granted permission to have sent to him or her. It does not matter what the content of the email is; if it is unsolicited, it is spam.

Under the *Spam Act 2003* (Cth), it is illegal to send, or cause to be sent, unsolicited commercial electronic messages through email, instant message services (IM), telephone text messages (Short Message Service or SMS) or multimedia message service (MMS). It does not cover faxes, voice telephone calls or messages, or unsolicited ads that pop up to be seen by an internet user.

The Spam Act was passed as a result of public concerns about spam. As discussed above, email can be used for the purpose of fraud. The ways in which people's email addresses and personal information are collected and handled for the purpose of 'spamming' also raises privacy issues. Although the Spam Act applies to any spam regardless of content, a significant portion of the unwanted spam contains advertisements for pornography and other products related to sex, illegal gambling schemes, pyramid selling, and misleading or deceptive advertisements. Its method of distribution means that inappropriate material can be sent to minors.

The Australian Communications and Media Authority (ACMA), a Commonwealth statutory authority responsible for the regulation of radio and television broadcasting, telephone communications and the internet, enforce the Spam Act.

Research 8.2

1 Identify the definitions for the scams listed below by visiting the Scamwatch website:
   - **a** online auction and shopping scams
   - **b** domain name renewal scams
   - **c** spam (junk mail) offers
   - **d** free offers on the internet
   - **e** modem jacking
   - **f** spyware and key-loggers
   - **g** ringtone scams
   - **h** up-front payment scams.

2 Construct a list of other types of internet scams.

ISBN 978-1-108-86281-3 Milgate et al.

In Court

***Department of Internal Affairs v Atkinson*, 19 December 2008 (CIV20084091002391/ 2008)**

In 2008, a New Zealand man, Lance Atkinson, was found guilty in a New Zealand court of sending two million unsolicited emails between 2007 and 2008 using iNet Ventures, an Australian-registered company. These emails encouraged people to visit websites that used false claims to entice people to buy prescription drugs, 'male enhancement' products and weight-loss pills.

However, this was only a small part of Atkinson's spam operation. It is estimated that up to 10 billion spam emails were sent each day using a 'botnet' of 35000 computers. A 'botnet' is a large number of compromised computers using software robots ('bots') to send emails to bulk addresses. The emails were aimed to market Herbal King, Elite Herbal and Express Herbal brand pharmaceuticals, which were sent from Tulip Lab in India.

In 2005, the US Federal Trade Commission (FTC) had already pressed charges against Atkinson, shut down his spam network, frozen Atkinson's assets and fined him $2.2 million for running a similar spam network. The network that Atkinson ran was the largest in the world, with connections to Australia, New Zealand, India, China and the United States, and at its height was responsible for a third of all spam. The FTC received over three million complaints about the operation.

One of the interesting aspects of this case is that it highlights the inability of any international law or mechanism to deal with the spam that adversely affects all users of the internet throughout the world. The only action that can be taken by states is to make their own laws against spam and to unilaterally pursue the culprits for breaching this law. Often, states cooperate to track down the criminals responsible, though this cooperation is not always guaranteed due to states' differing priorities and resources. Obviously, failed states have a difficult time cracking down on spam even if they have the political will to do so.

Review 8.2

1. Recall what Lance Atkinson did.
2. Describe the size of Atkinson's operation.
3. Identify the laws Atkinson violated.
4. Outline the ingredients for the successful prosecution of criminals like Atkinson.

Legal Links

For further discussion about spam and what is being done internationally to tackle it, view the following websites:

- Australian Competition and Consumer Commission's 'The London Action Plan'
- The Spamhaus Project.

To see Australian spam legislation, view the Federal Register of Legislation's website and enter '*Spam Act 2003* (Cth)' into the search field.

Cyberterrorism

Cyberterrorism is the use of information to intimidate or coerce a government or its people to further a group's or a person's political agenda. Attacks could lead to economic loss, collapse of critical infrastructure, bodily injury or death. Some military commentators describe this as the 'new terrorism' of our times. Instead of carrying a backpack filled with explosives, a

ISBN 978-1-108-86281-3 Milgate et al.

terrorist can cause far greater damage by unleashing a carefully engineered packet of data onto the internet and directing it at systems that control essential infrastructure such as power stations, dams, airports, hospitals, electricity grids and financial systems.

Terrorist acts could include attacks against:

- internet nodes
- defence systems
- networks and computer systems
- telecommunications infrastructure
- the stock market
- nuclear power plants
- critical infrastructure such as electricity grids
- water supply
- transportation systems
- health infrastructure.

Terrorists could also make use of:

- 'botnets' of thousands of computers to launch an attack
- electronic threats
- virtual blockades
- email attacks
- viruses and worms.

Sadly, governments may never be fully prepared for serious cyberterrorist attacks. As Zittrain (an American professor of internet law and the George Bemis Professor of International Law at Harvard Law School) said in his book, *The Future of the Internet and How to Stop It*, we have not yet 'experienced a 9/11 on the internet' (i.e. an event as catastrophic as the September 11 attacks in the United States in 2001). He argues that governments will only act decisively to improve security against cyberterrorism and other threats on the internet if they experience a massive catastrophe: in other words, a 9/11 in cyberspace.

Cyberwarfare

One of the problems of a cyber-attack is that it is hard to notice when it starts. It may take days before realising an attack is under way.

Types of attacks

There are several methods of attack in cyberwarfare:

- propaganda – using propaganda on the internet to wage a psychological war against an adversary
- cyberespionage – obtaining secrets from an adversary using the internet
- probing attacks – designed to find weaknesses in an adversary's defences in preparation for a much larger attack in the future
- distributed denial-of-service (DoS) attacks – when a large number of computers in one country are used to launch a DoS attack against systems in another country

Figure 8.4 Homeland Security Secretary, John Kelly (centre), talks with White House Chief Strategist, Steve Bannon (right), and Senior Advisor for Policy, Stephen Miller (left), before a meeting about cybersecurity with US President, Donald Trump, at the White House on 31 January 2017.

- disruption of equipment essential for the defence services of an adversary country such as computer networks, satellites and communications
- attacking essential infrastructure such as water, power, fuel, communications and transportation systems.

In 2017, Wikileaks published a series of documents, known as Vault 7, which showed capabilities of the CIA to engage in cyberwarfare, including accessing computer operating systems, web browsers, smartphones and smart televisions. They also described CIA monitoring of the 2012 French presidential election.

In 2016, the Russian Government engaged in an 'influence campaign' over the United States presidential elections, with activities that allegedly included spreading fake news on social media and hacking the Democratic National Committee's computer network to publish (via Wikileaks) material damaging to the reputation of candidate Hilary Clinton.

Intellectual property in cyberspace

The term 'intellectual property' refers to creations of the mind that have commercial value. These include inventions, literary works, artistic works, music, software programs, databases, plant varieties, trademarks and designs. Most of these things can be created or published on the internet.

Intellectual property law protects the legal rights arising from a person's intellectual creations. It applies not to the ideas themselves but to the expression of these ideas. So the idea must have developed into something tangible – for example, a software program or an essay – to qualify for protection. Three types of intellectual property rights are **copyright**, **trademarks** and **patents**.

Intellectual property is the exception when it comes to international law and cyberspace. In many areas of law, international treaties do not distinguish between offences committed in cyberspace and otherwise; however, there are a number of treaties and international organisations that deal specifically with intellectual property issues on the internet.

copyright
an exclusive right to publish, copy, publicly perform, broadcast or make an adaptation of certain forms of expression; namely sounds, words or visual images

trademarks
words, names, symbols or devices, used individually or in combination, to identify and distinguish the goods or services of one company from those of another

patents
rights granted for a device, method, substance or process that is new, inventive or useful

Review 8.3

1 Identify three types of crime committed via the internet. Explain how each crime can harm people.
2 Define 'fraud'. Describe how fraud can be committed via the internet. Discuss other ways that fraud can be committed.
3 Define 'spam'. Using examples, discuss if spam is merely an annoyance, or if it raises serious legal issues.
4 Construct a list of legislation that specifically deals with cybercrime. Identify other legislation that has been used to prosecute crimes committed in cyberspace.

Research 8.3

View the website of the World Intellectual Property Organization (WIPO).
1 Identify WIPO's definition of 'intellectual property'.
2 Construct a list of the international treaties that relate to intellectual property.

ISBN 978-1-108-86281-3 Milgate et al.

Copyright

Copyright is the type of protection given to work intended to convey information or enjoyment of literary form such as books, software, broadcasts, films and music. The *Copyright Act 1968* (Cth) protects material that has been produced in Australia. The laws of other countries that have signed the international treaties to which Australia is a signatory also protect this material. The international conventions that ensure that any protection given to Australian creative works also applies globally are:

- *Berne Convention for the Protection of Literary and Artistic Works* (1886)
- *Universal Copyright Convention* (1952)
- *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (1961)
- *World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994)
- *WIPO Copyright Treaty* (1996)
- *WIPO Performances and Phonograms Treaty* (1996)
- *Copyright Amendment (Online Infringement) Act 2015* (Cth).

New challenges for the law relating to copyright have arisen as a result of digital technology.

Another major area of copyright violation involves computer software that is copied and sold without authorisation, causing losses of billions of dollars to the companies that originally created the programs. Such unauthorised production is in breach of the World Trade Organization (WTO) agreements, negotiated and signed by most of the world's trading nations. If countries refuse to act against intellectual property violations within their borders, other countries whose companies are suffering loss as a result can ask the WTO to take action.

Trademarks

Trademarks are signs or symbols that give a person or corporation the legal right to use, license or sell the product or service for which it is registered.

Figure 8.5 A Member of the European Parliament, Axel Voss, reacts after the vote on copyright in the digital single market during a plenary session at the European Parliament on 26 March 2019 in Strasbourg, France. The European Parliament adopted controversial copyright reforms championed by news publishers and the music business, delivering a blow to the tech giants that lobbied furiously against it.

ISBN 978-1-108-86281-3

A trademark distinguishes a person's or company's product from all others' products. Some registered trademarks have become famous images that will forever be associated with certain brands of goods.

Patents

Patents are for the protection of intellectual property in inventions. The aim of patent laws is to encourage people to continue to research or develop new products or technology. A patent gives the owner the exclusive right to derive commercial benefit from the invention for the term of the patent, within Australia and its territories. International agreements regarding patents, such as the *Patent Cooperation Treaty* (1970), give our trading partners similar rights and ensure that the patent rights of Australian inventors are upheld overseas.

Of these three types of rights – copyright, trademarks and patent – copyright has the most relevance to cyberspace. Information technology has greatly reduced the cost of reproduction of text, images and multimedia products, and the internet has similarly reduced the cost of transportation and distribution. Consider the difference between a truckload of books and the same content published electronically. The 'culture' of the internet has been a further issue for intellectual property law: many resources are freely shared in cyberspace, with no or minimal commercial profit expected. While the ease of obtaining material without paying for it clearly causes disadvantage to the people who produce that material, some have argued that with the rapid development of cyberspace, we need to rethink the concept of property and the laws that govern property of all types.

8.3 Difficulties with enforcing rights

There are a number of ways in which individuals are vulnerable in cyberspace. These include:

- **cyberbullying**
- **cyberstalking**
- racial hatred
- exposure to violent, disturbing and/or illegal material, including child pornography
- exposure to adult material inappropriate for children
- intrusions into privacy.

cyberbullying
harassment using digital media such as websites, email, chat rooms, social networking pages or instant messaging

cyberstalking
repeated harassment using email, text messaging or other digital media with the intention of causing fear or intimidation

Legal Links

For more information about trademarks and patents, view IP Australia's website.

Review 8.4

1 Define 'property rights'. Explain the specific nature of intellectual property rights, in contrast to other kinds of property rights.
2 Recall what can be protected by each of the following and explain how each of these works:
   a copyright
   b trademark
   c patent.
3 Discuss, with examples, how intellectual property rights are affected by the increasing use of the internet.
4 Outline some of the legal means of protecting intellectual property in Australia and internationally.

ISBN 978-1-108-86281-3 Milgate et al.

In cyberspace, there are few barriers between individuals and there is potentially harmful content. In addition, people who have grown up with the internet and are comfortable using it and other forms of digital technology may be less cautious than those who have adapted to it and adopted it at a later point in their lives. Online, people tend to loosen up and reveal things that they would be less likely to divulge in their offline world. Psychologists call this feeling of invincibility the **disinhibition effect**.

disinhibition effect
the tendency to say and do things in cyberspace that the person would not ordinarily say or do in the face-to-face world

Social networking sites such as Twitter and Facebook and online communication media such as chat rooms require varying degrees of public personal disclosure; that is, information of a personal nature shared in what is essentially a public forum. The impression that friends are 'chatting' in a controlled, private space is an illusion. Other people can access this information, either immediately or at some later stage, as online information remains indefinitely in cyberspace.

Privacy

The information that we present about ourselves online, including photographs, forms our **digital dossier**. This digital dossier comprises all the information about a person held in multiple locations.

digital dossier
all the types of information about a person that he or she has deliberately or unintentionally put onto the internet, held in multiple locations

Governments and businesses have always collected information about individuals, but now the speed of data collection practices has outpaced methods of protecting that data. In early 2018, it was revealed that a political consulting firm called Cambridge Analytica had mined the personal data of over 80 million Facebook users without their consent. This was done by way of a personality quiz app, which retrieved personal information not only of the 300 000 people who installed the app (arguably consenting to the information gathering), but also that of all their Facebook friends. The app developer shared this with Cambridge Analytica, who in turn made it

Figure 8.6 Cambridge Analytica former employee and whistleblower, Christopher Wylie, testified before the Senate Judiciary Committee on Cambridge Analytica and data privacy in Washington, DC on 16 May 2018.

available to a number of political organisations who wanted to target messaging and influence people in matters such as the 2016 US presidential election, the 2016 Brexit vote and the 2018 Mexican general election. Facebook CEO, Mark Zuckerberg, issued a personal apology and promised to change Facebook's processes.

There has been a trend towards the use of services and storage of personal and other data in 'the cloud', on sites that the user does not own or control; also, the user need not have knowledge of or expertise in their creation or maintenance. Individuals have little control over how the most powerful search engines use their information. Information, stories, photos and anything else you may post on a website may be removed later, but they have already been recorded in an internet archive, as well as in a search engine 'cache' – a 'snapshot' that is taken of the page as it originally appeared. Other people may also copy your words or photos and post them on their own websites or webpages. So your information acts like a 'digital tattoo': even when it's no longer wanted for display, it is not easily removed.

Privacy laws

The *Privacy Act 1988* (Cth) contains 'privacy principles' covering federal government agencies and relating to the handling of citizens' personal information such as social security, health insurance and taxation.

ISBN 978-1-108-86281-3 Milgate et al.

Amendments to the Privacy Act in 2000 extended the privacy regime to parts of the private sector, relating to how businesses should collect, store, use and disclose personal information. Some states and territories, including New South Wales, have also enacted privacy legislation; others have privacy schemes for government agencies based on the privacy principles contained in the federal Privacy Act.

There is currently no statutory tort for breach of privacy. However, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, the High Court held that there was nothing standing in the way of developing one. Since then, there have been several cases heard in state courts that point towards the recognition of such a tort.

In 2008, the Australian Law Reform Commission (ALRC) produced a report called, *For Your Information: Australian Privacy Law and Practice*, in which it recommended extensive changes to privacy laws and practices to take account of new technology, as well as a way that individuals can bring a civil action for serious breach of privacy. The federal Privacy Act was introduced in 1988, predating super computers, the internet, mobile phones, digital cameras, ecommerce, sophisticated surveillance devices and social networking websites – all of which make it more challenging to keep personal information secure. The federal Privacy Act worked well for a long time, but without refinement it cannot keep up with developing technologies. Information privacy now connects with nearly every part of our day-to-day lives. This includes medical records and health status, finances and credit rating, and other personal details recorded on a vast array of company and public databases. Even our ability to display photos of ourselves online has privacy implications. In 2012, the federal government passed the *Cybercrime Legislation Amendment Act 2012* (Cth) to tighten privacy rules by giving people more information about the use of their personal details in cyberspace. However, critics wonder whether this is enough and are concerned about government moves to store the browsing history of everyone in Australia.

In May 2016, the European Union passed a law data protection and privacy for all citizens of the European Union. The General Data Protection Regulation (GDPR) came into force in April 2018. The GDPR also has impact outside Europe because it lays down the requirements for transfer of information outside Europe. It requires all controllers of personal data to have processes that safeguard personal data and to use the highest privacy settings as default.

Figure 8.7 On 22 May 2019 in Brussels, Belgium, European Commission Vice-President, V**ě**ra Jourová, addressed a press conference about taking stock of the General Data Protection Regulation, one year after it came into force.

ISBN 978-1-108-86281-3 Milgate et al.

Research 8.4

1 Source online the following article, 'Facebook moves 1.5 bn users out of reach of new European privacy law' (by Alex Horn, *The Guardian*, 19 April 2018).
   a Describe how Facebook responded to the GDPR when it came into force in April 2018.
   b Assess Mark Zuckerberg's explanation of this decision.
2 Find recent media articles about the GDPR.
   a Discuss if there is still any controversy about the GDPR.
   b Assess the effectiveness of the GDPR since 2018.

Metadata

Metadata is very useful when you are trying to find data or files. Tagging particular items can help you search for what you are looking for. For example, if you are looking for a legal article, keying in the word legal into a search engine will result in various documentation that has been tagged with the word legal or legal type terms. However, there may be a danger to our privacy due to metadata. Despite all these laws about privacy, the reality today is governments and corporations are using metadata to discover more about people's tastes, interests and relationships. In the recent book Data and Goliath by Bruce Schneier, the author claims that we are living in the 'golden ages of surveillance' and that we are all 'open books to both government and corporations'. Schneier says that the technology of today gives 'governments and corporations robust capabilities for mass surveillance' and that our response to this 'creeping surveillance has largely been passive'.

metadata
the data about data; it is information that identifies individuals through phone and internet activity giving a detailed picture of their lives and relationships

Figure 8.8 American whistleblower, Edward Snowden, speaking via Skype at the Wired Next Fest 2019 in Milan, Italy. Snowden worked in the United States as a contractor to the CIA. In May 2014, he fled the United States after leaking information about mass global spying carried out by the American National Security Agency. He was given temporary asylum in Russia.

Video

ISBN 978-1-108-86281-3 Milgate et al.

Review 8.5

1 Discuss how someone's 'digital tattoo' might pose problems for them in the future. Outline some hypothetical scenarios and propose ways that you can prevent this from happening to you.
2 Define 'metadata'. Discuss why metadata threatens everyone's privacy.

Safety

Another potential danger of revealing too much about yourself online is that false identities are easily created, and the person with whom you are communicating may not be genuine. Parents may be justifiably concerned about **online predators**, who assume false identities to entice young people into harmful encounters online or in the physical world.

online predator
a person with malicious intent (e.g. a sex offender or paedophile) who gives false and misleading identities with the aim of enticing their victims into harmful encounters online or in real life

For others, the disinhibition effect may contribute to behaviour such as rude language, harsh personal criticism or violent online games. At the extreme end of the continuum, the disinhibited behaviour may include threats, cyberbullying or cyberstalking.

Expression of **racial hatred** is illegal in Australia under the *Racial Discrimination Act 1975* (Cth). The *Racial Hatred Act 1995* (Cth) amended this Act to extend its coverage, giving people a mechanism to complain about racial hatred. In the offline world, racial hatred may occur through speech, gestures, images or written publications. This law applies equally to cyberspace, at least for people under the jurisdiction of Australian law. As with other types of expression, it is relatively easy for anyone to encourage racial hatred in cyberspace.

racial hatred
abuse or denigration of a person because of his or her race, or verbal abuse or denigration of a race generally

In late 2008, there were calls in Australia to toughen laws on cyber-racism after a spate of occurrences on social networking sites. In the *Criminal Code Act 1995* (Cth), Part 10.6 deals with telecommunications services and includes section 474.17, which states that it is illegal to use 'a carriage service to menace, harass or cause offence'.

A person is guilty of an offence if:

a the person uses a carriage service and
b the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Protecting children

One of the most significant concerns about cyberspace is the need to protect children, not only from inappropriate content and online predators, but also from serious criminal offenders who victimise children. Child pornography is a legal and moral problem that goes beyond the legality of images or text on the internet or other media.

In the United States, laws to protect children from inappropriate material must be drafted in such a way as not to violate the right to freedom

Research 8.5

Research the laws relating to cyber-racism in Australia and evaluate their effectiveness. Start with the cyber-racism section on the Australian Human Rights Commission's website.

Legal Links

For more information about online safety issues, see the website of the Australian eSafety Commissioner.

ISBN 978-1-108-86281-3 Milgate et al.

Review 8.6

1 Describe how cyberbullying, cyberstalking and cyber-racism are different from their counterparts in the physical world.
2 Assess whether laws relating to these acts should be drafted to relate specifically to cyberspace, or whether existing laws are adequate.
3 Propose some non-legal ways that could be used to protect against cyberbullying, cyber-racism and online predators. Consider the following agents in your response: parents, teachers and schools, older teenagers (e.g. siblings, friends or mentors of younger children), software companies and internet service providers.

of expression contained in the First Amendment. Another difficulty is that if a law is too broad in the scope of what should be prohibited, it can prohibit too much – including content that is unlikely to be accessed by children or to have anything to do with the victimisation of children. This and other issues will be further examined later in the discussion of the proposed 'clean feed' legislation in Australia.

Internet filtering

Similar concerns about offensive and obscene content were raised in Australia during the period of the Rudd–Gillard governments. The idea of 'clean feed' legislation originated during the Howard federal government and involved the establishment of a filtering scheme that would be imposed on all **Internet Service Providers (ISPs)**.

Internet Service Providers (ISPs)
companies that offer customers access to the internet

The Rudd Labor government elected in 2007 continued to consider the 'clean feed' proposal. The $70 million plan would block webpages listed in a 'blacklist' maintained by ACMA. It was argued that this would not only prevent internet users from

In Court

***Reno v American Civil Liberties Union*, 521 US 844 (1997)**

In 1996, due to public pressure, the US Congress passed the *Communications Decency Act 1996* (CDA). Two provisions of the CDA prohibited the 'knowing' transmission on the internet of obscene or indecent sexual communications or images to people under 18 years of age.

Many people considered these CDA provisions to violate the principle of freedom of expression. So a broad collection of individuals and groups (the American Civil Liberties Union, the Electronic Frontier Foundation, Human Rights Watch, and organisations and trade unions of editors, publishers, high school journalism teachers) united to challenge the CDA in court. (The 'Reno' in the case name is Janet Reno, the US Attorney-General from 1993–2001.) A US federal court ruled that the CDA violated the First Amendment of the US Constitution; the US Government appealed this decision in the US Supreme Court.

The US Supreme Court affirmed the lower court's decision and held that the indecency provisions of the CDA were an unconstitutional restriction of free speech. The court found that the terms 'offensive' and 'indecent' were vague, and the CDA provisions were overly broad. It concluded that the CDA did not focus enough on protecting minors from potentially harmful material. Moreover, there is no effective method of finding out the age of an internet user.

The court's view was that online communication differs significantly from broadcast media, in that users seldom encounter content online 'by accident'. Therefore, the internet should be subject to less regulation than the broadcast media.

ISBN 978-1-108-86281-3 Milgate et al.

seeing unwanted and inappropriate material, but would also combat child pornography itself. Two potential types of filter were canvassed. Either all pornographic material would be blocked, or an 'opt-in' scheme would allow users to continue receiving 'adult material'.

The mandatory proposal was much more restrictive than the voluntary ISP filter schemes operating in some European countries, which block only child pornography. One version of the scheme in Australia would include a wider range of material, some inappropriate for children but not necessarily involving pornographic or violent content. 'Social themes' upsetting to children could include divorce and euthanasia.

It has been pointed out that criminals distributing child pornography seldom use sites that are accessible on the internet. Increasingly, they are using less public methods such as peer-to-peer networks, which allow single computers to communicate with each other; encrypted networks, or smaller networks using codes that only the members know; or other systems that prevent public access. Consequently, blocking websites is not an effective means of stopping the spread of child pornography.

Some ISPs dislike the proposal because it is too easily bypassed by users, and because enforcement would be too onerous. Another objection was the risk that the filter would block material that has nothing to do with the type of content that the law aims to fight. Due to significant grassroots opposition to the 'clean feed' – as well as the Labor government's political problems – these proposals to filter the internet in Australia have stalled and no action was taken on the 'clean feed' idea.

8.4 Future directions

Why laws are needed

Cyberspace is a new and exciting development in society, but arguably there is no reason to think people are any better able to regulate social behaviour there than in any other place, in the absence of external authority.

In 1995, when eBay was founded, the company's owners did not believe that they needed to rely on government or laws to make their online business work. They had an online 'feedback forum' where buyers and sellers could post praise and complaints about one another and their transactions, and one 'customer support person' who was paid $100 a month to resolve disputes. However, with the growth of the company, scams began to proliferate. Goods were offered but not delivered, hundreds of would-be buyers were affected, and it was only a matter of time before eBay faced a lawsuit by alleged victims of fraud. Without the threat of prosecutions to limit the relatively small number of dishonest users, cybercrime could ruin an online business. Governments are needed to create an environment where the rule of law prevails and where law enforcement mechanisms will deter those who break the law.

Governments provide public goods that enable individuals and businesses to use the internet effectively. These public goods are:

- the cable network and communication laws
- criminal law
- laws governing property rights
- enforcement agencies.

Essentially, the smooth functioning of the internet depends on governments preventing harm and protecting rights. Countries whose governments do a poor job of this are finding that big companies are refusing to do business there.

Current status and sources of law in cyberspace

National

At a national level, both statutes and court decisions are used to govern the use of the internet within nation states. Many laws relating to cyberspace are contained within more general statues, as outlined previously in this chapter. Examples include sections 308–308I of the *Crimes Act 1900* (NSW), which set out computer offences, including hacking, and the *Spam Act 2003* (Cth). Further, superior courts can also create precedents in relation to the legalities of activities in cyberspace.

International

Unlike other areas of law where issues cross national boundaries, there are few specific international treaties that deal specifically with cyberspace. Given the exponential rise in internet use since the 1990s, one would expect that there would be many

ISBN 978-1-108-86281-3 Milgate et al.

international treaties to deal with common issues faced by all states. However, this is yet to occur.

Some international organisations and their current roles with respect to governance in cyberspace are:

- **United Nations**: The United Nations has little control over the internet or what happens in cyberspace, except in the area of intellectual property. There are no UN-sponsored treaties or conventions that are specifically designed to govern cyberspace. Intellectual property aspects of internet use are looked after by WIPO.
- **World Intellectual Property Organization (WIPO)**: WIPO is a specialised agency of the United Nations concerned with intellectual property.
- **European Union (EU)**: The EU is an economic and political partnership of European nations that has regulatory powers in various areas of social and economic life. In 2003, the EU reformulated its regulatory framework covering communications to cover 'all electronic communication networks and services', and began to review that framework in 2008 to ensure that it stays current. The EU has made a number of treaties relating to cyberspace. Parties to the Council of Europe Convention on Cybercrime (2001), for example, include 38 European countries, Canada, Japan, Montenegro, South Africa and the United States.
- **World Trade Organization (WTO)**: The WTO looks after trade matters between nations. This includes trade aspects of intellectual property, which are dealt with via the TRIPS agreement. The WTO also deals with ecommerce matters.
- **Internet Corporation for Assigned Names and Numbers (ICANN)**: This non-profit corporation was established in 1998 to coordinate the naming system on the internet, which is used to identify all websites. It has international representation but is very much under US government control. ICANN's role is strictly limited to the management of the domain naming system. However, it has the potential to become the most powerful organisation overseeing the internet if in the future there is a wider representation of the international community.
- **Internet Assigned Numbers Authority (IANA)**: IANA is one of the oldest internationally organised institutions, having been established by the US Defence Information Agency in 1972 for the purpose of assigning unique addresses to all computers connected in networks at that time. Today it manages over 20 million domain names, with around 40 000 registered every day.

Figure 8.9 Vice President and the Director for Security at the Pochta Bank, Stanislav Pavlunin, at the session, 'Is Russia prepared for new challenges in cyberspace?' at the 2019 Russian Investment Forum in Sochi, Russia.

All of these organisations have websites that you can view.

Strategies for governments

In their efforts to exert control in cyberspace, governments do not have to be completely effective to be adequately effective. Achieving perfect legal control is quite often just too expensive.

Intermediaries

One way in which governments can exert control over content is by enlisting local intermediaries such as ISPs and the companies that control the physical internet connections. They can also influence the policy of what goes on the local portals for search

ISBN 978-1-108-86281-3 Milgate et al.

engines. By utilising financial intermediaries, such as PayPal, banks or credit card companies, a government can wield huge influence over an industry – indeed, it can cripple it without going to court.

Needless to say, some countries that have utilised these methods are not known for having a high regard for freedom of expression or for corporate independence from government.

Prosecution of individual criminals

Quite often the simplest way a government can assert control over cyberspace is by physically arresting an individual suspected of cybercrime. The difficulty is that the person must be within the territorial borders of the government that is seeking him or her. Otherwise, **extradition** treaties can be used to remove the person from the country where he or she has taken refuge.

extradition
the handing over of a person accused of a crime by the authorities of the country where he or she has taken refuge to the authorities of the country where the crime was committed

Challenges to government control of cyberspace

One of the greatest challenges for governments is that each new technological innovation tends to make it easier for the law to be violated in some way. Often there will be a race between people using new technology to avoid the law, and authorities using new technology against the law-breakers. It can be quite costly for governments to chase and shut down illegal operations in cyberspace. Also, only developed (first world) countries have the financial and other resources to do this.

Another major difficulty for governments seeking to control content is the risk of censorship. As we have seen, this is of particular concern to countries with explicit protection for freedom of expression. On the other hand, countries that have no qualms about limiting free speech, such as China and Saudi Arabia, have achieved unprecedented control over internet content within their jurisdictions.

As there are many different legislative regimes in the world, what is illegal in one country may be permitted in another. In the absence of effective international conventions to deal with content that has human rights implications, such as child pornography, some nations have implemented measures such as ISP filtering.

Global laws

The challenge of transnational cybercrime

Cybercrime is big business and it poses a challenge for law enforcement agencies. Crimes such as data theft, data tampering, and the creation of viruses and worms are enormously damaging. Companies

Research 8.6

1. View the OpenNet Initiative website and read the information relating to global internet filtering.
2. Using the 'view country profiles' drop-down menu, find some countries that have implemented ISP filtering schemes. Research the different schemes in use.
3. Explain how these schemes attempt to protect innocent content providers and internet users while filtering out objectionable material.
4. Outline some of the types of objectionable material that these filters target.

Review 8.7

1. Discuss why strategies involving the use of intermediaries (e.g. ISPs, companies that provide physical infrastructure and banks) are problematic. Outline some of the objections that could be made to these strategies.
2. Identify three problems for governments seeking to make certain types of web content illegal.

ISBN 978-1-108-86281-3 Milgate et al.

also tend to under-report the effects of cybercrime on their business because they do not want the adverse publicity.

ISPs are not capable of blocking criminal activity unless they have the specific details of which user is involved. In combating cybercrime the enforcement agencies have to work quickly to deal with criminal acts because it is easy for criminals to slip back into anonymity once they know they have been detected.

One major reason for the Australian Government introducing the Metadata Laws in 2015 was to combat **terrorism**. This legislation requires ISPs to store information about their customers' phone and online usage for two years. However, civil liberties groups are concerned that too much power has been given to government in this legislation.

terrorism
violence or the threat of violence, directed at an innocent group of people for the purpose of coercing another party, such as a government, into a course of action that it would not otherwise pursue

The only binding international treaty on cybercrime to have been formed to date is the Council of Europe's *Convention on Cybercrime* (2001), which entered into force in July 2004. However, it has been difficult getting countries to agree to sign the convention due to sensitivity about sovereignty and authorising third parties to do cross-border searches. Also, there are civil liberty concerns that the treaty jeopardises free speech and privacy rights. Forty-seven nations had signed and ratified the convention as of 2015, leaving seven signatories who have not yet ratified it. Though the aims of the treaty are noble, it has not yet made a significant contribution to fighting cybercrime. Nations are still relying on unilateral action and ad hoc cooperation with a few other like-minded nations to fight cybercrime.

However, the *Convention on Cybercrime* (Draft 25), along with recommendations made by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, influenced the development of Australia's *Cybercrime Act 2001* (Cth), discussed earlier in the chapter.

ICANN's potential

One organisation that has enormous potential to be the ultimate global authority on the internet is ICANN. This non-profit organisation is responsible for the domain name system (DNS). The founders of ICANN intended it to be the ultimate authority for the internet. However, the US Government had responsibility for its oversight, under a memorandum of understanding between ICANN and the US Department of Commerce, from 1998 to 2009. Representatives of other countries and other observers have questioned why the United States should have primary authority, and argued that it should be more independent and therefore more international. In 2009 the United States gave up its control of ICAAN.

Some of ICANN's achievements have included:

- decentralisation of the sale and distribution of domain names, which led to a significant drop in the price of registering a domain name
- establishment of an effective method of resolving trademark disputes
- reduction in the incidence of cybersquatting; that is, making a profit from the use of someone else's domain name.

Most of all, ICANN has ensured the stability of the internet so that individuals, businesses and governments rarely worry about the internet collapsing.

Figure 8.10 In 2019, the American convenience store chain Wawa had a massive data breach. Malware discovered on Wawa payment processing servers on 10 December 2019 affected customers' credit and debit card information from 4 March 2019 until the breach was contained on 12 December 2019.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 8.11 Shaltai Boltai (Humpty Dumpty) hacking group leader Vladimir Anikeyev (aka Lewis) attends a parole hearing at Moscow's Lefortovo District Court. Anonymous International (Shaltai Boltai) specialised in hacking the accounts of officials and businessmen and putting the information for sale.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- Cyberspace is an area in which the law is playing an increasing but controversial role. The characteristics of cyberspace include global coverage, easy anonymity for users and the facilitation of creative activity.
- Crimes specific to cyberspace include hacking and spam.
- Fraud and violations of intellectual property rights are not specific to cyberspace, but they take on a distinctive character in that context.
- Privacy and safety issues are of concern to many internet users, and particularly to parents of young users.
- The Australian Law Reform Commission has recommended the development of a statutory tort of breach of privacy, and other reforms to take account of new technology.
- Efforts to protect children from indecent or inappropriate material on the internet can conflict with the protection of individual rights to free expression. Combating serious criminal activity that makes use of the internet faces similar challenges, as well as the difficulty of enforcement.
- Philosophical approaches to rights in cyberspace fall into two general camps: *laissez-faire* and interventionist.
- While greater government control of cyberspace has clear benefits with respect to fighting crime, democratic governments must ensure that individuals' civil rights are not violated.
- International regulation of cyberspace is in its infancy.

Questions

Multiple-choice questions

1 Two distinct features of cyberspace that will influence laws relating to it are its:
   a security and predictability.
   b anonymity and global character.
   c political progressivism and educational value.
   d democracy and communitarianism.

2 It can be concluded from the US Supreme Court decision in *Reno v American Civil Liberties Union* that:
   a cyberspace requires some degree of government control.
   b laws that attempt to regulate internet content may restrict free speech.
   c online communication is more like a conference call than a private conversation.
   d all of the above

3 The international organisation concerned with copyright law is:
   a ICANN
   b IANA
   c the UN
   d WIPO

4 Spam is:
   a the unauthorised duplication of goods protected by intellectual property law.
   b an unsolicited commercial electronic message.
   c an attempt to gain money through some sort of deception.
   d the intentional misrepresentation or concealment of information in order to deceive or mislead.

5 A digital tattoo is:
   a a unique type of computer identifier used by some European countries.
   b a software program unique to the individual, which is stored online somewhere in cyberspace.
   c a type of internet scam.
   d information placed on the internet that is no longer wanted but that cannot be easily removed.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

1 List the different types of intellectual property and explain how cyberspace may pose unique problems for intellectual property law.
2 Describe the various ways in which privacy can be violated in cyberspace.
3 Explain how privacy is protected in Australia.
4 List some of the problems arising from the free and unrestricted transmission of information in cyberspace.
5 Explain why government control of cyberspace is constantly challenged.
6 List the international organisations that have some authority for the regulation of cyberspace. Describe the function and jurisdiction of each organisation.
7 Outline the reasons why law is not always effective in cyberspace.

ISBN 978-1-108-86281-3 Milgate et al.

Part III
Law in practice

30% of course time

Principal focus

Students investigate contemporary issues that illustrate how the law operates in practice.

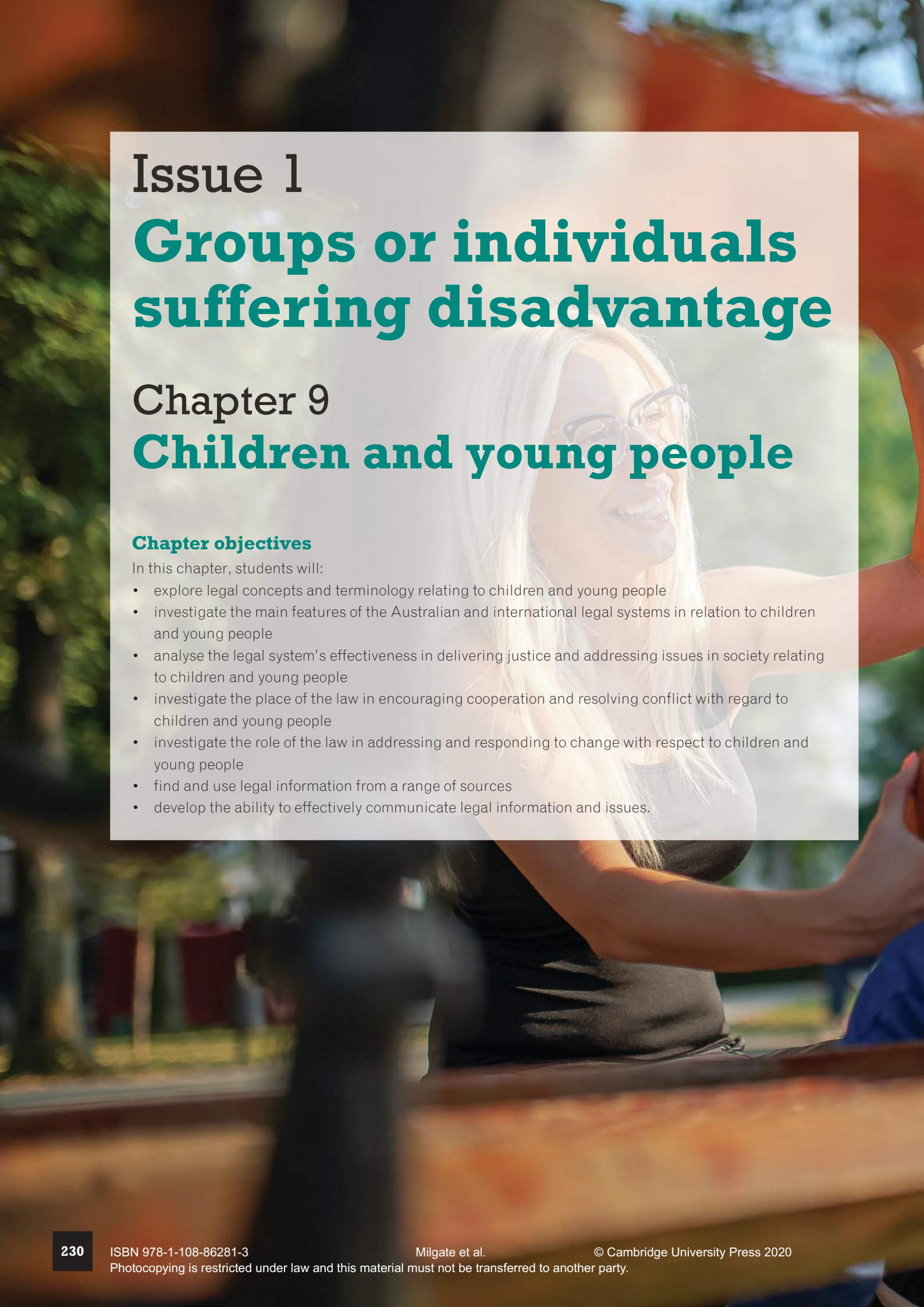
Themes and challenges

The themes and challenges covered in Part III include:

- the relationship between justice, law and society
- the development and reform of law as a reflection of society
- the importance of the rule of law
- the responsiveness of the legal system in dealing with issues
- the effectiveness of legal and non-legal mechanisms in achieving justice for individuals and society.

Chapters in this part

ISBN 978-1-108-86281-3 Milgate et al.



Issue 1
Groups or individuals suffering disadvantage

Chapter 9
Children and young people

Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology relating to children and young people
- investigate the main features of the Australian and international legal systems in relation to children and young people
- analyse the legal system's effectiveness in delivering justice and addressing issues in society relating to children and young people
- investigate the place of the law in encouraging cooperation and resolving conflict with regard to children and young people
- investigate the role of the law in addressing and responding to change with respect to children and young people
- find and use legal information from a range of sources
- develop the ability to effectively communicate legal information and issues.

ISBN 978-1-108-86281-3 Milgate et al.

Relevant law

IMPORTANT LEGISLATION

Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Children (Criminal Proceedings) Act 1987 (NSW)
Children's Court Act 1987 (NSW)
Education Act 1990 (NSW)
Births, Deaths and Marriages Registration Act 1995 (NSW)
Children (Protection and Parental Responsibility) Act 1997 (NSW)
Young Offenders Act 1997 (NSW)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Adoption Act 2000 (NSW)
Australian Citizenship Act 2007 (Cth)
Advocate for Children and Young People Act 2014 (NSW)

SIGNIFICANT CASES

Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402
Department of Health & Community Services (NT) v JWB & SMB [1992] HCA 15 ('Marion's case')
Re W (A Minor) [1993] Fam 64

ISBN 978-1-108-86281-3

9.1 Children, young people and the law

Children and **young people** represent the future of society. The respect we afford them and the way in which we support and nurture their social, emotional and cognitive development are crucial to the maintenance of a fair and just community.

Video

children
generally, persons aged 15 years and younger, depending on the legal context

young people
in New South Wales, persons aged between 16 and 18 years

How the law defines 'children' and 'young people'

Traditionally, the legal age of adulthood was 21 years. In the past 20–30 years, most jurisdictions have lowered this age to 18 years.

Article 1 of the *United Nations Convention on the Rights of the Child* (1989) states that anyone under the age of 18 is a child unless the national law specifies an earlier age.

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) defines a 'young person' as someone aged between 16 and 18.

These definitions are important because laws treat children and young people differently from adults. These laws are intended to:

- prevent them from being exploited
- protect them from the consequences of making uninformed decisions
- protect others from being disadvantaged by dealing with a person who is a minor.

A history of the status of children and young people

Historically, children had no legal rights until they reached adulthood. It was not until the late nineteenth century that concern about the working conditions of children, and the broader effects that child labour had on the quality of many children's lives, set in motion significant changes.

Throughout the nineteenth century, children in poorer families were constantly threatened by the spread of disease. They lived in dirty, overcrowded housing with very poor sanitation. The infant mortality rate was as high as 50% for children in their first year. Many children also experienced violence on a regular basis. For many, poverty and crime were significant influences in their formative years. Joining a gang and participating in crime and prostitution were ways of surviving until adulthood.

Children committing criminal acts were treated in the same way as adult offenders. The concept of an age before which a person could not be held criminally responsible – ***doli incapax*** – did not exist, and children as young as seven or eight were convicted of serious criminal offences.

doli incapax
(Latin) 'incapable of wrong'; the presumption that a child under 10 years of age cannot be held legally responsible for his or her actions and cannot be guilty of a criminal or civil offence

Children were forced to work from a young age. The beginning of the industrial era saw the beginning of child labour in factories, where they worked long hours, usually with dangerous machinery, for very low pay. They also experienced work-related diseases due to hard physical labour or from working with industrial chemicals while unprotected.

The concept of public education did not exist. The education children received depended on the wealth of their family. Private tutors or governesses who taught the children at home were one option for the rich, or boys could be sent to exclusive boarding schools.

Figure 9.1 Children pick slate in an anthracite mine in Pennsylvania, United States.

ISBN 978-1-108-86281-3 Milgate et al.

In 1870, the *Elementary Education Act* was passed in England, introducing compulsory universal education for children aged 5–13 years. In Australia, the Church of England initially assumed responsibility for the education of colonists. Following disagreements between Anglicans, Presbyterians and Catholics as to which religion had authority for this task, each colony between 1872 and 1895 passed Education Acts making primary education a state responsibility and stipulating that it would be 'free, compulsory and secular'. Many parents of limited economic means needed their children to be working, and it wasn't until the introduction of a minimum working age that children began to attend school regularly.

By the end of the nineteenth century, governments, religious institutions and charities had become aware that children required specific legislation to protect them from violence and abuse, and to give them greater opportunities to develop socially and emotionally.

Recognition of children's rights

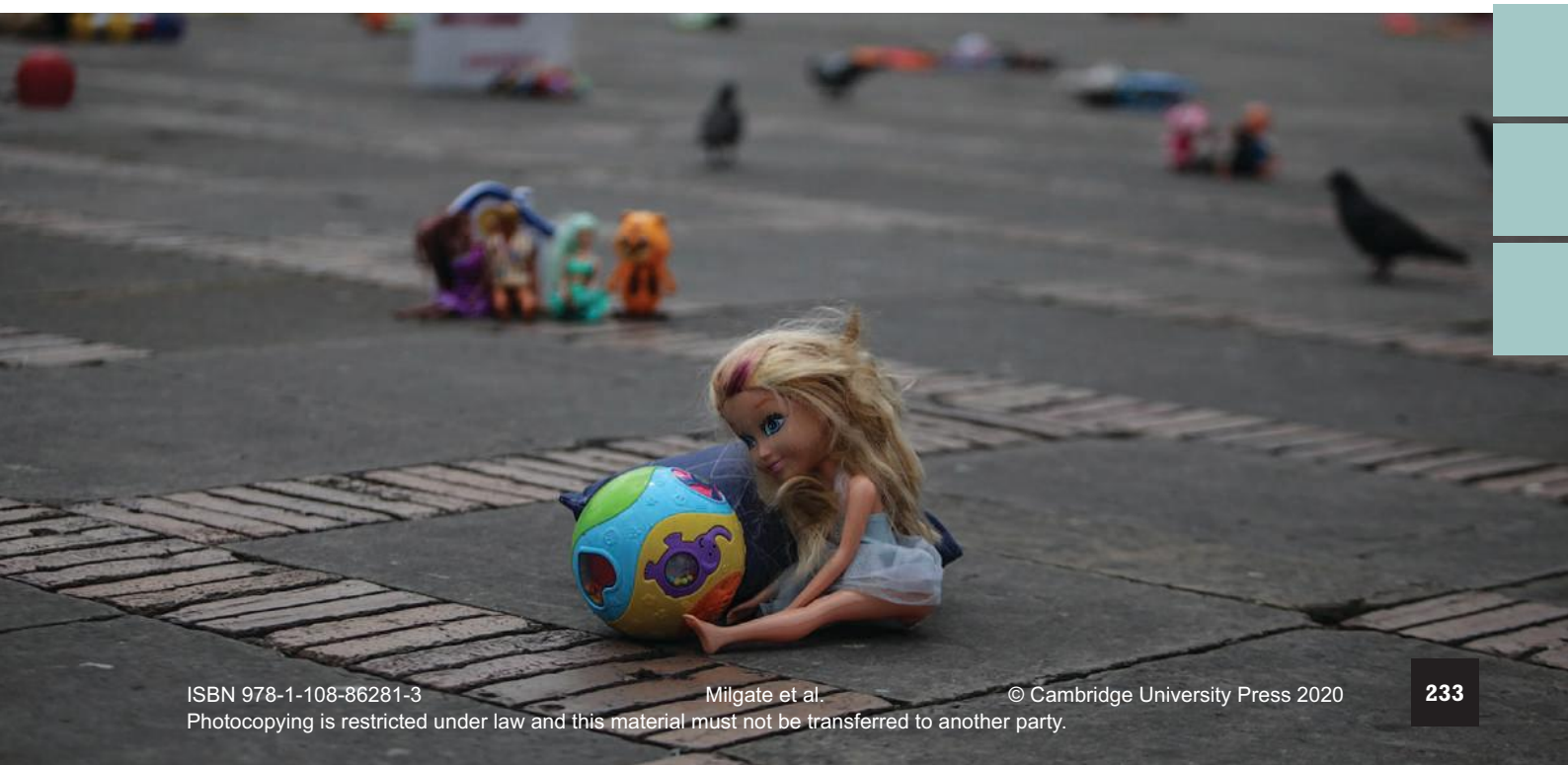
Two significant events in the 1980s that advanced the rights of children and young people, internationally and in common law countries, were the opening for signature of the *United Nations Convention on the Rights of the Child* (1989), and the Gillick case in England.

United Nations Convention on the Rights of the Child

The *United Nations Convention on the Rights of the Child* (1989) ('Convention on the Rights of the Child') sets out a comprehensive set of rights for all children and young people. It covers civil, political, economic, social and cultural rights, and requires that all state parties act in the best interests of the child. The *Family Law Act 1975* (Cth) and other Australian legislation endeavour to reflect that objective. The basic rights of a child, as set out in Articles 1–40 of the Convention on the Rights of the Child, include the right to life, to have one's own name and identity, to be raised by one's family and to have a relationship with both parents, even if the parents are separated.

The Convention on the Rights of the Child is the most widely ratified human rights treaty, with more than 193 countries having ratified it. The exceptions are the United States and Somalia. It is monitored by the UN Committee on the Rights of the Child, which assesses state parties' performance, reports to the UN General Assembly and makes recommendations. The committee does not have the power to hear individual complaints of violations of children's rights.

Figure 9.2 On 20 November 2019, in the Bolívar Square in the Colombian capital city of Bogotá, more than 5000 toys were displayed in a protest against child abuse in Colombia. The year 2019 marks the thirtieth anniversary of the adoption of the *United Nations Convention on the Rights of the Child* (1989). However, despite being the most ratified international treaty in the world, children's rights are still not respected around the world.



ISBN 978-1-108-86281-3 Milgate et al.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 15–16 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 9.1

1. Identify some of the challenges children and young people experienced in England in the nineteenth century.
2. Define the term *doli incapax*.
3. Using examples, outline how the law defines children and young people.
4. Read about the Gillick case online. Critically analyse the implication of the House of Lords's decision.

The Gillick case

Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 ('Gillick case') was a House of Lords decision. The Department of Health and Social Security (DHSS) had distributed a flyer advising doctors that they could lawfully provide contraception and advice to persons under 16 years old without their parents' consent. The local health authority refused to promise Victoria Gillick, a mother of five daughters, that they would not provide advice and contraception to her daughters without her consent. Gillick brought an action against the health authority and the DHSS, based on her belief that a child under 16 was too young to make such a decision without parental consent. Justice Woolf in the first instance held that Mrs Gillick was not entitled to declarations prohibiting the doctors at the clinic from prescribing contraceptives or providing advice to her daughters. The Court of Appeal allowed Mrs Gillick's appeal, and the Department of Health and Social Security, on behalf of the health authority, took the matter to the House of Lords, which affirmed the appeal on the basis that a child under 16 years was capable of consent in medical matters, provided that he or she had 'sufficient understanding and intelligence to enable him or her to understand fully what is proposed'. In other words, children have the right and the ability to make decisions that affect their lives, and they can do so competently as long as they understand the implications of their decisions.

9.2 Legal responses

Civil law in relation to children and young people

The *Family Law Act 1975* (Cth) governs disputes between married and de facto couples, including disputes relating to children. The 'paramount consideration' for orders relating to children made under this Act must be the children's best interests.

Many other aspects of the law applying to children come under state jurisdiction. In New South Wales, these include the following matters.

Registration

Under the *Births, Deaths and Marriages Registration Act 1995* (NSW), parents have seven days after the

Research 9.1

Find the website of the Office of the United Nations High Commissioner for Human Rights. On this website, search for the *United Nations Convention on the Rights of the Child* (1989).

1. Outline the main rights in this convention.
2. Identify the significance of this convention.
3. Outline any similarities between this convention and the Gillick case.

ISBN 978-1-108-86281-3 Milgate et al.

birth of a child to give notice of the birth, and 60 days to complete the registration process. This puts the existence of the child on the public record and gives the child a legal name, that of the father or mother in most cases, and therefore affords to the child all legal rights and protections. The parent or parents also assume responsibilities under the law for the child's welfare. If a child is stillborn, the state Registrar of Births, Deaths and Marriages must be notified within 48 hours.

If a child is a **foundling**, the person who has been granted guardianship of the child is responsible for having the child's birth registered. An **adoption order** made under the *Adoption Act 2000* (NSW) must also be registered (*Births, Deaths and Marriages Registration Act 1995* (NSW) s 23). A child's name may be changed, and children over the age of 12 must consent to this change (*Adoption Act 2000* (NSW) s 101; *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 28, 29).

foundling
a deserted infant whose parents' identity is unknown

adoption order
a court order that establishes a new legal relationship between potential adoptive parents and a child eligible for adoption; an adoption order also severs the legal relationship that existed between the adoptive child and his or her natural or legally recognised parents or guardians prior to the adoption process

Citizenship

The *Australian Citizenship Act 2007* (Cth) replaced the *Australian Citizenship Act 1948* (Cth). It sets out how a person becomes an Australian citizen, the circumstances in which a person may cease to be a citizen, and some other matters related to citizenship. Under the Act, a child is automatically an Australian citizen if they are born in Australia with at least one parent who is an Australian citizen. If a child is born overseas with at least one parent who is an Australian citizen, they may apply to be registered as an Australian citizen by descent, although certain criteria must be met. A child who is a permanent resident and who has been legally adopted also automatically acquires Australian citizenship.

Education

Children have the right to be educated, and it is compulsory for children aged 6–17 to attend school under the *Education Act 1990* (NSW). Under section 22 of this Act, parents must send their children to a government school or a non-government school registered with the NSW Education Standards Authority (NESA), or register them for home schooling. Section 4 of the Act asserts that it is the duty of the state to ensure that every child receives an education of the highest quality.

Work

Generally it is acknowledged that it is in the best interests of children that they remain in school and receive a formal primary and secondary education. According to the NSW Office of Industrial Relations, there is no minimum legal age limit for young workers. If, however, they are under 15 years, they must receive authorisation from the NSW Department of Education to leave school. Young people in the workplace are covered by all of the relevant workplace and safety legislation for workers in New South Wales.

The NSW Commission for Children and Young People, in its 2005 Children at Work report, surveyed 10 999 children and young people in Years 7–10, living in New South Wales about their working experiences. Although the survey found that the majority of children could list both positive and negative aspects of working, and that they especially liked getting paid and gaining experience and responsibility, the report also showed some trends of concern:

- Children living in less disadvantaged areas were more likely to work, and work decreased with increased social disadvantage. Children with greater household responsibilities had fewer opportunities to work.
- Young workers were paid less than mature people doing the same jobs, possibly because they often work on an informal or casual basis and their work is outside regulatory requirements. Recent cases in 2017, 2018 and 2019 have documented the underpayment of many young people across a range of industries in Australia. A report produced by the Young Workers Centre estimates that one in five young workers are paid below award wages.
- High levels of harassment and injury were reported by the children surveyed.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 9.3 Child fatalities in the workplace in Australia, 2003–2016.

Source: Safe Work Australia.

In addition to these issues – which are still prevalent in 2019 – Safe Work Australia has repeatedly highlighted the extent to which children and young people are harmed or injured while at work.

Medical treatment

In the case of the *Department of Health & Community Services (NT) v JWB & SMB* [1992] HCA 15 ('Marion's case'), the High Court of Australia followed the decision in the Gillick case, holding that once a person has sufficient maturity and intelligence to understand what is proposed, she or he is capable of consenting to medical treatment. This common law test is subject to section 49 of the *Minors (Property and Contracts) Act 1970* (NSW), which protects a medical practitioner from liability in tort for treating a young person, if the young person has given consent to the medical or dental treatment and is aged 14 years or over. Parents have the responsibility to seek proper medical care for their children, even if they have religious objections. Section 174 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) authorises a medical or dental practitioner to carry out emergency treatment on a child or young person without parental consent.

As legislation does not deal with a young person's right to refuse medical treatment, this issue is governed by the common law. If a child under 16 years refuses medical treatment, parents have a right to insist that it be performed, despite the Gillick test of competency (*Re W (A Minor)* [1993] Fam 64). A court can override a young person's refusal of medical treatment if the refusal is not in his or her best interests.

Research 9.2

View the websites for Young People at Work and Lawstuff to research other aspects of work for children and young people. Summarise your findings in a few paragraphs.

ISBN 978-1-108-86281-3 Milgate et al.

Discrimination

Children and young people are protected from discrimination on the basis of age by Part 4G of the *Anti-Discrimination Act 1977* (NSW). This Act also outlaws discrimination on the basis of sex, race, sexuality and other characteristics, and applies to discrimination in work, education and the provision of goods and services. There are a number of exceptions, however, relating to superannuation, insurance, credit applications, vehicle safety and sport, and the Act does not affect the operation of laws relating to the legal capacity of children or of laws specifically designed to protect them.

Contracts

Under the *Minors (Property and Contracts) Act 1970* (NSW), people under 18 years are generally not bound by a contract, lease or other transaction (ss 8, 17). The courts will not enforce such contracts, even if they do exist. The exception to this, contained in section 19 of the Act, is a situation where a young person enters an agreement that is for his or her own benefit and is a necessity such as accommodation or food. For example, a young person who leaves home at age 17 to take an apprenticeship and has to sign a rental lease for accommodation or needs to buy a car on finance for transport will be bound by the contract.

Some minors may be able to enter into certain contractual arrangements if they have a parent or guardian who acts as a **guarantor** to ensure that the contractual obligations are fulfilled.

guarantor
a person who gives a formal promise that someone else's contract will be fulfilled, often backed by some form of asset that will stand as collateral to secure the promise

The Supreme Court of New South Wales can confer the capacity to enter a legal contract upon a minor (s 26).

Torts

There is no age restriction on taking legal action for a civil wrong. If a child is injured as a result of someone else's negligence, is a victim of defamation, or suffers loss or damage as a result of some other wrongful behaviour, he or she is entitled to sue the wrongdoer.

A child is also personally responsible for his or her own wrongful acts. The general rule is that parents are not liable for torts committed by their children.

Leaving home

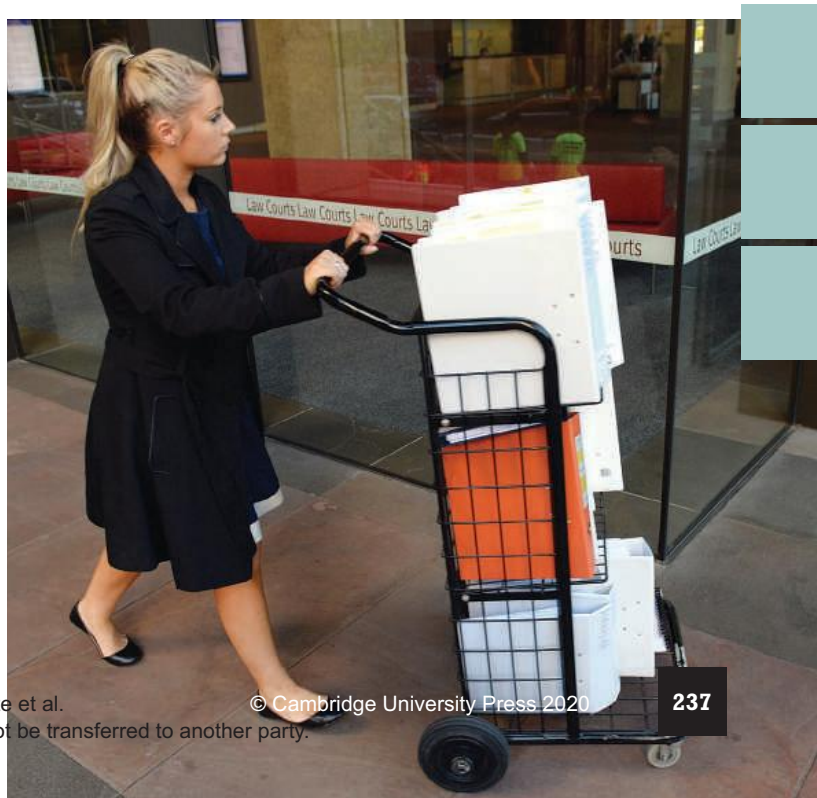
Young people do not have the right to leave their parents' home before the age of 18. However, the law would not normally force young people over the age of 16 to stay at home against their wishes. The following factors would be considered: maturity, accommodation, safe living environment and the parents' attitude.

Inheritance and parentage

The *Status of Children Act 1996* (NSW) provides that all children, including ex-nuptial children, are treated the same as those whose parents are married. This essentially means that **ex-nuptial** children have the same rights in relation to disposition of property made by a will or without a will as those born in wedlock. Any person left out of a will can contest this under Chapter 3 of the *Succession Act 2006* (NSW).

ex-nuptial children
children born of parents who are not legally married

Figure 9.4 In 2013, the children of Australian billionaire, Gina Rinehart, instigated court proceedings over the multi-billion dollar family trust. Rinehart's two eldest children, John Hancock and Bianca Rinehart, sought Gina's removal as head of the trust, which was set up by her late father, Lang Hancock, in 1988 and is worth at least $5 billion.



ISBN 978-1-108-86281-3

The *Status of Children Act 1996* (NSW) clarifies issues of parentage for children in New South Wales. There is a **presumption of parentage** if a child is born within a marriage. In addition, if a child is born within 44 weeks after the death of the spouse, the child is presumed to be the child of the deceased spouse.

presumption of parentage
outlines a specific condition whereby a man and/or a woman are presumed to be the parents of a child

For couples who live together but are not married, section 10 of the Act goes on to state:

- A child born to a woman is presumed to be a man's child if, at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the man and the woman cohabit but are not married.
- In all of the above cases the law clearly states that the birth mother is the legal mother; this is especially important in cases in which birth technologies have been used.
- If a child is born through the use of fertilisation procedures, the Act states that the intended 'social parents' are also the legal parents. In the case of a married or de facto couple, there is a presumption of knowledge of the procedure, but this can be challenged in court on the balance of probabilities. Men and women who donate biological material to assist in these procedures are not presumed to be the mother or father of the child who is the result of that pregnancy. Under the Act, the above provisions are irrefutable.

The *Family Law Act 1975* (Cth) and the *Marriage Act 1961* (Cth) are consistent with the approach used in the *Status of Children Act 1996* (NSW). Presumptions of parentage are in place to ensure that all children, where possible, will have assigned to them one or two parents with the responsibility outlined under the law to care for and maintain them.

Care and control

Children have the right not to be neglected or abused physically, sexually or emotionally. Child abuse in Australia is a worrying aspect of our society. Governments have passed laws to combat this, but to date the effectiveness of these initiatives has been limited.

Communities & Justice

Since 1 July 2019, the Department of Family and Community Services (FACS) and Department of Justice have been a single department, named Communities & Justice.

Communities & Justice is responsible for the care and protection of children in New South Wales. It carries out this role in cooperation with non-government organisations and government agencies. Its activities include the provision of accommodation and support for children and young people who need to live away from their families, the regulation of child care through licensing, and the funding and regulation of adoption services. The Department of Communities & Justice is authorised to intervene between parents and children where there is a need for care and protection. A child or a parent can also request the Stronger Communities Investment Unit (SCIU) to assist in cases where the family is experiencing difficulties. Intervention by the state can include preventative services such as family support and respite child care, through to extreme cases where children are removed from their families, or where police action is taken against abusers.

Why should our society protect children from abuse?

The following points outline the underlying presumptions for the prevention of abuse:

- children are important community members and they have the right to be safe from abuse
- in time, children may themselves become parents, and the way they parent their own children will be influenced by their own childhood
- research suggests that there is a strong link between child abuse and subsequent social problems
- prevention pays for itself in the long run.

Australia's signature on the *United Nations Convention on the Rights of the Child* (1989) means that the Australian Government is obliged to ensure that legislation and policy are put in place to protect children.

What is abuse?

Generally, there are four types of abuse:

- **Physical abuse** – this can involve any type of physical injury

ISBN 978-1-108-86281-3 Milgate et al.

- **Sexual abuse** – this can be in many forms, from suggestive comments to sexual intercourse
- **Neglect** – this can involve children not receiving adequate food, clothing, shelter and health care
- **Emotional abuse** – this can result from things that are said or implied.

Abuse generally lowers a person's sense of self-worth and affects a child or young person's ability to develop socially, emotionally and cognitively. Usually a child who is abused in any of these first three ways will have suffered some form of emotional abuse as well. Regardless of the type of abuse, they all have consequences for our society.

Child sexual assault is often hidden. Children often find it hard to talk about sexual assault because they think it is their fault or that no one will believe them. Even if children consent, sexual and indecent assaults against children are crimes. If the offender says the child consented there is one defence only: where the child was aged 14–16 years and the offender believed the child was over 16 years. The notification rate over the past 20 years has increased at a rate that has put Communities & Justice resources under enormous pressure. It is believed that this trend will continue at a similar or increasing rate.

Children and Young Persons (Care and Protection) Act

The guiding principles for administering the *Children and Young Persons (Care and Protection) Act 1998* (NSW) are as follows:

- the safety, welfare and wellbeing of children and young people are the paramount considerations
- children and young people must be given an opportunity to express their views concerning their safety and welfare, and these must be given due consideration
- culture, disability, language, religion and sexuality of the child or young person must be taken into account
- any course of action followed should be the least intrusive for the child or young person and her or his family.

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), a child or young person is considered at **risk of harm** when:

a the child's or young person's basic physical or psychological needs are not being met or are at risk of not being met,

b the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care,

b1 in the case of a child or young person who is required to attend school in accordance with the *Education Act 1990* (NSW) – the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive an education in accordance with that Act,

c the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated,

d the child or young person is living in a household in which there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm,

e a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm,

f the child was the subject of a pre-natal report under section 25 and the birth mother of the child did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

risk of harm
concerns about the safety, welfare and wellbeing of a child or young person because of sexual, physical or emotional abuse and/or neglect

Reporting of children and young people at risk

Under section 24 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), any person who has reasonable grounds for believing that a child or young person is at risk of harm may make a report to Communities & Justice. **Mandatory reporting** is a responsibility of all paid workers who are involved in delivering welfare services, health care, children's services, education, residential services or law enforcement, partly or fully, to children. They must make a report to Communities & Justice if they

ISBN 978-1-108-86281-3 Milgate et al.

Review 9.2

1 Outline how a child becomes an Australian citizen.
2 Construct a list of a child's or young person's legal rights and responsibilities in each of the following areas, along with the statutory or common law source of each of the rights and obligations:
   a education
   b work
   c medical treatment
   d entering a contract.

become aware during the course of their work that a child is at risk of harm.

The final report from the Royal Commission into Institutional Responses to Child Sexual Abuse was published in 2018. The report stated that there had been a systemic oversight of the failure to act on child sexual and other forms of abuse that children were subjected to by members of a range of institutions. The final report is available on the Royal Commission's website.

mandatory reporting
a person working in child-related employment must, by law, report to care and protection agencies a child who he or she believes to be at 'risk of harm'

Criminal law in relation to children and young people

Section 5 of the *Children (Criminal Proceedings) Act 1987* (NSW) clearly states the principle of *doli incapax*: 'It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.' This is the same in all jurisdictions in Australia.

Between the ages of 10 and 14 a child may be found guilty of a criminal offence, but the prosecution must rebut the notion of *doli incapax* and show that the child, at the time of the alleged offence, could distinguish between right and wrong. From the ages of 14 to 17, children and young people are held fully responsible for their actions. However, they are

Figure 9.5 Law enforcement officers at Saugus High School in California, the United States. On 14 November 2019, on his sixteenth birthday, a teenage boy gunned down fellow students at the school, killing two students and wounding another three before turning the gun on himself.

ISBN 978-1-108-86281-3 Milgate et al.

subject to a different range of criminal **sanctions** than adults who have committed the same offences. Detention is a last resort for a **juvenile** offender in all states and territories.

sanction
a penalty imposed on those who break the law, usually in the form of a fine or punishment

juvenile
a child or young person, generally under 18 years of age, although this may vary depending on the context

Young Offenders Act

The *Young Offenders Act 1997* (NSW) has the aim of providing diversionary measures for young offenders as alternatives to court appearances. The Act only applies to **summary offences** and to those **indictable offences** that can be dealt with summarily.

summary offence
a criminal offence that can be dealt with by a single judge without a jury and does not require a preliminary hearing

indictable offence
a serious criminal offence that requires an indictment (a formal, written charge) and a preliminary hearing; it is typically tried before a judge and jury and is subject to greater penalties than non-indictable offences

The principles of the Young Offenders Act are that:

- the least restrictive sanction should be applied where possible
- children should be informed of their right to seek legal advice
- criminal proceedings are not to be started if there is an appropriate alternative for dealing with a matter.

Under the Young Offenders Act, children and young people who committed an offence covered in the Act may proceed through a three-tiered system of diversionary processes, comprising **warnings**, **cautions** and **Youth Justice Conferences**.

warning
a formal notice given to a young offender, usually for a first minor offence

caution
a formal notice given to a young offender where the offence is more serious than one appropriately dealt with by a warning

Youth Justice Conference
a meeting of all the people who may be affected by a crime committed by a young offender; used to help the offender to accept responsibility for their actions while avoiding the court system

A warning can be given by a police officer, either at the place where the child was found offending or anywhere else. The child must be told of the nature, purpose and effect of the warning. No conditions can be attached to the warning, and no additional sanctions imposed. The police officer must ensure that the child understands the warning and must notify the parents.

A caution is given by a police officer or a specialist youth officer when the child admits the offence. It is used where the offence is more serious. The officer must determine whether a matter would be appropriately dealt with by caution by considering the seriousness of the offence, the degree of violence involved and harm caused to the victim, and the number and nature of any offences the child has committed. He or she must ensure that the child understands the nature, purpose and effect of the caution, and that he or she is entitled to obtain legal advice and to choose to have a court deal with the matter. A court may also give a caution. Before a caution is given, the offender must be given a written notice of it.

A youth justice conference may be used for offences of the same gravity as those for which a caution is imposed or one that is more serious such as those involving harm to a victim. Conferences are designed to encourage the offender to take responsibility for his or her own actions, to provide support services, to promote the rights of victims, and to involve families and others in the justice process.

Crimes Legislation Amendment (Police and Public Safety) Act

The *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) was introduced as a result of an increase in knife-related violence in New South Wales. The Act amended the *Summary Offences Act 1998* (NSW), creating new knife-related offences and giving additional search powers and 'move on' powers to police. It aims to reduce the number of weapons used, or even carried, in a public place by:

ISBN 978-1-108-86281-3 Milgate et al.

- providing police with extra power to conduct a search on an individual and to confiscate any dangerous implements they find
- allowing police to give reasonable directions to a person where necessary in public places
- enabling police to demand the name and address of a person who might provide information about serious offences.

The Act is seen as an anti-gang measure to allow police to disperse groups of people before situations escalate.

Children (Protection and Parental Responsibility) Act

The *Children (Protection and Parental Responsibility) Act 1997* (NSW) enables local police to remove young people under 16 years who are at risk in public places, and return them to their parents. The Act is unique in that the police are only given these powers in local government areas considered operational areas.

Currently in New South Wales, there are four operational areas: Ballina, Orange, Coonamble and Moree. Local government can apply to the Attorney-General's Office to become an **operational area**. They must demonstrate that they have adequate crime prevention and youth support programs.

operational area
a local government area that can apply for police to be given additional powers under the *Children (Protection and Parental Responsibility) Act 1997* (NSW)

In an operational area, the police can 'safely escort' a young person under 16 years from a public place if the young person is not being supervised by a responsible adult and is at risk.

The other main section of the Act gives the Children's Court the power to make parents attend the court with their children and to make them sign an 'undertaking' for their child's behaviour. In more serious cases, the court could punish the parents if it can be shown that their neglect has caused their children's offending.

The role of the United Nations

The *United Nations Convention on the Rights of the Child* (1989) has been important in putting the rights of children on the global agenda. Ratification usually means a government passing domestic laws to give effect to some or all of the principles of an international treaty. Once a state has signed and ratified a treaty, the United Nations committee structure monitors and reports on the extent to which that state is complying with its international obligations.

The Committee on the Rights of the Child meets to examine reports from ratifying countries. The 18 committee members are independent experts in the field of human rights, who are elected by the governments of ratifying countries. As mentioned, the committee has no coercive power. Australia has a responsibility under the convention to report to the committee on the steps that it has taken to give full effect to the contained rights.

The role of parliament and the courts

Federal and state parliaments have passed numerous Acts that protect children and young people by restricting their activities and by placing responsibilities on adults to ensure the welfare of children and young people. Certain rights of children

Legal Links

The NSW Police Force website has information on warnings, cautions and Youth Justice Conferences.

Review 9.3

1 Outline how children and young people are protected from discrimination.
2 Explain the purpose of *doli incapax*. Identify what age group *doli incapax* applies to.
3 Identify the offences in the *Young Offenders Act 1997* (NSW).

ISBN 978-1-108-86281-3 Milgate et al.

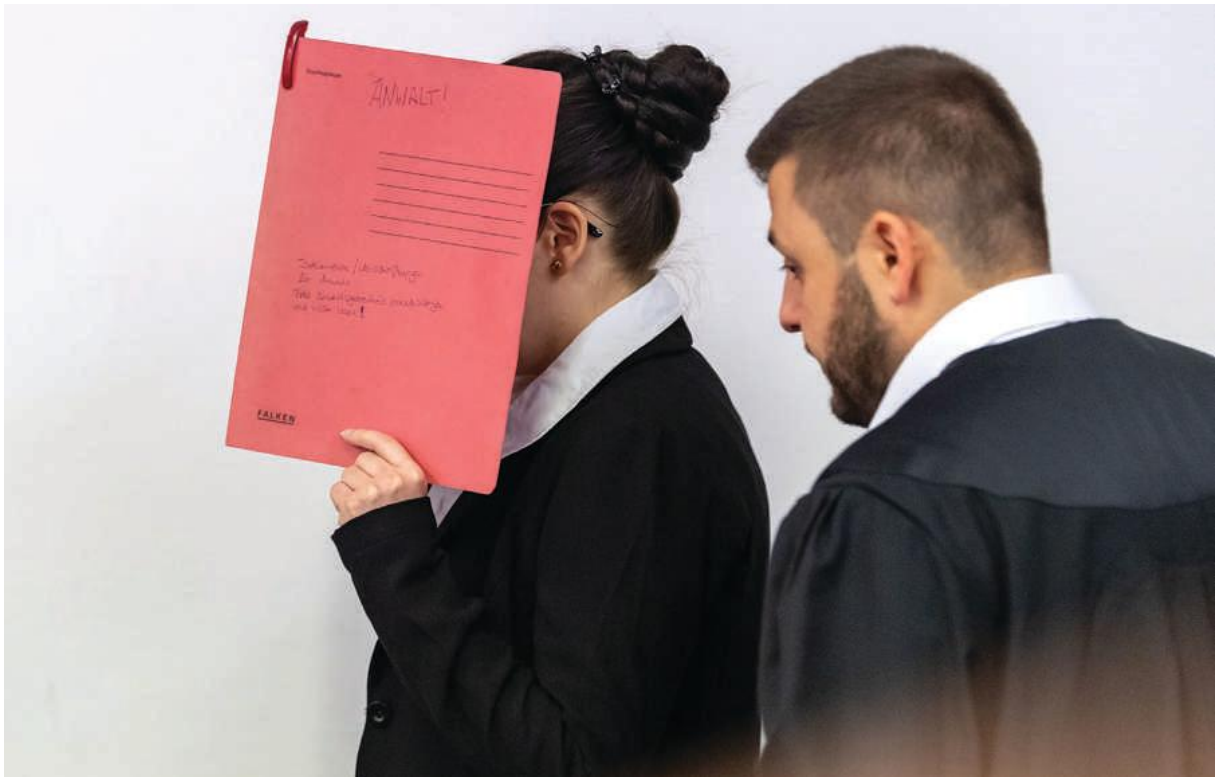


Figure 9.6 On 4 July 2019, a German woman, 'Jennifer W', who had joined the Islamic State (IS) jihadist group was accompanied by her lawyer, Ali Aydin (right), as she arrived at court for another session of her trial in Munich, Germany. The woman is accused of war crimes including letting a five-year-old Yazidi 'slave' girl die of thirst in the sun. The case against the woman is believed to be the first time in the world an IS militant has been brought to justice for committing international crimes against members of the Yazidi minority.

have also been enshrined in legislation, which in turn created legal institutions and processes that promote and protect these rights. The courts have also played a role, through cases that have affirmed the current law or changed the law through reinterpretation.

Some of the legal institutions in New South Wales that have been set up to protect children and young people follow.

NSW Advocate for Children and Young People

The NSW Advocate for Children and Young People is a statutory body set up to promote respect for and understanding of the interests and needs of children and young people. It was established in 2015, under the *Advocate for Children and Young People Act 2014* (NSW), and took over some of the functions of the previous NSW Commission for Children and Young People.

A key role is making recommendations to government and non-government organisations regarding legislation, policies, services and other matters that affect children and young people. For example, the previous body (NSW Commission for Children and Young People) made a submission to the Review of the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW) in December 2011.

It also undertakes research into matters that affect children and young people, and prepares a three-year strategic plan for children and young people in New South Wales.

NSW Office of the Children's Guardian

The NSW Office of the Children's Guardian was first set up under the *Children and Young Persons (Care and Protection) Act 1988* (NSW), and under further legislation in 2013 it became an independent government agency.

The office took over the former NSW Commission for Children and Young People's responsibility for implementing and monitoring the **working with children check**. This is the mandatory employment screening by employers of job applicants in child-

ISBN 978-1-108-86281-3 Milgate et al.

related employment, as outlined in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). There are penalties for employers who engage someone in employment relating to children without sufficient scrutiny of the person, or if they are aware the employee is a **prohibited person** for child-related employment. These requirements reduce the likelihood of prohibited persons having contact with children in the course of their work.

working with children check
a check by the NSW Office of the Children's Guardian on the appropriateness of a person in New South Wales to work in child-related employment

prohibited person
a person prohibited from working in child-related employment because of a conviction of a serious sex offence, murder of a child, or an offence involving violence towards a child

The office also has a range of responsibilities connected with out-of-home care in New South Wales, manages accreditation of non-government adoption services and authorises employment of young children in the entertainment industry.

Children's courts

The *Children's Court Act 1987* (NSW) deals with children's courts in New South Wales. There are seven specialist Children's Courts, five of them in metropolitan areas, with 13 Children's Magistrates. There are also five Children's Registrars who aid in administering matters before the court. The court has a dual role: determining matters of juvenile offenders that appear before it, and determining care and protection matters concerning children on application to it by Communities & Justice.

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (ss 71, 72), the court 'may make a care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any reason'.

Legal Aid NSW

Legal Aid NSW provides a range of services to children and young people in New South Wales. It represents children and young people in a variety of matters, from welfare proceedings in the Children's Court to family law matters in the Family Court. Its legal representatives will also appear for children and young people facing criminal charges in the Children's Court.

NSW Ombudsman

The main role of the NSW Ombudsman is to act as an independent review body that deals with individuals' complaints about the administration of government agencies or the agencies' compliance with specific legislation. Traditionally, the office is seen as representing the people's interests, and its credibility comes from its reputation for impartiality, independence from government and confidentiality.

There have been calls for a specialist 'children's ombudsman' that can take a more targeted approach to issues facing children and young people in their dealings with government agencies.

Another important role performed by the ombudsman's office is investigating and reporting on 'reviewable deaths' of children in New South Wales. A death is reviewable if at any time in the three years before the death, the child or a sibling has been reported to Department of Community Services (DOCS) for any matter. With the objective of preventing harm, abuse and neglect of children, the ombudsman's office assesses whether the child protection system could have prevented some of these deaths. From 2012–2013, 1067 children died in New South Wales. The ombudsman's office report released in 2015 stated that 41 (3.8%) of these deaths as reviewable: Of these:

- nine children died as a result of abuse (five), or in circumstances suspicious of abuse (four)
- 18 children died in circumstances of neglect (15) or suspicious of neglect (three)

Review 9.4

1 Outline the main role of the NSW Advocate for Children and Young People.
2 Describe what the 'working with children check' means.

ISBN 978-1-108-86281-3 Milgate et al.

- 14 children died while in care – all of whom were in statutory out-of-home care.

NSW Civil and Administrative Tribunal

As discussed in Chapter 7, the NSW Civil and Administrative Tribunal reviews administrative decisions of NSW Government bodies. Its Administrative and Equal Opportunity Division deals with applications for review of decisions made by DOCS. The division also hears applications for declarations that a person seeking to apply for a job working with children is not a prohibited person under the Commission for *Children and Young Persons (Care and Protection) Act 1998* (NSW).

COAG National Framework

In 2009, the Council of Australian Governments (COAG), an intergovernmental forum made up of the federal and all state and territory governments, published its *National Framework for Protecting Australia's Children 2009–2020*. This initiative has the aim of fighting child abuse and neglect by preventing it in the first place; that is, by protecting the safety and wellbeing of children. Recommendations handed down in 2018 by the Royal Commission into Institutional Responses to Child Sexual Abuse will have implications for government and non-government agencies in the light of the inadequacies exposed of institutions in protecting children from abuse.

9.3 Non-legal responses

As children and young people cannot vote, it is difficult at times for their voices to be heard.

Some very effective non-legal mechanisms keep the issues of children and young people on the political agenda. These mechanisms may be the first point of call, and can either provide valuable information about a person's rights or refer the person on to a relevant source.

Trade unions

Trade unions are organisations of workers who act together to maintain their rights to good working conditions. The Australian Council of Trade Unions provides information about pay and conditions, health and safety issues, apprenticeships and training, and negotiating employment contracts for young people entering the workforce for the first time.

Kids Helpline

The Kids Helpline is just one of many organisations from which children and young people in crisis can seek advice. It offers 24-hour free telephone and online counselling, and referral about issues, including family relationships, child abuse, mental health, bullying, drugs and alcohol, and eating and weight issues, as well as specific issues faced by people from Aboriginal and Torres Strait Islander, non-English-speaking or rural backgrounds. View the Kids Helpline website for more information.

Review 9.5

1. Describe the role of the NSW Ombudsman in protecting the rights of children and young people.
2. Outline the role the NSW Civil and Administrative Tribunal can play in protecting the rights of children.
3. Discuss the strengths and weaknesses of non-legal mechanisms in their ability to protect the rights of children.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 9.7 The Kids Helpline is a free service that gives advice and counselling to young people.

Australian Childhood Foundation

The Australian Childhood Foundation works to educate the community about child abuse. It also provides a list of services that offer help and support for people who have experienced child abuse, as well as resources for parents and others who are concerned about their own situation or want to report child abuse.

Legal Links

The Worksite for Schools website (https://cambridge.edu.au/redirect/9038) provides fact sheets, case studies, job profiles and other information about work that is specifically directed at young people.

Research 9.3

The organisations listed below are involved in protecting the interests of children and young people. Select two organisations and find their websites. Construct a fact sheet about each organisation.

- Committee on the Rights of the Child
- NSW Advocate for Children and Young People
- NSW Office of the Children's Guardian
- NSW Children's Court
- Communities & Justice
- Legal Aid NSW
- NSW Ombudsman
- Australian Council of Trade Unions

ISBN 978-1-108-86281-3 Milgate et al.

9.4 Effectiveness of responses

As they grow through adolescence and into adulthood, young people are more likely to take risks. At the same time there are adults in society who abuse and exploit children and young people. This means that children and young people will sometimes be at risk of harm, or at risk of harming others. It is in this light that the legislation and mechanisms in place to ensure justice for children and young people will be evaluated.

Children and young people and the criminal justice system

If children and young people are exposed to the criminal justice system, it is usually through interaction with a police officer when being arrested or questioned about some matter. This experience can influence their attitude to authority and to the wider community in general.

A joint inquiry of the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission was conducted in 1997. The inquiry titled *Seen and Heard: Priority for children in the legal process* examined the relationship of children and young people and the legal process. Of the 843 children and young people surveyed, 78% said the police rarely treated young people with sufficient respect.

> Young people are frequently targeted for police intervention – for lacking 'respect', for being 'rowdy', for being part of the 'rave culture', or simply for being young and out in public.
>
> Source: 'Young People and Public Space' conference workshop presented by the Youth Justice Coalition and Youth Action and Policy Association, 2002

The *Seen and Heard* inquiry also examined how policing could become more consistent with provisions in the Convention on the Rights of the Child, and recommended that national standards should be implemented via legislation or policy in certain areas of concern. Some of the main areas follow.

Young people and public spaces

There is a need to develop better guidelines on the use of public space by children and young people. In some states the police can remove children from public places when they are considered to be at risk of offending, whether they are suspected of illegal behaviour or not. It is argued that this is a restriction of children and young people's freedom of assembly and erodes their civil rights.

The *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) was introduced in response to the increased offences related to knives between 1996 and 1997. The Act made it an offence to carry a knife in a public place and gave the police the power to search people for knives and other weapons. It also gave the police the power to search people in public places if their behaviour appeared to cause fear, obstruct, harass or intimidate.

One way to gauge the effectiveness of this legislation is the extent to which knife-related offences have decreased because of the extra powers given to police. The NSW Ombudsman's Office also conducted a review of the legislation in 1999. The Youth Action and Policy Association, in a paper entitled 'Knives Legislation to Stay', commented that the report found that the increased powers of the police led to an increase in arbitrary stop and search procedures and that the legislation had led to only a modest increase in searches that uncovered a knife in the first year of operation. It also showed that there was an enormous increase in searches where no knife was found. The report indicated that, midway through 1999, 81.9% of people searched carried no weapon that would be a threat to public safety. The paper went on to state:

> As many of us had always expected, young people were the clear target of these new powers. What was surprising was the levels of harassment of young people … An incredible 68% of people searched were aged 25 or under. Not only were young people targeted for these searches, they were more likely unfairly targeted. Whereas only one in seven 17-year-olds who were searched was found to have knives, almost one in two 37-year-olds

ISBN 978-1-108-86281-3

had knives. The Youth Justice Coalition and other groups have argued that police stop and search powers should be consolidated into one piece of legislation as at present there are a minimum of six acts giving police the power to stop and search people which can cause confusion for the police and citizens alike.

Recently, the increased practice of using 'strip searches' at a number of musical festivals across the country in 2018 and 2019 has been called into scrutiny. Some of these searches were of minors and were undertaken with no adult present. The use of sniffer dogs has been contentious for some time in regard to the extent to which they accurately indicate a 'reasonable suspicion' that a crime, in this case drug possession, has been committed. In 2019, The New South Wales Law Enforcement Conduct Commission opened a four-day inquiry into the allegedly unlawful strip-search of the girl at the 2018 Splendour in the Grass festival near Byron Bay.

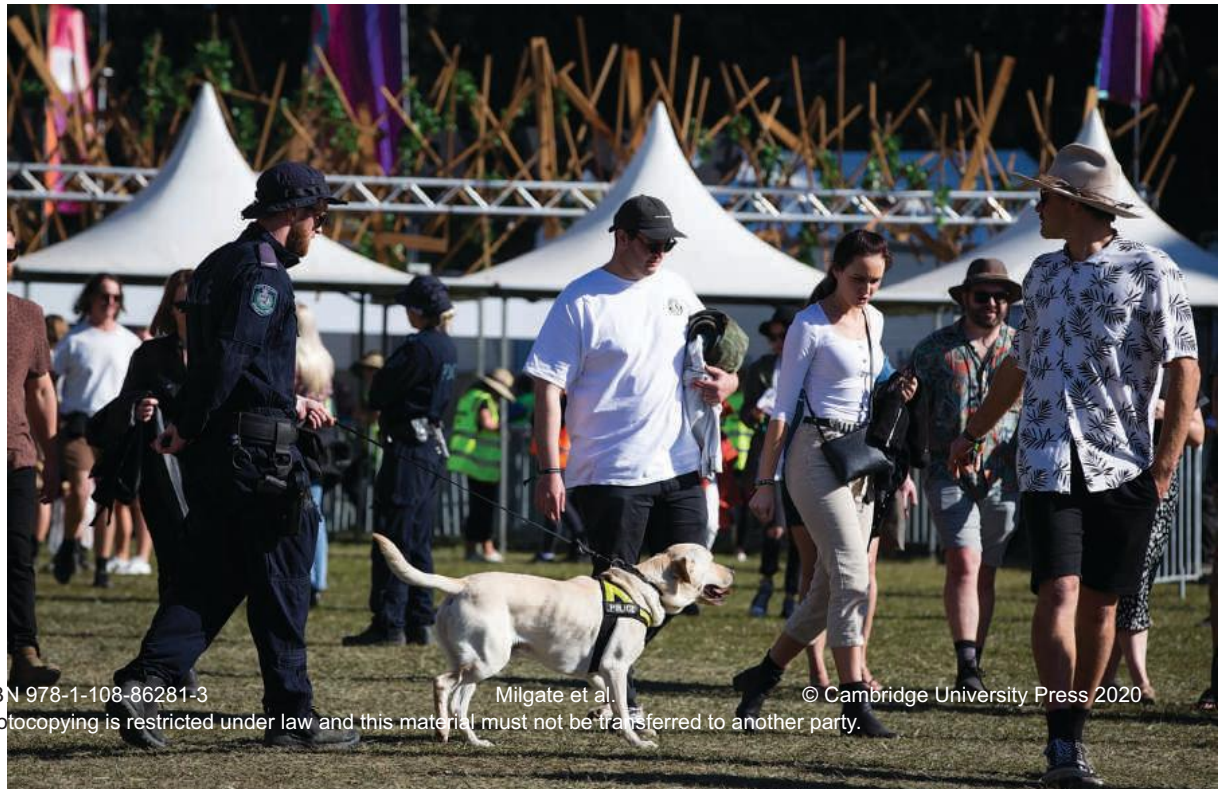
The *Children (Protection and Parental Responsibility) Act 1997* (NSW) was introduced to address the rise in juvenile crime caused by a lack of parental supervision. This Act has also been criticised for the way that it impedes children and young people's use of public spaces. A review of policy and legislation relating to youth street rights, conducted by the University of Technology Sydney's Community Law and Legal Research Centre and the Youth Justice Coalition, found that the this Act contravened the Convention on the Rights of the Child in a number of ways:

- impeding young people's rights of freedom of association and assembly
- discriminating against young people due to their visibility in public space
- giving the police arbitrary power of detention
- failing to consider the child's 'best interests'.

The *Seen and Heard* report produced by the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission also stated the legislation has problems. It outlined that police can scrutinise the behaviour of children and young people even if it is not criminal, and can act on stereotypes about young people.

Public spaces are very important to young people, given that there are very few places that they can get together to meet and spend time together. Young people congregating in groups are easily branded

Figure 9.8 Police officers and drug-detection dogs walk among patrons at the 2019 Splendour in the Grass festival in Byron Bay.



ISBN 978-1-108-86281-3 Milgate et al.

Research 9.4

View the website of the NSW Bureau of Crime Statistics and Research. Study the article, 'Knife offences and policing' (by Jacqueline Fitzgerald, 2000). Outline the effect the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) has had on assaults and robberies involving knives.

as anti-social, even though crime statistics show that young people are more likely to be victims than offenders. Move-on and stop-and-search powers serve the law-and-order agendas of governments by trying to clear the streets and supposedly making the community safer. Given this, and the diminishing ratio of public space available due to the increase in privately owned shopping malls, the civil rights of children and young people are frequently being infringed.

Arrest and police interview

In some jurisdictions, it is alleged that police rely heavily on arrest to gather evidence or to further the interrogation of suspects. In other words, arrest can be used as a method of investigation. This is especially so for Aboriginal and Torres Strait Islander youth.

Article 37(b) of the Convention on the Rights of the Child states that arrest should be a 'last resort', not a routine practice, as it can be a very negative experience for children and young people. The *Seen and Heard* report also recommended that for children at risk, welfare and health services might be the more appropriate agencies to deal with the situation. This is not to deny that arrest is appropriate when it is necessary for a police officer to protect the community.

All suspects have the right to contact a lawyer and to have him or her present during questioning, as long as this does not interfere with the police investigation. Persons under 18 can contact the Legal Aid Youth Hotline if they have been arrested and need legal advice. However, people do not always exercise this opportunity because they are not aware of their rights. Further, a situation sometimes exacerbated by language difficulties, cultural differences or age. The Australian Law Reform Commission and others have recommended greater efforts by police to inform accused persons of their rights in terms that they can understand and act on.

Sentencing of young offenders

Another area of concern at the time of the *Seen and Heard* report was the sentencing of juveniles. Children and young people, more than any other offenders, have the best chance of rehabilitation and reintegration into society. As such, the sentence that offenders receive should take into account the age of the offender and the circumstances under which the offence was committed. The report noted that research has indicated that detention and other harsh sentencing options are generally ineffective as deterrents to reoffending.

Most jurisdictions consider these factors. In New South Wales, the courts follow guidelines under the *Children (Criminal Proceedings) Act 1987* (NSW), which considers juvenile offenders. However, the report suggested that there was room for improvement in this area, observing that 'magistrates often do not take sufficient account of social factors such as homelessness, family circumstances, educational needs and so on in determining sentences for children' and recommending that 'sentencing options should take into account the special health and other requirements of children and young people'.

Figure 9.9 Zachary Cruz, 18, the brother of the teenager who killed 17 people at Marjory Stoneman Douglas High School in Florida, USA, in February 2018. Cruz was arrested for trespassing but was released from custody 10 days later.

ISBN 978-1-108-86281-3

Youth conferencing

While youth conferencing generally deals with matters that would be dealt with summarily, it can, under the *Young Offenders Act 1997* (NSW), be used for some indictable offences such as robbery and aggravated break, enter and steal. One of the criticisms of well-intentioned laws like the Young Offenders Act is that they are not being used for a sufficiently wide range of offences, and therefore some young offenders are missing out on the benefits that conferencing offers. The Shopfront Youth Legal Centre, in its submission in response to the NSW Law Reform Commission paper on sentencing young offenders in 2003, argued that:

> Youth justice conferencing is suitable for a wide range of offences, even very serious ones. It is not a 'soft option'. Indeed, it could be said that conferencing works best in the case of relatively serious offences because the young offender is obliged to consider the consequences of his or her actions, in particular the harm caused to the victim. In most cases, conferencing is a more effective mechanism than court for achieving this.

A further criticism of the application of the provisions of the Young Offenders Act suggests that conferencing needs to be supported by additional rehabilitative measures. According to the Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn, in March 2012, 'the conference regime established under the *Young Offenders Act 1997* (NSW) is currently no more effective than the NSW Children's Court in reducing juvenile re-offending among persons eligible for a conference'.

Conferencing in Victoria produced lower reoffending figures but it is also suggested that this may be influenced by the fact that Youth Justice Conferencing in that state considers matters that are more serious and conferencing is not as easy to dismiss as a soft option.

Dr Weatherburn went on to say that, '[o]ne can only speculate about the reasons for this but one possible explanation is that YJCs do not address the underlying causes of juvenile offending (e.g. drug and alcohol use, parental neglect and abuse, poor school performance, boredom and unemployment).'

The NSW Commission for Children and Young People supported this in its submission to the Review of the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW) in December 2011. It believes the current legislation does not meet the needs of children and young people for the following reasons:

- Recent research has revealed a greater understanding of the development of the adolescent brain until the age of 25. It has suggested that our understanding of the meaning of criminal responsibility for children and young people may need to be reassessed. (In October 2019, Centre Alliance's Rebekha Sharkie put legislation to parliament to lift the age from 10 to 14, which was backed by independent MP Zali Steggall.)
- The report also goes on to say, 'the attempt to combine the so called "justice" and "welfare" models of juvenile justice in the legislation has created a complex and sometimes contradictory amalgam of community-based sanctions and controls alongside formal court processes and detention. It is possible that this has led to "net widening", as police warn, caution or refer to conferencing children who might otherwise have been dealt with informally.'

Lastly, it argues that the principles of restorative justice that underpin youth justice conferencing are contentious and there is insufficient evidence for the effectiveness of youth justice conferencing in its current form in reducing recidivism. This supports the view expressed by Dr Weatherburn.

Care and protection of children and young people

The Wood Royal Commission (1997) into police corruption spent its last two years investigating issues surrounding child abuse. Evidence emerged about the lack of effective procedures and processes for reporting and following up alleged instances of child abuse within governmental agencies and the

ISBN 978-1-108-86281-3 Milgate et al.

broader community. It also highlighted the magnitude of child abuse in society and the need for better legislative responses to deal more effectively with the complexity of the issues surrounding child abuse.

As the rights of children emerged, so, too, did an awareness of the problems associated with child abuse and the long-term damage it can cause. Evidence also began to emerge that domestic violence and child abuse are linked, and are good predictors of each happening.

The situation of child abuse portrayed by the 2008 statistics is even more disturbing in Aboriginal and Torres Strait Islander communities across Australia. The rate of all types of abuse in 2008 was estimated to be much higher in the Aboriginal and Torres Strait Islander population. Aboriginal and Torres Strait Islander children were six times more likely to be removed from their families. It was argued the Howard government's intervention into remote Aboriginal and Torres Strait Islander communities was necessary on the ground that the rate of abuse of Aboriginal and Torres Strait Islander children was unjustifiably high. The Australian Law Reform Commission has also found that in 2008, Australian Aboriginal and Torres Strait Islander children were no safer than they had been 10 years before.

In further developments, Justice James Wood, who in 2008 headed the Special Commission of Inquiry into Child Protection Services in New South Wales, recommended a number of changes to the child protection system currently operating in New South Wales. As the system is crumbling under the weight of notification of 'children at risk', Wood has proposed a new category of mandatory reporting, whereby the more serious matters only will be referred to Communities & Justice. The police, teachers and doctors, according to Justice Wood, can handle many of the non-urgent reports that are being made to Communities & Justice.

The Royal Commission into Institutional Response to Child Sexual Abuse has well documented the failing of a range of institutions across the country in adequately dealing with instances of child sexual abuse. In October 2018, the Federal Parliament issued an apology on behalf of the state to victims whose cries for help were ignored. The extent to which adequate compensation will be forthcoming and the implementation of the Commission's recommendations will be a test of the Commonwealth's resolve to finally ensure that the laws in place to protect children and young people will be more effectively administered.

Children and young people in the workplace

A number of children and young people are engaged in the workplace and most are satisfied with the benefits it offers. The two main issues, as outlined earlier, are that the incidence of work-related injuries and the incidences of harassment continue to be too high.

A further two issues regarding children in the workplace are rates of junior pay, which are in breach of the Convention on the Rights of the Child, and the use of child labour in some industries in Australia. Child labour is where children between the ages of 4–15 years are forced to do work that affects their education and their social and psychological development. This is generally associated with poorer developing countries, but has been identified in Australia in the textile industry. Reports have been made of children working long hours at sewing machines after school and during the school holidays. As these reports are made, they continue to be investigated by unions and governments.

International issues

Children around the world are exploited and abused where the laws of their countries fail to offer protection to them. There are approximately 250 million child labourers worldwide. In 2012, it was estimated there were as many as 250 000 to 300 000 children and young people involved in armed conflict, with up to 100 000 of these believed to be in Africa.

In countries ravaged by war and famine, where family structures have been destroyed, children lack the protection normally afforded to them within the family. Very recently in Australia, children sat in immigration detention centres, having broken no laws, as a result of the previous federal government's punitive laws relating to asylum seekers. In other countries, minors are still being executed for the crimes they have committed.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 9.10 Children carry garment cloth in Dhaka, Bangladesh. Many products sold throughout the world are still made using forced child labour.

Australia's obligations under the *United Nations Convention on the Rights of the Child* (1989)

As discussed earlier in this chapter, the Committee on the Rights of the Child examines parties compliance to the *United Nations Convention on the Rights of the Child* (1989) and their obligations under this convention. The committee can report and publish adverse findings on countries that have failed to enforce the rights of its children. States can choose to ignore or comply with such findings.

Australia has been a strong supporter of this convention from the very outset, and has an extensive body of federal and state law in place designed to protect and promote the welfare of children and young people. At the same time, there are still areas where Australia can do better.

The Joint Standing Committee on Treaties was set up to investigate and report on:

- issues arising from treaties
- proposed treaty actions
- questions relating to a treaty which one of the houses of parliament or a minister has referred to it
- other matters which the Minister for Foreign Affairs has referred to it.

For example, in 1998 its Report 17 looked at domestic ramifications of ratification; federal, state and territory progress in complying with the Convention on the Rights of the Child; the adequacy of programs and services for children's health, education and welfare; the adequacy of legislation in addressing the needs of children; and further action required. Nonetheless, some have argued that the development of a process for scrutiny of draft legislation for compliance with treaty principles should be a high priority.

Other deficiencies in Australian law regarding the Convention on the Rights of the Child include the following:

- The defence of 'lawful correction' is still available in all states and territories to parents who use **corporal punishment** on their children, except in New South Wales, where it has been limited by legislation prohibiting force to the head or neck, and force causing harm 'likely to last for more than a short period'.
- There are laws under which police can deny children and young people use of **public space** by asking them to leave or removing them; for example, Part 3, Division 2 of the *Children (Protection and Parental Responsibility) Act 1997* (NSW).
- Children and young people are paid less for doing the same work as adults on junior rates of pay.
- It is argued that the criminal age of responsibility of 10 years is too low.

corporal punishment
the physical punishment of people, especially of children, by hitting them

public space
areas set aside in which members of the community can associate and assemble

Child executions

Child executions violate international law. It is acknowledged throughout the international community that putting to death child offenders negates the current thinking that children and young people have the potential for growth and change, and hence rehabilitation. It is further argued that execution denies the child or young person this chance. International law clearly denounces the death penalty for children and young people who have committed crimes when they were under the age of 18.

Despite this, some countries still use the death penalty. The number of executions is small, but as

ISBN 978-1-108-86281-3 Milgate et al.

In Court

***Roper v Simmons* 543 US 551 (2005)**

In 2005 in the case of *Roper v Simmons*, the US Supreme Court ruled that the execution of child offenders is a violation of the US Constitution. This contrasts a ruling made in 1989 by the same court that executing 16- and 17-year-old offenders was constitutional. In 2005, the court found that there was now a national consensus against executing child offenders. The court reached this conclusion after considering international and national trends, scientific evidence, and appeals from human rights, religious, legal and child advocacy organisations.

Amnesty International has called for an immediate end to all child executions.

TABLE 9.1 Recorded executions of child offenders since 1990

Year	Recorded executions of child offenders	Total recorded executions worldwide	Countries carrying out executions of child offenders (numbers of reported executions are shown in parentheses)
1990	2	2029	Iran (1), United States (1)
1991	0	2086	
1992	6	1708	Iran (3), Pakistan (1), Saudi Arabia (1), United States (1)
1993	5	1831	United States (4), Yemen (1)
1994	0	2331	
1995	1	3276	Iran (1)
1996	0	4272	
1997	2	2607	Nigeria (1), Pakistan (1)
1998	3	2258	United States (3)
1999	2	1813	Iran (1), United States (1)
2000	6	1457	Democratic Republic of Congo (1), Iran (1), United States (4)
2001	3	3048	Iran (1), Pakistan (1), United States (1)
2002	3	1526	United States (3)
2003	2	1146	China (1), United States (1)
2004	4	3797	China (1), Iran (3)
2005	10	2148	Iran (8), Sudan (2)
2006	5	1591	Iran (4), Pakistan (1)
2007	14	1252	Iran (11), Saudi Arabia (2), Yemen (1)
2008	8	2390	Iran (8)
2009	7	714, excluding China	Iran (5), Saudi Arabia (2)
2010	1	527, excluding China	Iran (1)
2011	3	676, excluding China	Iran (3)
2012	1	682, excluding China	Yemen (1)
2013	3	778, excluding China	Saudi Arabia (3)
2014	12	1061, excluding China	Iran (12)
2015	9	1634, excluding China	Pakistan (5), Iran (4)
2016	2	1032, excluding China	Iran (2)
2017	4		Iran (4)
2018	3		Iran (3)

Source: Amnesty International

ISBN 978-1-108-86281-3 Milgate et al.

Figure 9.11 Mary Robinson, the former UN High Commissioner for Human Rights, was quoted in the Amnesty International report, *Stop Child Executions*.

Amnesty International states, in its report *Stop Child Executions*, it is 'an affront to all notions of morality and decency when it comes to the protection of children – one of the most vulnerable groups in society'. Of those countries that still use the death penalty, many have publicly stated that they will not use it against children and young people. This, it is said, reflects 'the conviction that the lives of child offenders – due to a young person's immaturity, impulsiveness, vulnerability and capacity for rehabilitation – should never be simply written off'.

The Amnesty International report quotes Mary Robinson, the former United Nations High Commissioner for Human Rights:

> The overwhelming international consensus that the death penalty should not apply to juvenile offenders stems from the recognition that young persons, because of their immaturity, may not fully comprehend the consequences of their actions and should therefore benefit from less severe sanctions than adults. More importantly, it reflects the firm belief that young persons are more susceptible to change, and thus have a greater potential for rehabilitation than adults.

ISBN 978-1-108-86281-3 Milgate et al.

Between 1990 and 2019, Amnesty International recorded 145 executions of children in 10 countries: China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, South Sudan, Sudan, the United States and Yemen. Several of these countries have now changed their laws to exclude the practice. Iran has executed more than twice as many child offenders as the other eight countries combined; Iran has executed 93 child offenders since 1990.

Amnesty International states that:

> the exclusion of child offenders from the death penalty is now so widely accepted in law and practice that it has become a rule of customary international law – international rules derived from state practice and regarded as law (*opinio juris*) – and therefore binding on every state, except on those that have 'persistently objected' to the rule in question.

Child executions also breach international treaties such as the:

- *International Covenant of Civil and Political Rights* (1966), Article 6: 'Sentence of death shall not be imposed for crimes committed by persons below 18 years of age.'
- *United Nations Convention on the Rights of the Child* (1989), Article 37: 'Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age.'

Research 9.5

Research an international human rights issue that relates to children and young people (e.g. child slavery, child soldiers, forced child labour). Construct a fact sheet outlining the issue. To get started, search for the issue on Amnesty International's website.

Figure 9.12 A boy holds a rifle as the Regional Coordinator of Community Authorities (CRAC-PF) community police force teaches a group of children how to use weapons, in Mexico, on January 24, 2020. The CRAC-PF vigilante group trains children as young as five so they can protect themselves from drug-related criminal groups operating in the area.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- Historically, children had no legal rights. This began to change gradually in the nineteenth century, with the introduction of free compulsory education and laws limiting children's labour.
- The *United Nations Convention on the Rights of the Child* (1989) was an important development in promoting the rights of children and young people. More countries have signed this convention than any other international treaty.
- The law generally defines a child as a person under the age of 16, and a young person as a person aged 16–18.
- The status and rights of children under the law are contained mainly in legislation in the areas of work, education, discrimination, medical treatment and contracts.
- All states in Australia have enacted care and protection legislation over the last 30 years.
- Children and young people are given special consideration in respect to criminal law, which takes into account the age of the offender at the time of the offence.
- The *Young Offenders Act 1997* (NSW) provides diversionary measures for young offenders who have committed summary offences and some indictable offences.
- The United Nations Committee on the Rights of the Child oversees the implementation of the *United Nations Convention on the Rights of the Child* (1989).
- The NSW Advocate for Children and Young People is an independent body that conducts research related to children and young people.
- The Office of the Children's Guardian monitors out-of-home care in New South Wales and non-government adoption service providers. It also conducts 'working with children' checks.
- The Children's Court of New South Wales has a dual role with respect to children and young people. It hears criminal matters relating to young offenders as well as offer care applications for children and young people who are considered to be at risk of harm.
- Communities & Justice investigates reports of children who are considered at risk of harm.
- Non-legal mechanisms for protecting the rights of children and young people include counselling services and services offered by community organisations.

Questions

Multiple-choice questions

1 Which of the following is a feature of *doli incapax* in New South Wales?

a Children and young people are responsible for their crimes from the age of 14.

b There are certain crimes for which children and young people are not responsible.

c Children under the age of 10 are not responsible for their crimes.

d People with mental disabilities are not responsible for their crimes.

2 Which of the following is the best definition of a 'young person'?

a A young person is a person under the age of 16.

b A young person is a person between the ages of 12–16.

c A young person is a person aged between 16–18.

d A young person is a person aged between 18–25.

ISBN 978-1-108-86281-3 Milgate et al.

3 Which of the following is **not** a reason for the law to treat children and young people differently?
   - **a** to prevent them from being exploited
   - **b** to protect them from the consequences of making uninformed decisions
   - **c** to give them the best chance of finding appropriate employment
   - **d** to protect others from being disadvantaged by dealing with a person who is a minor

4 Which of the following statements best describes Australia's obligations under the *United Nations Convention on the Rights of the Child* (1989)?
   - **a** Laws must be passed within Australia to implement all of the convention's provisions.
   - **b** Australia can pass whatever laws it chooses to, as it is a sovereign state.
   - **c** Australia can pass whatever laws it chooses to, as it is a sovereign state, but it is obliged to pass laws to implement the provisions contained in the convention.
   - **d** Australia will pass laws recommended by the UN General Assembly.

5 Which of the following bodies monitors the mandatory screening of applicants for jobs in child care?
   - **a** Australian Council of Trade Unions
   - **b** Communities & Justice
   - **c** NSW Office of the Children's Guardian
   - **d** Committee on the Rights of the Child

Short-answer questions

1 Outline what changed in the treatment of children and young people by the end of the nineteenth century. Explain why this occurred.
2 Provide examples of contexts where the criminal justice system treats children and young people differently from adults.
3 Explain how the *Young Offenders Act 1997* (NSW) is unique and outline some of the recent criticisms made of the Act.
4 Comment on the extent to which the United Nations can regulate the implementation of the *United Nations Convention on the Rights of the Child* (1989) throughout Australia and the rest of the world.
5 Outline the roles of the NSW Commission for Children and Young People.
6 Discuss some challenges that may confront Communities & Justice in performing its role effectively.
7 Identify at least two non-legal mechanisms that promote the rights of children and young people.

Extended-response question

1 Critically evaluate how the legal system responds to the issue of juvenile justice. Refer to strategies for crime prevention, issues surrounding arrest and detention, diversionary schemes and court proceedings for young people.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

ISBN 978-1-108-86281-3 Milgate et al.

Issue 1
Groups or individuals suffering disadvantage

Chapter 10
Women

Chapter objectives

In this chapter, students will:

- explore legal concepts and terminology that relate to women
- investigate the main features of the Australian and international legal systems that relate to women
- analyse the effectiveness of the legal system to deliver justice and to adequately address issues in society relating to women
- investigate the place of the law in encouraging cooperation and resolving conflict with regard to women and the law
- investigate the role of the law in addressing and responding to change with respect to women
- find and use legal information from a range of sources
- develop the ability to effectively communicate legal information and issues.

ISBN 978-1-108-86281-3

Relevant law

IMPORTANT LEGISLATION

Women's Legal Status Act 1918 (NSW)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Workplace Gender Equality Act 2012 (Cth)

SIGNIFICANT CASES

O'Callaghan v Loder [1984] EOC 92–023

ISBN 978-1-108-86281-3

10.1 Women and the law

For centuries, women have campaigned for change in order to have their voices heard. Throughout history, men have held most of the political power and held most of the wealth in most societies. Intended or not, policies and laws have favoured men in all facets of society. Gender should not be a factor in determining the worth of an individual's work, but women have been discriminated against in many areas and denied equality of opportunity, especially in the workplace.

At both federal and state levels, there is a substantial body of legislation and policy specifically relating to the rights of women. In this unit of study, the changing status of women in Australia today will be examined, as well as the legal and non-legal mechanisms for achieving equality (primarily in the workplace). The unit will also include an evaluation of the effectiveness of these responses.

Other issues relevant to the rights of women in Australia today will be covered in the Year 12 course in the unit on family law.

Historical roles and attitudes

For many years, the attitude that women are different from men and inferior in significant ways has been reflected in the laws and policies of many countries, including Western societies. These attitudes meant that women had only a short period of paid employment – if any – until they married and took up the role they were destined to fulfil: homemaker. Men almost exclusively held all positions of power and owned practically all property. It followed that the position of women in society was one of subservience and powerlessness. Women's working lives involved domestic duties such as rearing children, preparing food, sewing and various other tasks in the home.

This position was strongly influenced by biology. As most women were bearing children (no reliable and safe contraception was available), they were left at home, dependent on their male partners.

Views of women's essential nature extended to various aspects of social life, and sometimes attempts were made to explain or justify these views. Much was written and said by men about women, especially in Victorian England, from reasons as to why they belong in the home bearing children, to analysis of their sexual desires.

There have been signature times throughout the last 120 years where women's restricted roles were more prominently challenged. During the two World Wars, women, through necessity, successfully took on traditionally male roles due to the shortage of men at home.

This was especially so during World War II. Women ran farms, worked in factories and generally maintained productivity at home. Although this work was at times difficult, many women also found it liberating. They came to see that they had potential beyond their traditional roles in society, and began to ask why many areas of employment were denied to them and, more importantly, why they did not receive equal pay. In 1943, an Australian Women's Conference for Victory in War and Victory in Peace was held in Sydney. The participants drew up a program of reforms for the government to incorporate into post-war Australia. This document, the Australian Women's Charter, contained 23 objectives such as the establishment of a national network of childcare centres and equal pay. It is considered a 'landmark manifesto' of Australian **feminism**.

feminism
the advocacy of rights for women on the basis of the equality of men and women; there are many varieties of feminist ideas in political and social thought

Figure 10.1 Historically, a woman's role was that of homemaker. Many women are still expected to fulfil that role.

ISBN 978-1-108-86281-3 Milgate et al.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 15–16 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 10.1

1 Describe the social attitudes about women prior to the twentieth century and give some reasons why these attitudes permeated society.
2 Construct a detailed timeline to outline the historical development of the roles of women in society.

For many women, though, the end of the war meant room had to be made for the returning soldiers, and they resumed their domestic roles as wives, mothers and homemakers.

The 1960s and 1970s was the next important period when women challenged their secondary status to men. The feminist movement of this time took on matters such as discrimination in the workplace and liquor licensing laws in some states, which said women couldn't be served in the public bar. Important pieces of legislation such as the *Family Law Act 1975* (Cth), the *Anti-Discrimination Act 1977* (NSW) and the *Sex Discrimination Act 1984* (Cth) were products of this era.

In 1975, the United Nations proclaimed that year to be International Women's Year to promote issues relating to women around the world. Today in Australia there is a significant body of law that protects the rights of women and promotes equality of opportunity. Having said this, the status of women in society continues to be affected by particular issues and concerns. For example, women still lack pay equity, may suffer violence in the home and are under-represented in senior management roles in the workplace and in parliamentary representation at a state and federal level.

In 2017, the 'Me Too' movement emerged in response to the treatment of women, particularly in the entertainment industry. The movement involved women publically sharing their experiences of sexual harassment and discrimination. Some of the women's experiences involved high-profile men; in some cases, these men were then charged with criminal offences. For example, in 2020, Harvey Weinstein – one of the most influential movie producers in Hollywood – was found guilty of sexual assault offences and was sentenced to 23 years' imprisonment. The movement broke the silence over the treatment of many women and has garnered significant publicity and support worldwide.

Progress and challenges for women

Education, training and workforce participation

A person's status in society is greatly influenced by opportunities to acquire skilled employment. Historically, women who wanted to enter professions had many barriers to overcome, some of which persist today. The formal education that most young girls received was usually short in duration and assumed a future as a homemaker.

In the nineteenth century, there seemed no pressing reason for young women to complete their secondary education, let alone go to university. Those women who were able to attend university to study subjects such as law and medicine did so in the knowledge that even if they passed their exams, they would not be given degrees and were effectively barred from practising in their chosen field. This did not deter some women, whose thirst for knowledge and a chance to use their talents spurred them on regardless.

Passage of the *Women's Legal Status Act 1918* (NSW) opened the way to recognition of women's right to enter professions. Many women who had successfully completed their degrees were able to do so, and some were elected to parliament in the 1920s.

ISBN 978-1-108-86281-3 Milgate et al.

TABLE 10.1 Education participation rate[(a)(b)(c)], 15–24 years

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Males %	56.1	56.1	55.9	55.9	56.2	56.1	56.5	59.7	57.8	58.1	59.4	59.7	58.7	59.2	60.3	61.2	60.9
Females %	56.0	57.9	58.5	57.8	58.1	57.5	57.9	58.1	58.3	59.6	60.3	61.9	60.9	62.6	64.0	64.4	64.9

(a) Includes any of the following: Certificate III or IV; Advanced Diploma or Diploma; Bachelor Degree; Graduate Diploma or Graduate Certificate, or Post Graduate Degree.

(b) Prior to 2013, data excludes people permanently unable to work.

(c) Males and females who have attained Year 12 or a formal qualification at Certificate III or above as a proportion of all persons for each sex and age group.

Source: ABS 4125.0–Gender Indicators, Australia, September 2018, Table 5.1.

TABLE 10.2 Apparent retention rate for full-time school students, Year 7 or 8 to Year 12

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Males %	68.1	69.8	70.3	70.4	69.9	69.0	68.8	68.9	70.8	73.2	74.6	75.8	77.8	80.0	80.7	80.9	81.2
Females %	79.1	80.7	80.7	81.4	81.0	80.7	80.1	80.5	81.4	83.0	84.3	84.3	85.6	87.4	87.4	87.8	88.5

Source: ABS 4125.0. Gender Indicators, Australia, September 2018, Table 5.3.

TABLE 10.3 Workforce participation by gender, full-time or part-time status and occupation

	Female			Male		
Occupation	Full-time (%)	Part-time (%)	Total (%)	Full-time (%)	Part-time (%)	Total (%)
Clerical and administrative workers	43.3	30.7	74.0	22.8	3.2	26.0
Community and personal service workers	26.8	44.3	71.0	17.5	11.5	29.0
Sales workers	18.6	43.3	62.0	21.8	16.2	38.0
Professionals	35.3	19.9	55.2	38.2	6.6	44.8
Managers	28.2	8.3	36.5	58.4	5.0	63.5
Labourers	11.5	22.9	34.4	41.1	24.5	65.6
Technicians and trades workers	7.8	6.4	14.2	76.2	9.6	85.8
Machinery operators and drivers	6.3	3.5	9.8	75.9	14.4	90.2
Total employees	**25.0**	**21.8**	**46.9**	**43.2**	**9.9**	**53.1**

Source: ABS (2018) *Labour Force, Australia*, Detailed, Quarterly, February 2015, cat. no. 6291.0.55.003, Table 07, viewed 24 November 2018. Note: Occupations are ranked from largest proportion of female employees to smallest.

ISBN 978-1-108-86281-3

The participation rate of young women in education has continued to increase significantly over the past 30 years, and in the years 2007–2017 has increased marginally (see Tables 10.1 and 10.2). Women enrolled in higher education comprised 58% of enrolments in 2016. However, women have been under-represented in trade apprenticeships in Australia and are substantially under-represented in the manual trades. The number of women in manual trades was less than 3% in 2015. This seems consistent with the level of occupational segregation seen in NSW and throughout Australia today, especially in the trades. With respect to labour force participation, women have made significant gains in the period covered by the ABS Labour Force statistics, with participation rising from 43.5% in February 1978 to 60.5% in October 2018. Across Australia, women still constitute the majority of part-time and casual workers. Workers in these categories often lack job security and other benefits available to those in full-time employment such as parental leave and holiday pay.

Social security

In the early twentieth century, the provision of welfare payments to people who were unemployed or otherwise experiencing difficulty earning an income was not seen as a responsibility of the federal government. This changed with the Great Depression in the early 1930s, when it became apparent that, at times, people might be unemployed due to circumstances beyond their control.

Review 10.2

1 Examine Table 10.3 and list the occupation groups in which women are well represented and under-represented.
2 Outline possible reasons for women's under-representation in the following occupations: labourers; technicians and trades workers; machinery operators and drivers.

Figure 10.2 Women make up over 50% of enrolments in higher education.

ISBN 978-1-108-86281-3 Milgate et al.

Unemployment benefits today are available to women as well as men. There are also family allowance payments to assist with the costs of raising children, and low-income families may receive rental assistance to help with private rental accommodation.

All people who have carers' responsibilities – for example, for a family member with a disability – can receive Carer Payment benefits because their responsibilities affect their ability to earn an income. The majority of carers are women. Most recipients of parenting payments are also women. A person, regardless of marital status, can qualify for parenting payments if he or she has primary responsibility for one or more young children and meets certain income tests. Separated parents can receive financial assistance with the cost of caring for their children, through the Child Support Agency.

Studies have shown that, over the long term, women fare far worse financially than men after a divorce. In addition, approximately 90% of lone-parent families are headed by women. The responsibilities of child care present significant barriers to entering the workforce. While financial support from the government is therefore vital, most people who are dependent on welfare as their main source of income nevertheless live on or below the **poverty line**.

poverty line
the minimum level of income needed to meet basic necessities below which a household is defined as poor; the poverty line is different in different countries

Marriage

In the past, when a woman married she effectively lost the legal identity she had as a single person. The law did not recognise the existence of the woman within the marriage, as her legal identity became that of her husband's. They were regarded as ***unito caro***.

unito caro
(Latin) 'one in flesh'; meaning that when a woman married, in the eyes of the law, she assumed the legal identity of her husband

William Blackstone, author of *Commentaries on the Laws of England, 1765*, said that in a marriage the husband and wife are a single person in law:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and *cover*, she performs everything and is therefore called in our law-french a *feme-covert*.

The effect of this type of legal reasoning and attitude was far-reaching. Almost all women before the twentieth century were married and as a result nearly all women were assigned an inferior status in society. Evidence of this can also be found in the areas discussed in this chapter.

Today, the rights and responsibilities of men and women in relationships can be found in the *Family Law Act 1975* (Cth) and the *Property (Relationships) Legislation Amendment Act 1999* (NSW).

The right to own property

A married woman lost all control over any personal property she owned at the time of the marriage, and also any she acquired during the marriage. If she owned any **real property**, it came under her husband's control, but remained hers for the purpose of inheritance. As the husband was the breadwinner and the wife was dependent on him (an inferior position), women were generally subject to the will of their husbands.

real property
property consisting of land and the buildings on it

This situation continued until the *Married Women's Property Act 1882* was passed in England, and later a similar act was passed in New South Wales, the *Married Persons (Property and Torts) Act 1901* (NSW). These Acts gave women greater control over their personal property. At the time of its passing, the 1901 Act was seen as forward-thinking and progressive, and it established an independent legal status for married women.

The Act effectively allowed women to retain ownership of any property they brought into the marriage and to make dispositions of property by

ISBN 978-1-108-86281-3 Milgate et al.

means of a gift. The Act also protected any property left to a woman in a will and protected a woman from a husband who was unscrupulous or a spendthrift. In other words, a husband could not spend his wife's money or sell any property his wife had inherited from her family or other sources. Today, men and women can hold, manage and dispose of property in their own right and as they see fit. The *Family Law Act 1975* (Cth) and the *Property (Relationships) Legislation Amendment Act 1999* (NSW) recognise the financial and non-financial contributions made by parties to a marriage, de facto or same-sex relationship before, during and after the relationship. As such, these pieces of legislation recognise the role played by the homemaker in contributing to the assets of the family.

The *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) now allows superannuation to be divided in the event of marriage breakdown. This was an important development, as superannuation is a sizeable asset, especially in the future when it matures. Prior to the passing of this Act, there were strict rules about when and how you could collect your superannuation; for example, when a person resigned from her or his job. As a result, many women who had been contributing in the home, but had no formal superannuation in their name, had no access to their share of the family's superannuation, which was usually in the husband's name. The legislation allows the superannuation to be split into two funds, one in each spouse's name. These aspects of property in relationships will be covered in the HSC course under family law.

The ability to sue and enter contracts

A ***feme sole***, or single woman, had the same rights as a man for civil wrongdoing (torts) and the same rights to sue or be sued and to enter into contracts. This was not the case for married women. If a married woman was being sued, her husband had to be a co-defendant, and if she wanted to sue someone, her husband had to be a co-plaintiff. A husband and wife were also not permitted to sue each other.

feme sole
(French) a single woman

Similarly, by herself, a married woman was not allowed to enter into a contract – her husband's signed authority was required. The legal position of women at this time reaffirmed the legal reasoning that husband and wife were one in law.

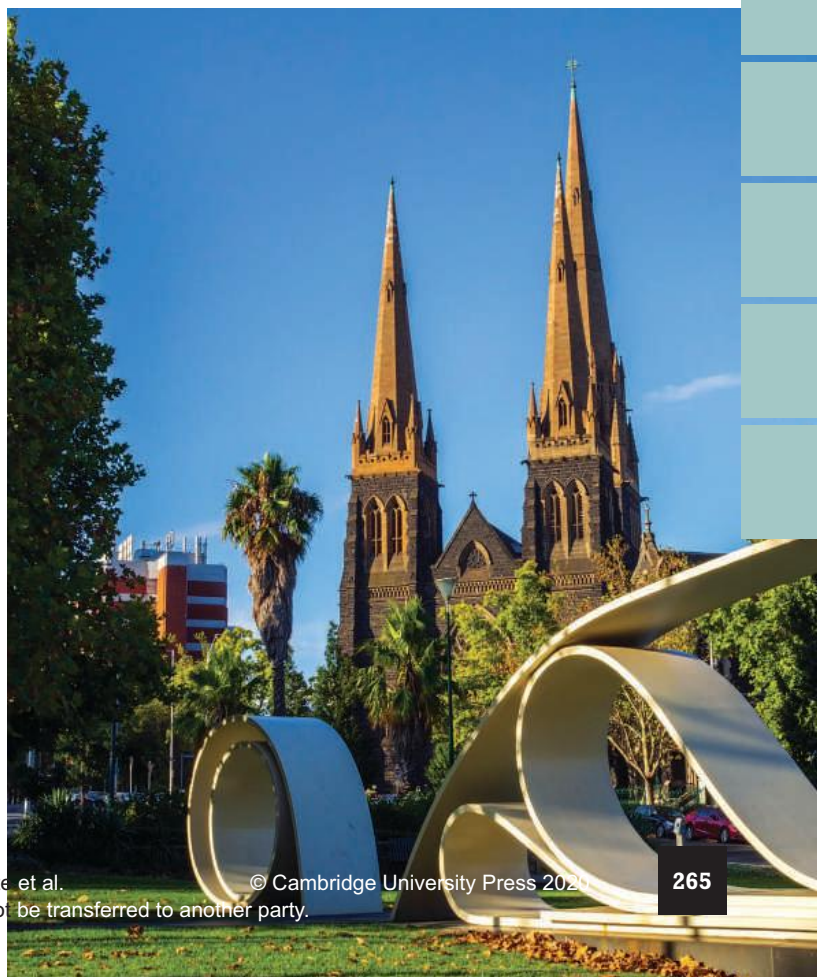
This situation changed with the *Married Persons (Property and Torts) Act 1901* (NSW). Either partner had the ability to sue or be sued, to sue the other and to obtain remedies to seize and protect their own separate property. Women could also enter into contracts on their own. Today, the common law and legislation recognise the rights of all men and women who are not minors to sue and be sued, and to enter contracts.

The right to vote

For women everywhere, the right to vote (**suffrage**) has always symbolised the fundamental right of all members of a democratic society. But until the early twentieth century, this right was

Video

Figure 10.3 This sculpture, 'Great Petition', was created by artists Susan Hewitt and Penelope Lee and was launched on 3 December 2008 to celebrate the one-hundredth anniversary of women being granted the right to vote in Victoria. The sculpture depicts the petition submitted to the Victorian Parliament in 1891 that called for women to be granted the right to vote. The sculpture sits near the Victorian Parliament building in Melbourne. The original petition, containing 30000 names, is 260 metres long.



ISBN 978-1-108-86281-3

not generally available to women. The right to vote was also an important symbol of women's struggle for equality. In Britain, it was Emmeline Pankhurst who was the driving force behind the **suffragette** movement. Suffragette marches on parliament grew in size from approximately 300 marches in 1906 to 4000 marches in 1907. Suffragettes chained themselves to pylons and gates and disrupted many political meetings.

suffrage
the right to vote, guaranteed by the law

suffragette
a term used to describe a supporter (whether male or female) of the suffrage movement

Emmeline Pankhurst was driven by the injustice of a lack of universal suffrage. She was determined to right this wrong, as was evident when she said that to get reform realised:

> You have to make more noise than anybody else, you have to make yourself more obtrusive than anybody else, you have to fill all the papers more than anybody else, in fact you have to be there all the time and see that they do not snow you under.

Rose Scott was an important person in the Australian suffragette movement. In a similar vein to the movement in England, Scott, along with other women, marched and held rallies to raise awareness around the issue of the right to vote.

Politicians in Australia were certainly more receptive to the issue of universal suffrage. This may have been in part due to the fact that Australia was a young country and the contributions that women had made in a pioneering sense were well appreciated. Hence, the vote for women in England lagged behind that of Australia, even though it was the suffragette movement in England that inspired the movement in Australia. Regardless, Australia certainly was one of the world leaders in giving women the vote.

As can be seen in Table 10.4, women in South Australia gained the vote in 1894, and all women were allowed to vote in Commonwealth elections in 1902. The rest of the states soon followed. Aboriginal and Torres Strait Islander women did not gain the right to vote in federal elections, in every state, until 1962. Until that time, Aboriginal and Torres Strait Islander women had been excluded by the *Commonwealth Franchise Act 1902* (Cth) (now repealed).

Jury service

Even though women had gained the right to vote, the right to serve on juries came much later. In New South Wales, like many other parts of Australia, a person had to satisfy certain property qualifications to serve on a jury. This was discriminatory because at the time most household property was in the husband's name. In 1947, this requirement was dropped, but there was still no automatic right to serve; women had to apply to do so. In 1968, the jury roll automatically included all women, but if a women didn't wish to be included she could simply advise the officer responsible for the rolls, and she would be removed.

TABLE 10.4 Years in which voting rights for Australian women were won

State	Voting rights	Right to stand for parliament
South Australia	1894	1894
Western Australia	1899	1920
Australia (Commonwealth)	1902	1902
New South Wales	1902	1918
Tasmania	1903	1921
Queensland	1905	1915
Victoria	1908	1923

ISBN 978-1-108-86281-3 Milgate et al.

During debate in parliament over the introduction of the *Jury Act 1977* (NSW), the Attorney-General, F. J. Walker, said:

> … that because of an outmoded selection system and the proliferation of persons who may claim **exemption** from jury service, the stage has been reached where the jury rolls now in use are not truly representative of the ordinary citizen.

exemption
being immune from certain duties and obligations

As the main aim of the Jury Act was to ensure 'that jury service, so far as is practicable, will be shared equally by all adult members of the community', the responsibility to serve on juries was extended to all those enrolled to vote. This, of course, included all women.

Women from non-English-speaking backgrounds

Migrant women throughout Australia experience the same barriers as other women, but the problems are compounded by a language barrier, especially in the workplace. There is a high concentration of migrant women in blue-collar jobs, which are not known for flexible working hours. Generally, migrant women have less confidence in negotiating job-sharing or part-time options with their employers. Moreover, they are often less able to afford to work only part-time.

Migrant women have been employed in factories in substandard conditions throughout Australia. Because these women have little English, they have not always been aware of their rights. Some of these workplaces are characterised by unsafe conditions, onerous shift work, bullying, inadequate toilet and rest room facilities, little attempt to have multilingual health and safety signs, and pay that is lower than the legal minimum wage. The trend towards contracting labour hire companies for casual workers has exacerbated the problems, as companies thereby avoid legal obligations that they would otherwise have to employees.

A large number of migrant women also carry out home-based work. While this work offers flexible hours, and there is no need to pay for child care, evidence suggests that many women work long hours in poor conditions and are paid a pittance on a piecework basis. In 1992, the federal government's 'Inquiry into Equal Opportunity and Equal Status for Women in Australia' reported on this situation in its publication, *Half Way to Equal*. As documented in the submission of the Asian Women at Work Action Group to the 2007 National Industrial Relations Inquiry, and a July 2008 report by the Australian Human Rights Commission, the problems are still very much in evidence.

It has also been noted that migrant women have an unemployment rate higher than Australian-born people, and for those from non-English-speaking backgrounds it is even higher than for migrants fluent in English. Even some migrant women today with a high level of educational qualifications usually cannot work in Australia without undertaking expensive bridging courses, sometimes on top of a recognised language course. As a result, many of these women must take jobs that pay far less than the jobs they would have had in their original countries, because their qualifications are not recognised.

Review 10.3

1 Explain some of the main workplace issues facing women from non-English-speaking backgrounds.
2 Outline why women from non-English-speaking backgrounds are more likely to be exploited in the workplace than women who speak English.

ISBN 978-1-108-86281-3 Milgate et al.

Research 10.1

Asian Women at Work (AWATW) has a membership of over 1300 migrant women workers. The group works to educate and empower Asian women workers in Australia. View AWATW's website for more information.

1. Search online for websites that discuss AWATW's activities.
2. Outline the specific difficulties that migrant women face at work.
3. Outline how AWATW recommends women can tackle these difficulties.
4. Discuss which agents would be involved in these efforts to tackle difficulties at work and their roles of these agents.

Aboriginal and Torres Strait Islander women

The impact of colonisation on Aboriginal and Torres Strait Islander women was devastating. In addition to disease and massacre, it is generally accepted that there were many examples of young girls and women being victims of sexual assaults by members of the non-indigenous community. For the children of the Stolen Generations and their families, the practice of taking children from their parents resulted in great spiritual, physical and emotional suffering. Today, Aboriginal and Torres Strait Islander women fall behind on most indicators of health and wellbeing. The life expectancy of Aboriginal and Torres Strait Islander women is 75.6 years compared to 84.6 years for non-indigenous women.

Figure 10.4 June Oscar AO is an Australian Bunuba woman, Aboriginal and Torres Strait Islander peoples rights activist, community health and welfare worker, and film and theatre producer. Oscar began a five-year term as Australia's Aboriginal and Torres Strait Islander Social Justice Commissioner on 3 April 2017.

Aboriginal and Torres Strait Islander women are twice as likely to suffer from cervical cancer and eight times more likely to die from it than non-indigenous women. Diabetes resulting from dietary and lifestyle issues is a major problem. Aboriginal and Torres Strait Islander women between the ages of 35 and 64 are 33 times more likely to die from diabetes than non-indigenous women.

The labour force participation rate for Aboriginal and Torres Strait Islander women is significantly worse than non-indigenous women (see Figure 10.5). With respect to educational indicators, Aboriginal and Torres Strait Islander women fare significantly worse than non-indigenous women and the general non-indigenous population on retention rates to Years 11 and 12, post-school and tertiary qualifications. There has been a slight improvement in some of these areas, but thus far, many government attempts to overcome these entrenched disadvantages have failed.

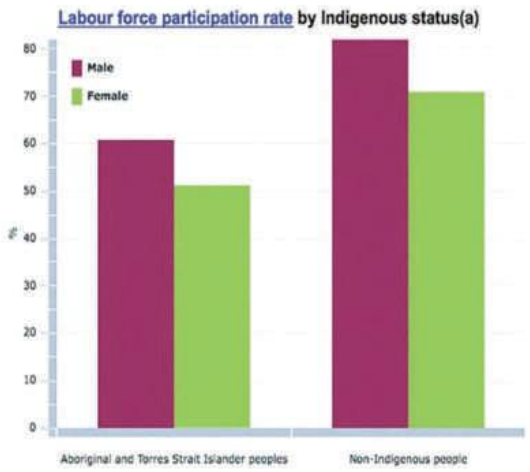


Figure 10.5 Comparison of estimated Aboriginal and Torres Strait Islander and non-indigenous labour force participation rates (15–64 years of age) as at 2016 Census; reported 2018.

Source: Australian Bureau of Statistics

ISBN 978-1-108-86281-3 Milgate et al.

Review 10.4

1 Outline some of the health and wellbeing issues facing Aboriginal and Torres Strait Islander women today.
2 Assess why some of the attempts to resolve these issues have failed.

10.2 Legal responses

International law

The main treaty that addresses discrimination against women around the world is the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW). It was **opened for signature** in 1979 and **entered into force** in 1981.

opened for signature
(of a treaty) negotiations have concluded and the treaty is ready for parties' signatures; many treaties, especially those convened by the United Nations, will be open for signature only until a certain date; others, such as the Geneva Conventions, are open for signature indefinitely

entered into force
(of a treaty) having become binding on those states that have consented to be bound by it

The preamble of CEDAW acknowledges that the *Charter of the United Nations* (1945) and *The Universal Declaration of Human Rights* (1948) affirm that all human beings are born free and are equal in dignity and rights. It also acknowledges that under human rights treaties, **states** have responsibilities to 'ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights'.

state
a politically independent country

It affirms that, in spite of this, there is still discrimination against women around the world. The treaty states that this discrimination:

> … hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

CEDAW contains 30 Articles. Articles 1–16 set out the main rights of women. Articles 17–22 outline the powers and responsibilities of the Committee on the Elimination of Discrimination against Women, the body set up to monitor the implementation of the treaty. Articles 23–30 set out the provisions governing the formal operation of the treaty; for example, the time frame for its being open for signature and entering into force, and how disputes about interpretation are to be resolved.

As a signatory country, Australia has an obligation to ensure that its laws and policies protect the rights of all women and promote equality of opportunity.

The role of the United Nations in protecting the rights of women

The United Nations is the mechanism whereby countries around the world meet and sign international declarations and treaties. The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) has been important for forwarding the rights of women throughout the world. Today there are 189 parties to this convention.

However, with all aspects of international law there is a difference between signing an international treaty and ratification. Due to the sovereignty of all states, there generally has to be the political and/or economic will before a state will agree to sign a treaty. Most states act out of self-interest, and the United Nations can only pressure states to comply with international law. Once a state has signed a treaty, the UN committee structure monitors and reports on the extent to which they are complying with their international obligations.

This is no different for the CEDAW. The Committee for the Convention on the Elimination of Discrimination against Women was established under Article 17 of the convention. The committee has 23 members who are considered experts in fields relevant to the treaty. This committee is different from other human rights committees in

ISBN 978-1-108-86281-3 Milgate et al.

Figure 10.6 In Ankara, Turkey, on the International Day for the Elimination of Violence against Women in 2017, a protester chants slogans in a protest by Kurdish and Turkish women about protecting their rights and lives. The UN General Assembly designated 25 November as the International Day for the Elimination of Violence against Women to raise awareness of the fact that women around the world are subject to rape, domestic violence and other forms of violence.

that all the members have always been women. The members of the committee serve four-year terms and usually meet once a year for two weeks. The committee monitors the implementation of the treaty by examining reports submitted by states that have ratified or acceded to CEDAW.

Australia has a responsibility under CEDAW to report to the committee every four years, or as the committee may require, on the steps it has taken to give full effect to the rights contained in it. Having a federal structure of government can present difficulties in ensuring that all states are complying with the treaty.

The committee experiences significant difficulties as a mechanism set up to oversee the implementation of the treaty because the states that have become a party to it have made many reservations. It is well documented that CEDAW has had more reservations than any other treaty and hence the committee has limited powers to promote the implementation of the treaty.

The main provisions in Articles 1–16 of CEDAW are outlined below.

***Convention on the Elimination of All Forms of Discrimination against Women* (1979)**

Article 1 Defines discrimination against women as 'any distinction, exclusion or restriction made on the basis of sex that impairs or nullifies women's enjoyment of human rights and fundamental freedoms'.

Article 2 States that are a party to the treaty will condemn discrimination against women and will pursue means to eliminate it.

Article 3 States should take 'all appropriate measures, including legislation, to ensure the full development and advancement of women' guaranteeing

ISBN 978-1-108-86281-3 Milgate et al.

them the same fundamental human rights and freedom as men.

Article 4 Parties are to adopt special measures to ensure the equality of de facto couples between men and women and to protect maternity. These positive measures are not to be considered discriminatory.

Article 5 Social and cultural patterns of men and women are to be modified with the aim of eliminating prejudices and customary practices that are based on the inferiority/superiority or stereotyped roles of men and women. The importance of maternity to children and parenting as a responsibility of both men and women.

Article 6 To eliminate all forms of traffic in women and exploitation of prostitution of women.

Article 7 To eliminate discrimination against women in the public and political life in regard to voting, participation in government and non-government organisations.

Article 8 Women shall be given 'the opportunity to represent their Governments at the international level and to participate in the work of international organizations'.

Article 9 Women shall have 'equal rights with men to acquire, change or retain their nationality'.

Article 10 Women shall have the same rights as men to education and training.

Article 11 To eliminate workplace discrimination against women. This includes equality of opportunity, equal pay and conditions. This also includes the elimination of discrimination on the basis of pregnancy and maternity.

Article 12 To eliminate discrimination in the area of health care and ensure adequate services throughout pregnancy, confinement and the post-natal period.

Article 13 To eliminate discrimination against women in economic areas such as family benefits and finance, and also participation in areas of social life such as sports and cultural activities.

Article 14 To eliminate discrimination against women who face particular problems in rural areas.

Article 15 Equality with men before the law. This includes all aspects of civil law, in particular rights in respect to contracts.

Article 16 To eliminate discrimination against women in marriage and family relations. This can include equal rights with men in respect to entering a marriage and dissolution of a marriage. It also includes the same rights and responsibilities as parents.

Review 10.5

1 Select five Articles from the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW). Outline some state or federal legislation that has provisions consistent with CEDAW.
2 View the CEDAW website and identify some countries that are not signatories to the treaty. Propose a hypothesis on why this might be the case.

ISBN 978-1-108-86281-3 Milgate et al.

Domestic law

Legislation protecting women from discrimination exists at both state and federal levels in Australia.

Discrimination means treating someone unfairly because of some characteristic. Discrimination on the basis of sex may be considered to include discrimination because of someone's marital status or because she is pregnant or likely to become pregnant. There are two types of sex discrimination: **direct discrimination** and **indirect discrimination**. Direct discrimination is a more blatant form and is more easily identified; for example, where male employees are offered first choice for extra overtime ahead of female employees.

direct discrimination
a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of sex, race, national or ethnic origin, age, sexuality or other characteristic

indirect discrimination
practices or policies that appear to treat everyone in the same manner, but which adversely affect a higher proportion of people from one particular group

Indirect discrimination is usually harder to detect. It occurs when there is a procedure, rule or practice that, on the face of it, is the same for everyone and not discriminatory, but when carried out actually discriminates against a particular group of people. Indirect discrimination can occur even when there is no intention to discriminate. An example provided by the Australian Human Rights Commission is a situation where a manager offers a wage increase to all employees who have worked for the company for a number of years without interruption. On the face of it this may not seem discriminatory; however, given the fact that many more women than men interrupt their working lives for a period of time when they have children, this policy has the effect of treating women less favourably than men.

Sex Discrimination Act

Some, but not all, provisions of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) were implemented in Australian law through the *Sex Discrimination Act 1984* (Cth).

The Act aims to eliminate discrimination on the basis of sex, marital status or pregnancy in a number of key areas such as employment; education; the provision of goods, facilities and services; accommodation and housing; insurance; and superannuation. The Act explicitly included **sexual harassment** as a form of discrimination in employment and education and makes this behaviour illegal.

Figure 10.7 More women than men interrupt their working lives for a period of time when they have children.

sexual harassment
any unwelcome sexual behaviour, such as sexual advances, suggestive comments, unwanted touching, written communications or gestures, especially in the workplace

The other main aim of the Act is to promote community respect for the principle of the equality of men and women. The Act makes it illegal to:

- discriminate against someone on the basis of sex, marital status or pregnancy

ISBN 978-1-108-86281-3 Milgate et al.

- dismiss someone from her or his job on the basis of the person's family responsibilities
- sexually harass someone.

Sexual harassment is any unwelcome or unwanted sexual behaviour that makes a person feel humiliated or offended, and where that reaction is reasonable in the circumstances. It occurs when a woman (or a man) is subject to unwelcome behaviour from others because of their gender. It can include behaviour such as unwanted sexual advances, touching without consent, or making jokes or suggestive comments that are gender-oriented.

Often there is a power imbalance between the harasser and the harassed; usually the harasser occupies a higher position at the workplace. The person being harassed may think that her (or his) advancement, or indeed continued employment, depends on accepting such sexual overtures. This can make it difficult to establish a case for the harassment, even if the person decides later to make a complaint. In *O'Callaghan v Loder* [1984] EOC 92–023, Loder, who was the Commissioner for Main Roads, made sexual advances to an employee, O'Callaghan. While the NSW Equal Opportunity Tribunal recognised the power imbalance and was sympathetic to O'Callaghan, it nevertheless held that there is also an onus on the employee to make it known to the employer if his or her conduct is unwelcome. The tribunal was not satisfied that O'Callaghan had made it clear to Loder that she was offended by his behaviour; therefore, if Loder was not aware that his conduct amounted to sexual harassment, he did not breach the law.

Sexual harassment is still a pervasive element in the workforce today. The #Metoo movement in 2017–2019 has exposed harassment of women within the entertainment industry by some high-profile men in Hollywood and around the world. The toppling of Malcolm Turnbull as Prime Minister by the Liberal Party in 2018 saw claims by some women that they were intimidated and threatened with disendorsement of pre-selection for their seats in parliament if they did not fall in line with the leadership figures pushing for change.

A person who has a complaint under the *Sex Discrimination Act 1984* (Cth) can take action through the Australian Human Rights Commission (AHRC). This body, which was set up under the *Australian Human Rights Commission Act 1986* (Cth). The AHRC will investigate the complaint and organise a conciliation conference to try to resolve the complaint with the other party. If conciliation fails, the complainant may make an application to the Federal Circuit Court or Federal Court to have the complaint heard.

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is the new name of the Human Rights and Equal Opportunity Commission. It is an independent federal statutory body created by the *Australian Human Rights Commission Act 1986* (Cth). It has the responsibility to administer the five federal discrimination laws, each with their own commissioner. There is a president who is aided by the Human Rights, Race, Sex, Disability, Aboriginal and Torres Strait Islander, and Social Justice Commissioners.

The Sex Discrimination Commissioner's role is to promote greater equality between men and women. The main way this is to be achieved is through the development of policy, initiation of research, and education of all people in respect to the behaviours and structures that contribute to sex discrimination. The trafficking of women to Australia to work in the sex industry or to be exploited in other work-related areas is still a concern, not only for the Commission. The sex discrimination unit works closely with the Australian Border Force on this issue.

When people have complaints under the *Sex Discrimination Act 1984* (Cth) they lodge these with the complaints-handling section within the AHRC. The complaints-handling section has a responsibility to investigate and conciliate all complaints under the *Australian Human Rights Commission Act 1986* (Cth), including complaints about sex discrimination.

Anti-Discrimination Act

The broad-based *Anti-Discrimination Act 1977* (NSW) makes unlawful discrimination on the basis of sex, race, marital status, disability, responsibility as a carer, sexuality and age. It also establishes the Anti-Discrimination Board, which is part of the NSW Attorney-General's Department, to oversee the implementation of the Act. The Equal Opportunity Division of the NSW Administrative Decisions Tribunal hears complaints of discrimination.

Women who feel they have been discriminated against can make a complaint to the Anti-Discrimination

ISBN 978-1-108-86281-3 Milgate et al.

Research 10.2

View the UN Women website and read the 'About us' section.

1 Summarise the role of UN Women.
2 Identify some of the issues facing women in the world today.

Board, which will investigate the complaint and try to help the parties to reach a solution. If the board cannot resolve a complaint, women can take their case to the Administrative Law and Equal Opportunity Division of the NSW Civil and Administrative Tribunal, established under the *Civil and Administrative Tribunal Act 2013* (NSW), which can make a decision, like a court.

Complainants generally must make their complaint within 12 months of the alleged incident and it must be in writing.

Fair Work Australia is another authority that addresses discrimination in the workplace affecting all workers, including women.

Workplace Gender Equality Act

The principles of equal opportunity in the workplace reflect the right to equitable access to jobs, career paths, training and staff development and equitable conditions of employment.

In essence, equal opportunity is about:

- treating people with dignity and respect

TABLE 10.5 *Sex discrimination Act 1984* (Cth) – complaints received by grounds, 2017–2018

Sex Discrimination Act – grounds	Number	Percentage
Sex discrimination	349	30
Marital or relationship status	10	<1
Pregnancy	105	9
Sexual harassment	321	27
Family responsibilities	64	5
Breastfeeding	8	<1
Gender identity	30	3
Intersex	4	<1
Sexual orientation	87	7
Victimisation	138	12
Causes, instructs, induces, aids or permits an unlawful act	66	6
Advertisements		
Total	**1182**	**100**

Source: Australian Human Rights Commission, *Annual Report 2017–2018*.

Review 10.6

1 Describe the difference between direct and indirect discrimination.
2 Explain why indirect discrimination is difficult to establish and prove.
3 Outline the objectives of the *Sex Discrimination Act 1984* (Cth).
4 Define what is meant by 'sexual harassment'. Outline what needs to occur before a complaint of sexual harassment can be initiated.

ISBN 978-1-108-86281-3 Milgate et al.

- unbiased management decisions
- ensuring equal access in all areas of employment, including recruitment, transfer, promotion, training and development, information access, management and supervision of staff and conditions of employment, with all selection based on merit (the best person for the job)
- recognition and respect for the cultural and social backgrounds of staff and customers.

In other words, diversity is valued. The *Workplace Gender Equality Act 2012* (Cth) requires certain organisations to establish workplace programs to remove the barriers to women in the workplace, both when they enter and as they advance. Under the Act, any organisation that has 100 or more employees and that is a higher education institution, a private sector company, a non-profit or community organisation, a private school or a union must develop and implement such a workplace program.

The objectives of the *Workplace Gender Equality Act 2012* (Cth) reflect the idea that in a just and fair world there should be an equitable spread of both sexes in management and support jobs across all industries. At present, this is not case. It is also hoped that equal opportunity will provide much-needed role models in managerial positions so that younger women will aspire to these positions. As well, no woman can be considered for a particular job for which she is not suitably qualified. The Act is not about putting women in jobs ahead of men: section 2A(a) clearly states that one of its objects is 'to promote the principle that employment for women should be dealt with on the basis of merit'. This means that matters such as selection and promotion of employees should be based solely on their qualifications, experience and ability to do the job.

A recent global survey undertaken in 2019 revealed that Australia and New Zealand have recorded the biggest improvement in gender diversity in senior management since 2016. However, despite some progress, the data from the survey showed that women still faced barriers when balancing a career and a family (see 'News' below).

The *Workplace Gender Equality Act 2012* (Cth) also establishes the Workplace Gender Equality Agency to oversee the implementation of the Act.

Figure 10.8 Companies are expected to hire and promote women based on merit. Unfortunately, this does not always happen.

ISBN 978-1-108-86281-3

Research 10.3

1 View the NSW Department of Justice website and research some decisions made by the NSW Civil and Administrative Tribunal (in the Administrative and Equal Opportunity Division) in 2015.
2 View the Anti-Discrimination Board of NSW website. Click on 'Publications' and then 'Factsheets'. Select a fact sheet that is relevant to women and summarise women's rights in this area.

Australia makes big strides in closing gender gap, global survey finds
By Laura Chung
11 October 2019
The Sydney Morning Herald

Australia and New Zealand have recorded the biggest improvement in women senior managers over three years in a global survey of 3000 listed companies across 56 countries.

The report by the Credit Suisse Research Institute found Australia and New Zealand topped the 'momentum' category for female participation in senior management, with a 7.9% improvement compared with the 2015 sample. The next closest country improved by 7.7%.

It also said Australia and New Zealand's percentage of women on boards had increased from 19.5% in 2015 to 29.6% in 2019. However, other countries, including France, Norway, Italy and Vietnam ranked higher, recording 44.4%, 40.9%, 33.1% and 29.7% respectively.

The report showed the proportion of women in management increases as the percentage of women on boards rises, 'suggesting that the impact of greater diversity in the boardroom leads to a better gender balance in executive functions'.

Chief operating officer for Credit Suisse Australia, Katrina Glover, said the report was an invaluable snapshot for Australian boards and companies to measure their progress internationally.

'It is reassuring that we have seen significant progress being made in Australia and globally to achieve an equitable and inclusive workforce,' she said.

Gender, work and employment relations professor Rae Cooper from the University of Sydney Business School said while progress was being made, it was important to remember progress could be 'patchy'.

ASX 200 board seats occupied by women reached 29.7% last year, just shy of the Australian Institute of Company Directors 30% target.

Data from Chief Executive Women showed just 12 of CEOs in the ASX 200 were women and about 15 had no women executives at all.

The report, which draws on global data built by Credit Suisse company analysts, found that barely 5% of the 3000 companies analysed had women chief executives and less than 15% female chief financial officers.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

It noted that while progress had been made globally, women still faced barriers when balancing a career and a family.

'Women actually want to be able to combine having a family with having a career and be rewarded,' Professor Cooper said.

'The generation coming through will be a challenge to businesses because they expect that.'

Government agencies

There are agencies at both federal and state levels that provide policy advice on women's issues.

Office for Women

The federal Office for Women is part of the Department of Prime Minister and Cabinet. Its primary role is to provide policy advice to the Minister for Women, and to ensure that government and Cabinet decisions about legislation, policy and budgetary matters are made with a view to their effect on women. The Office for Women also administers programs to combat issues such as domestic violence and sexual assault, represents the Australian Government at national and international forums on women's issues, and has primary responsibility within the government for Australia's obligations under CEDAW.

Women NSW

At a state level in New South Wales, Women NSW is part of the NSW Department of Health. It advises the state government and works with other government agencies and non-government organisations to develop programs and policies with positive consequences for women. Women NSW is also responsible for domestic violence prevention: to lead and manage government policy relating to the prevention of domestic and family violence.

Workplace Gender Equality Agency

The Workplace Gender Equality Agency (WGEA) is the new name of the Equal Opportunity for Women in the Workplace Agency (EOWA). The WGEA is a statutory body set up under the *Workplace Gender Equality Act 2012* (Cth). It is a part of the federal Department of the Prime Minister and Cabinet **portfolio**. WGEA's main objective is to promote and improve gender equality in the workplace.

portfolio
a key area of government responsibility headed by a minister

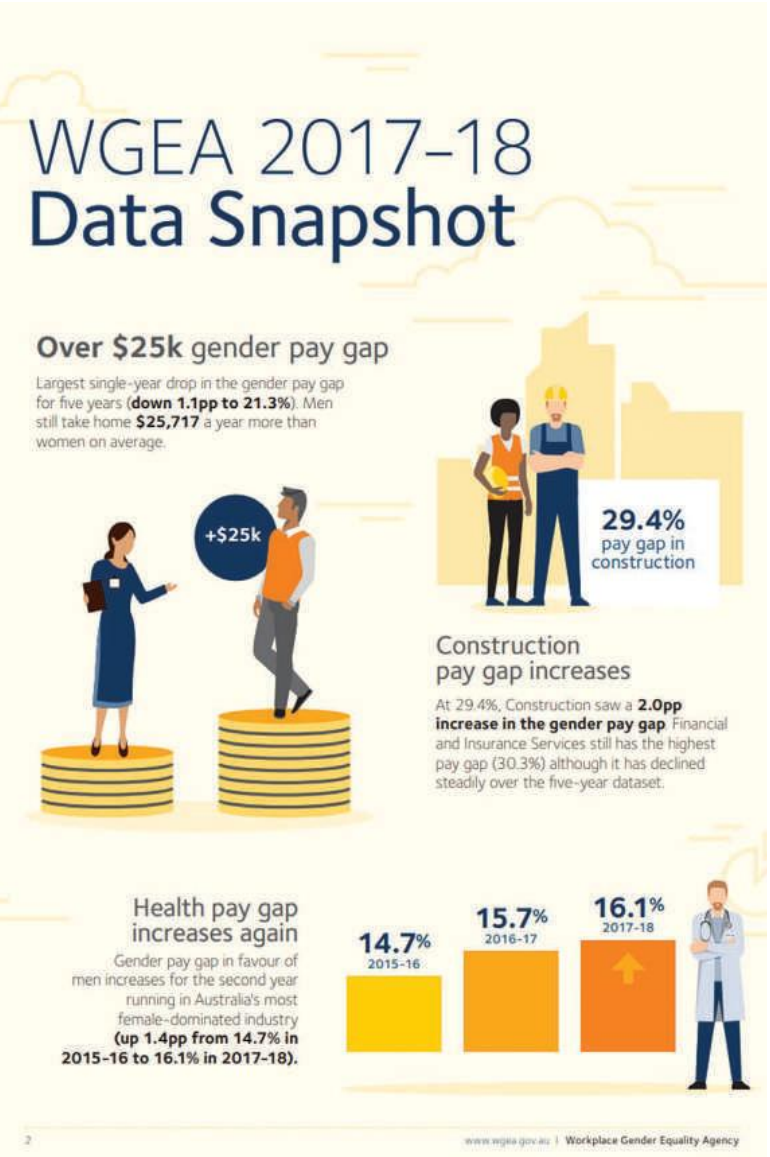
One of the challenges faced by WGEA is convincing organisations that there are many benefits to having an equal opportunity workplace. Some of these are that it helps in hiring and retaining the best applicants, improves productivity and creativity, attracts more female customers and enhances the organisation's management style. Organisations with more than 100 employees have to report annually to WGEA the steps they are taking to promote equal opportunity. Companies that do not comply with the legislation face two sanctions:

- being named in the federal parliament in a report put on the public record (referred to as the 'naming sanction')
- being unable to tender for federal government contracts and industry assistance.

Another important role performed by WGEA is the gathering of statistical data from a number of sources to give an up-to-date overview of women in the labour force. This is compiled annually and allows WGEA to track trends in equal opportunity in the workplace.

WGEA is an important mechanism if women are to achieve economic equality. It focuses attention on the position of women in the labour force, their representation at management levels, their level of earnings, their participation in work-related and employer-sponsored training schemes, and their employment status (full-time, part-time or casual). All of these factors impact greatly on women's ability to enjoy economic equality.

ISBN 978-1-108-86281-3



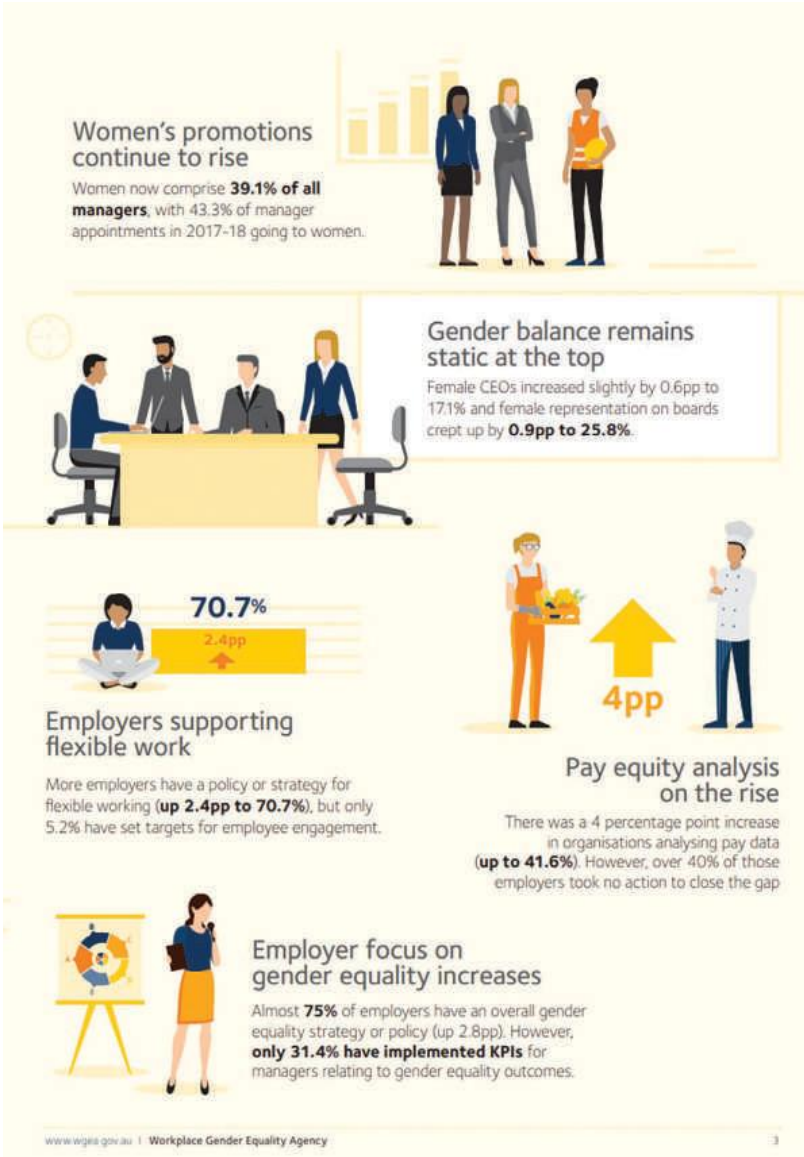


Figure 10.9 The 2017–2018 'Gender equality scorecard' released by the Australian Workplace Gender Equality Agency shows that in that financial year, 50.1% of employees were women, 17.1% of CEOs were female and 39.1% of manager were female.

Review 10.7

1 Explain the roles of the Office for Women, and Women NSW.
2 Outline and discuss some issues that might be raised by the Office for Women and by Women NSW in the development of law and policy relating to:
   a requirements for businesses regarding conditions of employment
   b budget provisions regarding the funding of health care
   c programs in which business leaders provide mentoring for high-achieving university graduates.

ISBN 978-1-108-86281-3 Milgate et al.

Case Study

Discrimination – the basis for the torture of women

One of Amnesty International's projects is the 'stop violence against women' campaign. The following information supplied by Amnesty International outlines the facts and issues on how discrimination is the basis for the torture of women. Better compliance by states and enforcement mechanisms through the CEDAW, especially Article 1, would help alleviate this problem throughout the world.

> The torture of women is rooted in a global culture that denies women equal rights with men, and legitimises the violent appropriation of women's bodies for individual gratification or political ends. In recent decades, women's groups and other human rights activists and non-governmental organisations around the world have made significant advances in preventing and combating abuses, providing support and redress for survivors of abuse and winning greater equality for women. Yet women worldwide still earn less than men, own less property than men, and have less access to education, employment and health care. Pervasive discrimination continues to deny women full political and economic equality with men.
>
> Violence against women feeds off this discrimination and reinforces it. When women are abused in custody, when they are raped by armed forces as 'spoils of war', when they are bought and sold as trafficked women, bonded labourers or in forced marriages, when they are terrorized by violence in the home, unequal power relations between men and women are both manifested and enforced. The torture of women will not be eradicated until discrimination on the grounds of gender is addressed.
>
> Violence against women is compounded by discrimination on the grounds of race, ethnicity, sexual orientation, social status, class and age. Poor and socially marginalised women are particularly liable to torture and ill-treatment. Such multiple discrimination further restricts women's choices, increases their vulnerability to violence, and makes it even harder for them to gain redress.
>
> Sometimes the perpetrators of these acts of violence are state officials such as police, prison guards or soldiers. Sometimes they are members of armed groups fighting against the government. However, much of the violence faced by women is at the hands of the people with whom they share their lives, whether as members of their family, of their community or as their employers. There is an unbroken spectrum of violence that women face at the hands of men who exert control over them.

Source: Amnesty International

The following case is one of many millions throughout the world:

> Indravani Pamela Ramjattan was sentenced to death in May 1995 in Trinidad and Tobago for the murder of her common law husband in 1991. During her trial, the lawyers introduced evidence of the years of abuse and violence she had suffered – including beatings, death threats and rape. Despite this evidence, she was convicted of murder, for which there is a mandatory death sentence. In 1999, an appeal court reduced her murder conviction to manslaughter and sentenced her to a total of 13 years' imprisonment based on psychiatric evidence that showed that at the time of the murder she was suffering from 'Battered Women's Syndrome'.

Source: Amnesty International

ISBN 978-1-108-86281-3 Milgate et al.

News

New steps in a nation's quest to end violence

By Jewel Topsfield

13 October 2019

The Sydney Morning Herald

It's one of the most dangerous countries in the world to be a woman, but a new initiative is marshalling businesses to help tackle Papua New Guinea's epidemic of family and sexual violence, writes Jewel Topsfield.

Saina* was hit so often she says her body started getting used to the pain. Her husband grew up in a family where violence was normal. He had mood swings, triggered by a potent mix of alcohol and jealousy.

Saina has a prestigious job at a firm in Port Moresby, Papua New Guinea (PNG). Under PNG's *wantok* system of kinship, those with money have a cultural obligation to share their wealth with their clan. So Saina would help pay bride prices (a traditional payment made by the groom's family when a couple marries) or death compensation or for a feast to celebrate a young woman's first menstruation.

Saina says her husband felt inferior and angry when she was publicly thanked. 'You are doing these things to get a big name,' he would tell her.

She begged her relatives to acknowledge her husband, the 'head of the family', and not her. 'They praise the breadwinner and it demoralises the male ego,' she says.

And so, the beatings would start again.

Every three months or so Saina would seek refuge at relatives' homes until things cooled down. Once, when pregnant, she went to a safe house. 'They said they didn't have dietary supplements to cater for pregnant women.'

65.6%
of women affected by domestic violence

90%
of women in PNG prisons serving time for murder after acting in self defence

80%
of children experience some form of physical, verbal or sexual abuse

So Saina waited, yet again, at an auntie's house, until her husband came to collect her and her newborn, bringing a pig for the relatives to atone for his violence.

'In PNG, a pig pays for everything,' Saina says. 'Instantly they forget your pain and struggle and send you back to your husband.'

PNG is one of the most dangerous countries in the world to be a woman. There is a lack of official data but an estimated two in three women are affected by domestic violence.

Belief in sorcery, known locally as *sanguma*, is widespread. Violence against those believed to be sorcerers or witches – most of whom are women – has escalated, especially in the country's Highlands.

Ninety per cent of women in prisons in PNG are serving time for murder, after acting in self-defence in response to family violence, according to a PNG Government report.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

In October last year, two things changed in Saina's life. Her husband began hitting their three-year-old son. She believes this was a way of him hurting her when she was numb to her own pain. Saina knew this time she had to leave him, for the sake of her four children.

Meanwhile, Saina's company subscribed to Bel isi PNG (Peaceful PNG), a world-first public–private partnership which marshals business to help tackle the country's epidemic of family and sexual violence. Bel isi PNG offers access to safe houses and case management – medical care, counselling and legal assistance – to employees of companies that pay a subscription fee.

'I was more or less their first client,' Saina says. Saina and her children spent a few days in a safe house. Bel isi PNG connected her to counselling and welfare services and helped her obtain a restraining order against her husband.

It's been a long and at times frightening ordeal. She's moved home several times and changed bus routes. She paid her relatives to sit outside her child's school gates all day and tip off the teachers and police if her husband arrives. 'Violence is expensive in PNG,' she says. But now, a year on, 'absolutely I feel safe'.

'Not only safe, I feel I have mental peace, I am emotionally stable, I concentrate on my work. My kids are still traumatised at times when triggered by fights or shouts but overall they are happier and their school grades have dramatically improved.'

In 2017, the PNG Government released a national strategy to prevent and respond to gender-based violence. It said that, despite work by the PNG Government, civil society and the international community to address the problem since the early 1980s, 'violence remains serious and pervasive'.

The 'rights-based and gender-responsive approaches' to tackle violence had struggled to be accepted in conservative PNG society. The vast majority of the approaches focused on awareness-raising, which the strategy said was only a first step that alone was not effective in reducing violence. 'The modern state, combined with some enduring aspects of traditional cultures and Christianity, has perpetuated patriarchal beliefs, ideas, attitudes, behaviours and institutions,' the strategy said.

'Human rights and gender equality, for instance, are still rejected and misperceived as Western ideas. In some circles they are seen as radical, subversive and in conflict with traditional cultures, Melanesian ways and Christian religious doctrine.'

But Bel isi PNG looks at violence from another perspective. It recognises that, as well as being a humanitarian issue, violence is also a significant cost to business.

A recent survey of three large companies in Port Moresby found 68% of employees had experienced family and sexual violence. They lost an average 11 days of work a year as a result. The amount of staff time lost cost one of the companies 3 million kina ($1.28 million), which was 9% of its total salary bill.

Stephanie Copus-Campbell, who has worked on development programs in PNG for years, believes Bel isi PNG is a potential gamechanger. 'Bel isi PNG has chosen to tackle the problem from the angle of the economic impact on the workplace, which benefits both individuals and companies,' she says.

Copus-Campbell formerly headed the Australian aid program to PNG and is now the executive director of the Oil Search Foundation, which runs health, education and women's protection programs. Several years ago, one of her top-performing employees suddenly stopped coming to

ISBN 978-1-108-86281-3

News (continued)

work. A month went by. Copus-Campbell begged the woman to talk to her. 'I really cared about this woman but I also risked losing her,' she says.

Finally, the employee agreed to meet at a local hotel. 'She was sitting in a dark corner,' Copus-Campbell recalls. 'All she did was pull her hair back.'

The woman had been horribly disfigured by her husband.

The experience haunted Copus-Campbell. It persuaded her not only of the need to support domestic violence survivors in the workplace but also to spend a lot more time 'listening and not telling'.

Bel isi PNG started with a donation from Bank South Pacific – a building. The bank's head of support services, Alicia Sahib, suggested its disused single men's quarters could be converted into a safe house after she learned bank employees were accessing other shelters. 'That was a shock to me,' Sahib says.

Steamships Trading Co. provided office space for the case management centre, which is operated by Femili PNG, a non-governmental organisation that tackles family and sexual violence. The Oil Search Foundation agreed to design, manage and help fund the project. Security firm G4S offered free 24-hour transport to safe havens. The Australian Government contributed $4.5 million over five years.

Twelve major companies and organisations have subscribed so far, including ANZ, homeware chain Brian Bell, Exxon Mobil and oil and gas producer Oil Search. Most of these have also implemented policies that address family and sexual violence in the workplace. Copus-Campbell acknowledges only about 15% of Papua New Guineans are employed in the formal sector.

Meanwhile, 85% live in rural areas, where violence is prevalent. In July, women and children were hacked to death with machetes during the slaughter of more than 20 people in the mountains of Hela province, sparking fears of a new era of tribal violence.

Copus-Campbell says survivors of violence who need help in any province can call Bel isi PNG and be connected to local services. 'It's a heck of a lot better than 20 years ago but we still have a long way to go.'

One of the things Papua New Guineans have stressed to Bel isi PNG is the need for men to be involved in advocating for change. The government's strategy on violence notes 'currently very few organisations in the youth or men's sector are active in gender-based violence response'.

In 2013, Kepari Leniata was burned alive in Mount Hagen, in the Western Highlands province of PNG, after she was accused of bringing about the death of a six-year-old boy using witchcraft. Her gruesome murder prompted an outpouring of grief and anger and led to a government crackdown on sorcery related violence.

It was also the catalyst for Eddie Aila to found Warrior Culture, a program that runs workshops in villages, communities and companies to help men overcome violent behaviour. 'When Kepari Leniata was murdered, some leaders were asking for men to be tortured, killed, castrated,' Aila says. 'I felt this language was going to scare men away. I was telling people they have to get men involved to stop family and sexual violence, they are 50% of the family.'

But Aila said that, while there were many programs for women, no one was helping men. 'I started Warrior Culture because I felt no-one was listening to me when I said men don't know how to manage their emotions, men don't talk about it, the expectation is they are macho.'

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

Aila is a sporting legend in PNG who represented his country in rugby league in the 2000 World Cup.

He has also faced his own demons. His partner left their violent relationship when he was 30. 'When she left, I thought she would come back because that is part of the cycle of violence,' Aila says. 'When she didn't come back, the massive void forced me to look inside. I thought, "This is terrible, my boys are going to be like me, and my girls are going to marry someone like me." It forced me to change.'

Warrior Culture is inspired by the *hausman* (men's house) tradition in PNG, where values and norms are taught by elders.

Aila is honest about his own experience. He says men are initially nervous around such a heavy topic, but then open up. They discuss blaming their wives for making them mad, suicide and concerns about infidelity. 'Men are basically feeling scared,' Aila says. 'The pattern is always the same … they don't think they are good enough.'

Aila is among a group of men whom Bel isi PNG has enlisted to help champion change. Another is Powes Parkop, the voluble governor of Port Moresby. Every Sunday, in the predawn streets of Port Moresby, Parkop leads a spirited 8-kilometre community walk, the pace more a gallop than a Sunday stroll.

The walk is about promoting health but is also a symbolic reclaiming of the streets for women and girls. Many carry banners calling for a safe city. At walk's end, on a makeshift stage on the side of the road, Parkop delivers a rousing sermon to the assembled crowd: stop violence against women, stop spitting betel nut, stop littering.

'The future will not clean itself,' he booms. 'The problem of violence in our city and our country is not a women's problem. It is our problem because men are insecure.'

But not all male champions of change are high-profile. Ovia Hekau lives with his wife and three daughters in a traditional stilt house in the village of Hanuabada on Port Moresby's coastline. The family fish through a hole in the lino on the kitchen floor. 'Christ is the head of this house,' says a sign in the living room.

Hekau works as a driver for the Oil Search Foundation and when he heard the male champions of change program discussed in the car, Hekau said he was keen to be involved.

'I would see my dad bashing up my mum,' he says. 'The arguments were loud, it was really frightening. I was five, maybe six years old … just sitting and crying.'

Hekau vowed not to repeat the past when he had his own family, 'It wouldn't put a good picture for my children.'

Community members often seek Hekau's counsel. He advises them not to hit their partners if they hear they have been unfaithful. 'After belting your wife [if] you find out what you heard is not true, you will definitely regret it,' he tells them.

Hekau's wife, Vavine, says her husband's friends and cousins look up to him. 'He doesn't take sides against the wife, for him wife-bashing is wrong,' she says softly. 'I am so proud he is not like his dad.'

*Saina's name has been changed to protect her identity.

ISBN 978-1-108-86281-3 Milgate et al.

10.3 Non-legal responses

Legal mechanisms have been put in place to overcome the historical and cultural barriers that women still face. There are also some very effective informal measures that keep the issues of women on the political agenda.

Trade unions

In the early part of the twentieth century, unions were against women's full participation in the workplace. As women were paid less than men, unions did not want a situation where employers were able to exploit this cheap labour and force men out of jobs.

Today, unions are strong advocates for the rights of women in the workplace. The Australian Council of Trade Unions (ACTU) lists the following achievements to which the union movement has contributed:

- the principle of equal pay for equal work
- women's parental leave
- improved child care
- universal superannuation
- anti-discrimination and affirmative action (equal employment opportunity) legislation.

A fundamental challenge still facing the ACTU is the fact that the major unions in Australia have a much lower percentage of women at the executive level than among the general membership.

Most recently, the ACTU campaigned for paid maternity leave, which it believes is a fundamental human right and a necessary measure to address the discrimination and disadvantage suffered by women are parents. At least 157 countries have some form of paid leave, and of those 30 are member states of the Organization for Economic Co-operation and Development (OECD). Without paid maternity leave, women face a lack of job security and income loss if they take time off after bearing a child. Paid maternity leave gives mothers time to bond with and breastfeed their babies without financial considerations necessitating an early return to work.

In 2011, the federal government introduced 18 weeks' paid parental leave for working women.

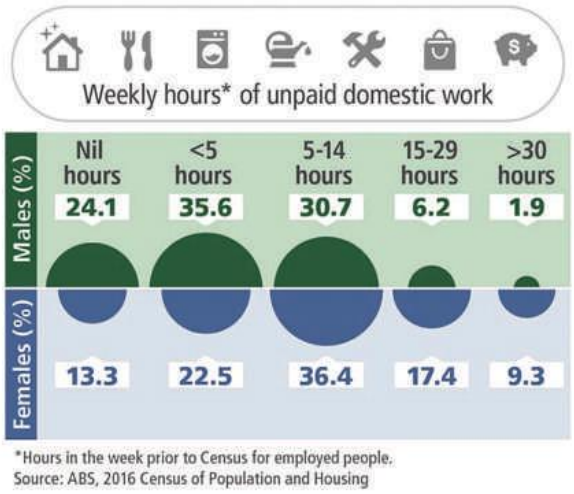


Figure 10.10 Statistics show that women continue to do more housework than men.

The scheme extends paid leave to either parent of a new born child if he or she is the primary carer and earns less than $100 000 per year. The decision was welcomed by parents, the union movement, and past Sex Discrimination Commissioner Elizabeth Broderick. Other commentators have commended the change arguing law and policies making it easier for fathers to take a greater role in child care are necessary in order for women to have true choices. In 2019, the scheme is still in operation and over time it will ideally become one of the 'norms' accepted for women in the workplace.

Lobby groups

There are non-government organisations (NGOs) throughout Australia that promote issues important to women. A well-known NGO is the Women's Electoral Lobby, founded in 1972. The Women's Electoral Lobby is dedicated to 'creating a society where women's participation and their ability to fulfil their potential are unrestricted, acknowledged and respected and where women and men share equally in society's responsibilities and rewards'. The Women's Electoral Lobby is a self-funded, non-profit organisation, not affiliated with any political party that lobbies governments, publishes research papers, participates in public debate, participates in legal cases where women's human rights are at issue and conducts campaigns to raise awareness of these issues.

ISBN 978-1-108-86281-3 Milgate et al.

Research 10.4

1 Find the Office for Women's website. From the 'Current Initiatives' section of the website, select two issues from these categories: 'Women's Economic Security'; 'Women's Safety'; 'Leadership'. Research these issues.
2 View the Women's Electoral Lobby website and research two policy positions of the group. Write a one-page report on what you discover.

10.4 Effectiveness of responses

The law is constantly evolving through legislation and the courts to reflect the changing values of the society it is meant to regulate. Over the past 30 years, women in Australia have seen landmark legislation passed addressing the issues they face, especially in the workplace.

In spite of the many improvements that women have fought for and achieved, there are still many areas that require constant vigilance and persistence in order for change to occur. It is in this light that the legislation and mechanisms for achieving justice for women will be evaluated. We will look at the responsiveness of the law in relation to Australia's international obligations under CEDAW, discrimination, equality of opportunity (especially in the workplace), and issues emanating from these such as pay equity, **gender segregation**, sexual harassment and child care.

gender segregation
the separation of people according to their gender

International

Women around the world are exploited and abused as a result of their unequal position under the laws of their countries. The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW) was a significant step forward in highlighting the issues and getting states to commit to ending discrimination against women.

States can choose to comply with or ignore their international obligations and usually act out of economic or political self-interest in determining their course of action. CEDAW is one of the treaties most ignored by states. Those states that have signed the treaty have included many **reservations**, which allow them to refuse to comply with certain parts of the treaty. Hence, the Committee on the Elimination of Discrimination against Women is not able to declare a state to be in violation of the treaty where it has entered certain reservations. The committee can only continue to encourage states to review their current reservations.

reservation
a statement made by a state when signing or ratifying a treaty that allows it to exclude certain provisions or modify them as they apply to the state's own practice

Upon ratification, the Australian Government entered a reservation with respect to paid maternity leave, which it has now complied with. It also entered a reservation stating that it 'does not accept the application of CEDAW in so far as it would require alteration of defence force policy that excludes women from combat duties'. Women in the Australian Defence Force now serve in combat areas, but structural and cultural discrimination is still very much evident in the defence forces. The *Treatment of Women in the Australian Defence Force* review, released in August 2012, revealed that one in four women in the defence forces had experienced some form of sexual harassment and this continues to be an ongoing cultural challenge today. It may be some time before such entrenched cultural attitudes towards women are overcome. Due in large part to states' reservations, there are still many areas where women experience discrimination and violations of their human rights. It is believed that there are at least four million women and girls sold into sex slavery each year and that approximately a quarter of all women experience domestic violence. It is estimated that up to 130 million women are victims of genital mutilation. Literacy is still a major cause

ISBN 978-1-108-86281-3 Milgate et al.

of concern: two-thirds of all adults who are illiterate are women. This is a consequence of poor education opportunities for girls compared to boys, especially in developing countries. Women are also four times more likely to be infected with HIV/AIDS than men, and up to 130 million women die from this disease each year. Education about the spread of AIDS and programs that address specific health issues relating to women are not adequate in many poorer countries.

At the same time, 189 countries have ratified CEDAW and have passed laws consistent with the treaty. Millions more girls now receive a primary school education and millions of women have been able to take out loans or now have the right to own or inherit property in their own right. The issues listed above are now well established on the global agenda, whereas prior to CEDAW they were isolated issues in different countries, the extent of which was not effectively monitored.

An **optional protocol** has been approved by the UN General Assembly to provide an additional enforcement mechanism, as exists with most other human rights instruments. This would allow individuals and groups to be able to make a direct complaint to the CEDAW committee about alleged breaches of the treaty. The optional protocol does not add extra rights. Rather, it tries to improve the enforceability of the existing instrument.

optional protocol
an addendum to a treaty, agreed to by the parties at a later date, to create enforcement provisions or to interpret the treaty in light of later developments

The Australian Government signed the optional protocol in 2008, thus sending a message to the international community about its commitment to the treaty. Australia has a good record with respect to laws and policies for women, compared to other countries in the world. The *Sex Discrimination Act 1984* (Cth) is one such mechanism.

Critical assessments have suggested that there are gaps in our laws with respect to women.

Figure 10.11 A picture of Japanese Prime Minister, Shinzō Abe, behind a statue of a teenage girl that symbolises the 'comfort women' who served as sex slaves for Japanese soldiers during World War II. This photo was taken at a demonstration held near the Japanese embassy in Seoul, South Korea, on 18 September 2019. The demonstration was demanding the Japanese Government formerly apologise for its use of Korean women as forced labour during World War II. On the day of the demonstration, South Korea officially dropped Japan from its 'white list' of trusted trade partners.

ISBN 978-1-108-86281-3 Milgate et al.

For example, the Australian Human Rights Commission 1999 report, *Pregnant and Productive* discussed the idea that it is a right, not a privilege, to work while pregnant, and pointed out gaps in the coverage of federal anti-discrimination legislation regarding that issue. Other critics have noted that the Sex Discrimination Act fails to take into account the fact that gender may combine with other characteristics of a person (e.g. race, disability or sexuality), resulting in different forms of disadvantage. In other words, it is not the case that discrimination is the same for all women, regardless of their individual attributes. Moreover, its reliance on complaints by individuals or groups directly affected, rather than addressing discrimination at the systemic level, makes enforcement problematic (see Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives', *University of New South Wales Law Journal*, 2004, p. 53).

The Australian Human Rights Commission argued that Australia's signing on to the optional protocol would provide the will to correct such deficiencies, as individuals then would be able to complain directly to the committee, putting added pressure on the Australian Government.

Domestic

Anti-discrimination legislation

State and federal anti-discrimination Acts provide far-reaching protection to women who experience any form of discrimination in the workplace. There are few restrictions placed on women as to what work they do. This is to some extent due to anti-discrimination law. Women today have moved into the workforce in unprecedented numbers.

The effectiveness of the legislation may, however, still be limited by a lack of knowledge of rights or reluctance to exercise those rights. This can be for many reasons such as fear of dismissal, failure to recognise that there is a problem, or being unaware that such rights exist in the first place.

Most of the blatant forms of discrimination have disappeared due to complaints made against employers and the educative effect of the laws. Discrimination today is usually more subtle and covert. Generally these types of discrimination involve systematic practices of disadvantage. If an employer has such a practice or policy that does disadvantage women, it is not illegal if the court believes it to be 'reasonable' (s 7B *Sex Discrimination Act 1984* (Cth)). This may go part of the way towards explaining the **glass ceiling** that women have described as an impediment to their career progress.

glass ceiling
an invisible barrier that prevents women from rising in an organisation through promotion; on the face of it, a company may not directly discriminate, but subtle practices may still discourage women or prevent them from being promoted to more responsible and better-paid positions

There are other factors that limit the effectiveness of the legislation in redressing grievances. Even if a complainant wins the case and is awarded damages, a woman may have to return to a hostile work environment. On top of this, the cost – economic and emotional – may be extensive.

Proving that an employer or other person has discriminated against a complainant can be difficult, and most of the time impossible. At the same time, the *Sex Discrimination Act 1984* (Cth) has enabled some important cases to be won. In 1994, a woman won $160 000 after losing her career and a position as a partner in a law firm. This was the largest award

Review 10.8

1. Explain, with examples, why there is a need for treaties such as the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) (CEDAW).
2. Define reservations and how they limit the effectiveness of CEDAW.
3. Evaluate the extent to which the Australian Government has implemented the provisions of CEDAW.
4. Outline how the signing of the optional protocol for CEDAW will strengthen the enforcement of the treaty.

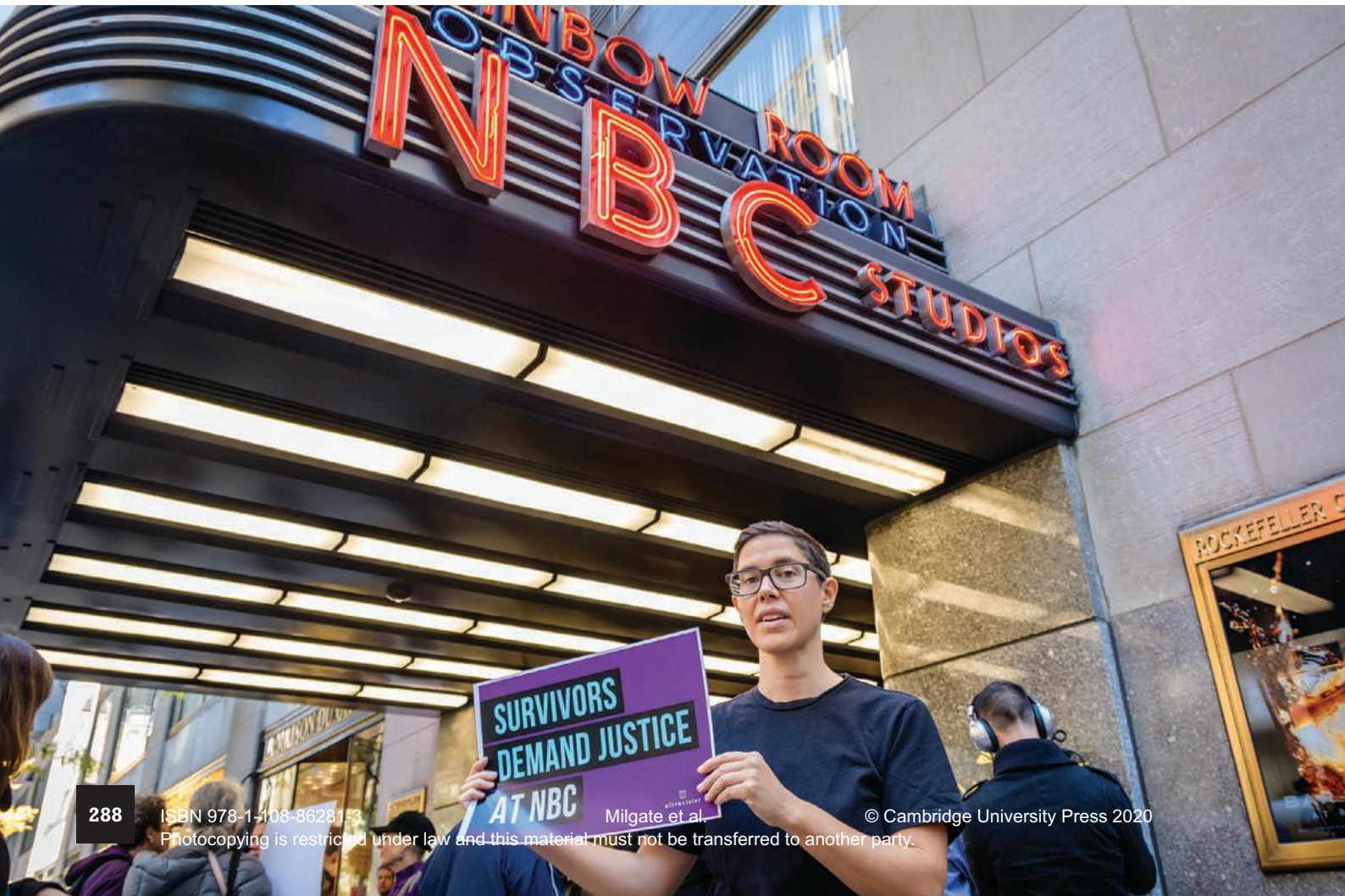
ISBN 978-1-108-86281-3 Milgate et al.

under the Act at the time, but many would argue that this is a small amount for a career. A study completed in 2012 by Paula McDonald at the Business School at the Queensland University of Technology, and Sara Charlesworth of the University of South Australia, found that half of all financial settlements for sexual harassment were below $7000. These amounts are significantly lower than what might be achieved through the judicial system. Redress through the courts, however, is out of reach for most women due to time and cost.

The provisions of the *Sex Discrimination Act 1984* (Cth) about sexual harassment have been effective in that the only requirement is to show that the unacceptable behaviour actually took place. Complaints of sexual harassment remain high, but this could also be attributed to women's greater awareness of their rights. The #MeToo movement has further highlighted the inadequacies of formal legal and non-legal mechanisms in place and how they have been fundamentally undermined by the power imbalance that still exist in many workplaces and in other parts of society.

The Australian Human Rights Commission estimates that one in five women and one in 20 men experience sexual harassment in the workplace. Its data continues to show that approximately 20% of complaints received by the Australian Human Rights Commission were under the *Sex Discrimination Act 1984* (Cth), and that a high percentage of these complaints relate to sex discrimination in the workplace. New technologies, including mobile phones, email and social networking, have increased opportunities for sexual harassment by providing new ways in which it may occur. Conversely, the digital footprints these avenues leave also enables evidence to be gathered. The Australian Human Rights Commission estimates that over two-thirds of those who made a complaint left their place of employment. Although unmeasured, the economic cost to employers and the community as a result of this staff turnover is a poor use of human resources.

Figure 10.12 Members of UltraViolet – a women's advocacy organisation – outside the NBC News headquarters in New York City on 23 October 2019. The UltraViolet members delivered a petition with more than 18500 signatures calling on the network to take immediate action to address abuses of power at NBC.



ISBN 978-1-108-86281-3 Milgate et al.

It also reflects a residual lack of respect for female colleagues in the workplace, as most of the complainants are women.

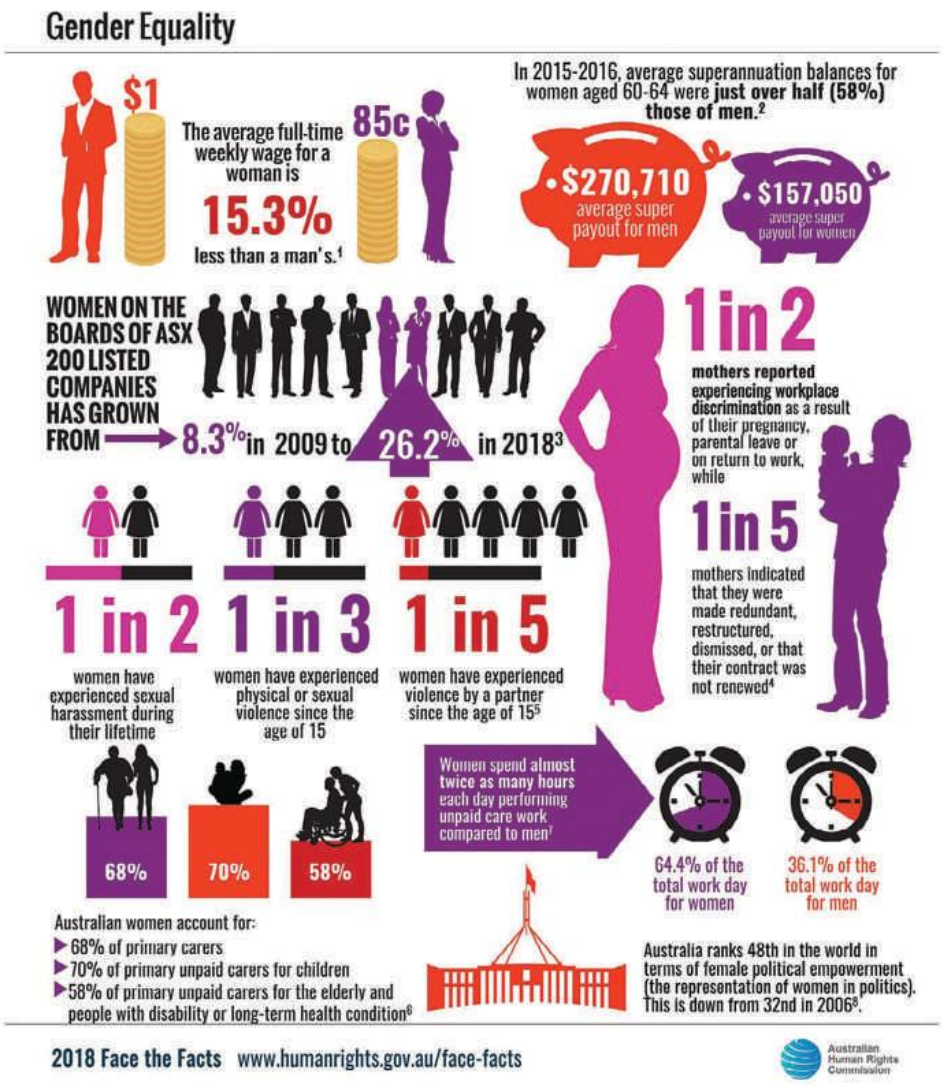
In spite of some of the criticisms outlined above, the *Sex Discrimination Act 1984* (Cth) has continued to evolve. In 1992, the Act was amended to ban discrimination on the basis of the occupation or identity of one's husband or wife. The idea of 'reasonableness' as a defence for direct discrimination on the grounds of pregnancy was also removed.

In indirect discrimination cases, the onus of proof is on employers to provide a defence as to why systems and policies alleged to be indirectly discriminatory are reasonable and necessary. The definition of 'sexual harassment' has also been strengthened, with the complainant only having to show that she or he 'reasonably' felt offended, humiliated or intimidated.

In 1994, amendments extended the scope of protection under the Act. One of these measures was to simplify the definition of 'indirect discrimination'. The number of exemptions under the Act, such as those relating to superannuation and insurance, has also recently been reduced.

It should be noted that the difference between the anti-discrimination and equal opportunity laws

Figure 10.13 Statistics from the Australian Human Rights Commission illustrate the degree of gender inequality that still exists today.



References: [1] Workplace Gender Equality Agency, *Gender paygap statistics* (February 2018) p. 1; [2] Ross Clare, *Superannuation account balances by age and gender*, Association of Superannuation Funds of Australia Ltd. (October 2017) p. 5; [3] Australian Institute of Company Directors, *Statistics regarding gender diversity on boards* (2018); [4] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review - Report* (2014) p. 8; [5] Australian Bureau of Statistics, *4906.0 - Personal Safety, Australia - Key findings* (2016); [6] Australian Bureau of Statistics, *4430.0 - Disability, ageing and carers, Australia: Summary of Findings*, 2015 (October 2016); [7] Workplace Gender Equality Agency, *Unpaid care work and the labour market* (November 2016) p. 4; [8] World Economic Forum, *Global Gender Gap Report 2017* (2017) p 10.

ISBN 978-1-108-86281-3 Milgate et al.

is that discrimination legislation is complaint-based, whereas the *Workplace Gender Equality Act 2012* (Cth) is based on the introduction of programs to eliminate discrimination at a systemic level. This Act has failed to significantly improve the representation of women in senior management and boards of Australia's top 200 companies. While there have been some successes in introduction of equality of opportunity programs in some workplaces, it seems that structural and cultural impediments to equality of opportunity for women in the workplace continue to prove difficult to overcome (read the article, 'Australia makes big strides in closing gender gap, global survey finds', above).

Under-representation of women has again been highlighted in the federal parliament in 2019 within the forty-sixth parliament of Australia. The Labor Party, which introduced a quota system, has approximately 47% representation of women, which is seen as significant progress. The Coalition government has increasingly come under fire for its lack of progress in this area. The Liberal Party is at 23% representation of women, and the National Party has 28%.

Pay equity

For many years the earnings of women have not matched those of men. Historically, women have always on average earned less than men, but since the 1970s this gap has been closing. For many advocates of economic equality for women, pay equity is an issue yet to be resolved.

Major developments in pay equity for women came about because of the following two test cases:

- equal pay for equal work case (1969)
- equal pay for work of equal value case (1972).

The equal pay for equal work case established that women doing the same work as men should receive the same pay. The equal pay for work of equal value case introduced the concept that different jobs of the same worth should get the same minimum wage. On the face of it, women's struggle to achieve equal pay had taken a quantum leap and justice had finally been achieved. What was not recognised were the explicit and implicit barriers confronting women in the workforce then and today, preventing women achieving pay equity with men.

Some of the reasons for a lack of pay equity with men are as follows:

- Women are less likely to be the recipients of over-award payments than men. Women receive approximately 54% of these type of payments compared to men. These payments are typically paid in occupations where there are skill shortages, usually in highly unionised, male-dominated occupations.
- Comparative worth – some occupations that predominantly employ women have been deemed to require fewer skills than occupations dominated by men, even when the educational barriers for entry are clearly higher for the predominantly female occupation. This can be seen in nursing, in which pay lags behind trades such as plumbing. In essence, occupations with a high proportion of women are undervalued.
- Less overtime – women are generally located in occupations that receive less overtime.
- Skills-based career paths – women are generally less likely to access accredited workplace training and education, even though they have the same educational qualifications and competencies as men.

The pay equity gender gap is still a cause for concern for the federal government.

Gender segregation of the workforce

Australia has one of the most sex-segregated workforces in the developed world. This means that women do not perform the same work as men. Women generally work in different jobs and different industries. Hence, some occupations have come to be considered 'female'.

This becomes apparent when one considers the following statistics. In 1992, the Commonwealth Government report *Half Way to Equal* stated that 55% of women worked in two occupational groups – clerks and salespeople, and personnel services – whereas men were spread over a range of occupations. Evidence also suggested that sex segregation was increasing. For example, women comprised 98% of typists and 1% of tradespersons in the fields of electrical and metal fitting and machining at the time of the report.

In 2016 in New South Wales, there was still a significant gender imbalance of nursing professionals

ISBN 978-1-108-86281-3 Milgate et al.

and teachers. In contrast, in science, building and engineering professions a high percentage are men.

On getting women to enter non-traditional areas of employment, it is suggested there is what is known as a 'threshold of normality'. When women comprise at least 15% of an industry workforce, this becomes sustainable in that young women have sufficient role models to encourage their participation in that industry.

In addition to this, Australian women currently spend about 36 hours per week on unpaid work – the second shift (men spend around 14.5 hours).

Patterns of employment

More women than men are likely to work part-time; hence, women earn less and are less likely to access work benefits. In 2012, women comprised 45.6% of all employees: 54% of women worked full-time (24.7% of all employees) and 46% worked part-time (20.9% of all employees). This affects women's superannuation contributions and hence their retirement benefits. It also affects their capacity to save.

Women often work in industries that are poorly unionised and they tend not be represented in the union structure. The enterprise bargaining system set up under the *Fair Work Act 2009* (Cth) assumes that all workers approach the bargaining table on a level playing field. However, a concentration of women in lower-paid jobs requiring fewer skills has made women vulnerable in respect to pay and conditions. The continuing deregulation of the workplace in the name of flexibility and choice will further influence pay equity for women and seriously undermine equality of opportunity in the workplace.

Child care is an example of an industry where the employees are predominately women who are poorly paid. In recent years, there have been mounting calls to improve the pay of childcare workers.

Equal opportunity in the workplace

The *Workplace Gender Equality Act 2012* (Cth) is the main piece of federal affirmative action legislation. The main provisions of the Act and the overseeing of the Act by the Workplace Gender Equality Agency

Figure 10.14 More women than men are likely to work part-time; hence, women earn less and are less likely to access work benefits.

ISBN 978-1-108-86281-3 Milgate et al.

Review 10.9

1. Define 'pay equity'. Identify the extent to which women experience pay inequity on a proportional basis to men.
2. Explain, with examples, at least three reasons why pay equity for women is still an issue in Australia today.
3. Define what is meant by the phrase 'gender segregation of the workplace'.
4. Outline reasons why gender segregation contributes to pay inequity for women.
5. Explain what is needed to get women into areas of employment that are not traditionally 'women's jobs'.

were discussed earlier. Affirmative action legislation has been in place since 1996. The extent to which it has made a difference to the equality of opportunity of women in the workplace can be gauged by the real choices that women have.

The *Workplace Gender Equality Act 2012* (Cth) encourages organisations to design workplace programs that promote 'the elimination of discrimination on the basis of gender'. One measure of success is the proportion of women who are in company board and executive management positions. In 2011, the EOWA census results showed that any significant change was melting away. It found that only 3% of the top companies had a female chief executive officer. Anna McPhee, a previous EOWA director, has been quoted as saying 'there was systematic discrimination against women in the workplace and that the top companies were still boys' clubs'. She also stated that women who were trying to get to the top faced a hostile culture, were belittled and harassed, and their skills were not taken seriously: 'the white male that could work 100 hours a week was still the most desired manager in an inflexible workplace' (Source: *Daily Telegraph*, 28 October 2008).

It is clear that women are confronted by the glass ceiling. This refers to a situation in which women can see a career path, but they are unable to progress past a certain level for a variety of reasons. Evidence suggests that it is indirect discrimination that contributes to this effect as it creates barriers to equal employment opportunities, and that it is rife in both the private and public sectors.

According to the EOWA, at the current rate of progress, employment equity for women will come in approximately 177 years. They also estimate that fewer than 20 employers have 'made significant achievements in reshaping their workplaces to make them more accommodating of a diverse workforce, including the needs of parents'.

It was also suggested that most of the employers who reported to EOWA were doing the minimum to get by under the *Workplace Gender Equality Act 2012* (Cth). They still saw equality of opportunity as an additional expense to be carried by them. The reality is that when effective Equal Employment Opportunities programs are introduced they can deliver real savings.

While the rate of affirmative action progress to date has been uneven, it appears that organisations with a history of workplace segregation, where women are paid lower rewards, and where women have less access to training and promotion, need sustained affirmative action if real change is to occur.

At the same time, the *Workplace Gender Equality Act 2012* (Cth) does enjoy sufficient community support to ensure that companies comply. The naming sanction ensures a high rate of compliance.

This support, however, is not matched by a good working knowledge of the issues facing women in the workplace and hence the development of programs that genuinely try to address these issues. One of the challenges faced by EOWA (and now WGEA) is to continually educate organisations and the wider community about the invisible barriers that inhibit women from being given opportunities to fill senior management and leadership roles. Given that women now make up 46% of the workforce, and comprise 56% of university graduates, they are well under-represented in many areas.

ISBN 978-1-108-86281-3 Milgate et al.

> One of the biggest challenges we face in making the labour market more equitable remains how best to make workplaces family friendly. This includes some flexibility in allowing women and their partners to juggle work and family through more flexible hours of work, access to working conditions in part-time and casual employment etc. It is also about developing policy and practices that support and acknowledge that the stage in a family's life when raising children, especially in the early years, is short term in the context of a person's working life and allowances need to be made to allow families to better manage this.
>
> Human Rights and Equal Opportunity Commission, *Paid Maternity Leave Submission*. July 2002.

Paid maternity leave is also one way to minimise the separation that women experience from the workplace after childbirth. Australia's reservation to paid maternity leave under the CEDAW meant that the federal government for many years resisted such a scheme. A national Paid Maternity Leave scheme finally appeared on the political agenda of the Rudd Labor government. The 2008 economic crisis caused this to be again delayed – just as community support for such a move was gaining momentum. It was introduced in 2011 and is a positive step forward for women who interrupt their careers to have a family. The 2011 scheme is still in operation in 2019.

Quality, affordable child care is critical for women in finding the balance between work and family. However, the high costs of having children in long day-care is an economic hurdle that women and their families weigh up before deciding whether or not one parent returns to the workplace after having children.

Nationally, there are calls to arrest the declining birth rate, which is at 1.77 children per couple, below the replacement level of 2.1. An ageing workforce also presents challenges in maintaining a skilled workforce and our tax base. At present these two issues are mutually exclusive and only a radical rethink of workplace practices will provide workable solutions. The 'Fertility Decision Making Project' (2003) conducted by the Australian Institute of Family Studies found that 95% of respondents wanted children. It also found that they generally desired a larger family than what they would have in reality. The reasons given for this were concerns such as job insecurity and difficulties in managing work and family responsibilities.

The federal government has taken a positive step forward in setting up an inquiry, 'Balancing Work and Family'. Submissions from individuals and organisations have been taken to hear what the pressing issues and barriers to achieving this balance are. The decisions around juggling work and family should not be the sole responsibility of women. It is about how to achieve the best outcomes for all members of families. Giving more flexibility to share the load is just as important for men as for women. Essentially it is about choice. See article 'Australia makes big strides in closing gender gap, global survey finds'.

Figure 10.15 A child care centre at Anne Arundel Community College in Arnold, Maryland, USA. College students can face another financial hurdle in completing their education: the cost of child care. In many parts of the country, childcare costs rival the cost of college tuition. Some colleges are looking ahead and opening childcare centres on campus.

ISBN 978-1-108-86281-3 Milgate et al.

In Court

***Australian Iron & Steel v Banovic* [1989] HCA 56**

This landmark case involving indirect discrimination revolved around Australian Iron and Steel's retrenchment policy of 'last on, first off' (i.e. the last employees to be hired last are the first to be retrenched). On the face of it, this seems a reasonable policy to adopt; however, it adversely affected women because the company had only begun to employ women after many years of only employing men. The High Court found this policy imposed a condition 'in which a substantially higher proportion of one sex cannot comply than the other sex'.

It was also argued that discriminatory hiring policies in the past meant that more men were in senior positions that were immune to the retrenchment policy. The High Court deemed this to be discriminatory. It concluded that 'retrenchment policies that kept alive the effects of past employment discrimination constituted, themselves, sex discrimination'.

Review 10.10

1. Explain the principles of 'equality of opportunity' in the workplace.
2. Define the term 'affirmative action'.
3. Explain what is meant by the 'glass ceiling'.
4. Assess how effective the Workplace Gender Equality Agency has been in achieving attitudinal change in the organisations that report to it.
5. Outline why paid maternity leave and quality affordable child care are important issues for women in the workplace.
6. Discuss to what extent progress has been made in Australia with regards to 'affirmative action' in the workplace.

Research 10.5

1. View the Workplace Gender Equality Agency's website and find the media meleases section. Select two recent media releases and construct a short fact sheet to present to the class.
2. On the internet, look up 'gender quota systems in the workplace'. Outline what quota systems are in relation to equal opportunity. Brainstorm the advantages and disadvantages of having a quota system, as is currently the case in the United States.

Review 10.11

Draw a table with two columns headed 'strengths' and 'weaknesses', then construct a list of the strengths and weaknesses of the *Sex Discrimination Act 1984* (Cth).

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- Women historically were treated as second-class citizens. They were explicitly discriminated against in the areas of marriage, property, the right to vote, the ability to sue and enter contracts, and jury service.
- Today women enjoy the same rights as men in most of these areas, but still experience economic, legal and social disadvantage.
- Women from non-English-speaking backgrounds and Aboriginal and Torres Strait Islander women face additional barriers to equality of opportunity.
- The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) is the international treaty specifically addressing the many areas in which women experience discrimination.
- In Australia, anti-discrimination and equal opportunity legislation have been passed at federal and state levels. The chief Acts discussed in this chapter are the *Sex Discrimination Act 1984* (Cth), the *Anti-Discrimination Act 1977* (NSW) and the *Workplace Gender Equality Act 2012* (Cth).
- The Australian Human Rights Commission is a statutory body set up to administer the five federal anti-discrimination laws, one of which is the *Sex Discrimination Act 1984* (Cth).
- The Workplace Gender Equality Agency is a statutory body. One of its main functions is to oversee the development of equality of opportunity programs within organisations that are required to report under the *Workplace Gender Equality Act 2012* (Cth).
- Two legal mechanisms that exist to promote the rights and equality of women are the federal Office for Women, and Women NSW. These bodies attempt to influence legislation and policy as it applies to women.
- The Australian Council of Trade Unions and the Women's Electoral Lobby are non-government groups that campaign on issues concerning women, especially in the workplace.
- The effectiveness of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) is limited by the many reservations by states. The strength of this convention is dependent on states affirming its principles in domestic legislation.
- The effectiveness of the *Sex Discrimination Act 1984* (Cth) is limited by factors such as lack of knowledge of rights, reluctance to exercise rights, and the difficulty of proving discrimination.
- The *Sex Discrimination Act 1984* (Cth) has been strengthened by amendments that extend its scope, and remove certain exemptions and defences. The only requirement in sexual harassment cases is to prove that the offensive behaviour actually took place. The onus is on the employer to show why indirect discrimination was 'reasonable'.

Questions

Multiple-choice questions

1 Which of the following statements about women's historical status is **not** true?

a Women have been seen as essentially different from men and therefore expected to have different social roles.

b Women's jobs have been valued less and paid less.

c Events such as wars, despite their enormous social cost, have sometimes also provided opportunities for women.

d Women have not always had the same rights as men because in the past, most women preferred traditional social roles.

2 Which of the following statements relating to women's workforce participation is true?

a Part-time and casual workers usually have the same work conditions as full-time workers, and they are paid the same, proportional to hours worked.

ISBN 978-1-108-86281-3 Milgate et al.

b Workplace relations laws relating to pay and conditions are enforced more strictly in relation to labour hire firms and companies contracting 'outworkers'.
c Many migrants to Australia have difficulty getting jobs suited to their qualifications, which may not be recognised, and they may face the additional challenge of learning English.
d Aboriginal and Torres Strait Islander and migrant women have a lower unemployment rate than other Australian women, but they often have trouble getting part-time or casual work.

3 The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) contains:
a anti-discrimination laws that can be adapted to suit a country's cultural traditions.
b provisions condemning discrimination against women and setting out ways in which states are to combat and prohibit sexual discrimination.
c provisions that can be enforced by the UN Security Council or the UN General Assembly.
d a preamble stating that women are biologically the same as men and therefore not entitled to special treatment such as safety precautions at work when pregnant.

4 The *Sex Discrimination Act 1984* (Cth) prohibits:
a unwanted touching and dirty jokes at work.
b indirect discrimination at work unless it is part of a 'reasonable policy'.
c discrimination against doctors' wives because of their husbands' profession.
d all of the above.

5 Australia's signing the optional protocol for the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) will allow which of the following to happen?
a The federal government will be able to pass legislation prohibiting discrimination.
b The Committee on the Elimination of Discrimination against Women will advise states on how best to implement the treaty.
c Individual Australians will be able to complain directly to the Committee on the Elimination of Discrimination against Women.
d The Committee on the Elimination of Discrimination against Women will recommend trade sanctions against states in breach of the treaty.

Short-answer questions

1 Explain why women were treated as inferior to men in early Australian society.
2 Explain the particular barriers experienced by Aboriginal and Torres Strait Islander women and migrant women.
3 Define the term 'equal opportunity'. Outline how it is provided for in Australian law.
4 How is Women NSW different from its Commonwealth counterpart?
5 Assess the effectiveness of non-legal mechanisms in improving the rights of women in the workplace.
6 Explain the limitations that exist for a more effective implementation of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).
7 Discuss the strengths and weaknesses of the *Sex Discrimination Act 1984* (Cth). What reforms have taken place through amendments?

ISBN 978-1-108-86281-3 Milgate et al.

Extended-response question

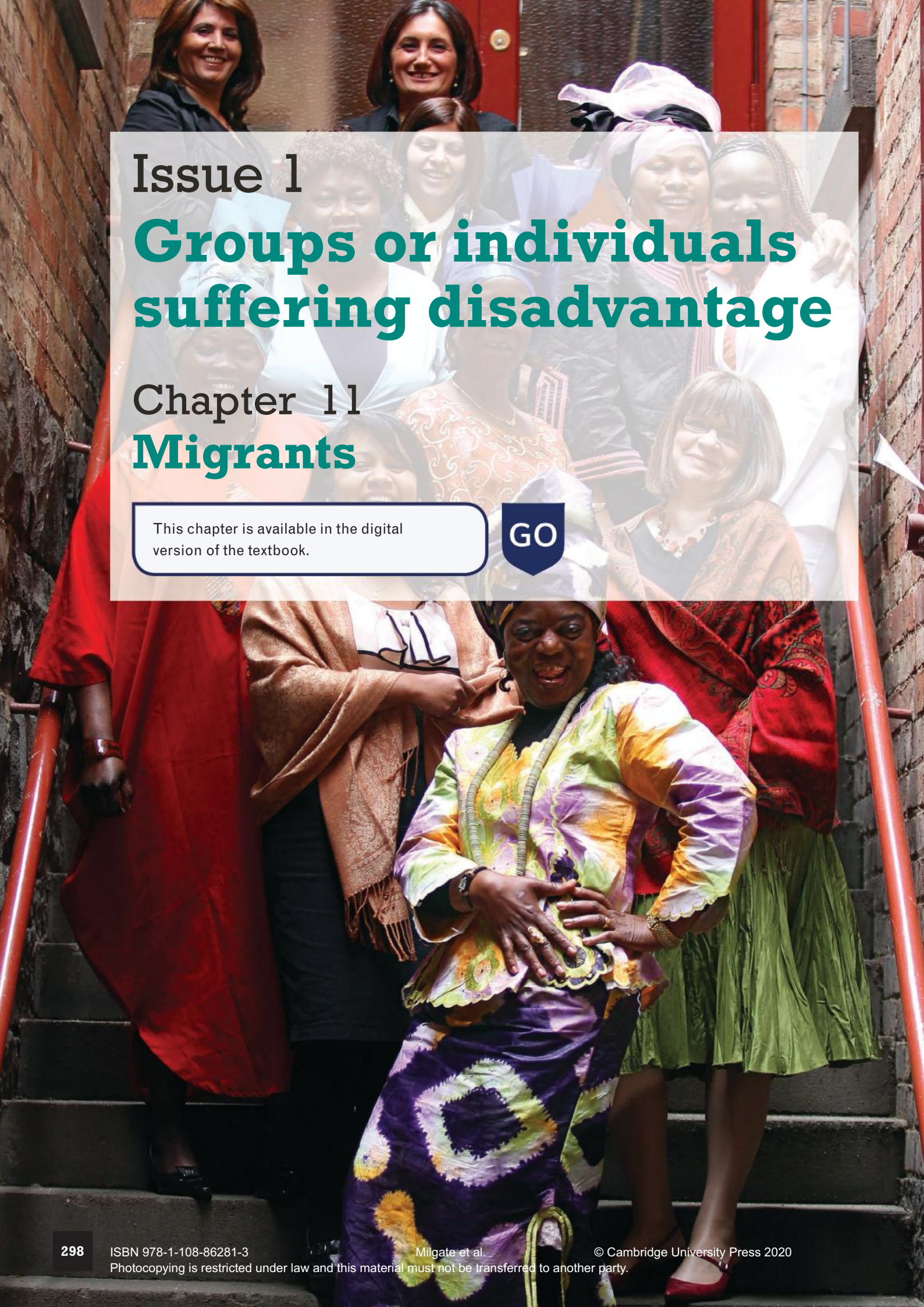
Evaluate the effectiveness of the legal system in dealing with discrimination against women. Read the following quote, the answer the following questions.

> [The ideal worker] works full time and overtime and takes little or no time off for childbearing or child rearing. Though this ideal-worker norm does not define all jobs today, it defines the good ones: full-time blue-collar jobs in the working-class context and high-level executive and professional jobs for the middle class and above. When work is structured in this way, caregivers often cannot perform as ideal workers.
>
> Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (1999, Oxford University Press, New York, p. 1).

1. What consequences do these expectations of the 'ideal worker' have for women?
2. Do these consequences also apply to men? If your answer is 'no', would your answer be different if more men took a more active role in parenting?
3. Suggest some legal and non-legal mechanisms for addressing these consequences.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

ISBN 978-1-108-86281-3 Milgate et al.



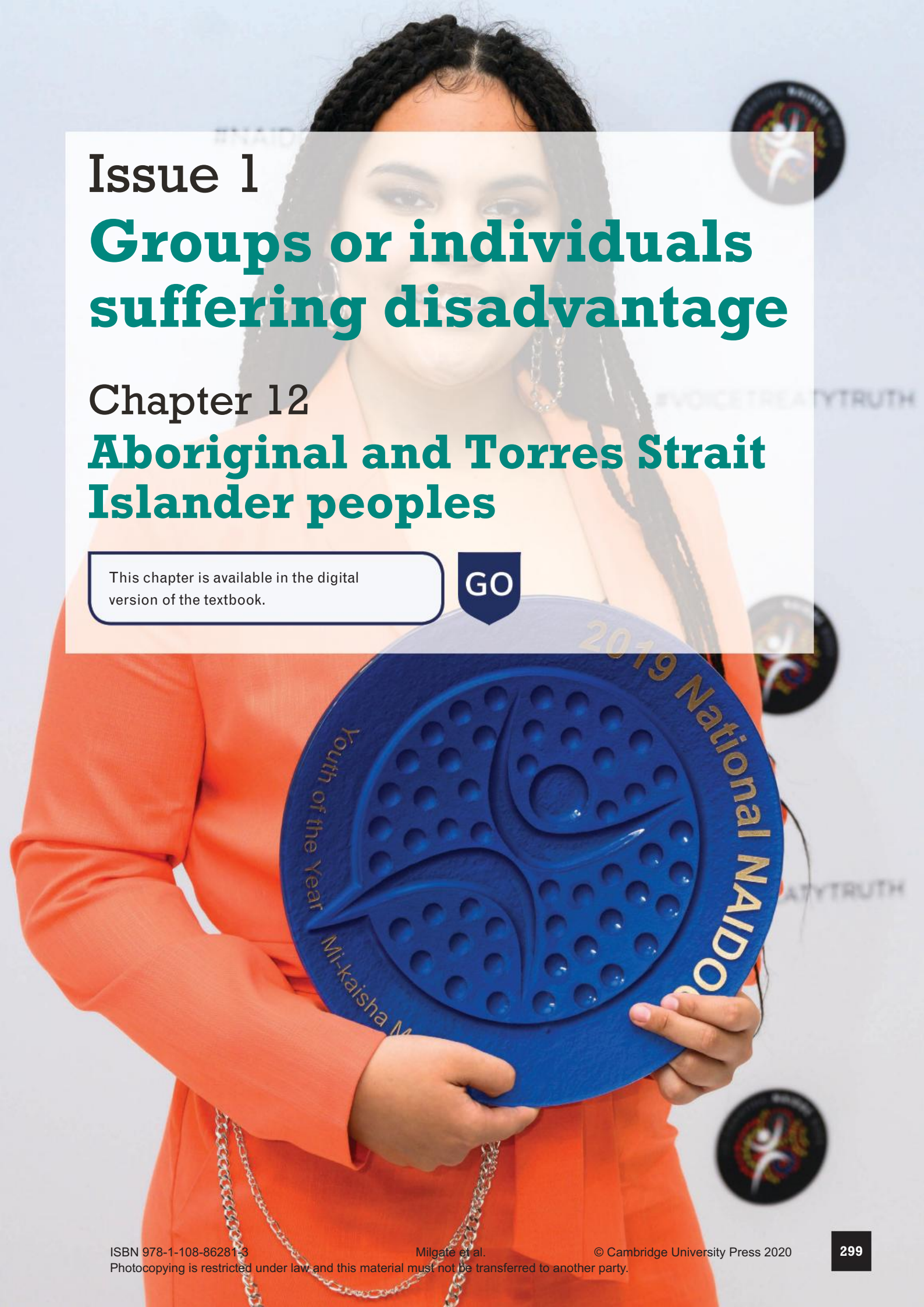
Issue 1
Groups or individuals suffering disadvantage

Chapter 11
Migrants

This chapter is available in the digital version of the textbook.

GO

ISBN 978-1-108-86281-3
Milgate et al.



Issue 1

Groups or individuals suffering disadvantage

Chapter 12

Aboriginal and Torres Strait Islander peoples

This chapter is available in the digital version of the textbook.

GO

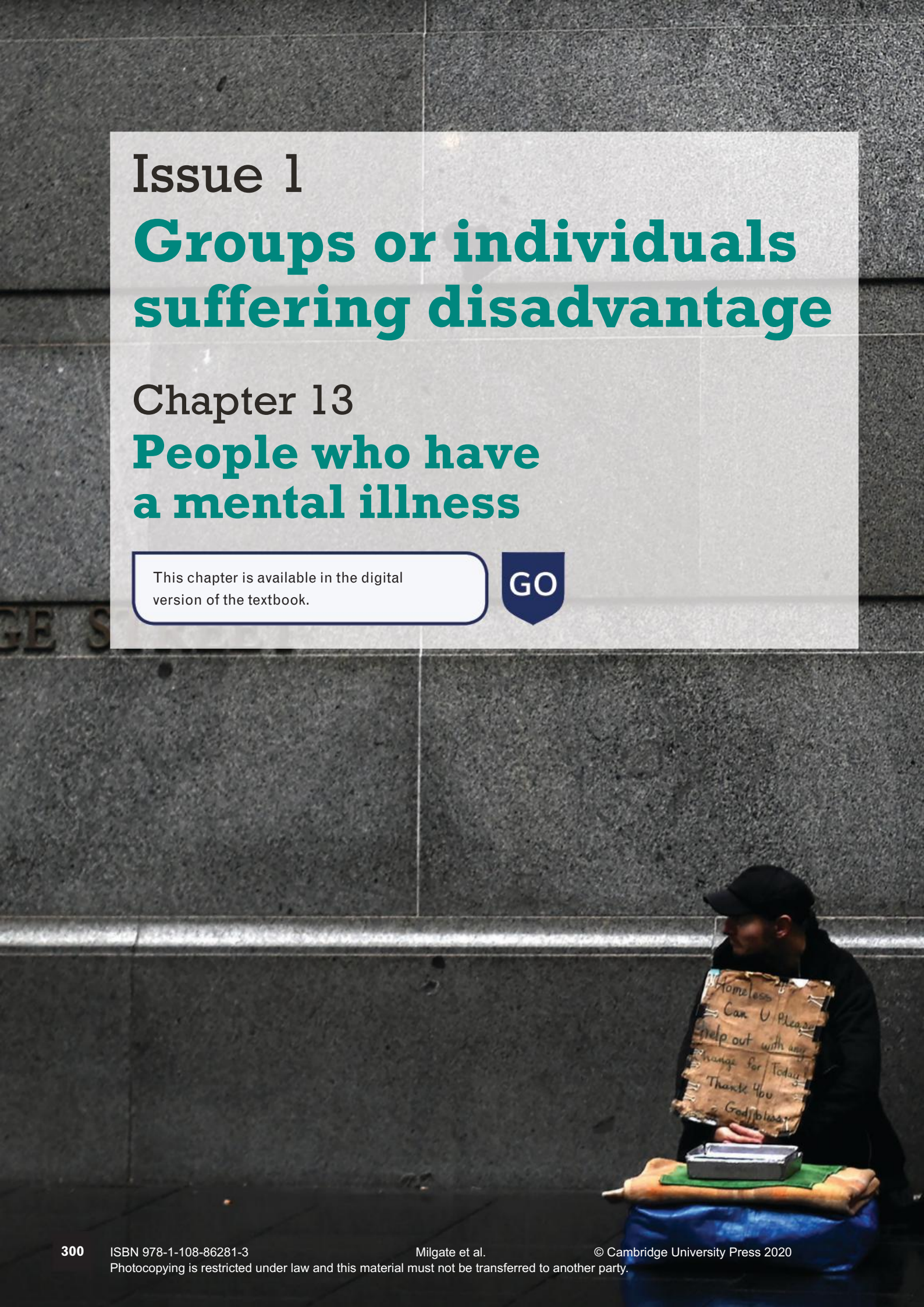
ISBN 978-1-108-86281-3

Issue 1
Groups or individuals suffering disadvantage

Chapter 13
People who have a mental illness

This chapter is available in the digital version of the textbook.

GO



ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3 Milgate et al.

Issue 2
Events that highlight legal issues

Chapter 14
The Bali Nine

Chapter objectives

In this chapter, students will:

- describe the key features of the investigation of transnational crime
- identify the relevant legal terminology in investigating and discussing Australian and Indonesian law in regard to transnational crime
- evaluate the effectiveness of Australia's legal system in achieving justice in fighting transnational crime
- investigate the relationship between society and the Australian and Indonesian legal systems
- recognise differing perspectives on issues related to the death penalty
- locate quality information from authoritative sources using the internet.

ISBN 978-1-108-86281-3 Milgate et al.

Relevant law

IMPORTANT LEGISLATION

International Covenant on Civil and Political Rights (1966)
Death Penalty Abolition Act 1973 (Cth)
Second Optional Protocol to the *International Covenant on Civil and Political Rights* (1989)
Indonesia Law on Psychotropic Substances, Law No 5 of 1997, art 59 (11 March 1997)
Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters (1999)
Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005 (Cth)
Agreement with the Republic of Indonesia on the Framework for Security Cooperation (2006)
Extradition Treaty between Australia and the Republic of Indonesia (2007)

ISBN 978-1-108-86281-3

14.1 A brief history of the Bali Nine

Overview of the case

On 17 April 2005, the Indonesia National Police (INP) arrested four Australians at Bali's Ngurah Rai International Airport: Michael Czugaj, Renae Lawrence, Scott Rush and Martin Stephens. The Indonesian police found heroin strapped to the bodies of these four people. Soon after, Andrew Chan was arrested by INP officers at the airport in Denpasar; Chan's suitcase had 0.01 grams of heroin residue in it. Later that same day, in a hotel in Kuta, Myuran Sukumaran, Tan Duc Thanh Nguyen, Matthew Norman and Si Yi Chen were arrested. The INP found nearly 350 grams of heroin in a bag at the Kuta hotel. This group of nine Australians was planning to smuggle a total of eight kilograms of high-grade heroin into Australia. From this time on, they were known as the 'Bali Nine'. Each of the nine Australians was charged with trafficking heroin and faced the possibility of receiving the maximum penalty of death by firing squad, or a lesser penalty of a life sentence or 20 years in jail.

On 29 April 2015, Andrew Chan and Myuran Sukumaran were executed by firing squad. This act was condemned by many Australians and pleas for clemency were made by the then Prime Minister Tony Abbott and Foreign Minister Julie Bishop. Despite being characterised as the 'king-pins' or 'ringleaders' of the Bali Nine's smuggling operation, Chan and Sukumaran had distinguished themselves as model prisoners during their 10 years in jail. Their executions shocked the nation and had a serious impact on Australia–Indonesian relations.

The international community places a high priority on cooperation in dealing with **transnational crime** and many agreements and treaties have been made between nations to facilitate cooperation. However, the international community is also committed to human rights. Sometimes, there is a clash between cooperation in transnational crime and commitment to human rights. In the case of the Bali Nine, there was a clash between

Figure 14.1 Andrew Chan (second from the left) and Myuran Sukumaran (right) arrive at the Denpasar District Court on 14 February 2006.

ISBN 978-1-108-86281-1 Milgate et al.

TABLE 14.1 The Bali Nine

Name	Age in 2005	From	Role	Sentence (after appeals)
Andrew Chan	21	Sydney	Ringleader	Execution
Si Yi Chen	20	Sydney	Drug mule	Life imprisonment
Michael Czugaj	19	Brisbane	Drug mule	Life imprisonment
Renae Lawrence	27	Newcastle	Drug mule	20 years' imprisonment; sentence commuted and released and deported to Australia in November 2018
Tan Duc Thanh Nguyen	21	Brisbane	Financier	Life imprisonment (died in June 2018)
Matthew Norman	18	Sydney	Drug mule	Life imprisonment
Scott Rush	19	Brisbane	Drug mule	Life imprisonment
Martin Stephens	29	Wollongong	Drug mule	Life imprisonment
Myuran Sukumaran	24	Sydney	Ringleader	Execution

Australia's cooperation with Indonesia in combating drug trafficking, and Australia's commitment to abolishing the death penalty.

transnational crime
crime that occurs across international borders, either in origin or effect

Planning

The nine young Australians had been recruited by contacts they had made in nightclubs in Australia. The heroin was sourced from Thailand and the group was to pick it up in Indonesia and smuggle it into Australia.

Andrew Chan, Myuran Sukumaran and Tan Duc Thanh Nguyen were in charge of this smuggling

Figure 14.2 Photos of the Bali Nine from February 2006. Top row, left to right: Myuran Sukumaran, Scott Rush, Tan Duc Thanh Nguyen, Renae Lawrence; bottom row left to right: Si Yi Chen, Matthew Norman, Michael Czugaj, Martin Stephens and Andrew Chan.

ISBN 978-1-108-86281-3 Milgate et al.

operation. The other six were to be **drug mules**, carrying the drugs from Indonesia to Australia. The drug mules were organised into separate teams and did not know of each other's existence until their arrest. All nine went on a 'holiday' to Bali, Indonesia, which is a very popular destination for Australian tourists.

drug mule
a person who transports drugs; either by concealing drugs in their luggage, by ingesting drugs in pouches, strapping drugs to their body, or concealing them in some other way

Before leaving for Bali, Andrew Chan met Martin Stephens and Renae Lawrence who were staying in room 126 at the Formule One Motel in the Sydney suburb of Enfield. Matthew Norman and Si Yi Chen were staying in the same motel, in room 129. Their suitcases were repacked with items needed for attaching bags of heroin to their bodies such as bandages, fabric bands and tight shorts. Chan flew to Bali on 3 April 2005. The others stayed at the Sydney motel for a few days, and then on 6 April, they also flew to Bali.

Meanwhile, Scott Rush and Michael Czugaj had flown to Sydney from Brisbane and were staying at the Spanish Inn Motor Lodge at Strathfield. They had been invited to Sydney by Tan Duc Thanh Nguyen. They were joined at the motel by Myuran Sukumaran who gave them cash and told them to book a holiday to Bali. Rush and Czugaj flew to Bali on 8 April 2005. Sukumaran and Nguyen were on the same plane.

Unbeknown to these nine young Australians, the Australian Federal Police had been following their movements with great interest.

Cooperation between law enforcement agencies

Australian Federal Police

In 2005, the Australian Federal Police (AFP) considered Indonesia to be one of the main places from which drugs would be smuggled into Australia. Also, there had been a recent crackdown on the importation of drugs into Australia and the AFP knew that drug lords were trying every trick in the book to keep up the supply of drugs into Australia. One way of smuggling drugs into the lucrative Australian market was by using drug mules.

The AFP had been watching the group of young Australians for six months, ever since they had received a tip-off from an informant in Brisbane. The AFP was not sure whether or not the nine Australians were part of a drug-smuggling operation. It took months of surveillance to build profiles and put together information about friendships and travel plans. By 8 April 2005, when all nine Australians were in Bali, the AFP had gathered a large amount of information about this group. All their intelligence pointed to Andrew Chan being the organiser. The AFP decided to contact their counterparts in Indonesia.

Indonesia National Police

The AFP's cooperation with the **Indonesia National Police** (INP) began in the late 1990s when Indonesia transitioned to a full democracy after the downfall of President Suharto's regime. From this time, the AFP provided training and support for the INP's enforcement activities regarding drug smuggling and transnational crime. AFP–INP cooperation intensified in the aftermath of the Bali Bombings of 2002 when the AFP formed a permanent investigative team in Indonesia called Operation Alliance. AFP officers in Operation Alliance worked closely with Indonesian police in response to the Marriott Hotel bombing in 2003, the bombing of the Australian Embassy in 2004 and the Bali Bombings of 2005.

Indonesia National Police
in Indonesia, the police force is called the Kepolisian Negara Republik Indonesia (POLRI)

On 8 April 2005, the AFP's senior liaison officer in Bali, Paul Hunniford, sent a letter to the INP, which stated that, '[the] AFP in Australia has received information that a group of persons are allegedly importing a narcotics substance (believed to be heroin) from Bali to Australia'. Four days later, on

Legal Links

For more information about the Australian Federal Police (AFP), see the AFP's website.

ISBN 978-1-108-86281-3 Milgate et al.

Legal Links

Further information about the relationship between the Australian Federal Police and the Indonesia National Police can be found in the article, 'Partners against crime: A short history of the AFP–POLRI relationship', written by David Connery, Michael McKenzie and Natalie Sambhi and published by the Australian Strategic Policy Institute in March 2014.

12 April 2005, Hunniford again wrote to the INP listing the passport numbers, birth dates and likely flight dates of eight young Australians (at this point the AFP had no knowledge of Myuran Sukumaran). The INP would soon transmit information about the ninth Australian to the AFP.

After receiving the two letters from the AFP, the INP began surveillance of the nine young Australians in Bali. They focused particularly on Andrew Chan who had been to Bali twice in the previous six months; one of those visits had been with Renae Lawrence. Chan and Lawrence had managed to smuggle heroin into Australia without a hitch in October 2004.

The crime

On 8 April 2005, Andrew Chan collected a specially constructed silver suitcase containing five kilograms of heroin from Cherry Likit Bannakorn, a 22-year-old woman from Thailand. Chan was not under surveillance, as the AFP had not yet sent the first of their letters to the INP.

From 12 April 2005, INP officers were stationed at the hotels where the young Australians were staying; the INP officers began taking photos and tracking their movements. The original plan was for the nine Australians to return to Australia on 9 April with the heroin. However, Andrew Chan wanted to wait for another shipment of heroin before the drug mules returned home. Bannakorn had not brought enough on her first trip so they had to wait until she could deliver more. This gave the INP officers more time to continue their surveillance and compile more evidence.

At 9 pm on 16 April 2005, Chan again met Bannakorn and collected the rest of the heroin. This time, INP officers were filming Chan. As well as visual surveillance, which included numerous photos and some videos, the INP was also monitoring the phone conversations between the nine Australians. Even though they spoke in code with each other on the phone, the metadata alone connected the Bali Nine, which made it difficult for them to claim, as they later did, that they did not know the other members of the group.

On 17 April 2005, Andrew Chan checked out of his hotel and went to another hotel where he and Myuran Sukumaran met Scott Rush and Michael Czugaj, and taped packages of heroin to their bodies. Then Chan and Sukumaran met and set up the drug mules from the other group: Renae Lawrence and Martin Stephens. The two groups of drug mules (Rush and Czugaj; Lawrence and Stephens), unaware of each other's existence, left in separate taxis to travel to the Ngurah Rai International Airport in Denpasar. Then Nguyen and Sukumaran headed to the Melasti Bungalows where they met Si Yi Chen and Matthew Norman. Meanwhile, Chan got a taxi to Ngurah Rai International Airport. During all of this time, every move had been observed and recorded by the INP.

Arrest

At 8 pm on 17 April 2005, Renae Lawrence and Martin Stephens arrived at the airport in Denpasar. From the moment they got out of the taxi, every move they made was watched. However, they were unaware of this as they passed through security without a hitch,

Figure 14.3 27-year-old Renae Lawrence from Newcastle is escorted by Indonesian Police through Denpasar Prison on 24 April 2005 in Denpasar, Bali, Indonesia.

ISBN 978-1-108-86281-3

not even being picked up by the sniffer dogs. Then the pair was approached by a customs officer, who asked them to follow him so they could be searched. This search revealed the packages of heroin.

Meanwhile, at 8:30 pm, Scott Rush and Michael Czugaj left the hotel for the Ngurah Rai International Airport. At the immigration counter at the airport, the two men were detained by customs officials and escorted into an office where they found Renae Lawrence and Martin Stephens. Rush and Czugaj were searched. Between them, the four drug mules were found to be carrying 8.2 kilograms of heroin worth around $4 million on the streets of Sydney.

Unaware that the four drug mules had been detained by customs, Andrew Chan arrived at the airport and checked into the same flight as Lawrence and Stephens. Soon after, customs officials and police officers asked Chan to come with them.

INP officers then went to the Melasti Bungalows where Myuran Sukumaran, Matthew Norman, Si Yi Chen and Tan Duc Thanh Nguyen were celebrating Sukumaran's twenty-fourth birthday. The four men did not know that they had been under surveillance. The police officers searched the hotel room; in a rucksack, they found 334.26 grams of heroin. The four men were handcuffed and taken to Polda police station.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 15–16 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

14.2 Legal responses

Trials

The Indonesian justice system is based on Dutch law, inherited from when Indonesia had been part of the Dutch empire. As a result, Indonesian law follows the European system, which is an **inquisitorial system**, rather than the **adversarial system** followed in Australia. There are no juries and each case is presided over by a panel of three to five judges. As well as leading the questioning of witnesses and suspects, the judges also decide the guilt or innocence of the accused.

inquisitorial system
a legal system where the court or a part of the court (e.g. the judge) is actively involved in conducting the trial and determining what questions to ask; used in some countries that have civil legal systems rather than common law systems

adversarial system
a system of resolving legal conflicts – used in common law countries such as England and Australia – that relies on the skill of representatives for each side (e.g. defence and prosecution lawyers) who present their cases to an impartial decision-maker

In court, the Indonesian prosecutors had decided to bring the same charge against all Bali Nine defendants, regardless of their role: the charge of 'exporting narcotics as part of an organisation'. This charge carried the death penalty. Once the trials were under way in the Denpasar District Court, the prosecutors followed the same strategy in each case of trying to get the co-accused to give evidence against each other. The four mules – Lawrence, Czugaj, Rush and Stephens – all followed the same story that they had told from the day of their arrest: they had no idea of the true reason of why they were in Bali until it was too late and that they had been threatened by the ringleaders,

Review 14.1

1. Identify what made the Bali Nine's crime a transnational crime rather than a domestic crime.
2. Describe the content of the letters that the Australian Federal Police (AFP) sent to the Indonesia National Police (INP) on 8 April and 12 April 2005.
3. Outline the methods used by the AFP and INP to gather intelligence on the Bali Nine before their arrest.
4. Recall how each member of the Bali Nine was arrested.

ISBN 978-1-108-86281-3 Milgate et al.

Chan and Sukumaran. When the four drug mules testified, they backed up each other's stories. When the prosecutors made their sentence request, they asked for 20 years for Lawrence, but life for Czugaj, Rush and Stephens. The judges did not agree and imposed life sentences for all four of the drug mules.

The ringleaders, Chan and Sukumaran, along with Norman, Chen and Nguyen, followed the same strategy of denying any involvement or any knowledge about the drugs. When these five were called to testify, they all said that they did not wish to give evidence because they were also suspects in the same case. When asked about their responses to the drug mules' accusations against them, they all issued denials.

The judges were visibly displeased and they were particularly annoyed with the testimonies of Chan and Sukumaran, despite the glowing personal references that were presented on their behalf during the trials. Sukumaran's defence lawyer, Mochamad Rifan, portrayed his client as being a scapegoat for the mules, who had tried to absolve themselves of all blame by putting all responsibility onto Sukumaran and Chan.

The prosecutors were harsh in their condemnation of Chan and Sukumaran. The prosecutors at Sukumaran's trial said that he had been evasive during the trial, was guilty and not a shred of leniency should be given. They demanded the death penalty. Similarly, Chan was described as being the 'driving force' of the Bali Nine operation and that he had failed to cooperate and had given confusing and convoluted evidence. Therefore, the prosecutor demanded the death sentence for Chan. In both cases, Judge Supratman said that there were no mitigating factors that might lessen the sentence and commented that a drug dealer was as bad as a terrorist. As a result, the judge found the two men guilty and sentenced them to death by firing squad. Chan and Sukumaran were the first Australians in history sentenced to death in Indonesia. Meanwhile, Norman, Chen and Nguyen were given life sentences.

The last of the Bali Nine to be tried were the men who made up the so-called 'Melasti Group'. These were the men arrested at the Melasti Beach Bungalows. Even though the evidence against the Melasti Group was more circumstantial, it pointed to Chen and Norman

Figure 14.4 Tan Duc Thanh Nguyen, Si Yi Chen and Matthew Norman wait for the beginning of their trials on 12 October 2005.

ISBN 978-1-108-86281-3 Milgate et al.

Review 14.2

1 Identify the arguments the four drug mules used in their defence at their trials.
2 Describe the strategy Andrew Chan and Myuran Sukumaran used in their defence.
3 Describe the outcome of the trials for each member of the Bali Nine.

being next in line to be the drug mules to transport heroin to Australia once they received the next shipment of heroin from Thailand. Each of the three men said that they had been in the wrong place at the wrong time. When each was asked by the judge whether they had regrets, they all said that they did. But when they were asked if they acknowledged guilt, they said they did not. They too were given life sentences.

Imprisonment and rehabilitation

After their arrest, the nine young Australians were held in cells at the Polda Jail. However, Chan and Sukumaran were split from the other seven due to claims by some that they feared the two 'ringleaders'. Eventually though, all nine ended up in Kerobokan Prison on 28 July 2005.

Kerobokan Prison

Kerobokan Prison came to the attention of the Australian public with the arrest of Schapelle Corby on 8 October 2004 for smuggling 4.2 kilograms of cannabis into Bali. By the time the Bali Nine were arrested, Corby had spent six months in Kerobokan Prison. Corby attracted a lot of attention from the Australian media and as a result the Australian public got to learn a lot about the Bali prison. On 27 May 2005, Corby was convicted for smuggling cannabis into Bali and was given a 20-year sentence. In addition, until October 2005, death row in Kerobokan Prison had been home to the three Bali Bombers who had been responsible for the 2002 bomb attacks.

With a population of nearly 800 people, Kerobokan Prison was overcrowded in 2005, but compared to other prisons in neighbouring countries like Thailand or the Philippines, it was not too bad. However, Kerobokan Prison has received bad press through books like Kathryn Bonella's *Hotel Kerobokan*. About half of the population of the prison was there for drug crimes.

The eight male members of the Bali Nine were lodged in the maximum-security block. Renae Lawrence was housed with the female prisoners in another block.

In 2005, Kerobokan Prison had a bad reputation, but since then it has been transformed. This is largely due to Ilham Djaya, who was the head of the prison until April 2008. Djaya's number one priority was to clean up corruption in the prison. Under Djaya's watch, gangs and drug dealers no longer ran the prison, the drab grounds of the prison were revamped and there are now gardens and lawn, which are tended to by the prisoners. Djaya's other priority was to rehabilitate the inmates. He sacked many of the guards and difficult prisoners were moved to other jails.

Within the maximum-security block, the eight male members of the Bali Nine were given some freedom to reconfigure and redecorate their cells. They set up some gym equipment in their cells and Myuran Sukumaran installed a screen-printing machine. They were allowed out of the block into the rest of the prison during the day.

Despite the fact that the four drug mules had testified against Chan and Sukumaran, they all got on well. In fact, reports indicated that Chan and Sukumaran had demonstrated kindness to their fellow Bali Nine prisoners. Chan had become a motivator, always insisting that the men keep active and not just sit around. Chan also had many repeat visitors who spoke of his engaging personality. Sukumaran developed a talent for art, and became a mentor to other prisoners.

In 2008, Ilham Djaya was replaced by Siswanto as governor of the prison; Siswanto was governor for three years. Under his guidance, the Bali Nine prisoners in Kerobokan Prison were able to continue their rehabilitation. In 2010, he gave character evidence supporting Chan and Sukumaran.

ISBN 978-1-108-86281-3 Milgate et al.

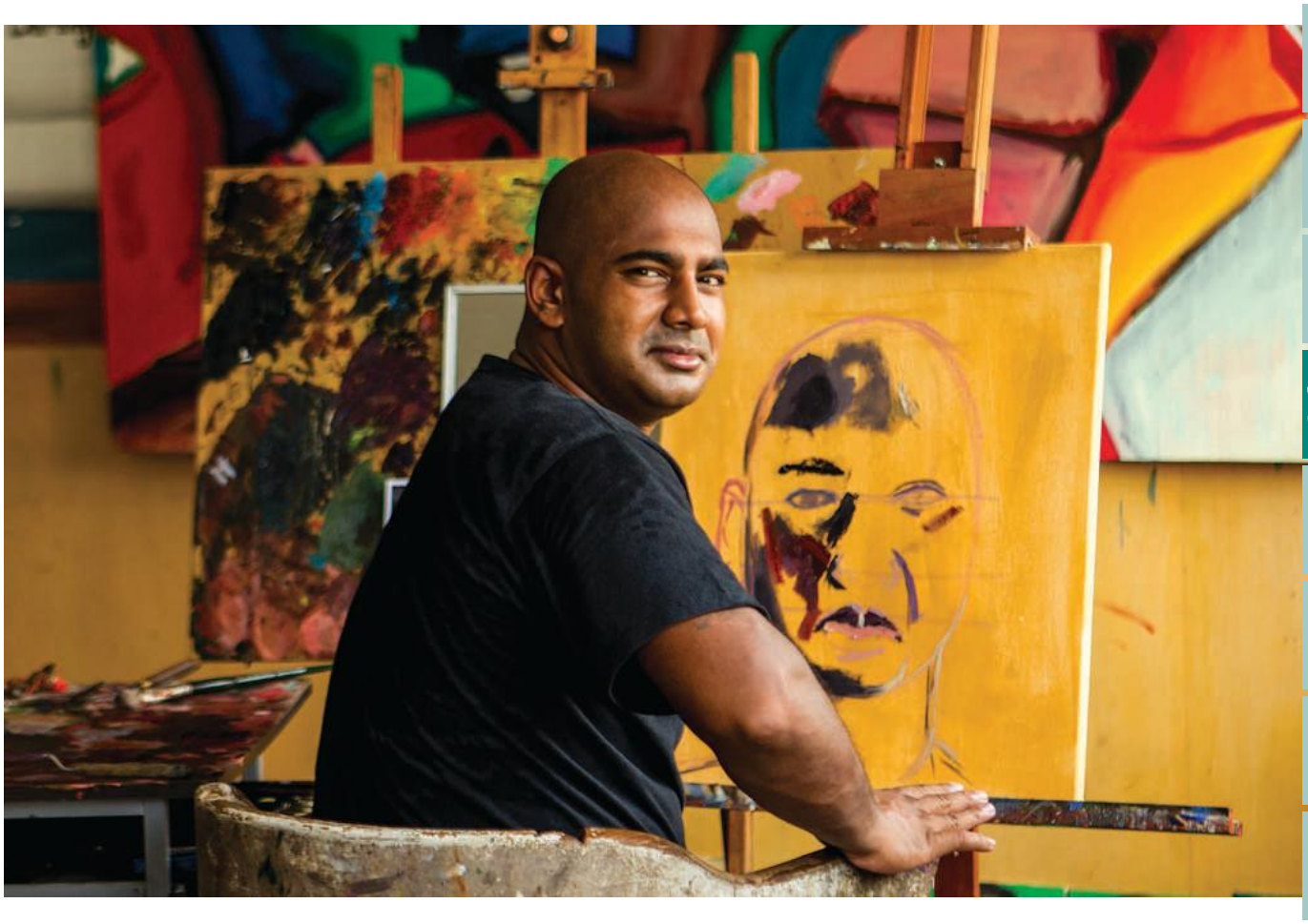


Figure 14.5 Myuran Sukumaran with some of his artworks painted while in prison.

Legal Links

Source online SBS's 2010 interview with Andrew Chan and Myuran Sukumaran, called *The Condemned*. It originally aired in November 2010, just days before a final hearing on whether Chan's and Sukumaran's death sentences for drug trafficking would be carried out. The interview gives an insight into Chan's and Sukumaran's living conditions in Kerobokan Prison and their rehabilitation. The interview also provides the perspective of Chan's and Sukumaran's lawyer.

Research 14.1

Source online Jewel Topsfield's article, 'Bali Nine executions: How Chan and Sukumaran's road to redemption changed Kerobokan jail', *The Sydney Morning Herald*, 19 February 2015.

1. Describe how Kerobokan Prison has changed since 2005.
2. Describe Chan's and Sukumaran's reaction when they arrived at the prison in 2005.
3. Outline the initiatives taken by Chan and Sukumaran to improve life in the prison for all the inmates.
4. Outline how Topsfield describes Sukumaran.
5. Discuss why the other inmates and the prison guards feared life in Kerobokan Prison once Chan and Sukumaran had gone.

ISBN 978-1-108-86281-3 Milgate et al.

Appeals

The appeals process available to the Bali Nine commenced with an appeal to their sentences given in the Denpasar District Court to the Bali High Court. Appeals from decisions made in the Bali High Court go to the Indonesian Supreme Court. The Indonesian Supreme Court oversees 68 high courts across Indonesia. The Supreme Court only considers questions of law, not fact. Another avenue that can be taken is to appeal to the Constitutional Court. This court has the same standing as the Supreme Court.

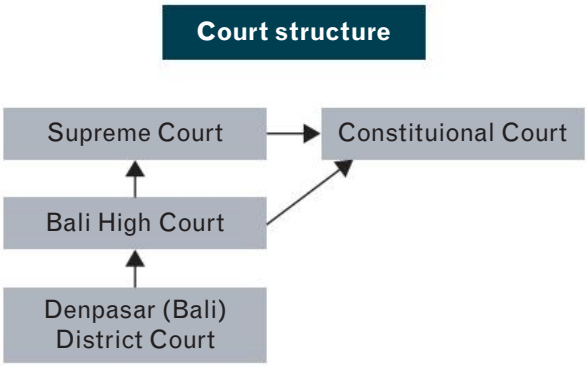


Figure 14.6 The court hierarchy in Bali, Indonesia.

TABLE 14.2 The Bali Nine's appeals process

Date	Appeal authority	Decision
26 April 2006	Bali High Court	• Chan and Sukumaran's death sentences confirmed • Life sentences reduced to 20 years' imprisonment for Chen, Czugaj, Lawrence, Nguyen and Norman • Life sentences upheld for Rush and Stephens • Convictions upheld for Nguyen, Chen, Norman and Rush, and death penalty imposed, rather than the lighter sentences granted by the Bali High Court (this was in response to the prosecution appealing the sentence reductions given by the Bali High Court)
27 April 2006	Bali High Court	
6 September 2006	Supreme Court	• Death sentences upheld for Chan and Sukumaran • Life sentence upheld for Stephens • Life sentence reinstated for Czugaj
3 May 2007	Constitutional Court	Ruled that Indonesian law permitted the death penalty for the crime of drug trafficking; this was in response to Chan, Rush and Sukumaran lodging a constitutional challenge against the death penalty
6 March 2008	Supreme Court	Final appeal to the court (called a Peninjauan Kembali or 'PK'); death sentences reduced to life imprisonment for Nguyen, Chen, Norman
10 May 2011	Supreme Court	Death sentence reduced to life imprisonment for Rush
10 May and 6 July 2011	Supreme Court	Appeals against death penalty dismissed for Chan and Sukumaran
13 May and 9 July 2012	Indonesian President Susilo Bambang Yudhoyono	Appeals for a pardon rejected for Chan and Sukumaran
December 2014 and January 2015	Indonesian President Joko Widodo	Appeals by Chan and Sukumaran for clemency rejected
January 2015	Denpasar District Court	Application by Chan and Sukumaran for a judicial review into their cases rejected
9 February 2015	Indonesian Court	Challenge against President Widodo's refusal to grant pardons dismissed
6 April 2015	Indonesian Administrative Court	Appeal against the ruling that they could not challenge Indonesian president's refusal to grant clemency rejected

ISBN 978-1-108-86281-3 Milgate et al.

All members of the Bali Nine appealed their sentences and exhausted the appeals process. Appealing a conviction can be risky as sentences can be increased as well as decreased, as members of the Bali Nine soon found out.

At the end of the appeals process, the sentences for the members of the Bali Nine were:

- six members (Si Yi Chen, Michael Czugaj, Tan Duc Thanh Nguyen, Matthew Norman, Scott Rush and Martin Stephens): life imprisonment
- one member (Renae Lawrence): 20 years' imprisonment
- two members (Andrew Chan and Myuran Sukumaran): death.

Since 2015, Chen, Czugai, Norman and Stephens have continued to submit applications to have their life sentences changed to a fixed-term prison sentences. To be successful, these applications need to be personally approved by the Indonesian president; to date, all such applications have been denied. In June 2018, Tan Duc Thanh Nguyen died in prison of cancer. In November 2018, Renae Lawrence's sentence was commuted, and she was released and deported to Australia.

Execution of Andrew Chan and Myuran Sukumaran

On 3 March 2015, Andrew Chan and Myuran Sukumaran were moved from Kerobokan Jail and transferred to the island prison of Nusakambangan in Central Java, which was to be their place of execution.

The method of execution at Nusakambangan was as follows:

- A special firing squad was recruited from the national police force.
- Inmates were moved to isolation cells 72 hours before the execution.
- Family members and religious counsellors were permitted to visit up to a few hours before the execution.
- Prisoners had their hands and feet tied, but chose whether they stood, knelt or sat before the firing squad.
- 12 marksmen aimed rifles at each prisoner's heart, but only three marksmen had live ammunition in their rifles.

Figure 14.7 On 4 March 2015, Bali Nine duo Andrew Chan and Myuran Sukumaran were transferred to the island of Nusakambangan in Central Java, Indonesia.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 14.8 Nusakambangan Island in Central Java, Indonesia.

- Medical personnel were present, and pronounced the prisoners dead after execution.
- Family members waited outside the prison; the bodies were cleaned and handed over to them after the execution.
- In the early hours 29 April 2015, Andrew Chan, 31, and Myuran Sukumaran, 34, were on the island prison of Nusakambangan, along with six other death row prisoners. They were all led outside and made ready for the execution. All eight prisoners decided to not be hooded or blindfolded. They had made a promise to each other that they would all look their executioners in the eyes. The firing squad used laser pointers on their rifles and aimed their rifles at their hearts. After a volley of shots, all eight men were dead.

14.3 Non-legal responses

Public campaign

Although their July 2012 appeal had failed, there did not seem to be a rush to execute Andrew Chan and Myuran Sukumaran. This changed in October 2014, with the election of President Joko Widodo, who had run on a campaign of being tough to drug smugglers.

Public opinion in Australia about Chan and Sukumaran had changed significantly since 2005: the Australian public now saw two quietly spoken and thoroughly reformed men. Following President Widodo's December 2014 statement that no mercy would be shown to drug dealers, supporters of Chan and Sukumaran strengthened public campaigns to pressure the Indonesian president to pardon Chan and Sukumaran. The Mercy Campaign put together a petition – which received over 200 000 signatures – that asked President Joko Widodo for clemency. Newspapers, such as *The Sydney Morning Herald*, added their pleas to the cause, with an editorial on 23 February 2015 stating that 'two men who have apologised and atoned from their crimes, [who are] pioneers of rehabilitation in Indonesia's prison system, will be killed senselessly'. The NSW Premier Mike Baird added his voice to the cause stating that, 'We all understand the need for justice – but not like this. I stand for mercy.' Radio broadcasters, news commentators, journalists, actors and

Review 14.3

1 Discuss why Kerobokan Prison had a bad reputation when the Bali Nine arrived there.
2 Outline the different avenues of appeal taken by Chan's and Sukumaran's lawyers.
3 Identify the outcomes of the appeals for the other members of the Bali Nine.

Research 14.2

Source online the article, 'Death for Bali ringleaders' (by Mark Forbes and Neil McMahon, *The Age*, 15 February 2006), which was published just after Chan and Sukumaran were given death sentences.

1 Identify which court heard the case.
2 Outline the reasons the judge, Arief Supratman, gave for giving the two men the death penalty.
3 Outline how prominent Australians reacted to the news of Chan's and Sukumaran's death sentences.
4 Identify the comment made by the Australia Federal Police Chief, Mick Keelty.
5 Discuss the next legal move for Chan and Sukumaran, according to their lawyers.
6 Outline the chance of Chan and Sukumaran reciving a presidential pardon.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 14.9 A Mercy Campaign rally in Melbourne. The Mercy Campaign attracted over 200 000 signatures on a petition asking for clemency for Andrew Chan and Myuran Sukumaran.

musicians also added their voices to the Mercy Campaign.

On 29 April 2015, when all hope was gone, people gathered in Australia and in Bali in all-night vigils until the time of execution.

International diplomacy

There were various diplomatic attempts to prevent the executions:

- In January 2015, Prime Minister Tony Abbott made a direct appeal to Indonesian President Widodo to show mercy.
- On 5 March, Foreign Minister Julie Bishop again attempted to stop the executions by offering to repatriate to their homeland three Indonesian drug criminals in return for sparing the lives of Chan and Sukumaran.
- United Nations Secretary General Ban Ki-Moon directly appealed to President Widodo.

Legal Links

The Mercy Campaign was an Australian-based campaign that focused on Andrew Chan and Myuran Sukumaran. More information about the Mercy Campaign is available on its website.

Research 14.3

Foreign Prisoners Support Service

Use a search engine to find the 'Wayback Machine', which stores old websites that are no longer in use. To find the old website, http://bali9.foreignprisoners.com', type 'Foreign Prisoner Support Service' into the search box. Read the webpage about the Bali Nine and then respond to the following questions.

1. Outline if there are any further significant details of the Bali Nine cases.
2. List the various types of support that prisoners in Kerobakan Prison can access.
3. Outline the advice given about:
   - **a** writing to the Indonesian authorities
   - **b** writing to the Australian Government
   - **c** writing to prisoners
   - **d** visiting a prison.
4. Identify the criticism of the Australian Federal Police's (AFP) handling of the Bali Nine.
5. Assess if this criticism of the AFP is warranted. Discuss to what extent the AFP should be bound by international human rights obligations.

Foreign Prisoner Support Service: Aims and policies

To find out more about the Foreign Prisoner Support Service, visit the 'About us' page on the organisation's website (https://cambridge.edu.au/redirect/9044).

1. Identify when this organisation was established.
2. Outline the organisation's aims.
3. Outline the organisation's policies.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 14.10 The Foreign Affairs Minister, Julie Bishop (left), and Deputy Opposition Leader, Tanya Plibersek (right), during a candlelight vigil for Andrew Chan and Myuran Sukumaran.

There was a diplomatic fall-out after the executions. The then Prime Minister Tony Abbott announced that Australia would withdraw its ambassador from Indonesia and relations between the two countries soured.

Memorials

Many people tried to take something positive from the lives of these young men or tried to honour their memory in some way. Others were motivated to campaign for an end to the death penalty altogether.

One attempt to memorialise the men for a good cause was the Australian Catholic University's (ACU) creation of two scholarships to be made available to Indonesian undergraduate students. The scholarships offer the equivalent of full tuition for four years at any ACU campus. The scholarships are awarded on the basis of an essay on the sanctity of human life. Professor Gregory Craven, the Vice-Chancellor of the ACU, was one of the founders and co-spokesmen of the Mercy Campaign. Professor Craven has said that,

> While our calls for mercy for Mr Chan and Mr Sukumaran were ultimately rejected, we strongly believe that hope remains for prisoners around the world who face a similar fate. In memory of Mr Chan and Mr Sukumaran, each of us can take action to end this punishment.

Research 14.4

Source online for the article, 'Bali Nine: Julie Bishop, Tanya Plibersek plead for clemency for Andrew Chan and Myuran Sukumaran' (by James Bennett and Louise Yaxley, *ABC News*, 12 February 2015).

1. Outline what occurred in federal parliament and why this was unusual.
2. Identify the arguments that Tanya Plibersek used in her address to federal parliament.
3. Identify the arguments that Julie Bishop used in her address to federal parliament.
4. Describe how the Indonesian Foreign Minister reacted to Bishop's plea for mercy.

ISBN 978-1-108-86281-3 Milgate et al.

Review 14.4

1 Identify some of the public figures who publically supported Andrew Chan and Myuran Sukumaran.
2 Describe the Mercy Campaign.
3 Outline the offer Julie Bishop made to the Indonesian Government.
4 Describe the initiative Professor Craven announced in honour of Chan and Sukumaran.

14.4 Effectiveness of responses

The case of the Bali Nine is a significant example of transnational crime affecting Australian citizens. It brings to the fore two competing interests of the Australian legal system: the protection of its citizens abroad, and the fight against transnational crime. Political leaders and the legal system need to find the right balance between these two priorities. This study raises the issue of the sanctity of life and the extent to which international law, with its clear statements against the death penalty, can deliver certainty in the protection of this principle in practice.

This case also raises the issues that confront Australians abroad who have to navigate the legal system of a foreign country, which is a situation that a growing number of Australians who live or work overseas have to face. Therefore, it is important that Australia has good relations with as many countries as it can, and has in place, understandings with those countries on how they should treat Australians in their justice systems and how we should treat their nationals in the Australian justice system.

Th Bali Nine case also concerns the purpose and effectiveness of punishment. Is punishment in the legal system only about retribution and deterrence? To what extent should rehabilitation have an impact on a prisoner's sentence? Both Andrew Chan and Myuran Sukumaran were considered to be rehabilitated in the 10 years they were in prison, yet it appears this was not taken into account in regard to their death sentence.

Andrew Chan and Myuran Sukumaran were the first Australians ever to be executed in Indonesia. Is the Australian public and the government comfortable with the idea that this could happen again? So, the question is: how effective is the law in dealing with the tension between international cooperation while dealing with transnational crime and Australia's own anti-death penalty stance, as well as our international obligations in regard to human rights law? If Australia is serious about working for the international abolition of the death penalty, then is it prepared to be consistent in its opposition to the use of the death penalty in Indonesia in all circumstances?

Australian–Indonesian cooperation

In the case of the Bali Nine, it seems that the AFP's actions gave preference to cooperating with Indonesian police over Australia's human rights obligations.

From the early days of the case, the AFP was under fire for its role in facilitating the arrest of the Bali Nine by INP in Bali. The two letters sent by Paul Hunniford of the AFP on 8 and 12 April 2005, handed over all the key information to the INP. The AFP left it up to their Indonesian counterparts to decide whether the INP would intercept and arrest the young Australians in Bali, or let them leave Bali for the AFP to arrest when they arrived in Australia. The AFP claimed that fighting transnational crime demanded close cooperation between countries, and that they could not put conditions on the release of information to their Indonesian counterparts.

In fact, in their letter of 8 April 2005, the AFP did indicate their preference that the Bali Nine be allowed to return to Australia for arrest (although it was not a precondition of sharing the information). However, after the INP had arrested the Bali Nine, the INP then asked the AFP to send on the evidence that they had compiled in Australia; the AFP sent this information without requesting that the young Australians be exempted from the death penalty.

ISBN 978-1-108-86281-3 Milgate et al.

Most commentators agree that the AFP's actions in this matter were lawful, and that there are benefits to having a good relationship with Indonesia; for example, terrorist plots have been foiled and threats to both countries have been removed.

However, others feel that by sharing information with the INP, while knowing the death penalty was almost certain, the AFP may have acted lawfully but they did not act morally. It is arguable that the APF's actions do not comply with Australia's obligations under international law.

Arguments for and against sharing information without conditions

A report by the Australian Strategic Policy Institute (ASPI) in March 2014, called *Partners against Crime: A Short History of the AFP–POLRI Relationship* concluded with the following:

> The assistance given by Australia to Indonesia to develop police capacity is not charity. There is a clear expectation that such assistance will allow both forces to better deter, disrupt and prosecute transnational crime. Nor is this a one-way street … Indonesia has and continues to provide Australia with direct assistance and benefits. These benefits include foiled terrorist plots, the removal of mutual threats and help with combatting transnational crime. Without that assistance, it's plausible to assert that more Australians could have been killed by terrorists, that Australia's border security challenges would be even greater, and even more crime would make its way to Australia. So the relationship between the AFP and INP is in the direct interest of both countries, and benefits of this cooperation can be seen at the police-to-police, bilateral, and regional levels.

For the authors of the ASPI report, there is no doubt that the current policy of the AFP not putting any conditions on intelligence given to its Indonesian counterparts is satisfactory.

Although Lorraine Finlay's 2011 article, 'Exporting the death penalty? Reconciling international police cooperation and the abolition of the death penalty in Australia' questioned why after the arrest the AFP sent information without requesting an exemption from the death penalty, she ultimately argued that the AFP could not put conditions on the information:

> Restricting police-to-police cooperation by the application of the extradition framework to potential death penalty matters would prevent the sharing of a significant volume of useful and important information, and have the counter-intuitive effect of allowing information about relatively trivial criminal activity to be freely shared while at the same time restricting cooperation aimed at preventing and prosecuting the most serious offences … [Also] it would significantly restrict counter-terrorism cooperation with both Indonesia and the United States of America, and would prevent the exchange of drug-trafficking intelligence with countries such as Indonesia, Singapore and Vietnam.

It may have been lawful, but others suggest that it was not moral and it did not fit in with Australia's obligations under international law.

However, others disagree wholeheartedly and believe that the AFP could have done better and that Australia can and should put conditions on the information shared with other countries. Ronli Sifris' 2007 article, 'Balancing abolitionism and cooperation on the world's scale: The case of the Bali Nine' argues that the AFP was negligent in sharing the information with the INP in full knowledge that if the young Australians were arrested in Bali they would face the death penalty. Sifris says that this may have been lawful, but it was not moral. The AFP prioritised cooperation above Australia's commitment to the abolition of the death penalty. Sifris goes even further, stating that:

ISBN 978-1-108-86281-3 Milgate et al.

> Each human being has a moral right to life. By placing members of the Bali Nine in a position where the violation of their right to life was a clear possibility, the AFP violated their rights. … Consequently, in accordance with the moral paradigm expounded in this section, even if the actions of the AFP in providing information to the INP were not illegal, they were surely immoral.

Sifris also says:

> In light of this growing global trend [towards the abolition of the death penalty], it is difficult to understand why, in the case of the Bali Nine, the AFP voluntarily provided information to the INP with the knowledge that there was a real risk that the provision of this information would result in Australians being subjected to death by firing squad and did not seek assurances that the death penalty would not be imposed.

The death penalty

Cindy Wockner, one of the authors of the comprehensive book on the nine Australians, *Bali 9: The Untold Story*, had this to say about the execution of Chan and Sukumaran:

> For years I interviewed them in jail and visited and interacted with them. As I watched their transformation there was no doubt their rehabilitation was genuine. They had become decent and honourable young men who were trying, every day, to make amends for their crime. They knew they deserved to be in jail … Sukumaran and Chan were not the same people who were arrested on 17 April 2005. They had reformed and helped reform so many other lives. By killing them Indonesia lost its best chance yet to fight the scourge of drugs. The world is a poorer place. RIP Andrew Chan and Myuran Sukumaran.

Australian law

Australia's position on the death penalty in domestic law has been crystal clear for many years. In 1967, Ronald Ryan was the last person to be executed in Australia. The *Death Penalty Abolition Act 1973* (Cth) states that 'a person is not liable to the punishment of death for any offence'. No Australian jurisdiction uses the death penalty today. In parliament, there is a bipartisan approach to the death penalty with the major parties opposed to any return of capital punishment.

International law

The situation regarding the death penalty in international law is unresolved. While it is not illegal, we can see a movement towards its global abolition. The *International Covenant on Civil and Political*

Legal Links

The full text of the articles mentioned in this chapter are available online:

- 'Partners against crime: A short history of the AFP–POLRI relationship' (by David Connery, Michael McKenzie and Natalie Sambhi, published by the Australian Strategic Policy Institute, March 2014).
- 'Exporting the death penalty? Reconciling international police cooperation and the abolition of the death penalty in Australia' (by Lorraine Finlay, published by Sydney Law School, 2011).
- 'Balancing abolitionism and cooperation on the world's scale: The case of the Bali Nine' (by Ronli Sifris, published by the *Federal Law Review*, 2007).

ISBN 978-1-108-86281-3 Milgate et al.

Figure 14.11 On 28 April 2015, a protester holds a placard that reads 'death row is a murder and death penalty is not justice' during an anti-death penalty rally in front of Merdeka Palace in Jakarta, Indonesia. The families of Andrew Chan and Myuran Sukumaran paid an anguished final visit to their loved ones, wailing in grief as ambulances carrying empty white coffins arrived at the prison.

Rights (1966) does allow for it, but only in limited circumstances, as listed in Article 6.2:

> ***International Covenant on Civil and Political Rights*, Article 6.2**
> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

However, the Second Optional Protocol of the *International Covenant on Civil and Political Rights* (1989) leaves no doubt as to the United Nations' position on the death penalty. In Article 1, the Protocol states:

> **Second Optional Protocol of the *International Covenant on Civil and Political Rights* (1989), Article 1**
> No-one within the jurisdiction of a State Party to the present Protocol shall be executed.
> Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.
> Video

Numerous other treaties and covenants enshrine opposition to the death penalty. It is also to be noted the *Rome Statute of the International Criminal Court* (1998), which led to the creation of the international Criminal Court, excludes the use of the death penalty. So it is clear that there is a movement towards the global abolition of the death penalty. Since 1990, it has been abolished in over 40 countries, and has generally not been reintroduced.

However, the increased amount of transnational crime means that cooperation between national police forces in the fight against transnational crimes is steadily increasing. This has resulted in many mutual assistance treaties between governments, which in turn has led to tension in the international sphere between the recognition of human rights in the extradition process and the need for cooperation when dealing with international crime. Currently, the balance is tipping in the direction of human rights being given the priority in the extradition processes between countries. In extradition cases, it seems that

Legal Links

View the following international instruments online:
- *International Covenant on Civil and Political Rights* (1966), Article 6.2
- Second Optional Protocol of the *International Covenant on Civil and Political Rights* (1989), Article 1.

ISBN 978-1-108-86281-3 Milgate et al.

countries are able to resolve the tension between international cooperation and the commitment to the abolition of the death penalty. The question is whether cooperation between national police forces should also move in this direction.

Australia's policy on global abolition of the death penalty

If Australia wants to work towards the abolition of the death penalty in countries in which large numbers of Australians work or holiday, then it needs to follow a consistent and long-term approach. Australia's position on the death penalty in regard to the Bali Nine was compromised by its support for the execution of the Bali Bombers in 2008. To be effective with the Indonesian Government in promoting the abolition of the death penalty the Australian Government needs to have a principled and consistent policy. No advocacy will be effective if Australia further equivocates on capital punishment.

In a 2002 report for the Lowy Institute, Dr Dave McRae argued that Indonesia is the key to achieving the abolition of the death penalty in the south-east Asian region. In comparison to other countries in the region (e.g. Malaysia and Singapore), Indonesia is in fact moderate in its use of the death penalty. There are strong lobby groups within Indonesia both for and against the death penalty. However, the one factor that could tip Indonesia in the direction of abolition is the fact that there are many Indonesian nationals on death row in other countries and the Indonesian Government has been working hard in opposing the imposition of the death penalty on these people. Indonesia could be won over by the argument that if they abolished the death penalty at home, it would be easier to plea for mercy for Indonesians facing execution in other countries.

Dr McRae also argues that the abolition of the death penalty in Indonesia would contribute to the protection of Australians in Indonesia and would minimise the threat to relations between the two countries. Also, it would build momentum towards death penalty abolition in the south-east Asian region.

Since the execution of Chan and Sukumaran in 2015, it seems that no progress has been made in regard to the death penalty in Indonesia. Since the re-election of Joko Widodo as president in 2019, the Indonesian Government has been pursuing more hard-line policies in a number of areas. Widodo's new Attorney-General, Sanitiar Burhanuddin, has vowed to resume executions in Indonesia (an unofficial moratorium has been observed since 2016). At the end of 2018, there were 308 people on death row in Indonesia and around 70 people had been executed by the end of 2019. This was at the same time that Indonesia was appointed to the United Nations Human Rights Council. By 2020, it was clear that the death penalty had returned as a possibility for any Australian, or any foreigner, caught breaking the law in Indonesia.

In 2003, former High Court judge, Justice Michael Kirby, said the following concerning the death penalty:

> We have set ourselves upon a path to a higher form of civilisation. It is one committed to fundamental human rights. Such rights inhere [*are invested*] in the dignity of each human being. When we deny human dignity we diminish ourselves. We become part of the world of violence. Judges and lawyers stand for the rational alternative to a world of terror and violence. The law will often fail. But inflicting the death penalty is the ultimate acknowledgment of the failure of civilisation.

Figure 14.12 On 23 July 2019, two Australians, William Cabantog (centre) and David Van Iersel – who had been arrested in Bali for possessing cocaine – were paraded in front of local media.

ISBN 978-1-108-86281-3

Research 14.5

Find Amnesty International's website; locate the section on the site about the campaign to end the death penalty. Access the latest report.

1. Find out how many executions have taken place in each of Australia's south-east Asian neighbours.
2. Identify which countries have carried out the death penalty in recent years and how many executions have taken place.
3. Outline what the report identifies as the trends for the death penalty in our region.
4. Compare this with the global trends on executions.
5. Describe what concerns the report expresses and if there are any signs of hope that the death penalty could be ended worldwide.

Legal Links

Search online for the article, 'A key domino? Indonesia's death penalty politics' (by Dr Dave McRae, Lowy Institute, March 2012).

Review 14.5

1. Assess why the executions of Andrew Chan and Myuran Sukumaran are significant for Australia.
2. Outline the criticism of the AFP's role in the Bali Nine case.
3. Assess if the AFP's actions in regard to the Bali Nine were lawful:
   - **a** in domestic law
   - **b** in international law.
4. Describe Cindy Wockner's opinion of the execution of Chan and Sukumaran.
5. Identify the domestic actions and laws that have ended the death penalty in Australia.
6. Outline how the death penalty is viewed in the:
   - **a** *International Covenant on Civil and Political Rights* (1966)
   - **b** Second Optional Protocol of the *International Covenant on Civil and Political Rights* (1989).
7. Discuss the current situation in regards to ending the death penalty globally.
8. Outline Australia's policy on the death penalty.
9. Recall what Dr McRae recommends should be Australia's policy and actions concerning the death penalty.
10. Reflect on Justice Michael Kirby's view of the death penalty.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 14.13 Co-curator Ben Quilty and friend of Myuran Sukumaran speaks to the media at the 'Another Day in Paradise' exhibition preview at Campbelltown Art Centre on January 11, 2017 in Sydney.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- The Bali Nine case is an example of a transnational crime involving different national police forces.
- The Australian Federal Police (AFP) and the Indonesian National Police (INP) have been cooperating since the late 1990s.
- Information the AFP gave to the INP made it possible for the Bali Nine to be arrested in Bali, Indonesia.
- Indonesia has a mandatory death sentence for drug smugglers.
- The Bali Nine had to navigate a totally different legal process in Indonesia that is based on the inquisitorial system.
- Andrew Chan and Myuran Sukumaran were considered to be reformed after 10 years in prison, but it appears this carried no weight in their appeals for clemency to the Indonesian president.
- If Australia is serious about working towards the abolition of the death penalty internationally, it needs to have a far more consistent approach to this issue.

Questions

Multiple-choice questions

1 The Australian Federal Police was established after:
   - **a** the bombing of the Hilton Hotel in 1979.
   - **b** World War II.
   - **c** the September 11 terrorist attacks in 2001.
   - **d** the Bali Bombings in 2002.

2 The highest court in the Indonesian judicial system is the:
   - **a** High Court.
   - **b** District Court.
   - **c** Supreme Court.
   - **d** Administrative Court.

3 Since 2005, Kerobokan Prison has been:
   - **a** riddled with corruption and dominated by gangs.
   - **b** reformed and focused more on rehabilitation.
   - **c** closed down.
   - **d** expanded.

4 The Australian Federal Police's role in the Bali Nine case has been criticised for:
   - **a** prioritising cooperation with Indonesia above human rights concerns.
   - **b** failing to work effectively with the Indonesian National Police against transnational crime.
   - **c** involving themselves in Indonesian politics.
   - **d** being too slow to act when tipped off about the Bali Nine in Australia.

5 The death penalty has not been used in Australia since:
   - **a** 1967.
   - **b** 1975.
   - **c** 1990.
   - **d** 2005.

Short-answer questions

1 Outline the Bali Nine's plan to smuggle heroin into Australia.
2 Recall the surveillance methods the Indonesian National Police used to gather evidence on the Bali Nine before their arrest.
3 Describe the conditions in Kerobokan Prison.
4 Outline the structure and processes of the Indonesian judicial system.
5 Describe the role Australian politicians played in the attempt to save Andrew Chan and Myuran Sukumaran.
6 Discuss how the existence of the death penalty in Indonesia poses an increased threat to Australians.
7 Recall what the international covenants state about the death penalty.

Extended-response question

Evaluate the argument that the Australian Government needs to take a far more proactive role in working towards the abolition of the death penalty.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

ISBN 978-1-108-86281-3 Milgate et al.

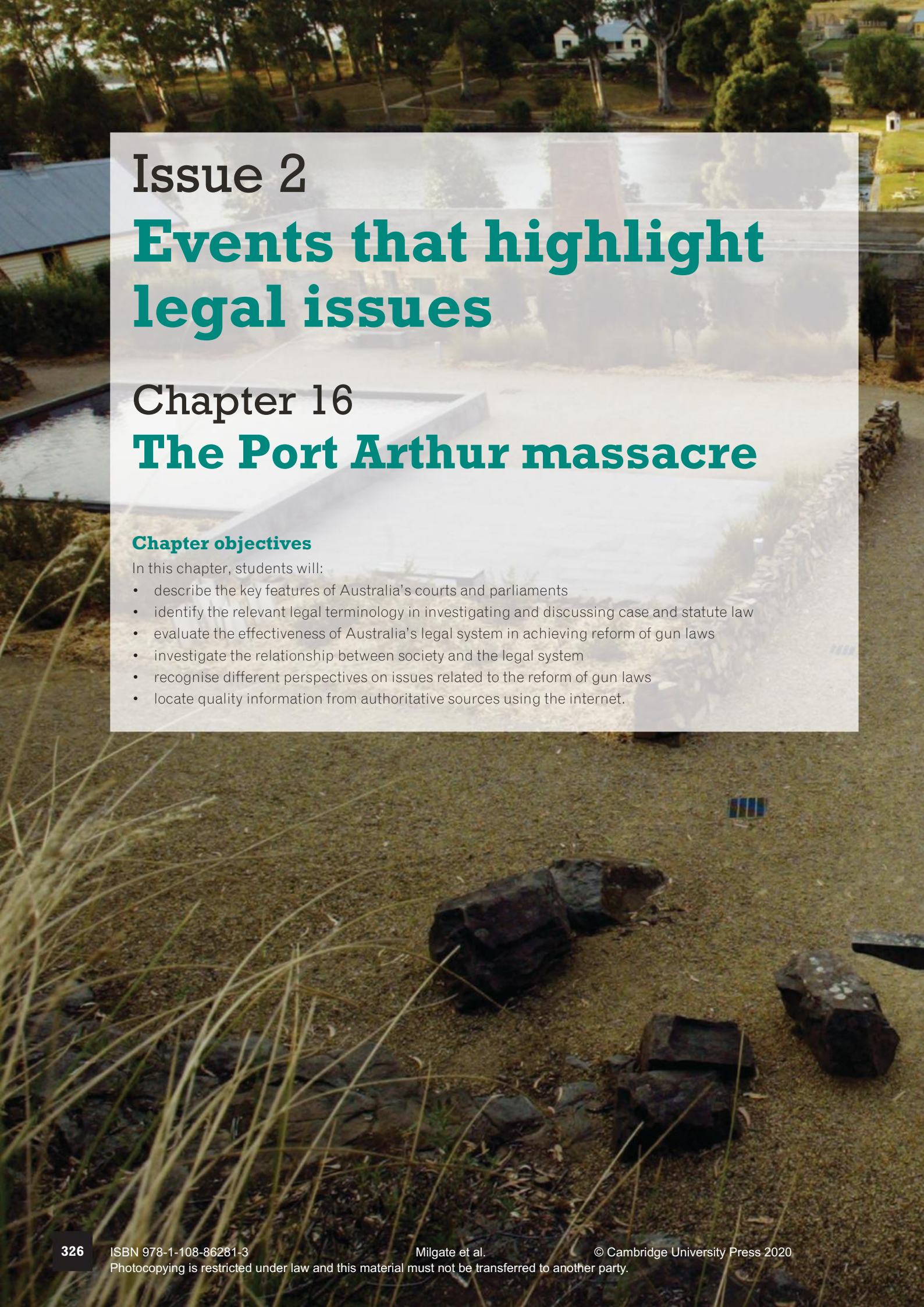
Issue 2
Events that highlight legal issues

Chapter 15
Alcohol and violence

This chapter is available in the digital version of the textbook.

GO

ISBN 978-1-108-86281-3



Issue 2
Events that highlight legal issues

Chapter 16
The Port Arthur massacre

Chapter objectives

In this chapter, students will:

- describe the key features of Australia's courts and parliaments
- identify the relevant legal terminology in investigating and discussing case and statute law
- evaluate the effectiveness of Australia's legal system in achieving reform of gun laws
- investigate the relationship between society and the legal system
- recognise different perspectives on issues related to the reform of gun laws
- locate quality information from authoritative sources using the internet.

ISBN 978-1-108-86281-3 Milgate et al.

Relevant law

IMPORTANT LEGISLATION

Firearms Act 1996 (NSW)
National Firearms Agreement (1996)
National Firearms Program Implementation Act 1996, 1997 & 1998 (Cth)
Weapons Prohibition Act 1998 (NSW)
National Firearm Trafficking Policy Agreement (2002)
National Handgun Control Agreement (2002)
United Nations Security Council, Resolution 2117 (2013)
Arms Trade Treaty (2014)

SIGNIFICANT CASES

R v Bryant [1996] TASSC

ISBN 978-1-108-86281-3

16.1 A brief history of the Port Arthur massacre

On Sunday 28 April 1996, a Tasmanian man called Martin Bryant ate a meal on the deck of the Broad Arrow Café located at the Port Arthur historical site. When he was finished, he entered the café, took a rifle from his bag and started indiscriminately shooting. He then moved to the gift shop and then on to the car park, where he pulled out an automatic weapon, firing at the people there. Driving up the road, he continued shooting. By the time he was finished, he had killed 35 people.

The horrific **massacre** at Port Arthur sent shock waves around the nation and set in motion a chain of events that eventually led to a complete reform of Australia's gun laws. This reform revealed a significant division in Australian society between those for and against gun control. Not everyone agreed with the reforms, or saw gun control as a solution to the incidence of violence. Other critics even suggested that a conspiracy was in play and that the massacre had been orchestrated as a catalyst for law reform. The swift response of the Australian legal system to the problem of automatic weapons engendered enormous international interest, winning both praise and condemnation. In the United States, anti-gun coalitions were encouraged and increased their efforts towards reform of gun laws. Meanwhile leaders in the gun lobby warned the US Government might try to do the same as Australia.

massacre
the intentional killing of a large number of people

The effectiveness of gun law reform in Australia in the wake of the Port Arthur massacre stands in stark contrast to the lack of reforms thus far in the United States. In his visit to the United States, Pope Francis made a speech to the Joint Session of Congress, on 24 September 2015, in which he identified a number of concerns about the United States and the world. On the issue of guns, the Pope criticised them as 'deadly weapons' and said that we all had a duty to stop the arms trade. He asked the congress members sitting before him: 'Why are deadly weapons being sold to those who plan to inflict untold suffering on individuals and society?' The answer he said was greed. It was for money, the Pope said, and this money was 'drenched in blood, often innocent blood'. The Pope in this speech echoed the hopes of many in the United States who have been crying out for gun reform legislation.

Figure 16.1 The Australian MP, Colonel Mike Kelly, signed the *Arms Trade Treaty* (2014) when it opened for signatures at the United Nations on 3 June 2013. Australia used its seat on the UN Security Council (2013–2014) to champion the creation of this treaty, which aims to regulate the multibillion-dollar arms industry. The UN General Assembly overwhelmingly approved the treaty. While the treaty does not control the domestic use of weapons in any country, it does require the countries that signed the treaty to establish national regulations to control the transfer of arms.

ISBN 978-1-108-86281-3 Milgate et al.

In the international context, the trade in small arms used for illegal activity remains a current issue. Recently, on the international scene, some progress was made with the Arms Trade Treaty that entered into force in 2014. Australia played an active role in the adoption of the treaty while a temporary member of the UN Security Council-led negotiations on the first ever resolution on small arms (UNSC 2117). However, small arms and light weapons continue to proliferate around the globe and threaten the peace and security of many societies. Dealing with the threat of guns to human security is an ongoing concern and the law plays a central role in this campaign. In its legal responses to the Port Arthur Massacre, Australia has shown the world that it is possible to minimise the threat of guns to civilian populations, and Australia showed in its time on the UN Security Council (2013–2014) that it was willing to play a global role on this issue.

The events

The facts of the Port Arthur massacre reveal the deliberate and intentional nature of Bryant's crimes. On the morning of the massacre, Bryant left his home in Hobart and drove to Port Arthur, approximately one hour's drive to the east. Port Arthur is one of Australia's most significant historic sites, as it was the site of one of Australia's most notorious convict colonies in the early 1800s. As was common, on the day in question, Port Arthur was overflowing with tourists.

On his drive to Port Arthur that day, Martin Bryant stopped off at a guesthouse called Seascape Cottage, where he entered and killed the owners, David and Noelene Martin. Bryant then drove to Port Arthur, arriving at about 1:10 pm. He parked his car and entered the Broad Arrow Café, where he purchased a meal and ate it on the deck. After eating, Bryant returned the tray and went back to his table where he pulled an AR-15 semi-automatic rifle from his bag. Entering the café, he began systematically shooting people at close range. He moved into the gift shop and did the same. Returning to his bag for additional ammunition, he reloaded and returned to shoot the people in the gift shop who had taken cover behind tables and furniture. In the first 90 seconds, 20 people were killed and 12 people were injured.

Bryant continued into the car park behind the café. People could hear the commotion and had taken cover behind the buses. He shot and killed another four people, wounding others. Bryant continued shooting people on the grounds of the historic site, then got into his car and drove past the tollbooth and onto the main road. Before exiting, he had killed seven more people, including Nanette Mikac and her two young daughters, Madeline and Alannah, aged three and six. Bryant chased Alannah behind a tree in order to kill her. Bryant then drove up the main road to a service station located at a general store. He used the BMW he was driving – having killed the driver and passenger and stolen it – to block a Toyota Corolla from leaving the pump area. He forced the male occupant into the boot of the BMW, shot the female occupant of the Corolla, dragged her body out of the car, got into the driver's seat of the BMW and took off down the road with the male hostage locked in the boot. A police officer arrived soon after and went in chase of Bryant a few minutes later.

Bryant returned to the Seascape guesthouse where he had begun his murderous killing spree earlier that morning. At the house, he took his hostage inside and set fire to the stolen BMW. At around 2 pm police officers arrived, but were forced to take shelter for a few hours in a ditch while Bryant fired on them with an automatic weapon. At 9 pm, a Special Operations police team arrived from Hobart. An 18-hour standoff ensued because Bryant claimed he had hostages. The following day, Bryant set fire to the house, taunting the police to come in and get him. Eventually, Bryant ran from the house with his clothes alight and was captured by police officers.

During the initial period of his police questioning, Bryant admitted to hijacking the BMW car, but denied having shot anyone. He stated that he had not visited Port Arthur that day. Bryant also claimed that the guns found by police were not his. During a bedside hearing in hospital, where he was being held because of his burns from the fire, Bryant was charged with just one murder. Police said additional charges would follow. On 22 May, Bryant appeared via a video link from Risdon Prison to the Magistrates' Court for a remand hearing.

During the following weeks, the police investigated all the events of the day, which resulted in the final charges being laid against him: 35 counts of murder, 20 counts of attempted murder, four counts of aggravated assault, eight counts of wounding, three counts of causing grievous bodily

ISBN 978-1-108-86281-3 Milgate et al.

harm, one count of arson and one count of unlawfully setting fire to property. He was convicted on 13 November 1996, and received multiple sentences of life imprisonment without parole.

The Port Arthur massacre attracted considerable media attention and debate because of the magnitude of the killings in a place that was popular with Australian and international tourists. There was interest also in Bryant himself. What kind of person would do this? Was he of sound mind? Those who knew Bryant were questioned by journalists eager to paint a picture for the public of who Martin Bryant was. A number of conflicting stories emerged. Distant relatives provided an album full of photographs. Two of Bryant's ex-girlfriends provided some more. On 30 April, the first photos of Bryant appeared on the front pages of the nation's press. *The Australian* newspaper enhanced a photograph of Bryant that exaggerated the whiteness of his eyes to give him an eerie, spaced-out look. Debate about Bryant's early life, history of gun use, state of mind and motivations continue today, as does curiosity about his life in prison.

Motive

Since the day of the Port Arthur massacre, there has been speculation about Bryant's motivation for the killing spree, focusing in large part on his childhood and his sanity. In 2006, Bryant's lawyer, John Avery, was reported to be writing a book about his former client. Extracts were published in the *Bulletin* magazine, along with transcripts of conversations between Bryant and Avery, school reports and psychiatric assessments.

The legal community and many in the media condemned Avery's behaviour and the magazine's publication of the material as being both professionally questionable and inconsiderate of the feelings of victims and their families.

In 2009, journalists Robert Wainwright and Paola Totaro published the book, *Born or Bred? Martin Bryant – The Making of a Mass Murderer*, which delved into his past.

One of the ideas about Bryant's motives, put forward by the defence psychiatrist, Paul Mullen, was that Bryant was inspired by a lone gunman's massacre of 16 children and one adult on 13 March 1996 in the Scottish town of Dunblane. Other speculation has focused on Bryant's below-normal intellect and resulting social isolation and anger, desire for attention, and a long-term grudge against his first victims, who had bought the Seascape property that he had wanted to buy.

Figure 16.2 Linda White (left) and her fiancé, Mick Wanders (centre) – both survivors of the Port Arthur massacre – leave the Supreme Court of Tasmania in Hobart on 20 November 1996, after the sentencing hearing of Martin Bryant.

ISBN 978-1-108-86281-3 Milgate et al.

Conspiracy claims

From the beginning, **conspiracy theories** surrounded the Port Arthur massacre. These suggested that the massacre was actually carried out by special operatives who framed Bryant. According to some of the proponents of conspiracy theories, particularly those who are strong opponents of gun control, the purpose of the massacre was to provide a platform for the federal government to bring about gun control law reform.

conspiracy theory
speculation that there is a cover-up of the information surrounding a significant event by the government or other authorities

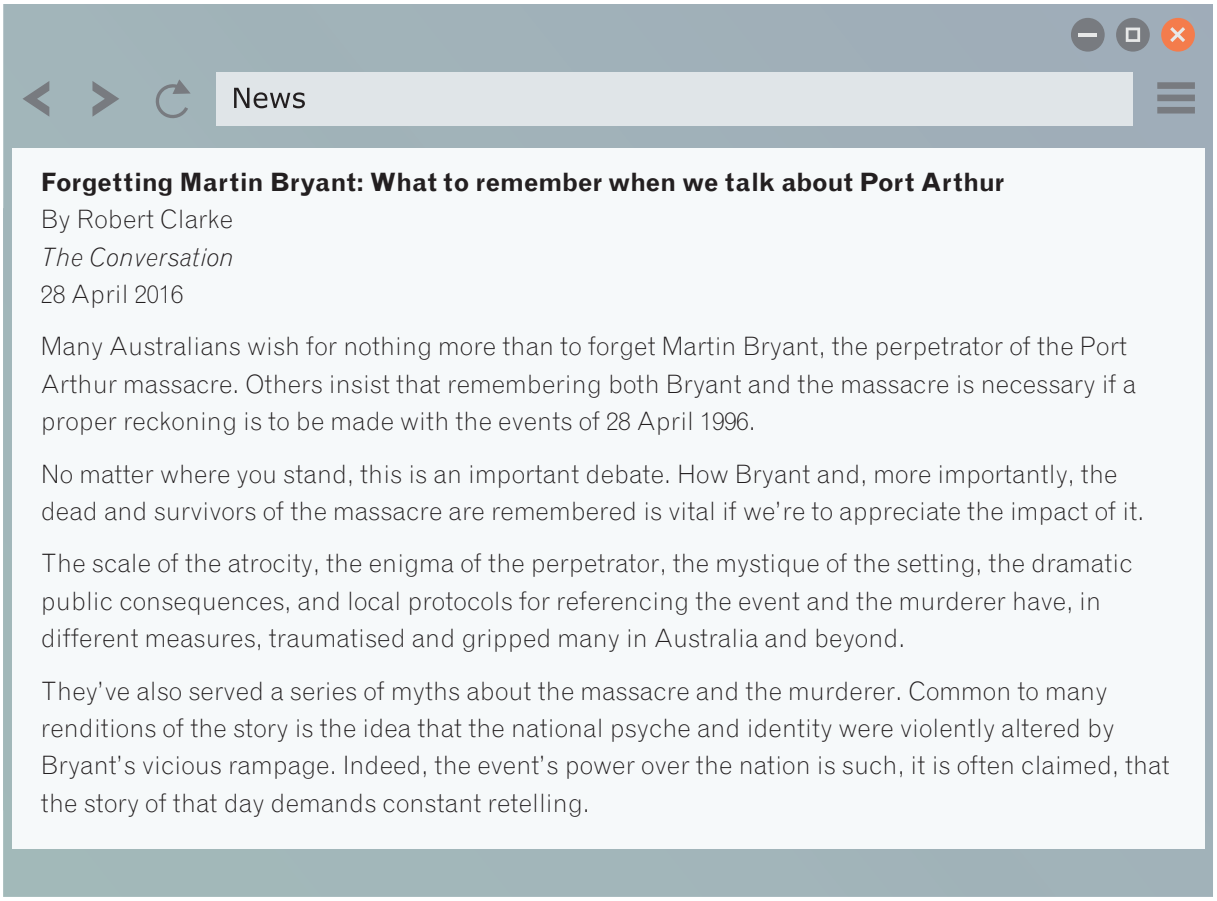
A more recent conspiracy theory is that the Port Arthur massacre was a plot: it would make it easier for terrorists to take over Australia if all of our guns have been confiscated. These theories do not enjoy any credibility in legal or scholarly circles.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 15–16 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 16.1

1 Construct a timeline of events from the day of the Port Arthur massacre until Bryant's arrest.
2 Discuss if you think people will ever know why Martin Bryant did what he did. Assess why a murderer's motives are a source of fascination and justify your response.



Forgetting Martin Bryant: What to remember when we talk about Port Arthur
By Robert Clarke
The Conversation
28 April 2016

Many Australians wish for nothing more than to forget Martin Bryant, the perpetrator of the Port Arthur massacre. Others insist that remembering both Bryant and the massacre is necessary if a proper reckoning is to be made with the events of 28 April 1996.

No matter where you stand, this is an important debate. How Bryant and, more importantly, the dead and survivors of the massacre are remembered is vital if we're to appreciate the impact of it.

The scale of the atrocity, the enigma of the perpetrator, the mystique of the setting, the dramatic public consequences, and local protocols for referencing the event and the murderer have, in different measures, traumatised and gripped many in Australia and beyond.

They've also served a series of myths about the massacre and the murderer. Common to many renditions of the story is the idea that the national psyche and identity were violently altered by Bryant's vicious rampage. Indeed, the event's power over the nation is such, it is often claimed, that the story of that day demands constant retelling.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

Looking at a monster

Consider the recent episode of Channel 7's weekly current affairs program, *Sunday Night*. 'Martin Bryant: The interview' (6 March 2016) opens with a dramatic montage of images and statements emphasising Bryant's demonic nature.

Acknowledging 'Australia was scarred forever by the horrors at Port Arthur 20 years ago', the program promises 'unseen' video footage of Bryant's police interviews that supposedly provide insight into the murderer's grip over the popular consciousness.

The health of the national psyche is again invoked to justify a planned film about the massacre. Of his proposed venture, *Bryant: The Port Arthur Massacre*, producer Paul Moder is quoted as saying it will be 'balanced and respectful' while nevertheless 'hard hitting … very confronting and … horrific'.

Responding to the – understandable – lack of support from survivors of the massacre, Moder apparently complains:

> I am being warned off by those sympathetic to the desire by many to bury the event in Australia's collective memory.

Every retelling of a catastrophic event includes certain elements while excluding others. But retelling the unfolding of the massacre with the focus strongly on Bryant and the 'national psyche' risks sensationalising the murderer as the epitome of evil. Rendering the story as a gothic drama risks marginalising the voices of actual victims and survivors.

A different view

Other examples of retelling the Port Arthur massacre go some way to rectifying this. And, in doing so, they remind us that there's no single story here.

Earlier this month, the ABC's *Australian Story* series presented an episode on Port Arthur. It focused on stories of the suffering and resilience of people who were at the massacre, such as Carolyn Loughton.

Loughton was visiting Port Arthur with her 15-year-old daughter Sarah when Bryant attacked people in the Broad Arrow Café. Carolyn survived; Sarah was killed.

Bryant certainly features in the story. But the primary focus is stories of those who died and those who survived, witnessing the shooting and its aftermath, as well as those who helped them. Here the themes of solidarity and of community fashioned in response to the atrocity prevail.

In its retelling of the Port Arthur massacre, *Australian Story* downplays the significance of the event in the national psyche while accentuating the theme of 'compassionate citizenship'.

It returns constantly to the reactions of those who found themselves under fire, those who attended to the dead and the wounded, and those who sought to change gun laws in the wake of the disaster.

Viewer attention is directed away from the menace and the mystery of Bryant. Instead, his victims are presented as active and central. And they invite a compassionate response.

Understanding history

The theme of compassionate citizenship is evident in other representations of the massacre. In works such as 'Port Arthur' and 'Port Arthur triptych', artist Rodney Pople brings together images of the historic site's convict and indigenous pasts, as well as acknowledging Martin Bryant and his actions.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

Pople links the history of violence associated with Port Arthur to the European invasion of Tasmania. His paintings create a confronting sense of empathetic unsettlement in the viewer.

In their deployment of images of Bryant, Pople's re-visionings of the Port Arthur massacre invite reflection on those other Australians, specifically Tasmanian Aboriginals, who've been subjected repeatedly to acts of indiscriminate and brutal violence.

The retelling of the Port Arthur massacre in Pople's work and *Australian Story* seek to reframe what happened 20 years ago. But they are not without their limitations. Like other stories of what happened at Port Arthur 20 years ago, they remain partial and incomplete.

Still, they try to refashion the memory of the massacre and invite audiences to shift their focus from Bryant and idealistic notions of a national psyche or identity that prevail in other accounts.

They challenge us to renew our understanding of the impact of the event on the victims and survivors. And they place the story of Port Arthur within a broader context of the history of violence in Australia, and of our responses to it.

Review 16.2

Read the article, 'Forgetting Martin Bryant: What to remember when we talk about Port Arthur' (by Robert Clarke, *The Conversation*, 28 April 2016), then answer the following questions.

1. Identify why Robert Clarke says it is important to debate how we remember the Port Arthur massacre.
2. Outline the main ways of remembering Port Arthur put forward in the article.
3. Discuss if speculation about a murderer's motivations serves any useful purpose.
4. Critically analyse the merit of focusing on the experiences of victims in recounting the Port Arthur massacre.

16.2 Legal responses

Indictment and sentencing

On 5 July 1996, 72 criminal charges were filed against Martin Bryant in the Supreme Court of Tasmania, in Hobart. Bryant did not enter a plea to any of these charges.

The police obtained 551 statements from witnesses in their investigations into the events of that day in Port Arthur. In September 1996, Bryant's lawyer convinced him to plead guilty, and Bryant was convicted on 13 November 1996 of a long list of crimes. The judge commented that he found it difficult to imagine a more chilling catalogue of crimes that were carried out in a coldly premeditated way, yet whose victims were selected randomly. The judge remarked on the continuing effects of the killings on survivors, the families and friends of those whom he had killed; the eyewitnesses; and the Port Arthur workers, ambulance officers and police officers who had to cope with the injured and dead.

On 22 November 1996, Bryant received 35 sentences of life imprisonment without parole for the murders, plus 21 years for each of the other counts in the **indictment**. The 'In Court' box below shows the judge's comments on passing sentence.

indictment
information presented for the prosecution of one or more criminal offences; a formal written charge

ISBN 978-1-108-86281-3 Milgate et al.

In Court

***R v Martin Bryant* [1996] TASSC**

Justice Cox's comments on handing down Martin Bryant's sentence included:

In consequence of the tragic events at Port Arthur on 28 and 29 April of this year and of his plea of guilty to the unprecedented list of crimes contained in the indictment before me, the prisoner stands for sentence in respect of:

- the murder of no less than 35 persons
- of 20 attempts to murder others
- of the infliction of grievous bodily harm on yet three more and
- of the infliction of wounds upon a further eight persons.

In addition, he is to be sentenced for:

- four counts of aggravated assault
- one count of unlawfully setting fire to property, namely a motor vehicle which he seized at gun point from its rightful occupants, all of whom he murdered
- for the arson of a building known as 'Seascape', the owners of which he had likewise murdered the previous day.

After having heard the unchallenged account of these terrible events narrated by the learned Director of Public Prosecution and his Junior, an account painstakingly prepared by them from the materials diligently assembled by the team of police and forensic investigators charged with that task, it is unnecessary for me to repeat it in detail or to attempt more than a brief summary. The prisoner, it is clear, a lengthy period of time before the day on which it was carried into effect, formed the intention of causing the deaths of Mr and Mrs Martin, against whom he had long harboured a grudge, and at the very least of causing mayhem among the large group of residents and visitors he anticipated would be present at the Port Arthur Historic Site, by shooting at them. Indeed he seems to have contemplated mayhem of such a drastic kind that it would in all probability provoke a response which would result in his own death. In furtherance of his intention, he acquired high-powered weapons and embarked with three of them, a very large supply of ammunition and accessories such as a sports bag to conceal the weapons, a hunting knife, two sets of handcuffs and rope. In addition, he carried large quantities of petrol in containers, fire starters and acquired a cigarette lighter en route. As he was not a smoker, the inference is that he intended to arm himself with the means of igniting the petrol and that this was intended to be used in unlawfully causing damage to some property in the course of his expedition.

Arrived at the Martins' home, he shot both of them dead and continued on to Port Arthur. There, at the Broad Arrow Café, he consumed a meal on the balcony outside and then, re-entering the café, placed the bag on an unoccupied table. He produced from the bag an AR15 rifle fitted with a 30-shot magazine and commenced to fire at close range at patrons who were complete strangers to him. In the first 15 seconds he discharged 17 rounds, thereby causing the deaths of 12 people, the infliction of grievous bodily harm to a thirteenth; wounds to five more; and injuries to an additional four whom he attempted unsuccessfully to murder. Moving through the café to the gift shop annexed to it, he continued to discharge the weapon at close quarters before leaving the premises approximately one minute after firing the first shot. In that period of 90 seconds, 29 rounds were fired, causing the deaths of 20 people and injuries, many of them severe, to another 12 who fortunately escaped with their lives. In addition, the spectators who escaped physical injury were subjected to emotional trauma of the most stressful kind. Although not the subject of any count in the indictment, this form of injury was clearly a by-product of the prisoner's wrongful conduct.

ISBN 978-1-108-86281-3 Milgate et al.

In Court (continued)

In the café he changed magazines and leaving it, he fired indiscriminately at various parts of the historic site intending to hit and kill those who were within range. In the car park, where there were a number of buses, he shot the driver of one in the back, killing him; and fired at groups of people seeking shelter in them or in their vicinity. Here he killed another person and caused injuries to a further three. He then exchanged the Armalite rifle for a semi-automatic .308 FN rifle or SLR, which was in the boot of his car parked nearby, and fired across the water towards the ruins and back towards the café. Still in the car park, the prisoner killed two further visitors and by firing at them shots which, in some cases, connected, attempted to murder six others. From here he moved up the road in his car and en route encountered Mrs Mikac and her two daughters, murdering all three in the heartrending circumstances already described by the Director of Public Prosecutions.

At the toll booth, he murdered the four occupants of a BMW, pulling the two female passengers seated in it from the car and shooting them at close range. He then commandeered the car, transferring from his own car some of the items in it, including the AR15 rifle, a quantity of ammunition, the two handcuffs and some petrol. Thereafter, he fired two shots at a car which had been reversed by the driver on appreciating the situation. Near the toll booth, 11 spent cartridges fired by the prisoner were later recovered.

A short distance from the toll booth, a white Corolla occupied by Mr Glen Pears and Miss Zoe Hall was parked at the service station. The prisoner brought the vehicle he was driving to a halt on the wrong side of the road and blocked the passage of the Corolla. He alighted with the SLR and tried to extract Miss Hall from the passenger seat. When Mr Pears attempted to intervene, he was forced into the boot of the prisoner's stolen vehicle. Miss Hall was then murdered in a series of three rapid shots from the hip and the prisoner moved on, returning to Seascape. On the way, and after his arrival, he fired at a number of vehicles causing very grievous harm to the occupant of one of them and endangering the lives of nine other people, including two police officers called to the scene.

[After he] arrived at Seascape, the prisoner forced Mr Pears, whom he was treating as a hostage, to enter the house, placed handcuffs on his wrists and immobilised him by attaching a second set of handcuffs to the first and some fixture in the premises. He then set fire to the stolen vehicle and retreated to the house where, at some time before his apprehension, he murdered Mr Pears by shooting him. Throughout the night he continued to discharge a number of weapons, his own arsenal augmented by weapons belonging to the Martins, and kept at bay the police who were surrounding the house, their response restricted by the belief that both the Martins and Mr Pears could still be alive. Clearly the Martins were not alive at that stage, but the prisoner deceitfully conveyed the impression that they were in telephone conversations with police negotiators. The following morning he set fire to the house, destroying it and, while fleeing from it in an injured condition due to burns, was apprehended.

Objectively, it is difficult to imagine a more chilling catalogue of crime. The prisoner, having had a murderous plan in contemplation and active preparation for some time, deliberately killed two persons against whom he held a grudge, and then embarked on a trail of devastation which took the lives of a further 33 other human beings who were total strangers to him and which caused serious injury, distress and grief to literally thousands more. The repercussions of these crimes have been worldwide. His selection of victims was indiscriminate. He killed and injured men, women and even children. He killed, or attempted to kill, local residents, visitors from other parts of this state, from other parts of Australia and visitors from a number of overseas countries. He killed individual family members, married couples and, in one case, all the members of one family save the bereaved father left to mourn them. The learned Director of Public Prosecutions has mentioned

ISBN 978-1-108-86281-3 Milgate et al.

In Court (continued)

the impact these crimes have had on individuals immediately affected by the loss of a family member or members, or who suffered physical injury in the course of this shooting rampage. He has also mentioned the effect it had on eyewitnesses who experienced the nightmare as it ran its course, or who came upon the scene or otherwise had to cope with the injured and dead.

This is not the place to acknowledge the contributions made by groups or individuals in dealing with the aftermath of these crimes. No doubt that will be acknowledged elsewhere. Suffice to say that there were many, many people who were severely affected by their distressing experiences and who will continue to be so affected for many years to come. It is proper to record also the anguish no doubt caused to the prisoner's mother and immediate family. Then there is the effect on the community at large: the shock and disbelief that criminal conduct on this scale could occur in Australia, let alone Tasmania; the feelings of outrage, anger, grief and frustration at not being able to do more to redress the wrong suffered by so many innocent victims. Though no way comparable to the human suffering endured by those directly affected, very considerable financial loss has also been occasioned to individuals and to the community at large. In the sentencing process, the impact upon the victims of crime cannot be ignored. In this case, more than any other I have ever experienced, they demand recognition.

In determining an appropriate punishment, the court is required to have regard to a great many factors:

- the gravity of the offence or offences
- the moral culpability of the offender so far as that lies within the limited province of human assessment
- the effect upon the victims
- the need to protect society from similar conduct by others, or repetition of it by the offender himself
- his background and antecedents
- any contrition or remorse on his part
- a host of other considerations.

In the forefront of this case is the prisoner's mental condition. The law recognises that if a person is afflicted by a mental disease to such an extent that he is unable to understand the physical character of what he is doing in, for example, firing a weapon at another person, or that he is rendered incapable of knowing that such an act is one which he ought not to do, or if he acts under an impulse which, by reason of mental disease, he is in substance deprived of any power to resist, then he should not be held criminally responsible for an act which, in a sane person, would clearly amount to a crime. Society is entitled to be protected from such a person, but he may not be held criminally responsible.

The great Australian jurist, Sir Owen Dixon, once observed that it was perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds. There is no utility, he said, in punishing people if they are beyond the control of the law for reasons of mental health. Nevertheless, a great number of people who come into a criminal court are abnormal. They would not be there if they were the normal type of average, everyday, person. Many of them, he said, are very peculiar in their dispositions, but are mentally quite able to appreciate what they are doing and quite able to appreciate the threatened punishment of the law and the wrongness of their acts and they are held in check by the prospect of punishment. It is clear on the materials before me that the prisoner falls into the latter category.

ISBN 978-1-108-86281-3 Milgate et al.

In Court (continued)

He is not suffering from a mental illness – certainly not one which rendered him incapable of knowing what he was doing or of knowing that what he was doing was wrong, or one by virtue of which he was deprived of any power to resist an impulse to do the things he did. He knew what he was doing and that it was something he ought not to do.

Nevertheless, he clearly has a mental condition which rendered him less capable than those of normal healthy mind of appreciating the enormity of his conduct or its effect upon others. I accept the psychiatric evidence that he is of limited intellectual ability, his measured IQ being in the borderline intellectually disabled range, but with a capacity to function reasonably well in the community. From an early age, he has displayed severe developmental problems, being grossly disturbed from early childhood. Whatever its precise diagnosis, as to which the psychiatrists differ, he suffers from a significant personality disorder. Professor Mullen said of him that his limited intellectual capacities and importantly his limited capacity for empathy or imagining the feelings and responses of others left a terrible gap in his sensibilities which enabled him not only to contemplate mass destruction, but to carry it through. Without minimising the gravity of his conduct or denying his responsibility for it, it would appear to me that the level of his culpability is accordingly reduced by reason of his intellectual impairment and the disorder with which he has been afflicted for so long, notwithstanding his parents' earnest endeavours to correct it, which the medical records acknowledge. That the prisoner, through these handicaps, in combination with a number of external factors beyond his control such as the loss of stabilising influences, has developed into a pathetic social misfit calls for understanding and pity, even though his actions demand condemnation.

The prisoner has shown no remorse for his actions. Though he has ultimately pleaded guilty, it has clearly been done in recognition of the undoubted strength of the evidence against him and amounts to little more than a case of bowing to the inevitable. That his change of plea has saved considerable distress, inconvenience and cost to those who would have had to be called as witnesses and to the victims and community at large by the prolongation of the proceedings is a factor which should be considered in his favour when weighing all the relevant considerations, but in the overall scheme of things, it is, in my view, overwhelmingly outweighed by the factors militating against him.

Having regard to the nature and extent of his conduct, I cannot regard it as anything other than falling within the worst category of cases for which the maximum penalty is prescribed. Taking account of the medical evidence and of his lack of insight into the magnitude and effect of his conduct apparent in all his appearances before this court, I have no reason to hope [otherwise] and every reason to fear that he will remain indefinitely as disturbed and insensitive as he was when planning and executing the crimes of which he now stands convicted. The protection of the community, in my opinion, requires that he serve fully the sentences which I will shortly impose. That consideration, as well as my belief that service of the whole of such sentence is the minimum period of imprisonment which justice requires that he must serve having regard to all the circumstances of his offences, leads to the conclusion that he should be declared ineligible for parole.

MARTIN BRYANT – on each of the 35 counts of murder in this indictment you are sentenced to imprisonment for the term of your natural life. I order that you not be eligible for parole in respect of any such sentence.

On each of the remaining counts in the indictment, you are sentenced to imprisonment for 21 years to be served concurrently with each other and with the concurrent sentences of life imprisonment already imposed. In respect of each sentence of 21 years, I order that you likewise not be eligible for parole.

Source: Reproduced with permission from the Chief Justice of the Supreme Court of Tasmania.

ISBN 978-1-108-86281-3

Figure 16.3 An aerial view of the Broad Arrow Café at the Port Arthur historic site in Tasmania, where Martin Bryant shot and killed 35 people.

Review 16.3

Read Justice Cox's sentencing comments in *R v Bryant* [1996] TASSC and write a report that addresses the following questions.

1. Identify the comments made by the judge about Martin Bryant's intellectual ability and mental health.
2. Evaluate whether the judge's observations about Bryant's upbringing, his social isolation, his intellectual ability and his mental health had any effect on the sentence.
3. Identify the comment made by the judge about remorse on the part of Bryant.
4. Identify the judge's comments about Bryant having pleaded guilty. Assess if this affected Bryant's sentence.
5. Summarise the final sentence.

Research 16.1

View on YouTube the ABC's broadcast, 'Survivors, emergency responders recount their memories of the Port Arthur massacre' (*ABC News*, 27 April 2016).

1. Identify some of the different groups of people impacted by the Port Arthur massacre.
2. Outline some of the ways these people have been impacted by the Port Arthur massacre.
3. Assess if Justice Cox reflected the impacts on survivors and victims in his sentencing comments; justify your response.
4. Outline some of survivors' views on Martin Bryant's capture.

ISBN 978-1-108-86281-3 Milgate et al.

Imprisonment

After his arrest, Bryant was held in hospital under police guard while he was treated for his burns. While **on remand** for seven months, until the conclusion of his trial, he was kept in near-solitary confinement in a specially built cell at the medium to maximum-security Risdon Prison. In 1997, Martin Bryant began his formal prison sentence at the old Risdon Prison hospital and became one of its most notorious inmates. He spent most of his time up to 2006 alone in his cell. Though the prison authorities did not consider Bryant mentally ill, they held the view that the prison hospital was the safest place for him because he was the most hated prisoner among the inmates. Apparently, he had been the target of a number of assaults and many of the inmates had made death threats against him.

on remand
(of an accused) in custody pending and/or during his or her trial

In 2006, the Tasmanian Government moved Bryant into the newly constructed Wilfred Lopes Centre, a mental health facility a few hundred metres from the prison. There are no guards inside the 35-bed unit, only nurses, doctors and support staff, and most inmates are not confined to cells but are free to wander around the complex. The centre was substantially a hospital with a therapeutic environment.

Some relatives and friends of Port Arthur victims were outraged that Bryant would be serving his sentence in such a facility. They objected because they felt they should have been told of the move prior to its occurrence. Further, they believed that it was inappropriate for someone who had not been declared insane at the time of conviction to be hospitalised. The previous year, the state's chief forensic psychiatrist, Dr John Crawshaw, had stated that Bryant did not meet the criteria for admission to the Wilfred Lopes Centre.

Their biggest objection, however, was the idea that Bryant would be able to move around hospital freely: they believed that he should be confined to a prison cell for the rest of his life.

In a leaked letter from Tasmania's Director of Prisons, Graeme Barber, to Dr Crawshaw, the reasons for transferring Bryant to the Wilfred Lopes Centre were stated as concerns for Bryant's health, wellbeing and safety, and the need to protect other inmates. Those opposed to the move questioned the validity of these concerns, given the recent $90 million redevelopment of Risdon Prison. Bryant has been transferred back to maximum security Risdon Prison on at least one occasion, in response to the public outcry about his being housed in the Wilfred Lopes Centre. From May 2009, he was held at the Wilfred Lopes Centre, but in isolation.

On 25 February 2011, Martin Bryant's mother was interviewed on the television program *60 Minutes*, in which she discussed her son's condition in prison.

Figure 16.4 Martin Bryant in Risdon Prison in Tasmania in September 2015.

Review 16.4

1. Identify the arguments for and against Bryant serving part of his sentence in a mental health facility rather than in a prison. Discuss in small groups.
2. Recall the issues raised by the 2015 News Corp report on Martin Bryant in prison at 48 years of age.
3. If a convicted murderer is found to be sane, describe the aims of the criminal sentence.

ISBN 978-1-108-86281-3 Milgate et al.

In the interview, she also made the controversial claim that she now thought that her son did not commit the crime, despite having believed he had done so at the time. The video and full transcript of the 2011 interview can be found on the *60 Minutes* website.

In September 2015, a News Corp publication reported that 48-year-old Martin Bryant was in a very depressed state and was a danger to his guards. Bryant, it was reported, weighed about 160 kg and was nicknamed 'Porky Pig' by fellow inmates. He was continually drugged and practically a 'vegetable', spending most of his time in his cell. He was held in contempt by his fellow prisoners and had tried to commit suicide on a number of occasions.

Gun law reform in Australia

Before 1996

By the 1980s there were approximately four million privately owned guns in Australia and about 700 gun deaths each year. These guns were owned primarily for hunting and by farmers who used them to kill pests such as rabbits and feral animals. The majority of gun deaths occurred due to misuse of rifle-type guns rather than handguns. The gun laws were fairly weak and varied greatly among the states and territories.

The gun debate in Australia started in Victoria after two separate incidents in which 14-year-old girls were accidentally killed by sporting shooters. As a result, the Victorian Government introduced a shooter's licence, which, while weak by today's standards, was nevertheless the first serious attempt to place some control on guns.

Then, in 1987, Australia experienced six gun-related massacres over the course of the year that resulted in 32 deaths. Each of these incidents was premeditated and were committed by people who legally owned guns. The best known of these occurred in Melbourne: the Hoddle Street massacre and the Queen Street massacre. The Victorian Government acted swiftly to introduce tougher gun laws. The Sporting Shooters Association of Australia (SSAA), an organisation formed to promote sports such as target shooting and hunting and which represents the interests of gun owners, opposed this action. The SSAA organised a protest march by 27 000 of its members through the streets of Melbourne. However, public sentiment against weak gun laws meant that the Victorian Government persevered with its reforms.

These state reforms were complemented at the federal level by the Hawke government's establishment of the National Committee on Violence, which produced a report in 1990 containing 30 recommendations. Among these recommendations was registration of high-powered rifles. The reforms that followed represented a significant step towards gun control in Australia.

Figure 16.5 A police officer peers through the shattered window of a vehicle abandoned by Martin Bryant at the tollgates to the Port Arthur historic site, after the Port Arthur massacre on 29 April 1996.

ISBN 978-1-108-86281-3 Milgate et al.

In 1991, a gunman shot six people in a shopping mall at Strathfield, New South Wales, with an ex-military semi-automatic rifle that he had easily obtained. Widespread outrage and debate followed. In 1992, the NSW Government introduced tougher gun laws. Many pro-gun groups bitterly opposed these laws, particularly since before the Strathfield massacre, the NSW Liberal government had been ready to introduce softer laws. The tougher gun laws led to the formation of the NSW Shooters' Party. Since then, the party, now known as the Shooters, Fishers and Farmers Party, has held a seat in the NSW upper house. Also in reaction to the tougher laws, the SSAA began looking to the National Rifle Association (NRA) in the United States for ideas on how to counter the tougher legal regime for guns that was taking root in Australia. The NRA is a powerful lobby group with the goal of promoting firearm ownership rights, relying on a broad interpretation of the Second Amendment of the US Constitution, which gives people the right to keep and bear arms.

Overall, the effect of the gun massacres that occurred in Australia between 1987 and 1991 was the development of public concern about guns, which coincided with leaders who were willing to enact the necessary legal reforms to put the nation on the path of a sensible gun control regime.

Tougher gun laws after the Port Arthur massacre

By the 1990s, Tasmania was the odd state out in terms of gun law reform. This made it quite easy for Martin Bryant to purchase the guns that he used to kill 35 people. In response to the public outcry about gun control after the massacre, former Prime Minister, John Howard, initiated a discussion on tougher gun law reforms. The Deputy Prime Minister, Tim Fisher, backed him.

Vedio

On 10 May 1996, a special meeting of the Australasian Police Ministers Council agreed to some resolutions that evolved into the *National Firearms Agreement* (1996) in which all the states and territories agreed to a 'uniform system of firearms licensing and registration'. The state governments and federal government signed the *National Firearms Agreement* (1996). Some of the key parts of this document stated that:

- gun ownership is a privilege and not a right
- semi-automatic weapons must be strictly controlled
- all guns must be registered
- guns must be stored securely
- there must be a 28-day cooling-off period when buying guns.

The *National Firearms Program Implementation Acts* of 1996, 1997 and 1998 (Cth) followed this up.

Such proposals seemed sensible to the average Australian; however, some National Party parliamentarians and pro-gun lobby groups, such as the SSAA, were horrified and did everything they could to stop the proposed new laws. It was in this context that conspiracy theories about the Port Arthur massacre sprouted. Some gun enthusiasts began to argue that the Port Arthur massacre was a government conspiracy and that Martin Bryant was set up, all with the aim of using it as an excuse to take guns away from all the law-abiding gun owners in the country.

The government buy-back scheme

As part of the reform of gun laws and culture in Australia, the Howard government in the aftermath of the Port Arthur massacre introduced a buy-back scheme and amnesty. Money was given to people who willingly handed over guns that appeared on a list of prohibited weapons – in particular, semi-automatic rifles and shotguns. Approximately one million guns were collected under the scheme.

Review 16.5

1. Construct a list of the reforms to gun law that occurred in Australia from 1980 to 1997.
2. Investigate the massacres (involving guns) that occurred in Australia in 1987 and how the government responded to these.
3. Outline the reforms to gun law that occurred in Australia from 1997 to 2007.
4. Evaluate the effectiveness of the government's response to public concern about gun use both before and after 1996.

ISBN 978-1-108-86281-3 Milgate et al.

16.3 Non-legal responses

Alannah and Madeline Foundation

The deaths of 35 people at the hands of Martin Bryant shocked Australians. Of the stories that emerged from that day, the murder of Nanette Mikac and her two young daughters, Alannah and Madeline, aged six and three respectively, were particularly devastating. Australians were reminded of the fragile nature of human life and the destructive potential of guns.

Walter Mikac lost his wife and daughters. These events had a profound effect on another Australian father of two young girls, Phil West, who, along with a small group of volunteers, established the Alannah and Madeline Foundation. The Foundation's goal is to keep children safe from violence. It does not receive government funding, but relies on fundraising events, private grants and individual donations to continue its work. The Foundation runs programs to assist with the recovery of children who have witnessed or experienced violence, and to prevent violence and bullying in schools. It also acts as a children's advocate before federal, state and local governments. HRH Crown Princess Mary of Denmark is the International Patron of the Alannah and Madeline Foundation.

Publicity

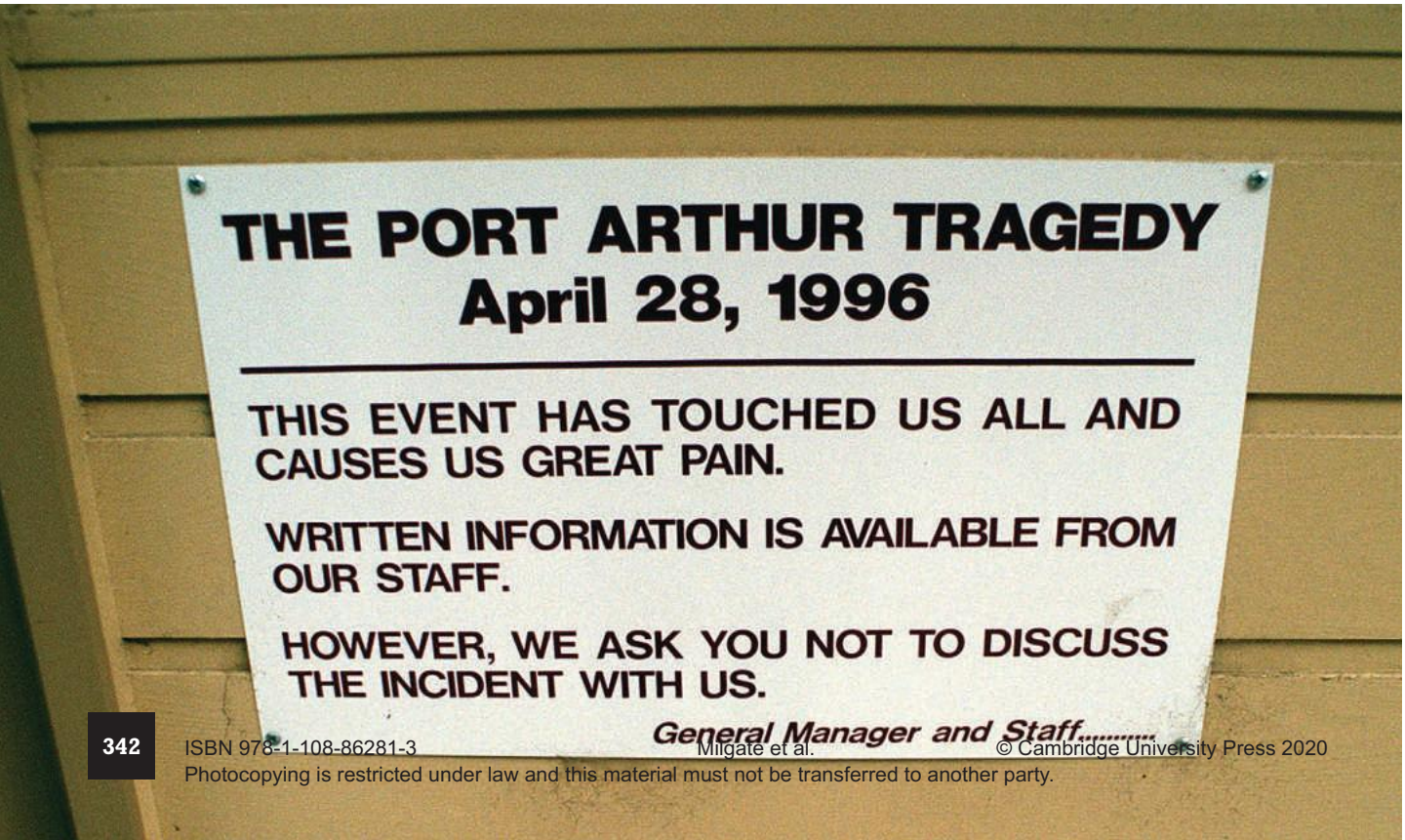
On 10 March 2012, Martin Bryant appeared in the headlines again ('Bryant painting prize outrage', *The Mercury*) when a controversial painting of Bryant at the site of the killings was awarded a prize. This was a challenge to the attitude of many people in Tasmania, who felt that the best way of dealing with the events on that day at Port Arthur in 1996 was to give the killer no publicity at all, particularly since this is what Bryant seems to have craved. Since 1996, many Tasmanians, particularly those affected in some personal way by the massacre, have refused to even utter Bryant's name. Nowhere on the site of Port Arthur is there any mention of his name.

16.4 Effectiveness of responses

Gun deaths

From 1998, Australia experienced a marked decrease in gun deaths when compared with the 1970s and 1980s. Handguns, however, appeared as a new menace in 2002. In a shooting that occurred at Monash University in Victoria that year, a student, who was a licensed pistol shooter, fired handguns in an econometrics class, killing two students and injuring four students and a lecturer.

Figure 16.6 A sign erected at Port Arthur requesting visitors not to discuss the Port Arthur massacre. This photo was taken on 4 April 1997.



ISBN 978-1-108-86281-3

Research 16.2

It has been approximately a quarter of a century since the Port Arthur massacre. There have been many studies on the impact of the 1996 gun law reforms and suggestions that these reforms are under threat.

Search the internet for the following two articles from Australian newspapers and then answer the questions below:

- 'Australia 20 years after gun reform: No mass shootings, declining firearm deaths' (by Dan Gaffney, *University of Sydney News*, 23 June 2016)
- 'Australia slipping backwards on *National Firearms Agreement*' (by Dan Gaffney, *University of Sydney News*, 5 October 2017).

1 Gaffney provides evidence of the success of gun law reform in Australia since 1996. Outline this evidence.
2 Discuss why the *National Firearms Agreement* (1996) is under threat, according to Dan Gaffney.
3 Search for recent articles about the *National Firearms Agreement* (1996) and assess the level of the threat to our gun laws today.

After the Monash shootings, the Australian Crime Commission (now known as the Australian Criminal Intelligence Commission) was formed. A statutory body develops strategies for dealing with serious and organised crime. One of the first things on its agenda was illegal trafficking in handguns. It had become apparent that there was an increase in illegal handgun use.

While handguns were emerging as the new threat in crime, the total number of deaths per year from **suicide**, unintentional killings and **homicide** dropped dramatically. There were 614 firearms deaths in 1990 while in 2016 there were 274.

suicide
the intentional taking of one's own life

homicide
the act of killing another human being

The buy-back scheme

The long-term effectiveness of this scheme has been closely monitored. While the post-1996 laws and the gun buy-back scheme have been widely hailed as a success, there were concerns emerging from 2015 that the gun lobby in Australia was exerting considerable pressure on the government to weaken the gun laws by reviews to the *National Firearms Agreement* (1996). In 2015, an article, 'After 20 years, Australia's gun control debate is igniting once again', appeared in *The Guardian* newspaper. The author, Lenore Taylor, argued that the gun lobby has been steadily winning concessions since Port Arthur, and pointed out that though one million guns were handed in after 1996, the national gun inventory has crept back to 1996 level due to imports. Taylor concluded with this ominous warning, 'These things have happened while we rested on our laurels, thinking the Howard government's gutsy stand would continue to keep us safe, while the pesky detail of the [*National Firearms*] *Agreement* was

Figure 16.7 A security guard holds up an Armalite rifle that is similar to the one used in the Port Arthur massacre. Behind him are some of the guns that had been handed in under the gun buyback scheme. After the Port Arthur massacre, Australia banned all automatic and semi-automatic rifles. In Victoria, during the first decade since the new laws were introduced, 20 000 guns were handed in and their owners were reimbursed by $12 million.

ISBN 978-1-108-86281-3

discussed in obscure working groups and relegated to the shadows. But after 20 years, Australia's gun control debate is igniting again.' Search for the full article on *The Guardian* website.

In 2017, there was a three-month national firearms amnesty, during which time 51 000 unregistered guns were handed in. Prompted by events such as the Lindt Café siege in 2014, this was the first national amnesty since 1996, although there had previously been some state-based amnesties. New South Wales had amnesties in 2001, 2003 and 2009, with 67 000 handguns surrendered.

Comparison: Firearms in the United States and New Zealand

While Australia has directly addressed the problem of gun deaths, other countries, such as the United States, have not been as effective in meeting this challenge. Political leaders in the United States have not been successful in countering the strong pro-gun culture supported by the extremely effective lobbying of the NRA. Gun massacres remain a feature of life in the United States, and the sale of firearms continues to grow every year. Websites set up to track gun crime and mass shootings in the United States reveal startling statistics on the extent and the cost of gun crime. In 2018, there were 323 mass shootings recorded in the United States, which resulted in 1661 people being shot and 387 people dying. On 15 March 2019, tragedy struck in New Zealand. A lone gunman killed 51 people in attacks on two Mosques in Christchurch. This was one of the worst mass shootings in recent history. The Christchurch attack had two connections to Australia. First, it was an Australian terrorist who committed the act, and second, the New Zealand Government followed the Australian example from 1996 and brought in tough gun laws and a gun buy-back scheme.

Figure 16.8 On 24 March 2018, students from the Marjory Stoneman Douglas High School in Florida, USA, led a nation-wide protest demanding sensible gun-control laws. There had been a mass shooting at their school on 14 February 2018. The protest followed a nation-wide student walkout earlier in the month. This was followed on 20 April 2018 with a protest to commemorate the nineteenth anniversary of the mass shooting at Columbine High School in Colorado.

ISBN 978-1-108-86281-3 Milgate et al.

Research 16.3

View online the television program, 'How Australia stopped mass shootings after the Port Arthur massacre in 1996' (Democracy Now, 19 March 2019). After watching the program, answer the following questions:

1 Identify who Rebecca Peters is and where Democracy Now is based.
2 Identify the recent event that prompted this interview.
3 Discuss why Americans are interested in Port Arthur. Construct a list of the actions that the Australian Government took after the Port Arthur massacre, according to Rebecca Peters.
4 Assess if Rebecca Peters makes a good case for the success of gun reform laws in Australia.

Research 16.4

1 View the 2002 documentary, *Bowling for Columbine*, and outline the main points it makes about guns in the United States.
2 Investigate the Second Amendment to the US Constitution. Discuss why gun law reform might be difficult to achieve in the United States in light of this clause.
3 View the website of the US National Rifle Association (NRA). See what information you can find about how the NRA can continue to justify opposing gun law reform even in the face of massacres like the one at Columbine High School.
4 Analyse the responses of the Trump administration to gun violence.
5 Discuss why the United States has been unable to tighten its gun-control laws.
6 Investigate whether there have been any recent significant changes on gun law reform in the United States.

Figure 16.9 In March 2019, Pauline Hanson held a press conference alongside fellow senior One Nation officials, James Ashby and Steve Dickson. This press conference was in response to the screening of an undercover investigation by news organisation Al Jazeera, which included hidden camera footage of Hanson appearing to suggest the 1996 Port Arthur massacre was a government conspiracy. Other footage from Al Jazeera's investigation showed Ashby and Dickson soliciting financial support in the United States from the National Rifle Association in a bid to seize the balance of power in parliament and weaken Australia's gun laws.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- The Port Arthur massacre on 28 April 1996 was the worst gun massacre in Australian history.
- The Port Arthur massacre set in motion a chain of events that led to gun reform in Australia at both state and federal levels.
- The Australian Government – in comparison to the governments of other countries, especially the United States – acted quickly and decisively to reform Australia's gun laws.
- The Sporting Shooters Association of Australia opposed these reforms.
- Media coverage of the Port Arthur massacre was concerned with trying to understand why Martin Bryant would indiscriminately kill 35 people.
- On 22 November 1996, Bryant was sentenced to 35 life sentences without the possibility of parole.
- Before 1996, gun laws varied greatly among Australia's states and territories.
- After the Port Arthur massacre, state and federal governments signed the *National Firearms Agreement* (1996).
- From 1998, Australia has experienced a decrease in gun deaths.
- Since the 1990s, the United States has failed to deal with the issue of gun violence.

Questions

Multiple-choice questions

1 The high-powered semi-automatic weapons that Martin Bryant used on 28 April 1996 were:
   - **a** imported from the United States.
   - **b** bought legally in Tasmania.
   - **c** acquired illegally.
   - **d** illegal under existing Commonwealth legislation.

2 Martin Bryant's motive for his crime:
   - **a** was that he had been bullied and abused as a child.
   - **b** was that he had a hatred of foreign tourists.
   - **c** was that he was insane and did not really know what he was doing.
   - **d** is not known for sure.

3 The most probable reason for the growth of conspiracy theories about the Port Arthur massacre is that:
   - **a** Australian political leaders have refused to speak publicly about the massacre.
   - **b** Martin Bryant was denied natural justice.
   - **c** pro-gun groups in Australia and overseas oppose attempts by governments in Australia to toughen the laws on guns.
   - **d** Martin Bryant was not capable of using a gun.

4 The toughening of gun laws in Australia since 1996 has led to:
   - **a** no change in the number of deaths from firearms each year.
   - **b** a doubling of the number of deaths from firearms each year.
   - **c** a decrease of the number of deaths from firearms each year.
   - **d** the elimination of all deaths from acts of homicide using a gun.

5 Achieving reforms of the gun laws in the United States is extremely difficult because:
   - **a** many politicians are against making tougher laws.
   - **b** the National Rifle Association has enormous cultural power and political clout.
   - **c** arms manufacturers successfully lobby politicians against tougher laws.
   - **d** all of the above.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

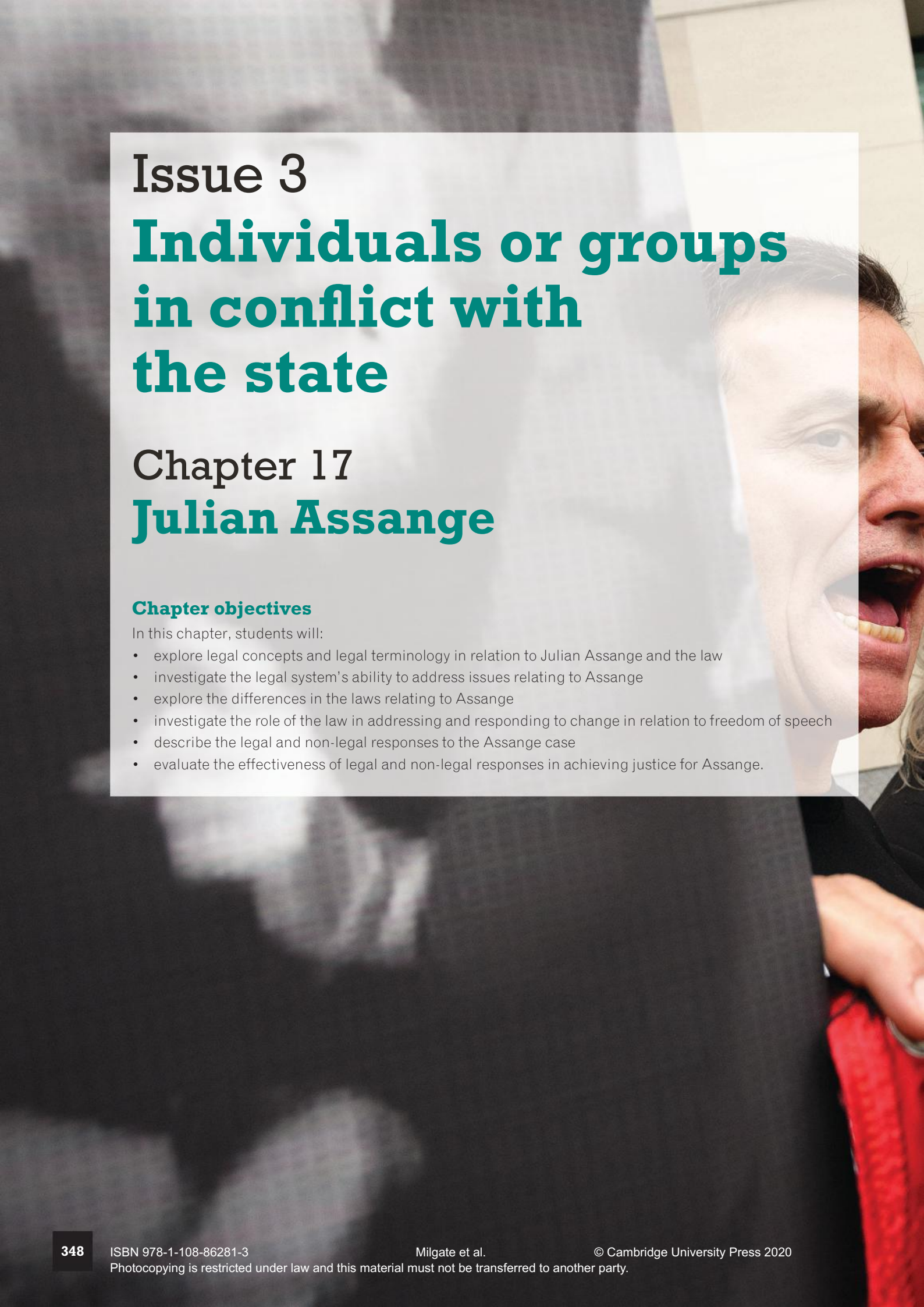
1 In your own words, summarise the events of 28 April 1996.
2 Outline how Martin Bryant was brought to justice.
3 Identify why Martin Bryant has been the subject of controversy since his imprisonment.
4 Identify why there are conspiracy theories about the Port Arthur massacre.
5 Outline some of the events that prompted gun law reform in Australia before 1996.
6 Outline the legal responses to gun-related deaths in Australia before 1996.
7 Describe the Tasmanian Government's attitude to gun law reform before 1996.

Extended-response question

Evaluate the effectiveness of the Australian legal system in dealing with the problem of gun-related deaths.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your response.

ISBN 978-1-108-86281-3 Milgate et al.



Issue 3
Individuals or groups in conflict with the state

Chapter 17
Julian Assange

Chapter objectives

In this chapter, students will:

- explore legal concepts and legal terminology in relation to Julian Assange and the law
- investigate the legal system's ability to address issues relating to Assange
- explore the differences in the laws relating to Assange
- investigate the role of the law in addressing and responding to change in relation to freedom of speech
- describe the legal and non-legal responses to the Assange case
- evaluate the effectiveness of legal and non-legal responses in achieving justice for Assange.

ISBN 978-1-108-86281-3 Milgate et al.

Relevant law

IMPORTANT LEGISLATION

Espionage Act 1917 (US)
The Universal Declaration of Human Rights (1948)
Vienna Convention on Diplomatic Relations (1961)
Computer Fraud and Abuse Act 1984 (US)
Diplomatic and Consular Premises Act 1987 (UK)
Criminal Code Act 1995 (Cth)
Extradition Act 2003 (UK)
Uniform Code of Military Justice (US)

SIGNIFICANT CASES

The New York Times Co v United States (1971) (403 US 713)
Julian Assange v Swedish Prosecution Authority (2011)
United States v Bradley Manning (2013) (court martial)

ISBN 978-1-108-86281-3

17.1 A brief history of the Julian Assange case

Julian Paul Assange (pronounced ah-sonje) is an Australian **whistleblower** widely known as the founder, editor-in-chief and director of **WikiLeaks**, a website established in 2006 to 'whistleblow' on a range of corporate and government activities.

whistleblower
a person who raises a concern about wrongdoing occurring in an organisation, company or government department

WikiLeaks
an international organisation (originating in Australia) committed to anonymously publishing documents that are unavailable to the public

Since 2010, Assange has been involved in a highly publicised and politicised legal case of international significance, involving Sweden, the United States, United Kingdom and Australia. It relates to a series of releases of highly sensitive information about the behaviour of the US military in Iraq. The information consists mostly of communications between staff and departments that are classified as 'secret'.

His situation is interesting from a legal perspective because it is not clear that he has broken any law. He is an Australian citizen, but he remained inside the Ecuadorian Embassy in the United Kingdom, in order to resist a Swedish **extradition** request, which related to sexual assault charges. Ecuador granted him asylum because Assange believed the US Government would seek his extradition from Sweden. The Swedish arrest warrant was rescinded in 2017, but Assange remained in the embassy. In late 2018, it was revealed that US prosecutors had a sealed indictment (formal accusation by a grand jury) against him. As at May 2020, Assange awaits the serving of these orders in Belmarsh prison.

extradition
the handing over of a person accused of a crime by the authorities of the country where he or she has taken refuge to the authorities of the country where the crime was committed

Assange's situation raises a number of important social and political issues relating to **freedom of speech**, freedom of the press and information, and the fine line between the government's wish to keep some political and strategic information confidential versus the right of news services or individuals to publish such information and individuals' right to know. Assange has been painted by some as a man with a brilliant mind and by others as an outstanding journalist. Indeed, he won the 2010 Martha Gelhorn prize for journalism. However, others label him a traitor, a vandal and an irresponsible journalist because his actions compromise the ability of national governments to keep some information secret in order to ensure the security of their citizens.

freedom of speech
where citizens of a country are not restricted or controlled by government censorship regarding what they say (except in terms of vilification, incitement and defamation)

Assange has been in conflict with at least four countries: they ranked his status as anywhere from the 'most dangerous person in the world' to a 'bail jumper' who refused to face accusations of sexual assault. His health continues to deteriorate after seven years living inside the Ecuadorian embassy (2012–2019).

Hacking

Julian Assange has highly sophisticated knowledge and skills in computer technology, software design and encryption. However, he has a history – dating back to the 1990s – of computer hacking of company databases and government departments, seeking out information that would not legally be available to him. His activities during this time have been described as 'kind hacking', in that his intention was not to destroy databases or sabotage companies, but to find information that related to his personal affairs and family.

In 1995, Assange was arrested and charged for hacking into the computer systems of Nortel, a now defunct Canadian telecommunications company. He pleaded guilty to 25 charges and was fined $2100. Assange could have gone to jail for up to 10 years, but the judge took into account his disrupted childhood. Later on, Assange created a group called 'Parent Inquiry into Child Protection'; setting up a type of database where protected legal records related to child custody issues in Australia could be accessed. The group enabled parents involved in child custody disputes to get information from the Children's Court and allowed them to raise issues of child protection

ISBN 978-1-108-86281-3 Milgate et al.

Figure 17.1 The WikiLeaks logo.

with government agencies. Court records also show that in 1993 Assange provided technical advice to the Victoria Police Child Exploitation Unit and helped in prosecutions. Assange has often put his computer technology skills to good use.

WikiLeaks

Julian Assange set up the website/news service WikiLeaks in 2006. He believes in publishing primary sources of information because he believes in the public's right to know.

Wikileaks.org originally began as a 'wiki'; that is, a website that allows multiple users to post, edit, and delete content. Wikipedia is probably the most well-known example of a 'wiki'. The 'Leaks' in WikiLeaks refers to information being 'leaked' (secretly given out) with the identity of the leaker remaining anonymous. It is a long-held tradition for journalists, news services and individuals to 'not disclose their sources' so that they cannot be punished for passing on information that may be considered confidential.

Many of us are placed in situations in which we have information about others that may be important. You may know something about a neighbour, school friend or teacher. Even when you know the information is true, it is still difficult to know whether to share the information and in what circumstances. Do we play 'whistleblower' or not? The definition of whistleblowing revolves around wrong or wrongdoing, but it is not always easy to know whether or not something is wrong or whether or not the information should be shared.

Video

Release of US military documents

In 2010, WikiLeaks released a number of US military documents. A US army soldier stationed in Iraq, Specialist Manning, accessed databases and downloaded secret information about US Government operations in Iraq and Afghanistan. It is alleged that over 250 000 documents or cables were downloaded with intent to leak them to WikiLeaks.

One of the most crucial leaks related to a video of a horrific slaying of Iraqi citizens by US soldiers, now known as '**Collateral** Murder'. Viewed from the gunsights of a military helicopter, it includes disturbing footage of an apparent ambush of civilians who do not appear to pose a threat to anyone. The clip can now be accessed on the internet, but it was a highly secret piece of military information not meant for publication.

Later in 2010, WikiLeaks launched another embarrassing set of documents, entitled 'Afghan War Diary', covering the period between January 2004 and December 2009. Most of the 75 000 documents are classified as secret. The documents reveal how coalition forces have killed hundreds of civilians in unreported incidents and were published by three major news publications including *The New York Times*.

collateral
(damage) in a military context, damage to or destruction of things other than the intended target such as civilian property and civilians

There are SHIELD laws (Securing Human Intelligence and Enforcing Lawful Dissemination) in many Western nations that are designed to protect journalists' sources from prosecution and incarceration: journalists are not required to reveal their sources. In New South Wales, this law is found in the *Evidence Amendment (Journalist Privilege) Act 2011* (NSW). Laws and principles are part of how countries protect freedom of speech and **freedom of the press**, both of which are fundamental to Western democracies. Without freedom from fear of persecution for publishing potentially damaging information, journalists and news services may not be able to present a balanced view of the news and of politics. The weaknesses or faults of a government and of an opposition, as well as of business and other groups, can be exposed by news services – this helps

ISBN 978-1-108-86281-3 Milgate et al.

the public decide on their future voting (and other) behaviour. Governments usually have a right of reply or are able to explain their behaviour or apologise for perceived mistakes.

As mentioned in Chapter 7, in 2019, the Australian Federal Police (AFP) raided the offices of the Australian Broadcasting Corporation (ABC) to investigate potential criminal behaviour by two journalists, Sam Clark and Dan Oakes. The AFP claimed that the journalists had illegally obtained information to use in a story about the behaviour of Australian Special Forces in Afghanistan between 2009 and 2013. There are distinct similarities with these events and the plight of Julian Assange who has always maintained to be a journalist and publisher of information that is in the public interest. Both the US and Australian governments beg to differ.

freedom of the press
where the news services and media outlets of a country are not restricted or controlled by government (except in terms of vilification, incitement and defamation)

Consider this in light of Assange's belief that citizens have a right to know what governments have done so that they can make informed decisions at election time or indeed make governments accountable for their actions.

Many governments have blocked the WikiLeaks website from their citizens. The US Government remains in conflict with Julian Assange and appears to be pursuing him in order to prosecute him for criminal offences related to his publication on WikiLeaks of classified diplomatic cables.

Free speech

'This is a free country and I have a right to free speech' is a statement that most Legal Studies students will recognise. We can express our opinions about our leaders, religions, government decisions and a range of other situations or issues without fear of persecution. Article 19 of *The Universal Declaration of Human Rights* (1948) underpins this right.

If your information is factual, and your opinion does not incite violence or hatred or defame another person or organisation, you are free to speak your mind in public, publish material and challenge authority in legal ways (see the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW)). Julian Assange and WikiLeaks maintain that they have a right – sometimes a duty – to publish information if it is the truth.

On the other hand, governments argue that some of their communications between agents and departments must be confidential to keep citizens and military personnel safe and military information secret. This includes the protection of the identities of civilians or informants in war zones who have secretly passed information to the US military. Indeed, governments do have a responsibility to protect citizens and allies and withhold information that may be to the detriment of their citizens.

Opinions differ on what constitutes protection of citizens and what is considered a national security issue. In late 2019, President Trump tweeted a photograph of a failed missile launch in Iran, which was reportedly a classified image. This is not the first time world leaders have used images for political gain and may in fact be hypocritical when considering the plight of Julian Assange.

The information published by WikiLeaks over the past few years has ranged from 'mildly embarrassing' to 'highly sensitive'. Some governments are simply embarrassed by what WikiLeaks has published and have moved to censor or ban their citizens' access to WikiLeaks. However, laws regarding the illegal exchange of information are now difficult to enforce. Australia's *Anti-Terrorism Act 2005* (Cth) and the *National Security Legislation Amendment Act 2010* (Cth) aim to fight terrorist activities and deal with other issues of national security, and they do not appear to have been breached by Assange's behaviour. However, legal opinion is divided in the United States, and Assange appears certain to face charges of sedition.

Legal Links

To learn more about WikiLeaks, how it works and why it was created, view the WikiLeaks website.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 17.2 Supporters of WikiLeaks founder, Julian Assange – including one wearing a Donald Trump mask – hold placards as they protest outside Westminster Magistrates Court in London, UK, on 30 May 2019 where there was a short hearing in Assange's extradition case.

Figure 17.2a The WikiLeaks website has been blocked by many governments.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 15–16 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

US response

Crucial to Julian Assange's conflict with the state is the US Government's treatment of Manning, who has been under arrest since July 2010. Facing 22 charges, Manning was willing to offer a guilty plea to some of the lesser charges in return for a reduced sentence. The most serious accusation was that of 'aiding the enemy', which carries a life sentence under the *Espionage Act 1917* (US). The basis for this accusation was that information passed to WikiLeaks was therefore available to Al-Qaeda. Manning alleges that there was no type of relationship with Julian

ISBN 978-1-108-86281-3 Milgate et al.

Review 17.1

1 Outline Julian Assange's background and behaviour from the 1990s to 2006.
2 Consider to what extent military documents should be shared by private citizens or journalists. Assess if the public has a right to know about conflicts in overseas countries.
3 Read the article, 'In a tweet taunting Iran, Trump releases an image thought to be classified'. Assess if US President Trump is justified in releasing military photographs of Iranian missile bases.

Assange, and that WikiLeaks allowed material to be uploaded secretly without revealing the identity of the provider.

In early 2013, Manning's sentence was reduced by 112 days by a military judge because Manning suffered mistreatment in confinement: under Article 13 of the *Uniform Code of Military Justice* (US), prisoners awaiting trial are to be protected from punishment on the grounds that they are innocent until proven guilty. However, Manning was sentenced to 35 years in jail in 2013 with an eight-year non-parole period. The day after sentencing, Manning, who had been diagnosed with gender identity disorder, announced the intention to transition from male to female: previously known as Bradley, she asked that she now be referred to by the name Chelsea and that female pronouns be used.

In January 2017, President Obama announced that Manning's sentence would be commuted to seven years – he emphasised that this was not a pardon – and on 17 May 2017, she was released. Manning appealed her original conviction, but on 31 May 2018, the US Army Court of Criminal Appeals upheld the first court's decision.

There are unconfirmed reports that at some point in 2012–2013, a US Grand Jury (a panel of prosecutors) took place and prepared a prosecution of Assange under the *Espionage Act 1917* (US).

Figure 17.3 A billboard in support of American whistleblower, Chelsea Manning, and WikiLeaks founder, Julian Assange, is driven around Westminster on 3 April 2019 in London, UK.

ISBN 978-1-108-86281-3 Milgate et al.

Research 17.1

1 Assess if Australian journalists Sam Clark and Dan Oakes are in a similar position to Julian Assange.
2 Find the *Espionage Act 1917* (US) online. Read the Act and use it to evaluate whether or not Julian Assange's actions are **espionage**.

espionage
the use of spies or spying to obtain information

Sexual assault allegations

In 2010, WikiLeaks moved its head office to Sweden, and in August of that year, two women, Sophia Willen and Anna Ardin, said that they had had non-consensual sexual relations with Julian Assange. Assange was interviewed by the Swedish police, but was not detained. He maintained that his encounters with both women were consensual. Later that year, when Assange was in London, the Swedish authorities issued a European Arrest Warrant (EAW) for him. He surrendered to British police and was detained for 10 days. He was released on bail of A$300 000, which was posted by a variety of notable friends. Interpol issued a **red notice** on him.

red notice
a request for the arrest and extradition of an individual for whom an arrest warrant has been issued in the requesting country; distributed by Interpol, the international police authority; Osama Bin Laden had a red notice issued by the US Government before he was captured and killed in 2011, and Julian Assange is currently subject to a red notice

Assange fought the EAW through the British legal system for over a year, with a number of appeals through the lower courts. On 14 June 2012, the UK Supreme Court ruled that he must be extradited to Sweden. Julian Assange sought **political asylum** and entered the Ecuadorian Embassy in London on 19 June 2012, after breaking his bail conditions in the United Kingdom. He was granted political asylum by the Ecuadorian Government and resided inside the embassy for seven years.

political asylum
a fundamental human right affirmed by Article 14 of *The Universal Declaration of Human Rights* (1948), 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'

The key factor in Assange's request for – and subsequent granting of – asylum was the treatment of Manning. Assange feared similar treatment and believed that his extradition to Sweden was a guise for a subsequent extradition to the United States to face the US justice system. Having been granted asylum, Assange was allowed to remain within the embassy, where the UK authorities could not arrest him. However, he would not be protected if he left the embassy grounds.

In May 2017, the Swedish arrest warrant was rescinded, although the chief prosecutor said that the investigation could be re-opened if Assange returned to Sweden before the statute of limitations expired in August 2020.

Assange remained in the embassy, as he was still subject to arrest by UK police for breaching his bail conditions. He gained Ecuadorian citizenship in December 2017, but in October 2018, the Ecuadorian President threatened him with eviction from the embassy. In November 2018, US celebrity Pamela Anderson, in an interview with *60 Minutes*, called on Prime Minister Scott Morrison to bring Assange home, but the prime minister rejected the request.

On 16 November 2018, the US Department of Justice accidentally revealed that prosecutors have an indictment against Assange, although because the document is sealed the exact nature of the charges has not been made public. Britain could therefore be pressured to extradite Assange to face criminal charges in the United States.

ISBN 978-1-108-86281-3

TABLE 17.1 Timeline of events

Date	Event
2006	WikiLeaks is founded as a wiki edited by a number of anti-government individuals. Julian Assange is listed as a director of the organisation.
2009	WikiLeaks establishes its head office in Iceland, a country with liberal internet censorship laws. The US Embassy in Iceland's capital city of Reykjavík becomes one of the first 'targets' of leaked information.
2010	'Collateral Murder' (allegedly leaked by US Army intelligence analyst, Specialist Manning) shows shocking footage of Iraqi civilians being gunned down by a US helicopter. Manning is arrested in the United States on 22 charges of treason and aiding the enemy.
June 2010	WikiLeaks moves its head office to Sweden.
Early August 2010	Sexual assault allegations against Assange emerge.
Late August 2010	Confusion surrounds the nature of the complaint to police by one of Assange's sexual partners. Assange goes to the Swedish police but is not detained and is free to leave the country.
September 2010	Assange flies to London for a number of WikiLeaks-related conferences.
October 2010	WikiLeaks launches another embarrassing set of documents, entitled 'Afghan War Diary'.
December 2010	Swedish authorities issue a European arrest warrant for Assange. He surrenders to British police and is detained for 10 days. He is released on bail of A$300 000, which is posted by a variety of notable friends. A red notice is issued by Interpol.
2011–2012	A 500-day legal process that involves fighting the European arrest warrant ends on 14 June 2012. After a number of lower court appeals, the UK Supreme Court rules that Assange must be extradited to Sweden.
2012–2013	There are unconfirmed reports that a US Grand Jury (a panel of prosecutors) has decided to prosecute Assange under the *Espionage Act 1917* (US).
June 2012	Assange takes refuge in the Ecuadorian embassy in London claiming diplomatic asylum.
August 2012	Ecuador grants Assange diplomatic asylum.
2012–August 2015	Assange lives inside the Ecuadorian embassy with London police guarding the embassy 'around the clock'.
September 2015	London police stop guarding Assange.
December 2015	Ecuador and Sweden reach a bilateral agreement for Assange to be interviewed inside the Ecuadorian embassy rather than be extradited to Sweden.
March 2016	Assange releases thousands of emails of US presidential candidate Hilary Clinton. Clinton used her private email address to send and receive top secret information when she was Secretary of State.
May 2017	Swedish arrest warrant rescinded; Swedish authorities no longer seeking extradition on sexual assault charges
December 2017	Assange gains Ecuadorian citizenship.
October 2018	Ecuadorian President threatens to evict Assange from the embassy in London.
November 2018	It is revealed that US prosecutors have a sealed indictment against Assange.
November 2019	Assange is evicted from the Ecuadorian embassy; he begins a 50-week UK jail term for skipping bail in 2012. UK's home secretary, Sajid Javid, approved an extradition request from the United States for Assange to face criminal charges.

ISBN 978-1-108-86281-3 Milgate et al.

Review 17.2

1 Describe the events leading up to the granting of asylum to Assange by the Ecuadorian Government in 2012.
2 Using the timeline in Table 17.1 above, identify in chronological order the three most important events that occurred between 2009 and 2019. Justify your selection.
3 Assess the fate of Julian Assange at the present time.

17.2 Legal responses

Political asylum

If an individual feels threatened by living in a country, they may seek asylum in another country. Julian Assange sought political asylum in the Ecuadorian Embassy in London – technically, embassies are a part of their country, not their host country, so the Ecuadorian Embassy is part of Ecuador, not of the United Kingdom.

Countries have granted asylum to individuals who fear political and physical persecution from their governments in numerous other cases. One example is Cardinal Joszef Mindszenty, who spent 15 years in the US Embassy in Budapest, from 1956 to 1971. He was given a life sentence in Hungary in 1949 for treason and conspiracy to overthrow the communist government. He sought political asylum during the 1956 Soviet invasion of Hungary and is possibly the most famous of all political asylum cases since World War II. It is not unprecedented for a foreign embassy to grant asylum under *The Universal Declaration of Human Rights* (1948).

Julian Assange and his legal team used a range of legal avenues to avoid being extradited to Sweden; seeking asylum in the Ecuadorian Embassy was a successful one. He was legally entitled, under the *Vienna Convention on Diplomatic Rights* (1961), to stay within the confines of the Ecuadorian Embassy. Because British authorities are unable to enter the premises of the Ecuadorian Embassy, police kept a 24-hour guard outside the embassy, with the apparent intention of arresting Assange the moment he stepped onto UK land. This surveillance ceased in August 2015 but Assange was not released until 2019, into the Belmarsh prison in the United Kingdom.

However, many observers of the Assange case ponder the question of whether the British Government could have legally seized Julian Assange from within the embassy itself. Under the *Diplomatic and Consular Premises Act 1987* (UK), ministers have power to withdraw recognition from diplomatic premises.

Figure 17.4 An artist's portrayal of Julian Assange being evicted from the Ecuadorian Embassy in London, UK, in 2019.

ISBN 978-1-108-86281-3

***Diplomatic and Consular Premises Act 1987* (UK), section 1(3–5)**

(3) In no case is land to be regarded as a State's diplomatic or consular premises for the purposes of any enactment or rule of law unless it has been so accepted or the Secretary of State has given that State consent under this section in relation to it; and if:

(a) a State ceases to use land for the purposes of its mission or exclusively for the purposes of a consular post or

(b) the Secretary of State withdraws his acceptance or consent in relation to land; it thereupon ceases to be diplomatic or consular premises for the purposes of all enactments and rules of law.

(4) The Secretary of State shall only give or withdraw consent or withdraw acceptance if he is satisfied that to do so is permissible under international law.

(5) In determining whether to do so he shall have regard to all material considerations, and in particular, but without prejudice to the generality of this subsection:

(a) to the safety of the public

(b) to national security and

(c) to town and country planning.

The British Government could have determined that the asylum granted to Julian Assange was not the intended purpose of the Ecuadorian Government's mission and withdrawn the consent or acceptance of using that land for that purpose. The government appeared to be

News

Julian Assange's extradition to the US will be decided by the UK courts in 2020

By James Vincent and Colin Lecher

The Verge

14 June 2019

The question of whether or not Julian Assange will be extradited to the United States is still unanswered after a London court ruled today that the WikiLeaks founder will face a five-day hearing on the matter in 2020.

Earlier this week, the UK's home secretary Sajid Javid approved an extradition request from the United States for Assange to face criminal charges. But the final authority to obey the request lies with the courts, which will hold a full hearing sometime after 24 February next year.

…

Assange faces 18 charges related to the leaking of classified information published by WikiLeaks. US prosecutors allege that he conspired with former US Army private Chelsea Manning to obtain the material, which included State Department diplomatic cables and documents on the wars in Iraq and Afghanistan.

The 47-year-old Assange was too ill to appear at his last hearing in London, but spoke in court today via video-link, reports Sky News. He told the court that '175 years of my life is effectively at stake,' and defended the actions of WikiLeaks, saying that the website was not involved in hacking classified information and is 'nothing but a publisher'.

ISBN 978-1-108-86281-3 Milgate et al.

locked in a dilemma between respecting international law and responding to the European arrest warrant, until April 2019, when the Ecuadorian embassy evicted Assange to waiting police.

United States espionage law

Meanwhile, in the United States a hearing or 'grand jury' is alleged to have taken place, preparing a prosecution of Julian Assange. The hearing was investigating 'possible violations of federal criminal law involving, but not necessarily limited to, conspiracy to communicate or transmit national defense information in violation of the Espionage Act'. The *Espionage Act 1917* (US) was introduced to protect the United States from traitors or spies undermining the government's attempts to defend its territories.

President Woodrow Wilson, on 7 December 1915, asked Congress to pass this law because:

> There are citizens of the United States … who have poured the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our government into contempt … to destroy our industries … and to debase our politics to the uses of foreign intrigue … We are without adequate federal laws … I am urging you to do nothing less than save the honor and self-respect of the nation. Such creatures of passion, disloyalty, and anarchy must be crushed out.

The legislation has been challenged and amended since 1917 but was most famously applied, unsuccessfully, in a 1971 case against Daniel Ellsberg (see *The New York Times Co v United States* 403 US 713), who leaked secret documents known as the Pentagon Papers. The Pentagon Papers revealed that the US Government knew from a very early stage that the Vietnam War could never be won, and that if they continued with the war there would be many more casualties than were ever openly admitted to. In addition, as an editor of *The New York Times* would later write, the Pentagon Papers:

> … demonstrated, among other things, that the Johnson Administration had systematically lied, not only to the public but also to Congress, about a subject of transcendent national interest and significance.

Daniel Ellsberg came into possession of the Pentagon Papers in much the same way as Julian Assange came into possession of the documents from Manning. He passed the documents on to *The New York Times* correspondent Neil Sheehan, who had given him a promise of confidentiality. However, Sheehan broke this promise, and wrote a major story built on material he had received from Ellsberg and from other contacts. The US Government was furious and obtained an injunction to prevent *The New York Times* publishing further articles based on the papers. *The New York Times* appealed the injunction, but in the meantime, *The Washington Post* gained access to the papers and began publishing its own articles. After this, 15 other newspapers received copies of the Pentagon Papers and began publishing. In *The New York Times Co v United States* the Supreme Court found that the press had a right to publish the papers. This ruling has been described as one of the 'modern pillars' of US citizens' First Amendment rights in relation to freedom of the press.

Legal Links

The Daniel Ellsberg case from over 40 years ago – which pre-dates the internet and digital forms of technology – has glaring similarities to Julian Assange's and WikiLeaks' conflict with the US Government. The article, 'Yes, Julian Assange actually is a criminal' (by Michael Lind, *Salon*, 22 December 2010) argues for the US Government's right to keep information confidential. By releasing sensitive and important information without prior consent or appropriate authority, Assange is seen as a traitor and a spy. Interestingly, Daniel Ellsberg was not convicted of espionage.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 17.5 The former CIA employee and whistleblower, Edward Snowden, speaks during a video conference to present his book, *Permanent Record* on 17 September 2019 in Berlin, Germany.

In 2013, another high-profile whistleblower, Edward Snowden received widespread media coverage for his actions in revealing secret documents to the public in much the same manner as Julian Assange. Snowden has been charged on two counts of breaching the *Espionage Act 1917* (US), and in June 2013, his passport was cancelled. At the time, he was travelling to the Republic of Ecuador (it is believed to seek asylum) via Russia, but the lack of a valid passport meant that he was unable to leave the transit area of Moscow airport. The Russian authorities subsequently granted him asylum, enabling him to leave the confines of the airport.

Review 17.3

1. Discuss your understanding of the term 'political asylum'. Outline some examples from overseas.
2. Outline the main factor that led to Ecuador's granting of political asylum to Julian Assange.
3. Read the extract from the article, 'Julian Assange's extradition to the US will be decided by the UK courts in 2020'. Justify the actions of the UK and US governments in pursuing Julian Assange.
4. Discuss the validity of a US grand jury in bringing Assange to justice.
5. Explain the reasons given for the passage of the *Espionage Act 1917* (US).

ISBN 978-1-108-86281-3 Milgate et al.

Research 17.2

1 Source online the article, 'Yes, Julian Assange actually is a criminal' (by Michael Lind, *Salon*, 22 December 2010). Describe the main arguments for the prosecution of Julian Assange in comparison with the exoneration of Daniel Ellsberg in the Pentagon Papers case of 1971.
2 Explain the argument in the article that news organisations should be able to publish information but private citizens may not. Consider what you personally post on social media.

17.3 Non-legal responses

Media

The Australian Broadcasting Commission (ABC) closely covered the issues in the Julian Assange case as they developed. An episode of its current affairs show, *Four Corners* that aired on 12 August 2012 discussed the issues in the case. The Channel Ten network in 2012, also broadcast the telemovie, *Underground: The Julian Assange Story*, which traced the early life and activism of Assange.

The 2013 film, *The Fifth Estate*, was a biographical thriller starring Benedict Cumberbatch as Assange. There have also been a number of documentary films on the subject, including *Mediastan* (2013), *We Steal Secrets: The Story of WikiLeaks* (2013), *Risk* (2016) and *Hacking Justice* (2017).

Politics

In 2012, Julian Assange announced that he would run for the Australian Senate in the 2013 election. The WikiLeaks Party was formed, and several candidates, including Assange, were fielded, but none received enough votes. Had Assange been successful in winning a seat, there is some question as to whether his relationship with Ecuador would have disqualified him.

Figure 17.6 Julian Assange supporters rally outside the British Home Secretary's office in September 2019 to demand Assange's freedom. During the rally, Roger Waters performed his Pink Floyd song, 'Wish You Were Here' and the journalist and documentary filmmaker, John Pilger, gave a speech in support of Julian Assange.

ISBN 978-1-108-86281-3 Milgate et al.

Research 17.3

Source and view different websites devoted to Julian Assange. Investigate the purpose of each sites. Discuss each organisation's contribution to the Assange case.

Community support

There are a number of internet-based support groups that are attempting to raise the profile of Julian Assange and encourage support for him in a number of ways. Individuals can make donations to help fund Assange's living and legal expenses. They can also spread the word about his situation and raise more support through social media pages.

17.4 Effectiveness of responses

The Assange case is receiving widespread attention internationally, particularly in the United States, the United Kingdom, Sweden and Australia. The Australian Government has remained relatively inactive in the Assange case. While Julian Assange remains within Ecuadorian territory, there appears to be little the Australian Government can do through international law.

Law professor Natalie Klein states that while Julian Assange is an Australian citizen, there is a limit to the legal actions the federal government can take because a person's nationality does not mean the laws of another country can be ignored when a person is overseas. The current Australian federal government appears to have little sympathy, time or resources to assist with Assange's defence.

In a post-September 11 world, with higher alerts from governments genuinely concerned about the safety and welfare of their citizens, Julian Assange could be considered a threat to national and international government security. Those who oppose Assange brand him a highly dangerous criminal: for them, capturing and shutting down WikiLeaks are paramount.

Conversely, Assange can be perceived as a champion of international relations. If governments all over the world were subject to scrutiny by WikiLeaks or other news organisations, they may be inclined to act more responsibly or indeed make apologies or pay compensation to victims of military activity or government mistakes that in the past may have been covered up.

Figure 17.7 Julian Assange circulated online an encrypted cache of uncensored documents as 'insurance'. Assange vowed that the secrets in the documents will be revealed if the website is shut down or Assange is arrested. The US ambassador to Lebanon at the time condemned the release of diplomatic cables by WikiLeaks as 'illegal and irresponsible', saying they only increased tensions in the turbulent country.

ISBN 978-1-108-86281-3

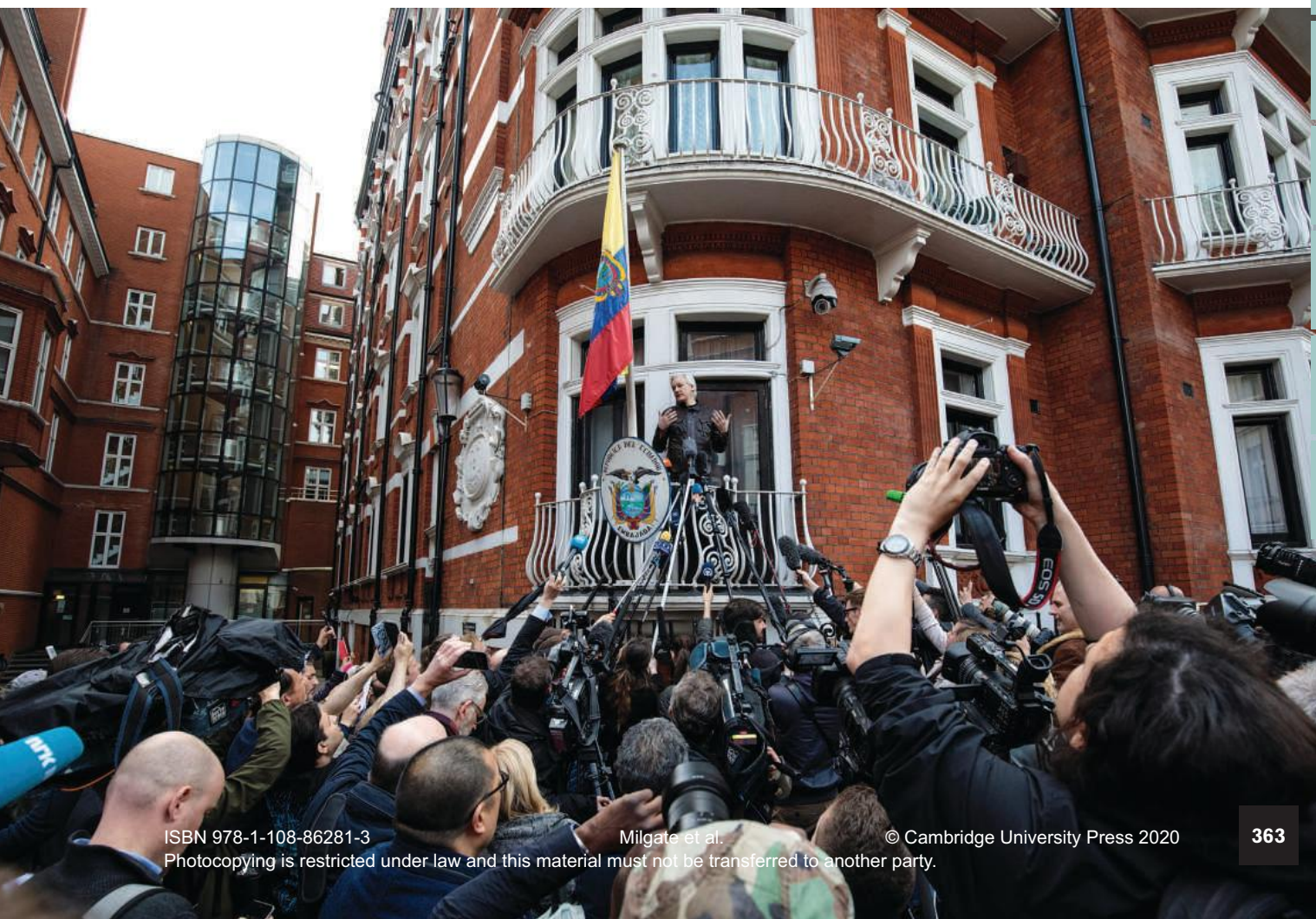
Legal Links

The Julian Assange case has exploded in the wider media, provoking opposing views on the issue of freedom of speech and international human rights. The public, along with prominent officials and those in the media, have expressed their views through social media and opinion articles. In their opinion article, 'WikiLeaks and free speech' (*The New York Times*, 20 August 2012), prominent film directors, Oliver Stone and Michael Moore, express their concern over how the Julian Assange case could perhaps be infringing the basic ideals of free speech.

Review 17.4

1. Identify the laws that apply to Julian Assange's stay in the Ecuadorian embassy and his departure from the United Kingdom.
2. Discuss the idea that if Assange was prosecuted in the United States, an important precedent would be set for journalists worldwide.
3. Construct a table with two columns, with 'for' and 'against' as headings. From your own perspective, list points under each heading in relation to Julian Assange's actions since 2009.
4. Discuss how the national and international community has responded to the case of Julian Assange. Assess if the responses have been negative or positive. Choose one opinion from each side and explain why each person or organisation holds the opinion it does.

Figure 17.8 Julian Assange speaks to the media from the balcony of the Ecuadorian embassy in London on May 19, 2017.



ISBN 978-1-108-86281-3

Figure 17.9 Human rights lawyer Jennifer Robinson speaks to the media outside Woolwich Crown Court, in London, during a break in Julian Assange's extradition hearing on February 25, 2020.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- Julian Assange created WikiLeaks as a way to 'whistleblow' on a range of corporate and government activities that would arouse public interest.
- Some think Assange is an outstanding journalist. Others label him a traitor, a vandal and an irresponsible journalist, as his actions compromise the ability of national governments to keep their citizens safe. Eric Snowden is another individual under investigation for activities known as 'leaking'.
- Interpol issued a red notice against Assange after he turned himself in to the British police then skipped bail. He then applied for political asylum in the Embassy of Ecuador.
- A free press is important for journalists and news services. Without it, the media may not be able to present a balanced view of the news.
- WikiLeaks is built on the hope that the publication of otherwise unavailable documents will encourage governments to behave more ethically and/or to apologise or pay compensation to those who deserve it.
- As at May 2020, Assange was held in a UK prison and was awaiting extradition to the United States.

Questions

Multiple-choice questions

1 WikiLeaks established itself in Iceland initially because:
   - **a** Iceland has few censorship restrictions on internet activities.
   - **b** The Australian Government strictly controls internet traffic.
   - **c** Internet data prices are cheap in Iceland.
   - **d** The Director of WikiLeaks is Icelandic.

2 Julian Assange was convicted of criminal charges in:
   - **a** the Victorian Supreme Court in the 1990s.
   - **b** a NSW Magistrates Court in 2010.
   - **c** the British Supreme Court in 2012.
   - **d** a Swedish local court in 2010.

3 The US Government:
   - **a** detained Chelsea (then known as Bradley) Manning on 22 charges.
   - **b** detained Julian Assange on 22 charges.
   - **c** requested that Julian Assange be extradited from Sweden.
   - **d** requested that Julian Assange be extradited from Australia.

4 The Ecuadorian embassy granted Julian Assange asylum because:
   - **a** his passport had expired.
   - **b** he was likely to be treated unfairly by Swedish authorities.
   - **c** the British Government is unable to grant political asylum to Australians.
   - **d** Ecuador and Australia have a bilateral agreement on political asylum.

5 The case of the Pentagon Papers is similar to the case of Julian Assange and WikiLeaks because:
   - **a** both cases involve *The New York Times*.
   - **b** both cases involve government secrets being released without authorisation.
   - **c** both cases led to criminal convictions.
   - **d** both Daniel Ellsberg and Julian Assange sought political asylum.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

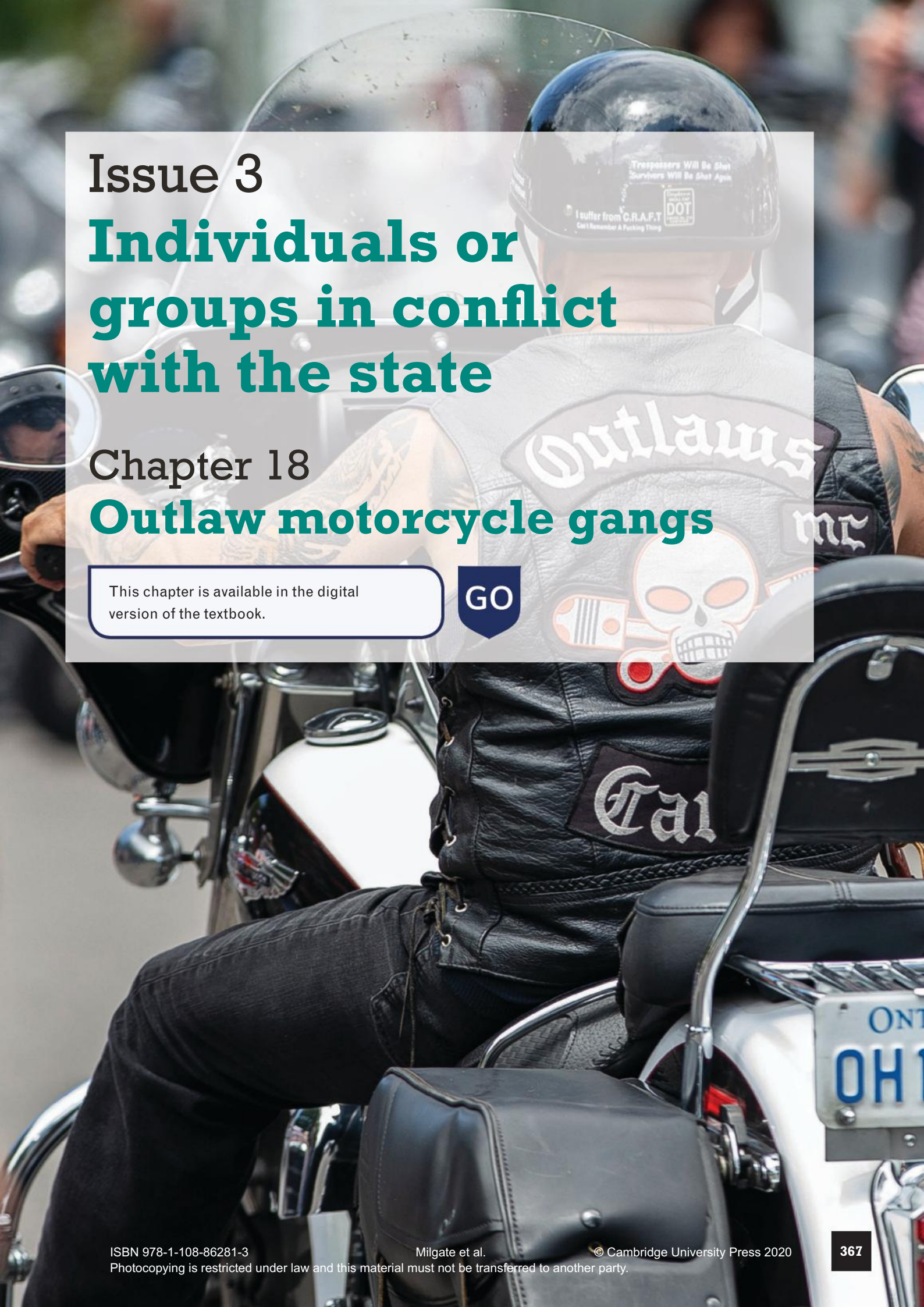
1 Define the term 'whistleblowing'.
2 Discuss how whistleblowing applies to the Julian Assange case.
3 Discuss when you or others should 'blow the whistle'.
4 Define the terms 'freedom of speech' and 'freedom of the press'. Assess if Australia has a free press. In your assessment, refer to a media article that criticises a government.
5 Comment on the Ecuadorian Government's decision to grant diplomatic asylum to Julian Assange. Discuss the reasoning behind the decision. Assess if it was justified.
6 Explain why Julian Assange was evicted from the Ecuadorian embassy in London.
7 Explain why Julian Assange was given a red notice. Identify another individual/s who have received red notices.
8 Assess if we need different laws for government information. Explain your response using the Assange case as an example.

Extended-response question

Evaluate the effectiveness of the law in resolving conflict between individuals and the state. Use the Julian Assange case to illustrate your response.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

ISBN 978-1-108-86281-3 Milgate et al.



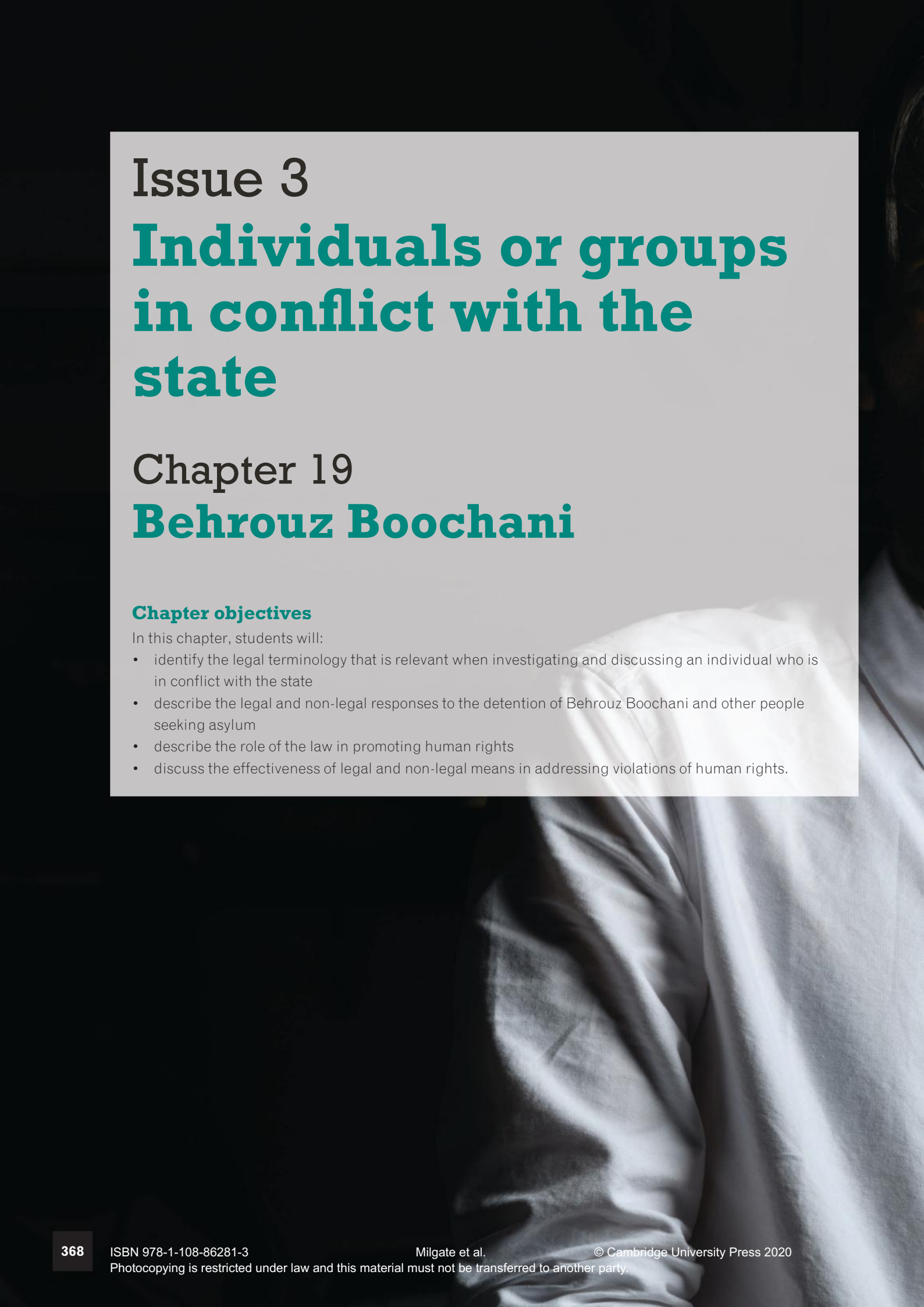
Issue 3
Individuals or groups in conflict with the state

Chapter 18
Outlaw motorcycle gangs

This chapter is available in the digital version of the textbook.

GO

ISBN 978-1-108-86281-3



Issue 3
Individuals or groups in conflict with the state

Chapter 19
Behrouz Boochani

Chapter objectives

In this chapter, students will:

- identify the legal terminology that is relevant when investigating and discussing an individual who is in conflict with the state
- describe the legal and non-legal responses to the detention of Behrouz Boochani and other people seeking asylum
- describe the role of the law in promoting human rights
- discuss the effectiveness of legal and non-legal means in addressing violations of human rights.

ISBN 978-1-108-86281-3 Milgate et al.

Relevant law

IMPORTANT LEGISLATION

International law

The Universal Declaration of Human Rights (1948)
Convention relating to the Status of Refugees (1951)
International Covenant on Civil and Political Rights (1966)
United Nations Convention on the Law of the Sea (1982)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
Convention of the Rights of the Child (1989)

Domestic law

Migration Act 1958 (Cth)
Border Protection (Validation and Enforcement Powers) Act 2001 (Cth)
Migration Amendment (Urgent Medical Treatment) Bill 2018 (Cth) ('Medevac Bill')
Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019 (Cth)

ISBN 978-1-108-86281-3

19.1 From seeking asylum to an Australian detention centre

Overview of the case of Behrouz Boochani

Behrouz Boochani is a Kurdish Iranian **refugee** who was caught between international human rights law and Australian domestic migration law. This is a story of one individual who has challenged the state by using his voice and his journalism skills.

refugee
A person who has been forced to leave their home area due to a well-founded fear of persecution based on religion, race, political opinion, nationality, ethnic or social group

Behrouz Boochani survived six years in Australia's offshore detention system that was created specifically for people seeking **asylum**. He finally left the detention centre in November 2019 but his future remained uncertain as he was on a one-month visa issued by New Zealand. By the time he gave his lecture at the WORD conference in Christchurch in November 2019, the 36-year-old had become one of the most well-known refugees in the world. This was due to his journalism that detailed his and others' experiences in detention and the media attention this attracted. The Iranian **asylum seeker** communicated directly with journalists about events on Manus Island but also produced a full-length film on his mobile phone (*Chauka, Please tell us in Time*) and wrote an award-winning book, *No Friend but the Mountains* (Picador, 2018). Boochani's aim has been to let the Australian people and the world see what he considers to be an inhumane system in the Australian detention centres for people seeking asylum. Many of his fellow inmates have suffered and bear physical and mental scars from their incarceration; some have died, while many others remain in indefinite detention. Amazingly, over the six years of imprisonment, Behrouz did not tell his family in Iran anything about his imprisonment or his fame.

Figure 19.1 Behrouz Boochani is a writer, journalist and a Kurdish Iranian refugee.

asylum
protection granted by a state

asylum seeker
someone who is seeking protection as a refugee

Research 19.1

1. On a map, locate the city of Ilam in Iran.
2. Describe Ilam's geographical location.
3. Identify other areas in the Middle East that the Kurds live in. What countries do the Kurds live in?
4. Access the website, 'The Kurdish Project'. Using the information in this website, discuss why the Kurdish people are a persecuted minority.
5. Find the article, 'The Kurds: A bitter history of betrayal' (by Michael Safi, *The Guardian*, 13 October 2019). Describe what further information this article gives about the problems of the Kurdish people up to the current time.

ISBN 978-1-108-86281-3 Milgate et al.

Life in Iran

Behrouz Boochani was born in the Kurdish Ilam region in western Iran in 1983. He was born in the middle of an eight-year long war between Iran and Iraq that was fought mainly across his Kurdish homeland. Some of Boochani's earliest childhood memories are of fighter planes in the sky. After completing his studies at Tarbiat Moallem University and Tarbiat Modares, he achieved a Master's degree in political science, political geography and geopolitics. After university, Boochani got a job as a journalist, writing for a student newspaper. He regularly wrote articles about politics in the Middle East, Kurdish struggles to keep their culture alive, and the rights of other minorities in Iran. In secret, Boochani taught the Kurdish dialect to children. Boochani also co-founded *Werya*, a Kurdish-language magazine that promoted Kurdish culture and politics. In February 2013, the Iranian Revolutionary Guard raided the *Werya* office and arrested 11 of his colleagues. Boochani went into hiding for three months.

Fleeing Iran

On 23 May 2013, the young Kurdish journalist got on a plane and fled Iran. Boochani arrived in Indonesia where he paid $5000 to a people smuggler for a place on a boat to Australia. After a harrowing journey during which the boat's engine failed and the pump stopped working, the asylum seekers on the boat were rescued and taken back to Indonesia. In the second chapter his book, *No Friend but the Mountains*, Boochani details the difficult boat journey and how close they all came to death. Two weeks after being returned to Indonesia, in July 2013, Boochani boarded another boat bound for Australia along with 60 people seeking asylum. This boat did not sink but it lost its way and the passengers nearly starved. The boat was spotted by a British cargo ship, which gave them some supplies, notified the Australian Navy, and waited with the people seeking asylum until an Australian Navy boat arrived.

In detention: Christmas Island

In August 2013, an Australian Navy ship picked up the people in Boochani's boat and took them to Christmas Island where they were detained for a month. In Chapter 5 of his book, Boochani recounts the rude shock at being taken to a detention centre and recounts being placed in cages, strip-searched and observed by CCTV continuously, even in the toilet. The people seeking asylum were then given the news that they had arrived four days after a new law had been enacted that declared that no-one who arrives in Australia by boat will ever be allowed into the country.

Boochani and the other refugees were then informed that they would be exiled to Manus Island in Papua New Guinea (PNG). Immigration officials gave briefings about how bad conditions were on Manus Island, especially about the island's malaria-carrying mosquitoes. Boochani recounted that being exiled to Manus Island was like a 'club that

Figure 19.2 Christmas Island, Manus Island and Nauru are key locations for Australia's policy of processing asylum seekers offshore.

ISBN 978-1-108-86281-3

has been raised above my head for a whole month and is waiting to bash down on me' (*No Friend but the Mountains*, p. 89). The asylum seekers from Boochani's boat were then flown to Darwin where they were put through what Boochani considered to be a de-humanising process by immigration officials and journalists. Boochani was given the number that he would now be known by – MEG45. From the perspective of the immigration officials, the people seeking asylum were 'nothing more than number' (*No Friend but the Mountains*, p. 96). The refugees were then put on a plane to Manus Island.

In detention: Manus Island

The detention centre on Manus Island is located on the eastern tip of the island on the PNG naval base at Lombrum. The Australian authorities named the detenion facility the Manus Island Regional Processing Centre or MIRCP. Once on Manus Island, Boochani quickly concluded that they were political hostages who were 'being made examples to strike fear into others, to scare people so they won't come to Australia' (*No Friend but the Mountains*, p. 107). Soon after arriving, Boochani met Reza Berati, someone who he came to admire deeply and who he nicknamed the 'gentle giant' in his book. Eventually, Boochani began documenting his experiences on Manus Island. He documented life in the detention centre and compiled information on what he viewed as human rights abuses, which he sent (using a secret mobile phone) to journalists. Over a period of five years, Boochani also transmitted thousands of WhatsApp text messages, in his native Farsi language, that would later form the basis of his 2018 book, *No Friend but the Mountains*.

In his writing, Boochani detailed all the aspects of life in detention from the mundane and boring to the terrifying and horrific. To Boochani, the most striking thing about Manus Island was the debilitating heat, from which there was little respite as the fans in the living quarters made little difference. He outlined the different sections of the Manus Island detention centre and how the centre appeared to function. Boochani described each day as a 'meaningless cycle of repeated struggles' in which all they had to do was reflect on their own lives 'always moving between the darkest, dullest and most worn out' scenes (*No Friend but the Mountains*, p. 131). The inmates played games such as cards and made up a backgammon game drawn on plastic. Sometimes in the evening, they got away with some raucous dancing that the guards were not game to stop.

Figure 19.3 People attend a candlelight vigil in Sydney on 23 February 2014. The vigil was held in response to the death of a 23-year-old Iranian man, Reza Berati, who died in a detention centre on Manus Island on 18 February 2014.

ISBN 978-1-108-86281-3 Milgate et al.

Research 19.2

Access 'A speech from Manus Island – Behrouz Boochani' (6 December 2018).

1. Assess what Boochani means when he says asylum seekers are both outside the law and a victim of the law.
2. Identify the evidence Boochani provides to back up his opinion that Australia's relationship with Manus Island is colonial in nature.
3. Recall what happened to the people who murdered Reza Berati in February 2014.
4. Recall the propaganda the asylum seekers were subjected to on Manus Island.
5. Discuss why Boochani considers the following to be forms of humiliation:
   a. queuing
   b. medical treatment.

According to Boochani, the way the authorities organised the daily routines was a further example of the regimentation and humiliation inflicted on the people in detention. The asylum seekers had to queue for hours for everything (meals, the toilets, the showers, medicine). No food was allowed to be taken out of the meal area. To get medical attention, the prisoners had to fill out a request form. A few days later, someone would see them but seldom could have their medical conditions dealt with properly. In an atmosphere of what Boochani saw as absolute despair, self-harm became a 'cultural practice'. In some instances, the electricity generator was mysteriously turned off, 'Within minutes the prison is transformed into a living hell' (*No Friend but the Mountains*, p. 171). Detainees were also subject to being placed in solitary confinement; Boochani described being in solitary confinement for three days in the 'Chauka', which was made out of shipping containers.

Boochani catalogued a 'twisted system' governing the prison and a 'deranged logic that confines the mind of the prisoner' (*No Friend but the Mountains*, p. 208). He described the detention centre as being run according to a '**kyriarchical** system', which is an idea coined by Elisabeth Schüssler Fiorenza in 1997. From a legal perspective, Boochani asserted that Australia's management of the Manus Island detention centre routinely broke both international humanitarian law and international conventions.

kyriarchy
a social system based on domination, oppression and submission

While he was detained on Manus Island, Boochani's creativity and activism kept him sane. When riots erupted at the detention centre in February 2014, Boochani kept journalists informed, particularly about the murder of his friend, Reza Berati. By then, Boochani had become the voice for the men imprisoned in the Foxtrot section of the detention centre.

The campaign to free the asylum seekers on Manus Island

In September 2015, an international campaign was launched on Boochani's behalf to pressure Australia to abide by the Article 33 of the *Convention relating to the Status of Refugees* (1951) that prohibits the expulsion or return of refugees. Boochani had asked repeatedly to be handed over to the United Nations.

On 20 June 2016, Prime Minister Malcolm Turnbull was surprised to receive a question via video-link on the ABC *Q&A* program from Behrouz Boochani. Boochani asked Turnbull, 'What is my crime? I am a refugee who fled injustice, discrimination and persecution. Why am I still in this illegal prison after three years?' The prime minister failed to directly answer Behrouz's question so Boochani immediately penned an article that appeared in *The Guardian* newspaper the following day detailing everything that had been happening at Manus Island.

In 2018, Boochani made a full-length film with his secret mobile phone. The film, *Chauka, Please tell us in Time*, was an investigation into the 'Chauka', a prison within a prison on Manus Island where inmates were placed in solitary confinement. The film also highlighted all the other aspects of life in the detention centre and the mental torture caused by the deprivation of hope.

ISBN 978-1-108-86281-3 Milgate et al.

Research 19.3

Access the following article, 'Malcolm Turnbull, why didn't you answer my question on *Q&A* about Manus Island?' (by Behrouz Boochani, *The Guardian*, 21 June 2016).

1. Recall what Boochani accuses Prime Minister Turnbull of doing.
2. Identify the court decision that Boochani accuses Prime Minister Turnbull of ignoring.
3. Identify the recent adverse changes.
4. Describe the injustice and double standards attested by Boochani.
5. Critically analyse the complaints system.
6. Identify the 2014 event that Boochani accuses the Australian Government of failing to address.

Legal Links

The PNG Constitution is available online.

As Boochani outlined in his article to Prime Minister Turnbull on 26 April 2016, the Supreme Court of PNG found the Manus Regional Processing Centre was illegal because it breached the right to personal liberty in PNG's Constitution. Later that month, PNG Prime Minister Peter O'Neill announced he would immediately ask the Australian Government to make alternative arrangements for people seeking asylum. Australia's Immigration Minister Peter Dutton responded in August 2016 that the centre would close but gave no timeline. Meanwhile, as Boochani had asserted in his article, the treatment of inmates was harsher than ever, with the inmates having no effective means of making any complaint about this treatment.

US refugee swap deal

In November 2016, the Australian Government appeared to have made a deal with the US Government in the last days of the Obama administration. According to the deal, the United States would resettle the refugees on Manus Island and Nauru in return for Australia taking refugees from the United States. However, the US Government would be able to choose who they took by using 'extreme vetting' procedures. This deal was tested in January 2017 when Donald Trump was inaugurated as the new US president. In the now famous phone call between Prime Minister Malcolm Turnbull and President Donald Trump on 28 January, the new president was highly critical of the refugee swap arrangement and stated that the United States has become a 'dumping ground' for 2000 'troublesome' people coming from Manus Island and Nauru. In August 2017, Greens MP Adam Bandt questioned Prime Minister Morrison about a leaked transcript of the January phone call. In the account, Morrison attempted to explain to Trump why these people seeking asylum could not be let into Australia:

> 'The only people that we do not take are people who come here by boat. So, we would rather take a not very attractive guy [from the United States] that helps you out than to take a Nobel Prize winner that comes by boat. That is the point.' To this, Trump replied: 'That's a good idea. We should do that too. You are worse than I am.'
>
> (Source: "'You're worse than I am," Trump told Turnbull he admired offshore detention', by Ben Jacob, *The Guardian*, 4 August 2019.)

ISBN 978-1-108-86281-3 Milgate et al.

The closure of a detention centre

On 31 October 2017, the Manus Island detention centre on the PNG naval base at Lombrum was closed. However, the 600 men detained there refused to move, claiming they feared for their safety from some hostile locals. The Australian authorities shut off the power, and cut off food and water supplies. The PNG military laid siege to the centre for 23 days. During this harrowing time, Behrouz Boochani kept in constant communication via WhatsApp with Omid Tofighian, a Sydney University academic who had been acting as Boochani's translator. In the constant urgent messaging, and in some longer articles, Boochani detailed the resistance of the refugees during the siege. However, the men were gradually worn down and overpowered by the PNG military and were forcibly transferred to three new detention facilities close to the town of Lorengau in PNG.

At the new facilities, the men had limited freedom. The asylum seekers could visit the nearby town of Lorengau, but they could only travel there by official bus and were searched getting on and off the bus. They also could not leave Manus Island without travel documents.

At this time, Boochani was placed in the Lorengau jail for eight days as punishment for reporting the 23-day siege. On his release, he was ordered to stop reporting. However, after all these years of resistance, Boochani was not deterred. It was now harder for the authorities to control his actions and harder for them to confiscate his phones, which they had done on many occasions before.

On 28 November 2017, Boochani sent a message to the Asylum Seeker Resource Centre thanking them for their support and again described the 23-day protest that had been stopped by force. The Asylum Seeker Resource Centre published this

Legal Links

The article, 'The last days in Manus Prison', written by Behrouz Boochani and Omid Tofighian, is available on the *Meanjin Quarterly* website.

Figure 19.4 Behrouz Boochani stands outside the abandoned naval base on Manus Island in June 2018. This is where he and other asylum seekers were locked up for three years.

ISBN 978-1-108-86281-3 Milgate et al.

account on their website. Boochani claimed that Immigration Minister Peter Dutton was incorrect in saying that the refugees only wanted to come to Australia. They just wanted freedom to go anywhere.

No Friend but the Mountains

On 31 July 2018, after five years of collaboration with his translator, Omid Tofighian, via WhatsApp, Boochani's book, *No Friend but the Mountains*, was released to wide acclaim both in Australia and around the world. In his book, Boochani claims to have witnessed deaths, riots, suicide attempts, murders and gun violence by intoxicated PNG soldiers. Importantly, Boochani's book is a piece of resistance and an analysis of the kyriarchal system, which is designed to bring people to their breaking point. Boochani said the Manus Island system was designed to take away a person's dignity. Writing helped him to keep his humanity.

In January 2019, Behrouz Boochani won a literary award for his book, *No Friend but the Mountains*. He could not attend the Victorian Premier's Literary Award ceremony in Melbourne because he was still being held on Manus Island. Boochani communicated to the event via text message as the internet connection was slow. He said his main aim in writing the book was to show the people of Australia and around the world how Australia's system of offshore processing had tortured innocent people on Manus Island and Nauru for the last six years. When accepting the award on Boochani's behalf, the book's translator, Omid Tofighian, said that:

> This is one of the most vicious forms of neocolonial oppression that is taking over the world at the moment – and to address this book in this way and to recognise it and draw attention to the narrative it is presenting will have repercussions for many generations to come.
>
> (Source: 'Behrouz Boochani: Detainee asylum seeker wins Australia's richest literary prize', by Calla Wahlquist, *The Guardian*, 31 January 2019).

Freedom

On 14 November 2019, Behrouz Boochani left PNG and travelled to New Zealand to speak at the Word Christchurch literary festival on 29 November 2019. In a daringly executed plan facilitated by the UN Refugee Agency (UNHCR) and Amnesty International, Boochani was able to get a one-month visa to speak at the festival in New Zealand. To get to Christchurch, Boochani undertook a series of secretive plane flights over 19 hours.

Legal Links

On 1 April 2019, Boochani's story was broadcast to the Australian people via the ABC television program, *Australian Story*. The story was a celebration of a life of resistance and hope in the face of despair and horror. The aim was also to explain how a stateless refugee from the Middle East fleeing persecution was placed in indefinite imprisonment on a distant island. This *Australian Story* can be viewed online.

Research 19.4

Access one of the following on YouTube:

- 'How refugee Behrouz Boochani challenged a system, one text at a time' (*Australian Story*, 1 April 2019).
- 'Writing is an act of resistance' (Behrouz Boochani, *TEDxSydney*, 30 July 2019).

1 Identify what further information can be obtained about Boochani's six years on Manus Island.
2 Identify the legal and non-legal means by the Australian Government, the PNG Government, and by supporters of the asylum seekers to address the situation on Manus Island.

ISBN 978-1-108-86281-3 Milgate et al.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 15–16 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 19.1

1. Outline Behrouz Boochani's family and life in Iran.
2. Recall why Boochani left Iran.
3. Describe Boochani's journey from Indonesia to Manus Island.
4. Identify what features of the Manus Island detention centre created a sense of despair in the inmates.
5. Outline the human rights abuses Boochani documented.
6. Discuss how Boochani resisted the detention system.
7. Recall how Boochani took his resistance to the highest level of political leadership.
8. Identify what sort of people outside Australia supported Boochani.
9. Identify the legal decision in PNG that started the gradual unravelling of the Australian detention centre regime on Manus Island.
10. Describe the revelations that emerged as a result of the refugee swap with the United States.
11. Outline some of the awards won by Boochani.
12. Discuss how Boochani eventually escaped from detention.

When he arrived in Christchurch, Boochani just wanted to enjoy life as a free man. After spending 2269 days in an Australian detention centre, he was free. However, even though he had escaped Manus Island and was no longer in detention, Boochani's future remained uncertain as he only had a one-month visa. Boochani had been accepted by the United States in the refugee-swap deal, but he did not know whether that would still hold now that he had left PNG. He felt a deep sense of duty to the men he left behind on Manus Island and the 46 men in the Bomana detention centre in Port Moresby. He particulary felt a duty to the 12 men who had died in detention and the over 1000 people who were psychologically and physically damaged.

Through his tireless activism, Behrouz Boochani has been able to shine a light on the Australian offshore processing system, be a voice for all his fellow detainees, and keep the world and the Australian public informed about the realities of life on Manus Island. While the story for all those caught in this system continues, for Boochani, this chapter of his story was at an end. Boochani's story is one of an individual who resisted the power of the state, documented what he perceived as an inhumane system, and made a difference.

19.2 Legal responses

Competing legal responses to asylum seekers

It is difficult to understand how the Australian Government could detain an innocent man fleeing persecution and treat him inhumanely. It is even more difficult to understand how the Australian Government could create a whole system for detaining thousands of people like Boochani. This system is unique in the world and is admired by some world leaders who pursue blatantly racist policies. Three questions need to be asked here:

- Why was such a policy created?
- How was this policy legally justified in domestic law?
- How is this policy in conflict with key international treaties that the Australian Government has voluntarily signed up to?

To seek the answers to these questions, we need to consider key developments that have occurred after World War II (1939–1945).

ISBN 978-1-108-86281-3 Milgate et al.

Figure 19.5 Australia helped to establish the United Nations and was a strong supporter of United Nations treaties in the decades after the end of World War II.

In the years since the end of World War II, Australia has been a strong supporter of the United Nations and the values encapsulated in a number of its key treaties. In the post-war decades, Australia voluntarily **ratified** several United Nations treaties.

ratify
to formally confirm that the country intends to be bound by the treaty

The following treaties (ratified by Australia) are relevant to the issue of refugees and asylum seekers:

- *The Universal Declaration of Human Rights* (1948)
- *International Covenant on Civil and Political Rights* (1966)
- *United Nations Convention on the Law of the Sea* (1982)
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984)
- *Convention on the Rights of the Child* (1989).

Until 2001, there was a bipartisan policy towards refugees and asylum seekers in Australia. Racism had effectively been removed as a factor in regard to migrants and immigration. Prime Minister Harold Holt (PM from 1908–1967), who introduced changes to the *Migration Act* (1958), officially ended the White Australia Policy. Then in 1973, Prime Minister Gough Whitlam (PM from 1972–1975) introduced legislation to totally remove race as a factor in immigration. The Whitlam government also radically began changing the culture surrounding race by introducing the Multicultural Policy. This was then capped off by the passing of the landmark *Racial Discrimination Act 1975* (Cth). In theory, Whitlam ended race as a factor in immigration. However, it was his successor, Malcolm Fraser, who ended racism in immigration in practice.

Liberal Prime Minister Malcolm Fraser (PM from 1975–1983) was faced with the issue of 'boat people' arriving on Australian shores from Indochina. In the years after the Vietnam War ended in Indochina in 1975, waves of people seeking asylum fled from Vietnam, Cambodia and Laos. They were fleeing persecution from the newly installed communist governments and some Vietnamese of Chinese descent fled because of racist persecution. Between 1976 and 1982, the Fraser Coalition government admitted approximately 70 000 refugees from Indochina, with 2500 of these arriving by boat. Another 80 000 people followed them in later years from Indochina through an immigration program. This effectively ended the White Australia Policy. In the Labor governments of Bob Hawke (PM from 1983–1991) and Paul Keating (PM from 1991–1996), a bipartisan policy was maintained concerning both immigration and racism.

Changed approach since 2001

The *Tampa* Incident, 2001

In 2001, two events occurred that, combined, set Australia on the path of creating a system for processing asylum seekers that was increasingly at odds with international law. The first of these events was the *Tampa* incident in 2001. On 24 August 2001, a boat carrying 433 mainly Hazara asylum seekers form Afghanistan was stranded in international waters 140 kilometres north of the Australian territory of Christmas Island. A Norwegian container ship, the *MV Tampa*, came and rescued the people seeking asylum – this was the expected procedure under international law, as outlined in the *United Nations Convention on the Law of the Sea* (1982). The captain of the ship took the people to Christmas Island. However, Australian authorities refused to allow them to be dropped off at Christmas Island.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 19.6 An Australian Navy ship approaches the ship, the *MV Tampa*, off Christmas Island on 2 September 2001.

On 29 August 2001, Prime Minister John Howard ordered Australian Army troops to capture the *Tampa* and take control of the people seeking asylum. On the same day, the prime minister attempted to create a new law. However, the Senate knocked back the ***Border Protection*** *Bill 2001* (Cth) on 30 August. Undeterred, Prime Minister Howard made arrangements with the governments of Nauru and New Zealand to send the asylum seekers there. Australian Navy ships transported 131 asylum seekers to New Zealand and 302 to Nauru. On 27 September 2001, the Howard government successfully passed the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).

border protection
the name given to the policy of preventing asylum seekers arriving in Australia for the reason that they represent a threat to national security

The Pacific Solution 2001–2007

September 2001 marked the beginning of a new policy that became known as the Pacific Solution. Firstly the *Migration Act 1958* (Cth) was amended to excise Christmas Island and other islands from the migration zone so people arriving there by boat seeking asylum could not apply for visas to enter Australia and were denied access to legal representation or to the protections of Australian law. Secondly the Australian Defence Force intercepted boats carrying asylum seekers and took them to the enlarged Christmas Island detention centre. Thirdly they were then sent to Manus Island or Nauru to have their claims as refugees processed. In 2001, 43 boats carrying 5000 people seeking asylum arrived in Australia. However, after the implementation of the Pacific Solution, over the next six years, only 23 boats arrived. The Howard government claimed the Pacific Solution to be a great success as it was deterring people from making the hazardous journey to Australia by boat.

Portraying asylum seekers as a security threat and people of poor character

On 11 September 2001, terrorists flew planes into the two World Trade Center towers in New York, and in the Pentagon located outside of Washington DC. Prime Minister Howard was in Washington DC when the attacks occurred. He immediately pledged Australian support in assisting the United States to respond to these acts of terrorism.

Meanwhile, back in Australia, the Coalition had been flagging in the opinion polls during 2001. In the federal election campaign, which commenced

ISBN 978-1-108-86281-3 Milgate et al.

on 8 October 2001, John Howard made border protection and national security the centrepieces of the Coalition's election policy. During his speech on the night of 28 October 2001, Prime Minister Howard made this statement, 'We will decide who comes here and the circumstances in which they come.' This statement was then printed on thousands of Liberal how-to-vote pamphlets.

This was a major turning point in Australian politics. Some political commentators have suggested that the government of the time, led by John Howard, purposely linked two very separate issues – first, the fear of terrorists and terrorism brought about by September 11 and, second, concern that asylum seekers arriving by boat were a threat to national security – for their own political gain.

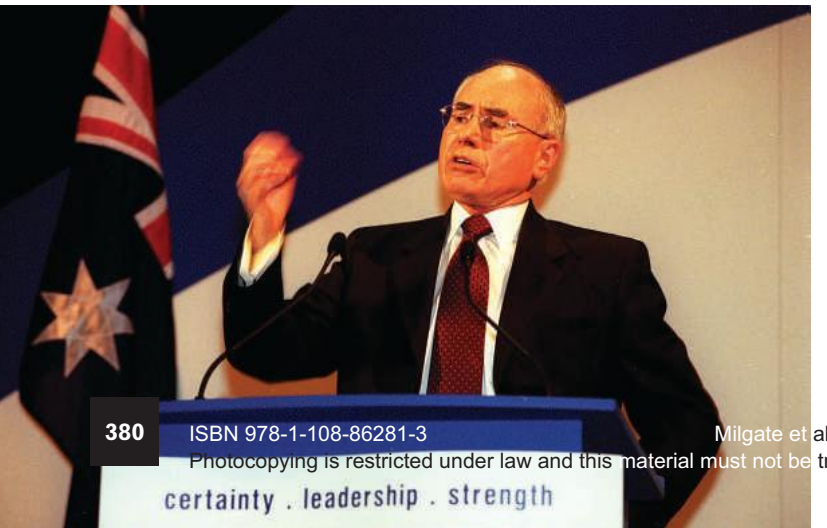
This link implicitly suggests that some asylum seekers could be terrorists and, therefore, terrorists could come to Australia as asylum seekers. This link was made despite there being no facts to support this notion and despite the fact that people seeking asylum are fleeing persecution by people who use violence (e.g. terrorists).

Unfortunately, the fact that many people seeking asylum were Muslim – the same religion as the September 11 terrorists – added to these fears in the minds of some Australians.

Further insinuations made about people arriving in Australia by boat seeking asylum were that they:

- tried to 'intimidate' the Australian people
- 'threw their children overboard' to be rescued
- deliberately sunk their boat to be rescued
- were a 'pipeline for terrorists'
- were 'illegal immigrants' and there was 'an undeniable link between illegals and terrorists'
- were 'queue jumpers' taking the place of refugees who had applied to come to Australia.

Figure 19.7 Former Australian prime minister, John Howard, launched the Liberal Party campaign on 28 October 2001.



In the years after the launch of the Border Protection policy, the Howard government continued to link asylum seekers to terrorism. This is despite the fact that in May 2002, the Director-General of ASIO, Dennis Richardson, said there was no evidence that terrorists were trying to come to Australia as asylum seekers. Richardson questioned why terrorists would do this if they knew they would be subject to mandatory detention.

'Border Protection' since 2001

Howard government 2001–2007

The Howard government's response to asylum seekers in the *Tampa* incident, the Pacific Solution, combined with his government's framing this as a national security matter, was a key factor in the Liberal party winning the November 2001 federal election. The Coalition government believed that they had a winning formula with this policy and so continued with their harsh treatment of people seeking asylum over the following years. The Labor opposition and human rights groups were highly critical of this policy. Due to intense lobbying in 2005, the government ceased the policy of mandatory detention for children. For the next two decades, the debate of policy on asylum seekers attempting to travel to Australia by boat was framed in terms of national security and 'border protection'.

Offshore processing discontinued under the Labor government: 2007–2012

After winning the federal election in December 2007, the Prime Minister Kevin Rudd ended the Pacific Solution and closed the Nauru detention facility. There was an increase in asylum seekers coming by boat and so the Labor government started to seek other solutions. Tragedy struck when a boat carrying 90 asylum seekers sank off the coast of Christmas Island causing the deaths of 48 people. In June 2010, Julia Gillard replaced Kevin Rudd as prime minister. The Gillard Labor government – under pressure from the opposition as being 'soft' on border security – reinstalled the Pacific Solution after reaching dead ends in its attempts to find other solutions (e.g. regional processing in Malaysia).

ISBN 978-1-108-86281-3 Milgate et al.

Labor's PNG solution: 2012–2013

In late 2012, the Gillard government re-opened both the Nauru and Manus Island detention facilities. In another leadership coup, Rudd replaced Gillard as prime minister. In July 2013, with only a few months until the next federal election, Prime Minister Rudd turned up the get-tough policy on asylum seekers to the highest level so far, by pledging that no-one who comes to Australia by boat will be eligible for asylum. The major reasons given were to stop people drowning at sea and to stop people smuggling. Behrouz Boochani arrived at Christmas Island three days after this announcement.

Political expediency greatly influenced both sides of the political spectrum in the treatment of asylum seekers arriving by boat with their continued detention offshore for processing.

Operation Sovereign Borders: 2013–present

The Liberal opposition leader, Tony Abbott, ran a 'Stop the Boats' policy as one the major components of his election campaign. He won the federal election on 7 September 2013. Immediately, the Abbott Coalition government implemented 'Operation Sovereign Borders'. Operation Sovereign Borders is a militarised border-protection policy that involves the Australian Defence Force preventing people who are seeking asylum from reaching Australia.

The Immigration Minister (first Scott Morrison then Peter Dutton) trumpeted a 'zero tolerance' policy, in which any means were used to stop boats coming to Australia (including not only turning boats back to Indonesia but also towing them back). This policy also made all 'on water matters' secret so there could be no scrutiny of any of the tactics used. The Coalition government pledged that no asylum seeker held in Australia's offshore detention facilities would ever be allowed to come to Australia.

US refugee swap deal: 2016

Operation Sovereign Borders continued unchanged under the new Coalition prime minister, Malcolm Turnbull (PM from 2015–2018), but the problem

Figure 19.8 On 23 September 2013 at a press conference in Sydney, the then Australian Government Minister for Immigration and Border Protection, Scott Morrison, spoke about the federal government's Operation Sovereign Borders policy. He promised a tougher approach on asylum seekers arriving by sea as part of the government's promise to 'stop the boats'.

ISBN 978-1-108-86281-3 Milgate et al.

Legal Links

For the latest information about asylum seekers in detention, go to the Refugee Council of Australia website.

Legal Links

To find this key legislation relating to asylum seekers, access the Australian Government's Federal Register of Legislation:

- *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth)
- *Australian Border Force Act 2015* (Cth)
- *Migration Amendment (Urgent Medical Treatment) Bill 2018* (Cth).

Legal Links

Access the following research paper from the Parliament of Australia's online library: 'Asylum seekers and refugees: what are the facts?'(by Janet Phillips, *Social Policy Section Research Paper Series*, 2014–2015, updated 2 March 2015).

remained of where to send the 1000 asylum seekers on Manus Island and Nauru. At a cost of over $55 million, seven asylum seekers were resettled in Cambodia.

In December 2016, Malcolm Turnbull negotiated a deal with the then President of the United States, Barack Obama, which involved the United States taking 1250 refugees in return for Australia taking a similar number of refugees from Central America. However, this was a very slow process and in early 2017, Prime Minister Turnbull had a difficult time convincing President Trump to honour the deal.

In the following three years, 600 people were resettled in the United States. At the end of 2019, over 562 people were still detained on Nauru and Manus Island, with another 47 people in the Bomana detention centre in Port Moresby.

The Medevac debate: February to December 2019

Medevac Bill passed, 12 February 2019

The Australian Government's hard-line policy towards asylum seekers has been challenged by many groups that have consistently advocated for human rights and for compliance with the international treaties Australia has ratified.

Dr Kerryn Phelps proposed a Bill (the *Migration Amendment (Urgent Medical Treatment) Bill 2018* (Cth) ('Medevac Bill')) that would allow doctors to have a greater say in bringing asylum seekers from Manus Island or Nauru to Australia for medical treatment. On 12 February 2019, with the support of the Labor Party (currently in opposition), the Greens and Independents, the Bill was passed in parliament against the government's wishes. Human rights supporters hailed this breakthrough and the majority of public opinion seemed to support the idea of giving treatment to sick asylum seekers.

The Morrison government's response to the Medevac Bill was one of hostility, particularly as it was the first time in many years that legislation had passed parliament with the support of the opposition and the minor parties. This Bill was contrary to government policy and was also an affront to their mandate to govern. There were incidences of regrettable commentary. Home Affairs Minister Peter Dutton claimed that people on waiting lists in public hospitals and those living in public housing would be disadvantaged if sick asylum seekers were brought to the mainland. Some government ministers also suggested there were potential terrorists, paedophiles and criminals among the remaining refugees held on Manus Island and Nauru.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 19.9 Independent members of parliament (left to right) Adam Bandt, Andrew Wilkie, Kerryn Phelps, Julia Banks and Rebekha Sharkie celebrate passing the Medevac Bill in the House of Representatives on 12 February 2019 in Canberra, Australia.

For this reason, Prime Minister Morrison justified reopening the Christmas Island detention centre at a cost of $185 million. The government said that any sick asylum seekers would be taken to Christmas Island instead of to the mainland, as the Medevac Bill had intended. However, after spending of $185 million to reopen Christmas Island, it was shut in April 2019, as it had not taken a single sick refugee. For most of 2019, sick refugees from Manus Island and Nauru were transferred temporarily to Australia for medical treatment. However, the Morrison government determined to repeal the Medevac Bill and pressured independent members of parliament to vote for a repeal.

Legal Links

To read the Refugee Council of Australia's view of the Medevac legislation, visit the council's website and access this media release: 'Australians demand the humane treatment of people seeking asylum and refugees as historic vote passes parliament' (Refugee Council of Australia, media release, 13 February 2019).

Repeal of the Medevac Bill, 5 December 2019

On 5 December 2019, the Medevac Bill was repealed. Dr Kerryn Phelps was scathing in her condemnation of the repeal of the Medevac Bill: This repeal signals a return to the government's unambiguously cruel and inhumane policy in the treatment of a small cohort of people seeking asylum. These are among the most vulnerable people on the planet. This decision to repeal medevac is an absolute violation of Australia's obligations under international law to provide these refugees with safe asylum and medical care. It also strikes at the heart of our medical training and ethical principles.

(Source: 'To those stuck in offshore detention: We will keep fighting for you. The medevac repeal is not the end', by Kerryn Phelps, *The Guardian*, 6 December 2019.)

ISBN 978-1-108-86281-3 Milgate et al.

Legal Links

Dr Kerryn Phelps' scathing condemnation of the repeal of the Medevac legislation can be read online in full ('To those stuck in offshore detention: We will keep fighting for you. The medevac repeal is not the end' (Kerryn Phelps, *The Guardian*, 6 December 2019)).

Research 19.5

Using media reports from December 2019 until the present, construct a timeline of the key developments concerning offshore processing and asylum seekers.

1. Identify and comment on any legal developments.
2. Assess the effectiveness of any non-legal developments.
3. Discuss the viability of offshore processing into the future.

Review 19.2

1. Identify the international treaties that Australia has signed that relate to refugees and asylum seekers.
2. Describe the *Tampa* incident.
3. Outline the Pacific Solution.
4. Assess the effectiveness of the US refugee-swap deal.
5. Describe the aim of the Medevac legislation.

The United Nations High Commissioner for Refugees was critical of the repeal of the Medevac Bill. On 5 December, this UN agency released a statement saying that the medevac mechanism had 'proven to be a timely, effective and often life-saving safeguard' and the UNHCR was concerned that the 'health situation of asylum seekers and refugees will continue to deteriorate' (source: 'UN refugee agency laments axing of 'life-saving' medevac laws' (*SBS News*, 5 December 2019)).

19.3 Non-legal responses

For over two decades, the Australian Government has implemented what many consider to be harsh policies towards people seeking asylum who travel to Australia by boat. There have been sustained campaigns by many people, groups and organisations to bring refugee policies in line with human rights and with Australia's international obligations.

Journalism

Throughout this period, journalists have sought to do their job and seek the facts about Australian Government policies and the plight of asylum seekers in offshore detention centres. Behrouz Boochani, a journalist himself, in his six years of imprisonment was able to develop relationships with journalists in Australia and overseas. Various media organisations – such as *The Guardian Australia*, *The Saturday Paper*, *The Financial Times*, *The Sydney Morning Herald* and the *Huffington Post* – published articles written by Behrouz Boochani. In this way, the media has played a very positive role in agitating for change in the way the Australian Government treats asylum seekers.

The media

Print media has played an important role in informing the Australian public about the situation of asylum seekers in offshore processing facilities. However, this was made very difficult after the implementation of Operation Sovereign Borders in September 2013.

ISBN 978-1-108-86281-3 Milgate et al.

Research 19.6

Access the profile of Behrouz Boochani in *The Guardian* newspaper.

1. Identify the range of topics that Boochani wrote about.
2. Read any two of Boochani's articles. Discuss the main points or arguments made in these articles.
3. Assess the effectiveness of this type of journalism in bringing about legal reform.

The government placed a veil of secrecy over all components of its offshore processing system. The media was not able to access information about boat arrivals as the immigration minister claimed these were 'on water matters'. Similarly, journalists and politicians were denied free access to Manus Island or to Nauru.

Writers and filmmakers

Behrouz Boochani has won awards for his book, *No Friend but the Mountains*, and for his film, *Chauka, Please tell us in Time*, and he has been invited to partake in many public forums and conferences. People working in the publishing and film industries became strong supporters of Boochani and of all the asylum seekers in offshore detention centres. For instance, one campaign launched in April 2019 included signatories from a Nobel laureate, several Booker Prize winners and multiple Walkley award winners. A letter signed by these people wanted to acknowledge the fact that Behrouz Boochani and his story are now an integral part of Australia's history. (Source: 'Bring Behrouz home to Australia: He is one of us', by Arnold Zable, *The Age*, 4 April 2019.)

Figure 19.10 On 20 July 2019 in Sydney, demonstrators gathered at a protest rally to demand the humane treatment of asylum seekers and refugees. The rally marks six years of Australia's detention of asylum seekers on PNG's Manus island, a practice that has drawn international criticism with news of alleged widespread abuse and an 'epidemic of self-harm' and suicide.

Universities

Behrouz Boochani was appointed an adjunct associate professor of the University of New South Wales in the Faculty of Arts and Sciences. In this position, it was envisaged that he could participate in lectures and events as part of the Forced Migration Research Network. At the time, Boochani was still in detention in PNG. During his six years of imprisonment, using a contraband mobile phone, he maintained an active presence at conferences and workshops run by various universities.

Civil society groups

Many civil society and human rights groups have waged determined campaigns to humanise the government's offshore processing regime. The following are a selection of these groups:

- the Australian Human Rights Commission
- the Asylum Seeker Resource Centre
- the Refugee Council of Australia
- the Catholic Alliance for People Seeking Asylum
- Welcome to Australia
- Save the Children
- Amnesty International New Zealand.

Medical professionals

Throughout the two decades of asylum seekers being 'processed' offshore, numerous doctors and other medical professionals have voiced their concerns about the impact of the system on the health and wellbeing of the asylum seekers. In November 2019, over 5000 doctors signed a petition urging senators to not repeal the medevac legislation.

Protests

Over the years, there have been numerous protests in support of the asylum seekers locked up on Nauru and Manus Island.

ISBN 978-1-108-86281-3 Milgate et al.

Review 19.3

1 Explain how Behrouz Boochani's own journalism has contributed to highlighting the plight of people in offshore detention.
2 Outline some of the difficulties the media has faced since 2013 in keeping the public informed on this issue.
3 Identify the role each of the following has played in advocating for the humane treatment of asylum seekers:
   a doctors
   b universities
   c writers
   d mass protests.

19.4 Effectiveness of responses

There are a number of perspectives to consider when assessing the effectiveness of the various responses to people seeking asylum, like Behrouz Boochani, who are caught up in Australia's offshore processing system.

Mental, psychological and physical toll on asylum seekers

One perspective is that of the people caught up in Australia's offshore processing regime. From their perspective, they were fleeing persecution and going to another country to legally seek asylum under international law. Some of the detainees were also aware that their inhumane treatment in detention violated human rights law and a number of international conventions. However, there were others that weren't aware of their rights.

They were allowed no legal rights or legal representation. Furthermore, many suffered mentally, psychologically and physically as a result of their lengthy imprisonment. For the detainees of Manus Island and Nauru, the Australian Government's refusal to abide by international human rights law left them with no hope.

Cost

The cost of offshore processing over the last two decades has been in the billions: $9 billion were spent on offshore processing just between 2016 and 2019. It is estimated that for the next three years, the cost of keeping the remaining 500 or so people in offshore detention will be $1.2 billion, which equates to $573 000 per detainee per year.

Damage to international law

International law is based on mutual respect. Treaties are voluntary agreements that govern how nations agree to treat each other and how governments agree to treat their people. In international forums, Australia regularly invokes the importance of respecting international law and promoting a rules-based order.

In the last two decades, as it has pursued a policy that the United Nations Human Rights Committee has said violates international human rights, Australia has been seen by some as a hypocrite in the international arena. The more that countries violate key aspects of the liberal international order, the more damage this does to the legitimacy of the international rule of law.

Legal Links

The following sources are available online:
- 'Offshore detention costs taxpayers up to $573 000 each person a year, report finds' (by Sarah Martin, *The Guardian*, 3 December 2019)
- 'The cost of Australia's refugee and asylum policy: A source guide' (Kaldor Centre, 12 September 2019).

ISBN 978-1-108-86281-3 Milgate et al.

Legal Links

To read move about the Global Compacts, source online the article, 'The Global Compacts on Refugees and Migration' (Kaldor Centre, 23 January 2019).

Figure 19.11 On 25 August 2019, Rohingya refugees gathered in the open field at the Kutupalong refugee camp to commemorate the second anniversary of the 2017 crisis when they were forced to flee their homes in Myanmar to escape a brutal military crackdown. According to the UNHCR, over 742 000 people from the persecuted Rohingya minority have escaped to Bangladesh since 25 August 2017.

Damage to international reputation

By and large, Australia has a good track record of doing good things in many areas, but these are overshadowed in the minds of many people and organisations by the Australian Government's treatment of some of the most vulnerable people on the planet. It must be recognised that Australia is the only country in the world that has an offshore processing system for asylum seekers. Many other countries, far poorer than Australia, accommodate refugees in the hundreds of thousands.

Failure to develop long-term strategies both internationally and for our region

There is a view that by having a self-centred focus on the relatively small number of people seeking asylum in Australia, some Australians have lost sight of the big picture. This is that there are more refugees in the world than ever before. The number of refugees is fast increasing due to wars, persecution

Figure 19.12 On 21 May 2015, when former prime minister, Tony Abbott, was asked about the prospect of resettling some Rohingya refugees in Australia, his reply was, 'Nope, nope, nope!'.

ISBN 978-1-108-86281-3 Milgate et al.

Research 19.7

Access the website of the UN Refugee Agency (UNHCR). On this website, find the 'Figures at a Glance' webpage.

1 Describe the scale of the refugee problem at a global level.
2 Identify the total funding for UNHCR programs for 2019. Assess how this compares to how much Australia spends on a relatively small number of people seeking asylum.

and instability in many locations around the world. Some say that Australia could be providing greater leadership in this area, particularly in our region, while also protecting the security interests of our country.

Damage to social cohesion

> Finally, many critics of Australia's two-decade long policy of offshore detention point to the damage to the social cohesion of Australian society. These critics argue that political rhetoric portraying people seeking asylum as representing threats to national security has been deceptive to say the least; it's the classic political sleight of hand: create a problem and then provide the solution in order to look like a hero. This tactic has inflicted a high price in terms of Australia's social cohesion. The irresponsible branding of asylum seekers as potential jihadists has so infected our collective psyche that we now feel threatened by the mere presence of Middle Eastern men or Islamic accoutrements like the Burqa.
>
> (Source: 'How we're exploiting the terrorism threat', by Paula Matthewson, *The Drum, ABC News*, 29 September 2015.)

A policy in line with our values?

Many critics argue that Australia's offshore detention policy is not in line with our national values. They ask how can we say that Australia provides a 'fair go' for all? According to Jane McAdam and Fiona Chong (*Refugee Rights and Refugee Wrongs*, 2019, p. 201), this policy has:

> ...undermine community cohesion and tolerance for diversity, and challenge fundamental conceptions of dignity and humanity. When a six-year-old asks why refugee children are trying to kill themselves, how do we as parents, teachers and a community respond?

Finally, in the words of Behrouz Boochani ('Human rights dinner keyote address', Human Rights Law Centre, 18 May 2018):

> Do not give up. The refugees have no choice but to persevere.
> We cannot stop resisting. Until we are free our struggle will never end.
> Never forget that we have endured all these years, the consequences of physical, emotional and psychological pain and affliction will never end.
> We cannot stop resisting.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- Behrouz Boochani fled from persecution in Iran in 2013 and was imprisoned on Manus Island in PNG for six years.
- The Australian Government had changed its policy on asylum seekers three days before Behrouz Boochani arrived on Christmas Island.
- Behrouz Boochani clandestinely documented his six years imprisonment on Manus Island in a film, a book, in newspaper articles and via online talks with various organisations.
- Behrouz Boochani came to the attention of the world and to the Australian public – even challenging then Prime Minister Malcolm Turnbull directly on TV.
- In November 2019, Behrouz Boochani secured a passage to New Zealand and a one-month visa. With his future uncertain, he pledged that he would not return to detention in PNG.
- The Howard government, using the 2001 *Tampa* incident, radically reframed Australia's policy on asylum seekers who arrived by boat and enacted the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).
- There has been criticism that people seeking asylum have been demonised and linked to the threat of global terrorism.
- Many civil society groups opposed government policies on people seeking asylum because these policies undermined human rights and Australia's obligations under various international treaties.
- Behrouz Boochani has influenced the debate about asylum seeker policies though his writing and his journalism.
- The repeal of the Medevac legislation in December 2019 ensured the continuation of Australia's offshore processing policy.
- Australia's legal system has been criticised as being ineffective in ensuring the wellbeing of asylum seekers in offshore locations.
- Australia's polices have damaged its international reputation and its credibility according to some critics in the region.

Questions

Multiple-choice questions

1 Behrouz Boochani was persecuted in Iran because he:
   - **a** was a Kurdish freedom fighter.
   - **b** was promoting Kurdish language and culture in his publications.
   - **c** was caught in a war zone between Iran and Iraq.
   - **d** was born in a Kurdish region in Iran.

2 Behrouz Boochani claimed that Manus Island functioned according a 'kyriarchal system'. A 'kyriarchal system' is:
   - **a** a system that used to exist in medieval times.
   - **b** based on domination, suppression and submission.
   - **c** one in which only those with money are treated well.
   - **d** all of the above.

3 In June 2016, Behrouz Boochani challenged the Australian prime minister with a question on the ABC's *Q&A* program. Which prime minister did he challenge?
   - **a** Scott Morrison
   - **b** Malcolm Turnbull
   - **c** Tony Abbott
   - **d** Julia Gillard

4 Behrouz Boochani's book, *No Friend but the Mountains*, was written via:
   - **a** Facebook.
   - **b** Instagram.
   - **c** WhatsApp.
   - **d** a hand-held computer.

5 Australian Government's policy on asylum seekers was radically transformed by the:
   - **a** *Tampa* incident.
   - **b** US refugee-swap deal.
   - **c** repeal of the Medevac legislation.
   - **d** PNG's High Court decision.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

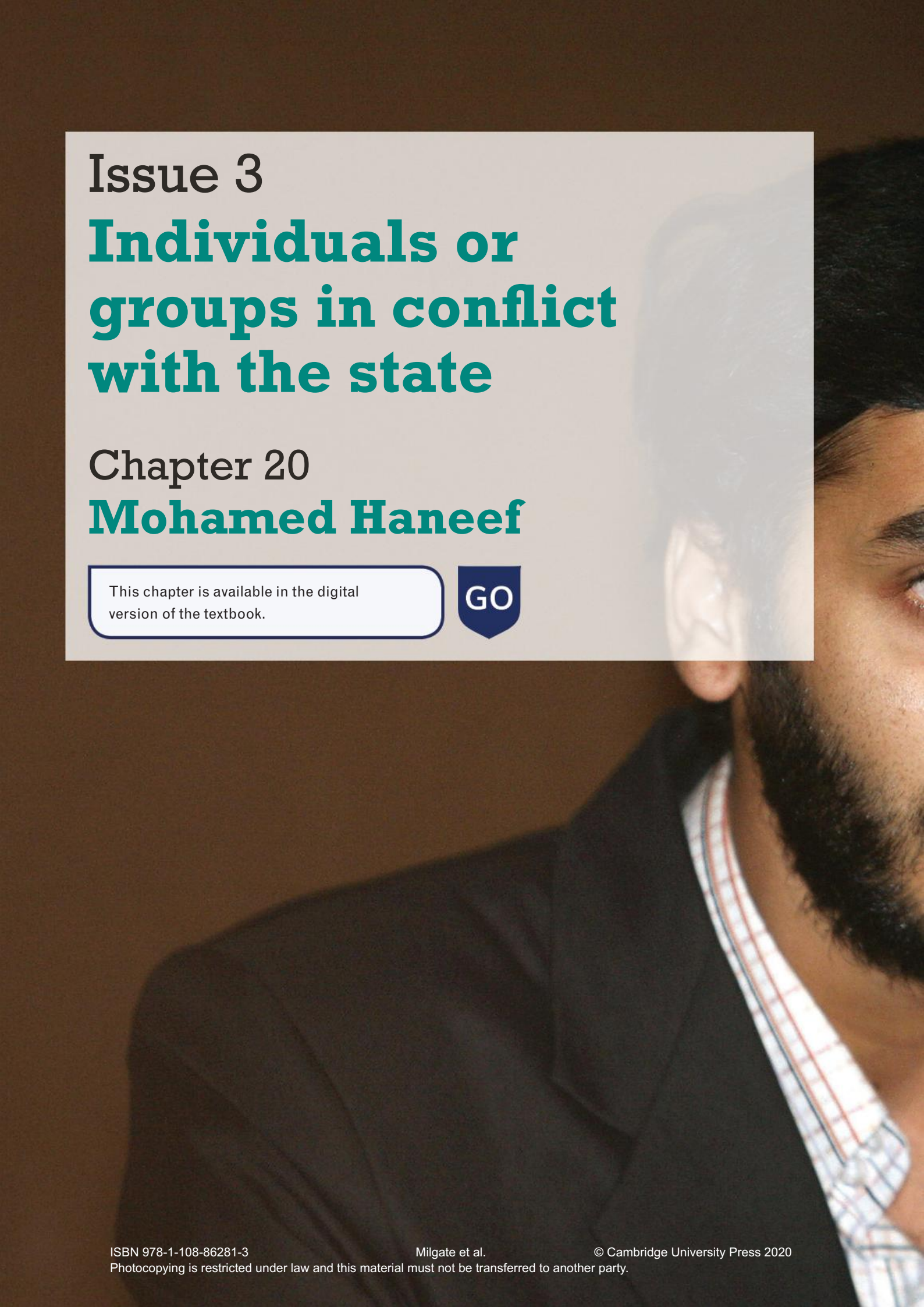
1 Identify the three locations in which Behrouz Boochani was in detention.
2 Identify how much time Behrouz Boochani spent in each of the three detention locations.
3 Describe Operation Sovereign Borders.
4 Outline the daily routine experienced by inmates imprisoned on Manus Island.
5 Identify the Australian prime ministers who have played a role in Australia's asylum seekers policies.
6 Identify the international treaties that Australia's offshore protection policies are at odds with.

Extended-response question

Assess the implications of the repeal of the Medevac legislation up to the current time.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

ISBN 978-1-108-86281-3 Milgate et al.



Issue 3

Individuals or groups in conflict with the state

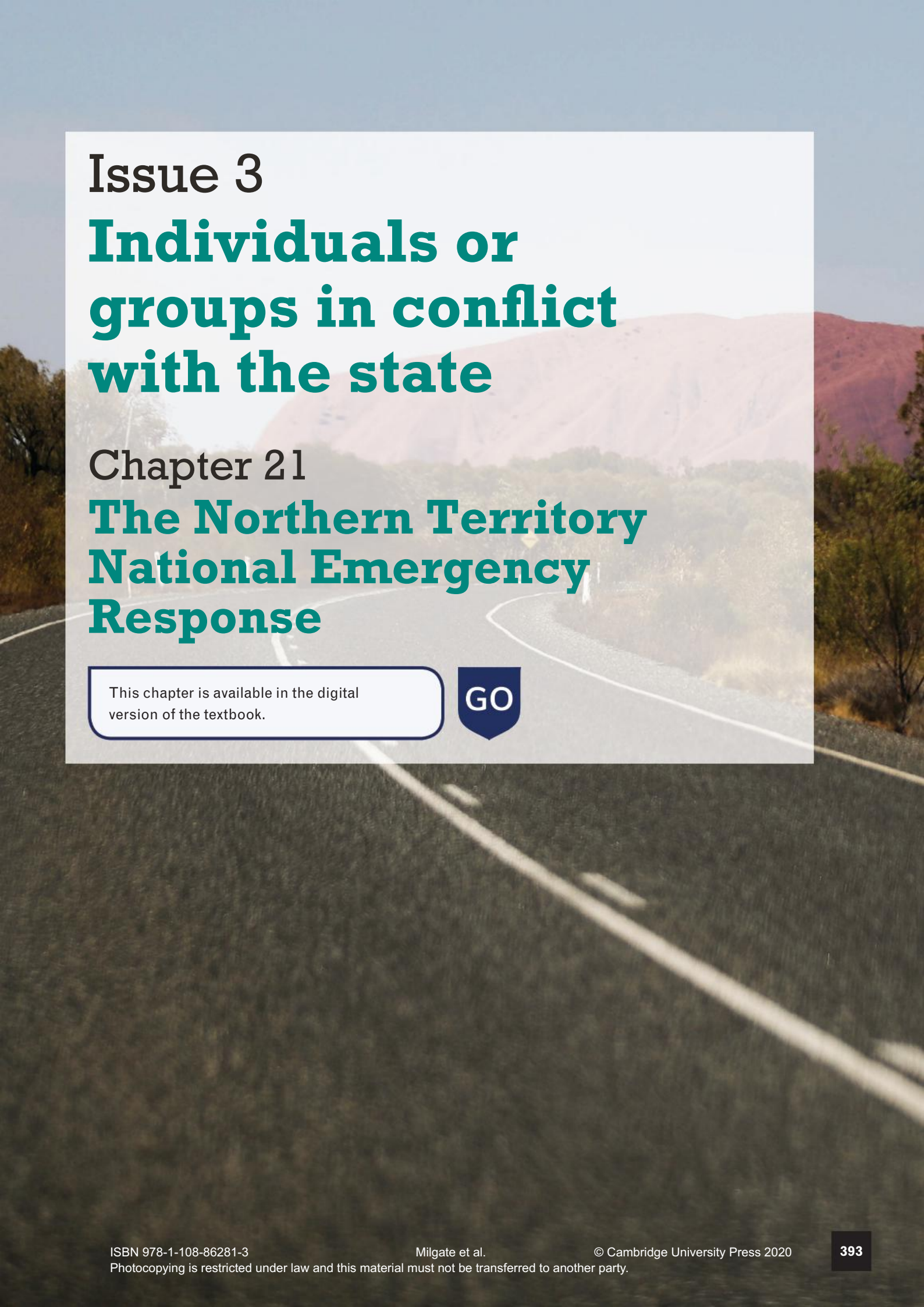
Chapter 20
Mohamed Haneef

This chapter is available in the digital version of the textbook.

GO

ISBN 978-1-108-86281-3
Milgate et al.

ISBN 978-1-108-86281-3 Milgate et al.



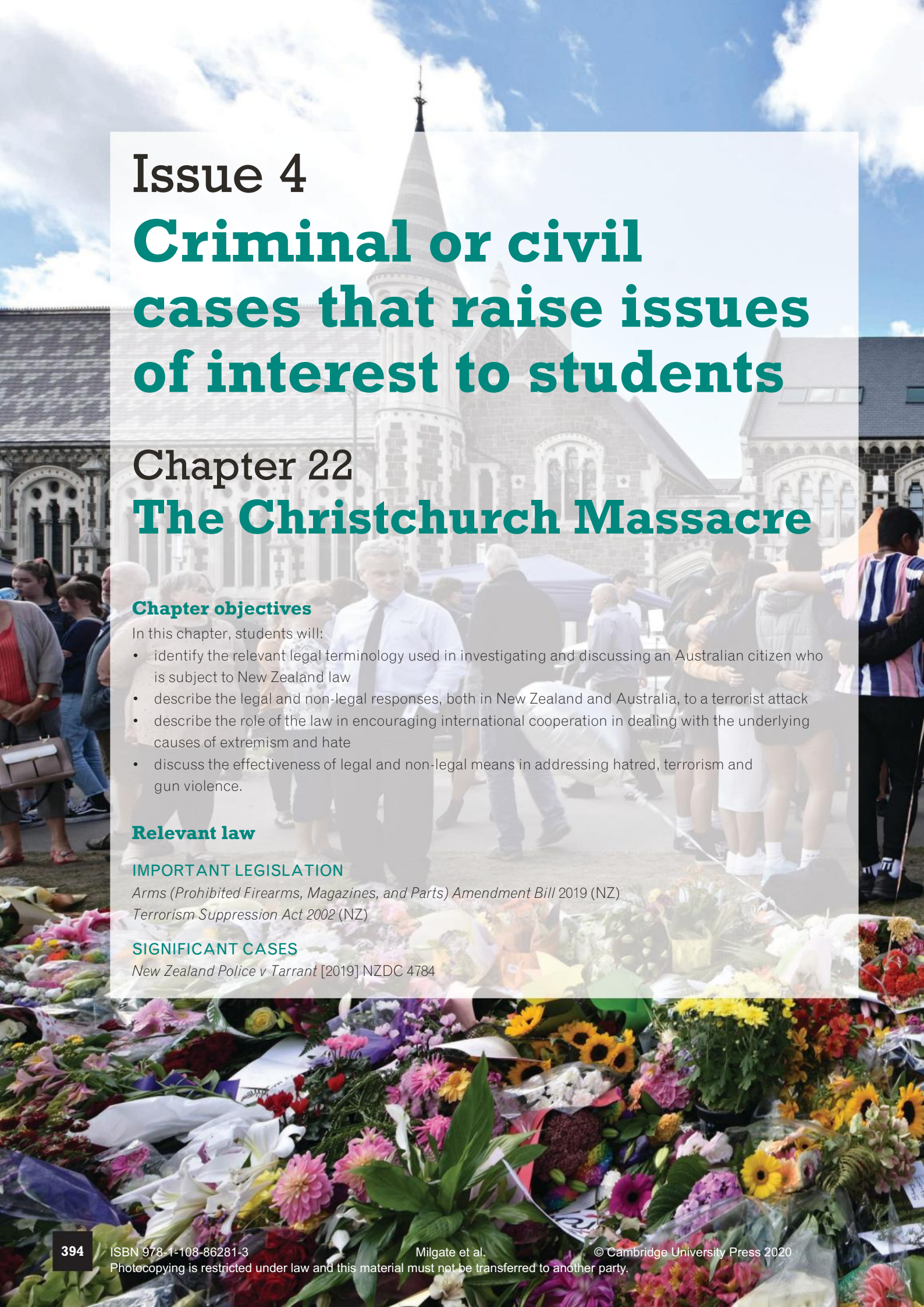
Issue 3
Individuals or groups in conflict with the state

Chapter 21
The Northern Territory National Emergency Response

This chapter is available in the digital version of the textbook.

GO

ISBN 978-1-108-86281-3



Issue 4
Criminal or civil cases that raise issues of interest to students

Chapter 22
The Christchurch Massacre

Chapter objectives

In this chapter, students will:

- identify the relevant legal terminology used in investigating and discussing an Australian citizen who is subject to New Zealand law
- describe the legal and non-legal responses, both in New Zealand and Australia, to a terrorist attack
- describe the role of the law in encouraging international cooperation in dealing with the underlying causes of extremism and hate
- discuss the effectiveness of legal and non-legal means in addressing hatred, terrorism and gun violence.

Relevant law

IMPORTANT LEGISLATION

Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019 (NZ)
Terrorism Suppression Act 2002 (NZ)

SIGNIFICANT CASES

New Zealand Police v Tarrant [2019] NZDC 4784

ISBN 978-1-108-86281-3 Milgate et al.

Note

NZ Prime Minister Jacinda Ardern vowed never to say the name of the Christchurch mosque gunman, 'He sought many things from his act of terror, but one was notoriety – that is why you will never hear me mention his name'. As a mark of respect, we have intentionally removed his name from most of this chapter. Instead of using his name, he is usually referred to as 'the terrorist'.

ISBN 978-1-108-86281-3

22.1 The crime: Friday 15 March 2019

The mass shooting of 100 people at two mosques in Christchurch, New Zealand, on the afternoon of Friday 15 March 2019, sent shockwaves around the world. The gunman killed 51 people, wounded 49 people, and left a community in fear and a nation in crisis. This crime is significant for Australia because the alleged killer is an Australian citizen and a self-declared white supremacist. Not only was this one of the worst mass shootings in recent times – surpassing even the Port Arthur **massacre** of 1996 – but it was also a calculated act of **terrorism** aimed at appealing to far-right groups and encouraging others to carry out similar attacks.

massacre
the intentional killing of a large number of people

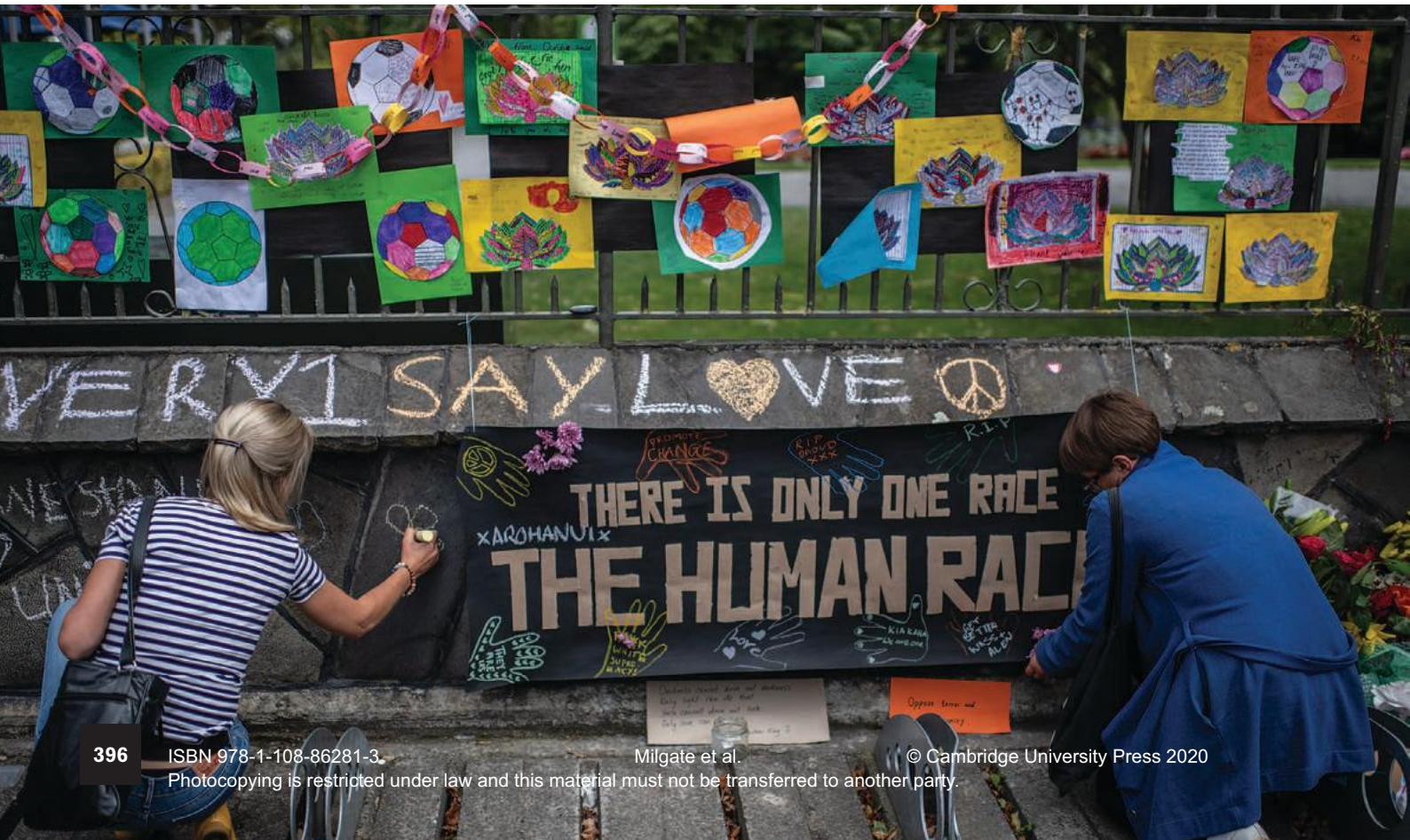
terrorism
violence or the threat of violence, directed at an innocent group of people for the purpose of coercing another party, such as a government, into a course of action that it would not otherwise pursue

On 15 March 2019, Brenton Tarrant armed himself with semi-automatic rifles, including an AR-15. These weapons had been modified with high-capacity magazines so they could hold more bullets. Brandishing these weapons, the terrorist entered the Al Noor Mosque in central Christchurch at 1:41 pm during Friday prayers. Within minutes, he had shot 42 people. By the time police arrived six minutes later, the terrorist had gone to another mosque in a nearby suburb, where he shot more people. After three minutes, he left the second mosque and, according to his manifesto, he was on the way to a third target, a mosque on the outskirts of Ashburton.

Before he reached his next destination, two police officers – after a radio call out – intercepted him. When they spotted the terrorist's 2005 Subaru Outback they forced the car to pull over and arrested him. He was taken to the Central Police Station in Christchurch for questioning. The terrorist's rampage had lasted no more than 20 minutes, yet bodies were strewn at two mosques and countless lives had been shattered.

All 16 minutes and 55 seconds of the massacre were live-streamed by the gunman; this footage was then shared by likeminded people on YouTube, Facebook and Twitter. In the first 24 hours after the

Figure 22.1 The Christchurch Botanic Gardens in Christchurch, New Zealand. In the days following the terrorist attack, people left messages of support for the Muslim community.



ISBN 978-1-108-86281-3

massacre, Facebook removed 1.5 million videos of the terrorist attack. The terrorist also uploaded a 73-page manifesto titled, 'The Great Replacement', and links to it were shared on Twitter and 8chan (8chan is an online forum where members can post anonymously and their posts vanish after a short time). He also emailed his manifesto to more than 30 recipients, including media outlets and the Prime Minister's office.

The NZ Police were not sure whether the gunman had acted alone. For all they knew, there may have been more terrorists involved in the attack. In addition, police were now aware that the terrorist was being followed in real time on Facebook and on other online forums. They did not know whether he was part of a coordinated attack by a number of extremists. Christchurch was placed in lock-down until the police were sure that there was only one terrorist.

The terrorist

The terrorist was born in 1990 in the town of Grafton in northern New South Wales. When his father died of a lung disease in 2010, the son received $500 000 in insurance compensation. He then quit his job at a gym and travelled around Australia during 2013 and 2014. After possibly spending some time in Asia, he went to Europe in 2014, visiting sites of historical significance for far-right groups in Serbia and France. References to these sites appear in his manifesto.

Back in Australia, he participated in a number of online far-right groups such as the United Patriots Front (UPF) and expressed support for the UPF's leader, Blair Cottrell. In May 2016, he posted violent language online directed at a critic of the UPF. The terrorist was also familiar with the far-right white nationalist group Lads Society. According to an ABC 'background briefing' report on 23 March 2019, he livestreamed via Facebook a celebratory video with Tom Sewell, leader of the Lads Society, from Melbourne's Federation Square. 'Simply one of the most important events in modern history', he commented in the livestream. He went on to declare that, 'Globalists and Marxists on suicide watch, patriots and nationalist triumphant – looking forward to Emperor Blair Cottrell'.

In August 2017, he moved to New Zealand where he started planning a terrorist attack on Muslim people. In 2018, he travelled to Pakistan, North Korea and Austria. It was while he was in Austria that he had online contact with Martin Sellner, the leader of a far-right identitarian group. It is unclear whether they ever met face-to-face. However, Sellner did receive a donation of 1500 Euros from the terrorist. Authorities in both Austria and Germany have been investigating any possible links between **identitarian** groups in their countries and the Christchurch terrorist.

identitarianism
a recent extreme right-wing ideology that slickly repackages old fascist ideas into more socially acceptable forms; often espouses the exclusion of Muslims and other minority groups

Once back in Dunedin, New Zealand, the terrorist returned to his small duplex but he did not appear to have a job. He regularly visited the shooting range at the Bruce Rifle Club. In October 2017, he applied for a gun licence and bought four guns and ammunition at the Gun City store.

At some point, the terrorist began working on his manifesto, 'The Great Replacement'. He claimed that his first draft was 250 pages long but then he cut it back to 74 pages. This document was full of the racist ideas of identitarianism and neo-Nazism, such as white supremacy and hate speech directed at immigrants. He took the title from a 2012 book by a French white nationalist conspiracy theorist, Renaud Camus, who drew on existing traditions of racism directed at migrants and merged them with the Eurabia conspiracy theory.

Some Australia journalists had this to say about the terrorist's manifesto:

> What was most disconcerting was its clarity. Stripped of the memes, chan gags and patchy grammar, it [the manifesto] was a direct statement of mangled history, vile ideology and deadly intent. Online plagiarism software checks suggested that his writing was original … Crucially, he intended to inspire further atrocities and help foment broader conflict.
>
> (Source: 'White Bred Terrorist' by Nick O'Malley, Tim Barlass and Patrick Begley, *Sydney Morning Herald*, 10 August 2019, p. 24.)

ISBN 978-1-108-86281-3 Milgate et al.

It was clear that the terrorist was part of an online community that promoted fascist views, conspiracy theories and the use of violence. He also had links with fascist groups both in Australia and in Europe. The Christchurch massacre was a carefully planned terrorist attack that was designed to go viral and to influence people in dark online **far-right** communities.

far right
(politics) similar to 'extreme right' – this describes right-wing political groups that are willing to institute extreme measures to deal with the perceived ills of society

Response from the NZ Prime Minister

Ten minutes after the shooting began on Friday 15 March 2019, NZ Prime Minister Jacinda Ardern received a call telling her the news. Police had only just arrived at the first mosque and the gunman was on his way to his second target. Ardern and her staff immediately went to the police station in New Plymouth. Over the next 90 minutes, the full horror of what had happened became apparent, including the livestreaming of the terrorist attack on Facebook.

Video

At 4 pm on 15 March, barely two hours after the attack, Prime Minister Ardern made her first public statement:

> Many of those who will have been directly affected by this shooting may be migrants to New Zealand, they may even be refugees here. They have chosen to make New Zealand their home, and it is their home. They are us. The person who has perpetuated this violence against us is not. They have no place in New Zealand. There is no place in New Zealand for such acts of extreme and unprecedented violence, which it is clear that this act was.

Figure 22.2 Hours after the terrorist attack on two mosques in Christchurch on 15 March 2019, NZ Prime Minister, Jacinda Ardern, spoke to the media at a press conference at parliament in Wellington, New Zealand. She said that one person was in custody and police were searching for another gunman.

ISBN 978-1-108-86281-3 Milgate et al.

Legal Links

To read Prime Minister Jacinda Ardern's speeches from 15 March 2019, go to the NZ Foreign Affairs and Trade website, under Media & resources - Ministry statements & speeches.

In a second address to the media four hours later, Prime Minister Ardern labelled the massacre a terrorist attack:

> We, New Zealand, we were not a target because we are a safe harbour for those who hate. We were not chosen for this act of violence because we condone racism, because we are an enclave for extremism. We were chosen for the very fact that we are none of these things.

A few months earlier, in September 2018, Prime Minister Ardern had given a speech at the United Nations. This speech stands out for its direct analysis of where the world is today and what we need to do to make things better. Ardern said that what the world needs to pursue is kindness. This is consistent with Ardern's whole approach to leadership since taking office:

> Perhaps then it is time to step back from the chaos and ask what we want. It is in that space that we'll find simplicity. The simplicity of peace, of prosperity, of fairness. If I could distil it down into one concept that we are pursuing … it is simple and it is this. Kindness.
>
> In the face of isolationism, protectionism, racism – the simple concept of looking outwardly and beyond ourselves, of kindness and collectivism, might just be as good a starting point as any. So let's start here with the institutions that have served us well in times of need, and will do so again.
>
> (Jacinda Ardern, Speech to the United Nations, 28 September 2018.)

The NZ Prime Minister reiterated her approach in an interview on the *Today* Show on 24 September 2018:

> I really rebel against the idea that politics has to be a place full of ego and where you are constantly focused on scoring hits against one another. Yes, we need a robust democracy but you can be strong and you can be kind.

The funerals and vigils

In response to the Christchurch massacre, there was a wave of support from around the world for New Zealand and its Muslim community. Vigils were held to remember the victims. A vigil was held in the Auckland Domain on 22 March. Another vigil held in North Hagley Park in Christchurch on 24 March was attended by 3000 people. This vigil was called the 'March for Love' and was organised by the same students who had organised the School Strike for Climate march. Incidentally, the School Strike for Climate march on 15 March 2019 was the same day as the shooting and in Christchurch was cut short by the massacre.

A week after the massacre, funerals were held in New Zealand and in the countries of origin for some of the victims. More than 1000 people gathered at Christchurch's Memorial Park cemetery for the burial of 26 of the victims in accordance with Islamic Law. An imam from the Al Noor Mosque said that the attacks had left the country 'broken but not broken-hearted' and he thanked the people of New Zealand for their support, love and compassion. Many women in New Zealand wore headscarves in solidarity with Muslim women, including the Prime Minister.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 22.3 On 17 March 2019 in Wellington, New Zealand, Prime Minister Jacinda Ardern hugged a woman at the Kilbirnie Mosque. Ardern received support from around the world for her resolute and compassionate handling of the government's response to the massacre. An article in *The New York Times* praised Ardern, declaring that her 'moral clarity is inspiring the world' ('Why Jacinda matters', by Surshil Aaron, *The New York Times*, 22 March 2019).

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 15–16 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge of the topic.

Review 22.1

1. Outline the evidence that the Christchurch terrorist had spent some time planning the attack.
2. Describe how the NZ Police and the NZ Government responded to the Christchurch massacre.
3. Identify the far-right sentiments the terrorist displayed before 2019.
4. Describe how NZ Prime Minister Jacinda Ardern responded to the terrorist attack. Assess why she responded this way.
5. Outline the support the Muslim community in New Zealand received from the wider New Zealand community.

ISBN 978-1-108-86281-3 Milgate et al.

22.2 Legal responses

The terrorist's manifesto

On 23 March 2019, the Chief Censor of New Zealand declared that the terrorist's manifesto, 'The Great Replacement', was 'objectionable' and that it was unlawful to possess or distribute the manifesto in New Zealand. However, in August 2019, NZ Police discovered that copies of the manifesto were being printed and sold outside the country.

Websites

In September 2019, Australian internet service providers (ISPs) were told by the Australian Government to block eight websites hosting videos of the Christchurch massacre. Back in March 2019, Australian ISPs had taken a proactive approach and had begun blocking 43 websites that were on a list provided by Vodaphone New Zealand. The eSafety Commissioner in Australia assumed responsibility for monitoring the objectionable websites identified. It was acknowledged that this was not a 'silver bullet' in dealing with extremism online.

Court appearances

On 16 March 2019, the terrorist was taken to court and was charged (initially) with one count of murder. This was because the court only needed evidence of one killing to keep the terrorist in prison. As he was brought into the courtroom, he made a white supremacist gesture with his hand. He was remanded without bail until his next court appearance on 5 April.

On Friday 5 April 2019, the terrorist appeared in the Christchurch High Court via video-link from prison. Many victims and relatives were present. The judge ordered that two assessments be carried out to determine the terrorist's mental health. The terrorist listened intently to the judge and made no comments. He was remanded in custody at the maximum security Auckland Prison until his next court date (14 June).

In the lead-up to the suspect's court appearance on 14 June 2019, media organisations in New Zealand took the unprecedented step of agreeing to a voluntary set of principles that were designed to limit the exposure of the terrorist's ideals and beliefs. The media agreed

Research 22.1

Research the trial of the Christchurch terrorist using the Courts of New Zealand website, and a range of media reports from New Zealand, Australia and other countries:

- from during the trial
- from the end of the trial (i.e. the summing up stage)
- from after the terrorist had been sentenced.

After you have completed your research, answer the following questions:

1. Identify significant moments in the trial of the Christchurch terrorist.
2. Outline what the survivors and relatives of victims thought about the trial.
3. Outline how the trial was viewed by the public in New Zealand, Australia and in other parts of the world.
4. Identify to what extent the discussion in court and in the media was about the terrorist's ideological motivation, and the danger of white supremacist and other hate groups.
5. Read the sentencing judgment. Identify what aspects were highlighted.
6. Identify if there was any discussion about the fact it was an Australian who carried out this act of terrorism.
7. Compare the trial with the 1996 trial of Martin Bryant for the Port Arthur massacre. (See Chapter 16).
8. Assess if it was a good idea for the survivors and the victims' relatives to have their day in court and if this trial provided closure for these people.

ISBN 978-1-108-86281-3 Milgate et al.

to limit coverage of statements that promote white supremacy or terrorism and not to quote from the terrorist's manifesto or broadcast imagery of white-supremacist symbols. The media pledged to adhere to these principles during the terrorist's trial.

On 14 June 2019, the terrorist again appeared in court via video-link from prison. He pleaded not guilty to all 92 charges including:

- 51 counts of murder
- 40 counts of attempted murder
- one count of terrorism under the *Terrorism Suppression Act 2002* (NZ).

On 26 March 2020, the defendant changed his plea to guilty of all charges. This came as a surprise as his trial – which had been due to start in the High Court of New Zealand on 2 June 2020 – had been cancelled due to New Zealand being in a nationwide lock-down due to the coronavirus pandemic.

Due to this sudden change in plea, the terrorist will proceed straight to sentencing. This means there will be no jury trial and no need for evidence to be provided to prove his guilt. Instead, a judge will determine his sentence.

This is normally a quick process. However, the coronavirus pandemic has held up the process. As a result, the sentencing hearing has been delayed until late 2020 when the majority of the survivors of the massacre can attend. Prime Minister Jacinda Ardern has said the guilty plea is a relief for the families of the victims.

This case now shares a similar conclusion to that of the mass killer, Martin Bryant, who also pleaded guilty in 1996. This guilty plea spared the families of the victims the harrowing experience of a lengthy court case.

Reform of New Zealand's gun laws

On 21 March 2019, just six days after the Christchurch terrorist attack, Prime Minister Jacinda Ardern announced that New Zealand would ban all types of semi-automatic weapons. She said that, 'our history has changed forever. Now, our laws will too'. The ban also covers accessories that enable semi-automatic weapons to be loaded with high-capacity magazines. Prime Minister Ardern also announced an amnesty for those who already owned these weapons so they could hand them in; under a weapons buy-back scheme. At the end of the amnesty period, anyone caught with a banned weapon would face a fine of up to NZ$4000 and three years in jail. Prime Minister Ardern said that a later round of amendments would legislate for a register of all firearms and their owners, and other issues of licencing and registration.

Ardern said gun-reform legislation would be introduced into parliament in the first week of April 2019 and she expected the laws would be in effect by 11 April. On 10 April, the NZ Parliament passed the *Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019* (NZ) and it received royal assent from the NZ Governor-General on 12 April. The vote for the Bill was 119–1. In a speech to parliament,

Figure 22.4 In an otherwise light-hearted and humorous interview on 18 November 2019 by *The Late Show* host on a visit to New Zealand, Stephen Colbert turned serious and asked about New Zealand's response to the Christchurch massacre. Colbert said, 'You immediately passed laws outlawing semi-automatic weapons. That was inspiring for us living here in the United States. How did you do it? I'm asking for 315 million friends of mine.'

ISBN 978-1-108-86281-3 Milgate et al.

Research 22.2

1 Access the website of the NZ Police.
   - **a** The gun amnesty only applied to certain types of weapons. Identify these types of weapons.
   - **b** Outline the conditions for handing in weapons to the NZ Police.
   - **c** Describe what would happen to the weapons that were handed in to the NZ Police.
   - **d** Outline the conditions for receiving compensation for any weapons surrendered.

2 Access the article, 'New Zealand gun buyback: 10000 firearms returned after Christchurch attack' (by Eleanor Ainge Roy, *The Guardian*, 12 August 2019).
   - **a** Assess the effectiveness of the 2019 gun buy-back scheme.

Prime Minister Ardern talked about the horrendous physical and psychological injuries suffered by the survivors, who would carry disabilities for the rest of their lives. She said 'she could not fathom how weapons that could cause such destruction and large-scale death could be obtained legally in this country'.

New Zealand's gun-law reform drew reactions from around the world. US Senator Bernie Sanders tweeted that, 'This is what real action to stop gun violence looks like'. However, unsurprisingly, the US National Rifle Association (NRA) did not welcome the reforms – the NRA has been trying for years to discredit Australia's gun laws (enacted in 1996 in response to the Port Arthur massacre). Dana Loesch, from the NRA tweeted, 'The US isn't NZ. While they do not have an inalienable right to bear arms and to self-defense, we do.'

The Royal Commission

On 13 May 2019, the NZ Royal Commission of Inquiry into the Attack at Christchurch Mosques was established to find out:

- what government agencies knew about the terrorist before the attack
- what actions they took (if any)
- what could have been done to prevent the attack
- what can be done to prevent similar attacks in the future.

The Royal Commission had to sift through highly classified information. For this reason, many of the hearings were held behind closed doors.

The Royal Commission's hearings looked at:

- the terrorist's activities before the attack
- his life in Australia
- the time he spent in New Zealand
- his overseas holidays
- the people he mixed with
- his use of social media
- how he obtained his gun licence, weapons and ammunition.

Research 22.3

Locate the website of the NZ Royal Commission of Inquiry into the Attack at Christchurch Mosques. Also locate media reports about this Royal Commission's findings.

1 Summarise the Royal Commission's main findings.

2 Discuss how the findings were received by:
   - **a** the media
   - **b** the NZ Government
   - **c** the Muslim community.

3 Identify any reforms or changes to government policy that occurred as a result of the Royal Commission's findings.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 22.5 Armed police officers patrol the grounds of parliament on 18 March 2019 in Wellington, New Zealand.

Judging by the 1100 public submissions received by the Royal Commission, there is significant public interest in the commission's findings. The commission's final report was originally due on 10 December 2019. However, there were concerns that this date was too early, that the December deadline did not allow enough time for the survivors and the Muslim community to be properly consulted, and that the commission's conclusions would be rushed. In response to these concerns, on 30 November 2019, the NZ Government extended the due date for the commission's final report to 30 April 2020 and provided an extra NZ$3 million in funding.

Arming NZ Police officers

In the months after the Christchurch massacre, the proposal that all NZ Police officers should be armed at all times was considered. Up to 2019, New Zealand was one of the few countries in the world where police officers did not carry guns, like in the United Kingdom and Norway. Police officers had handguns, rifles and Tasers locked in their vehicles, which could be used with permission of a superior officer. Trials were conducted in three areas of police officers carrying arms. In addition, Armed Response Teams were set up in Auckland, the largest city in New Zealand.

Concern in Australia

During October 2019, there was a concern in Australia about the perceived complacency of our Government in the wake of this terrorist attack committed by an Australian citizen. There has been little soul-searching or sense of responsibility about the fact that this attack was carried out by an Australian far-right white supremacist terrorist. Labor member of parliament, Anne Aly, said the idea that the shooter was not 'one of us' was wrong. 'No actually, he is one of us,' she said. Aly said this sort of attack was bound to happen eventually due to the upsurge in brazen extreme white supremacist activity in recent years. She also cited ASIO reports that a future terrorist attack would most likely be committed by a lone person, or a small group mobilised via social media or some online forum. Furthermore, Aly said that Australia needed to tackle the rhetoric used to justify and embolden right-wing extremism. Aly gave evidence at the NZ Royal Commission of Inquiry into the Attack at Christchurch Mosques.

ISBN 978-1-108-86281-3 Milgate et al.

Research 22.4

Locate recent media reports about Australia's response to the Christchurch massacre.

1 Identify any similar concerns to those of Australian members of parliament Anne Aly and Ed Husic that are raised in the media reports.
2 Outline the Australian Government's response to the Christchurch massacre.
3 Identity if concerns about far-right extremism have increased or decreased since 2019.
4 Assess whether the Christchurch massacre has affected the relationship between Australia and New Zealand.

Review 22.2

1 Outline how the terrorist's court appearances were handled.
2 Outline the action taken by the NZ Government on the issue of firearms.
3 Identify the task of the NZ Royal Commission of Inquiry into the Attack at Christchurch Mosques.
4 Describe the changes made to policing in New Zealand.
5 Discuss the concerns raised in Australia about the perceived complacency of the Australian Government in the wake of this terrorist attack committed by an Australian citizen.

According to another Labor member of parliament, Ed Husic, there were 50 terror-related deaths in 2018 in the United States because of far-right extremism. He also raised concerns that the Christchurch massacre had already been the inspiration for copycat attacks around the world. Husic was also concerned that Australia's law enforcement agencies were not given adequate resources to keep track of these threats.

22.3 Non-legal responses

Christchurch Call

The Christchurch massacre was livestreamed and then went viral; and despite attempts to remove it from the web, the video footage remains online. In response to this, on 15 May 2019, Prime Minister Ardern met with French President Macron to launch an initiative to deal with terrorist and

Figure 22.6 At the Élysée Palace in Paris, France, on 15 May 2019, the French President, Emmanuel Macron, and New Zealand's Prime Minister, Jacinda Ardern, attended a launching ceremony for the Christchurch Call, an initiative pushed by Ardern.

Research 22.5

Locate the Christchurch Call website. Explore the website and read the information about Christchurch Call.

1 Assess which of the government measures are:
   - **a** the easiest to achieve.
   - **b** the hardest to achieve.
   - **c** should be the highest priority.
2 Identify which of the online service providers' measures are:
   - **a** the easiest to achieve.
   - **b** the hardest to achieve.
   - **c** should be the highest priority.
3 Look up the following item on the website of New Zealand Foreign Affairs & Trade: 'Significant progress under Christchurch Call announced at UN Leaders' Week' (26 September 2019).
4 Critically analyse the progress made on the Christchurch Call at the United Nations in September 2019.
5 Find some recent media reports about the Christchurch Call. Describe to what extent the Christchurch Call has been followed up by governments and tech companies since 2019.

violent extremist content online. Macron and Ardern launched the Christchurch Call, which is a commitment by governments and tech companies to eliminate violent extremist and terrorist content online. The tech companies were asked to pledge to enforce their terms of service and re-evaluate their algorithms that directed users to extremist content.

The Christchurch Call acknowledges that the right to free expression is fundamental. However, no-one has the right to create or share violent extremist content. The Christchurch Call also asked national governments to adopt and enforce laws banning extremist material online. Governments were asked to give media outlets guidelines on how to report terrorist acts without giving the atrocitites too much publicity. The meeting between Ardern and Macron dovetailed with an initiative launched by Macron called 'Tech for Good' that brought together 80 tech leaders to explore ways in which new technologies could be made to work for the common good.

Community concern about the rise of far-right extremism

In Australia and New Zealand, there was concern about the rise of far-right extremism and the risk of further acts of violence. In the case of the Christchurch attack, what was most concerning was that the terrorist hoped the attack would inspire others to commit similar atrocities. This is why he livestreamed the attack on Facebook and disseminated a 74-page manifesto.

These concerns were heightened with other attacks in the months after the Christchurch massacre:

- **Arson attack on a mosque – Escondido California, United States, 24 March 2019**
  The fire was started at 3:15 a.m., while seven people were inside the mosque, but was put out before anyone was injured. There was no significant damage to the building.
- **Shooting at a synagogue – Poway, California, United States, 27 April 2019**
  One person was killed and three others injured. The killer claimed responsibility for this attack and for the fire in Escondido. Disturbingly, this killer also left a manifesto, and in it he praised the Christchurch terrorist. Both were users of 8chan.
- **Shooting at a Walmart store – El Paso, Texas, United States, 3 August 2019**
  22 people were killed and 24 people were injured. On 8chan, the killer claimed that he was inspired by the Christchurch massacre.
- **Shooting at a mosque – Bærum, Norway, 10 August 2019**
  One person was injured. The offender attempted to livestream the attack on Facebook. He described himself online as being

ISBN 978-1-108-86281-3 Milgate et al.

Research 22.6

Find a transcript of the speech Sacha Baron Cohen made to the Anti-Defamation League in November 2019 ('Facebook: Greatest propaganda machine in history'). Read the speech, then answer the following questions.

1. Outline the claims Sacha Baron Cohen makes about Facebook.
2. Identify Sacha Baron Cohen's criticism of Mark Zuckerberg.
3. Assess the validity of Baron Cohen's criticisms.
4. Assess to what extent the law can deal with Facebook not addressing the fact that far-right groups use the platform to promote violence.

chosen and said, 'We gotta bump the race war threat into real life.'

On 6 August 2019, while on an official trip to New Zealand, Jens Stoltenberg, the NATO Secretary General, stated that the Christchurch massacre had similarities to the 2011 attack in Norway where a far-right extremist killed 77 people. Stoltenberg rejected the view that terrorist attacks are always something that are organised from outside the country. He said they are home-grown too. Stoltenberg also said recent attacks were increasingly connected and un-moderated message boards – like 4chan, 8chan and Endchan – are a key factor in the spread of extremism. 4chan and Endchan, like 8chan, are online forums where members can post anonymously and their posts vanish after a short time. These forums foster a toxic culture and are the favoured forums for fostering extremist views and conspiracy theories.

On 14 August 2019, geopolitical and strategic risk expert, Paul Buchanan, warned that the Christchurch massacre has become a touchstone for far-right white supremacists around the world. According to Buchanan, there are three reasons for this:

- the location of the attack in a house of worship gave it a higher status than random attacks in shopping malls
- the attacks were livestreamed
- a large number of people were killed.

Buchanan said that he monitored the 8chan website while the shootings occurred and noted that there were users who urged the gunman on. Significantly, the Christchurch massacre was the first mass murder that was livestreamed for ideological reasons. Furthermore, Buchanan declared, 'To this generation of sociopaths, that really rung a bell because they are an audio-visual generation.'

Figure 22.7 Sacha Baron Cohen attends the seventy-first Emmy Awards on 22 September 2019 in Los Angeles, the United States. Two months later, the actor slammed Facebook for promoting online extremism.

ISBN 978-1-108-86281-3 Milgate et al.

Understanding far-right extremism

Christchurch attacks show Islamophobia is real, deadly and spreading around the world
By Imran Awan
The Conversation
20 March 2019

When I woke up to the news that 50 people had been killed and at least 20 wounded in shootings at two mosques in Christchurch, I couldn't help but reflect upon the words of those who refuse to accept that **Islamophobia** exists. In the United Kingdom, the columnist, Melanie Phillips, has argued that Islamophobia is a fiction used to shut down debate. Douglas Murray called it the Islamophobia 'problem', arguing that it was created by fascists.

Islamophobia is the fear, prejudice and hatred of Muslims and people perceived to be Muslim that leads to provocation, hostility and intolerance. A working definition, published in late 2018 by a group of British MPs, defined is as: 'Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness.'

It is motivated by institutional, ideological, political and religious hostility, and can merge with racism to target the symbols and markers of a being a Muslim.

I've been researching Islamophobia for more than a decade and found it has a devastating effect on victims, their families and wider communities. Such hatred is very real, and it has become globalised.

A STRING OF ATTACKS TARGETING MUSLIMS

The past few years have seen a number of deadly Islamophobic attacks in Europe and North America. In 2015, Zack Davies was sentenced for life after he attacked Sarandev Bhambra with a claw hammer and a 30 cm-long machete at a supermarket in Wales. A witness told the court that during the attack Davies had said it was for Lee Rigby – the soldier murdered by Islamist extremists in south-east London in 2013.

In 2017, Jeremy Joseph Christian became enraged when he saw a young Muslim woman wearing a hijab on a commuter train in the United States. He began verbally abusing her and used a knife to kill two passengers who tried to intervene. Christian defended the killings in a courtroom rant that included the following, 'Death to the enemies of America. Leave this country if you hate our freedom,' he said. 'You call it terrorism, I call it patriotism.'

The same year, Darren Osborne carried out a van attack against Muslim worshippers in Finsbury Park in London. At his trial, it was revealed he had previously threatened to kill all Muslims and had searched for material posted online by both far-right group Britain First and the far-right activist known as Tommy Robinson. In court, it was reported that Osborne had received a group email from Robinson in reference to the recent Manchester arena attack, which read: 'There is a nation within a nation forming just beneath the surface of the United Kingdom. It is a nation built on hatred, violence and on Islam.'

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

In the United Kingdom, extreme right-wing activity jumped by 36% in 2017–2018, according to data from Prevent, the country's terrorism-prevention program. Statistics released by the Home Office showed more than half of religiously motivated attacks in 2017–2018 were directed at Muslims.

RHETORIC THAT BREEDS HATRED

In the US, between January and September 2017, the Council for American-Muslim Relations recorded 1656 so-called 'bias incidents' and 195 hate crimes, an increase in both cases on the previous year. The council suggested President Donald Trump's 'toxic campaign rhetoric' towards Muslims was a contributing factor.

Trump has singled Muslims out as a suspect community. In his campaign for the presidency, he proposed a total and complete shutdown of Muslims entering the United States. Despite concerns raised about these statements, the US Supreme Court ruled in mid-2018 that a Trump administration travel ban aimed predominantly at people from Muslim-majority countries could come into full effect.

In the wake of the Christchurch attacks, security services are investigating whether the man charged with the attack had links to far-right groups in Europe. Details have begun to emerge of how the manifesto he published was influenced by the far-right ideology of Anders Behring Breivik, who murdered 77 people in Norway in 2011, and carried passages that praised Trump as a 'symbol of white identity'.

The view that all Muslims are dangerous and not part of society – amplified by politicians such as Trump and the radical far-right in Europe – has the ability to ignite further racial and faith-based schisms.

The attack in New Zealand outlines the international spread of Islamophobic hate crime, which becomes highly pertinent in a globalised world. There is a fear that what happened in Christchurch could spill over, and those with radical right sympathies could feel emboldened by the incident in order to promote their own warped version of what Islam is. In the days following the attack, two people were charged in Rochdale in northern England after a taxi driver was 'abused and threatened' with references to the Christchurch shootings, though this case has still to be tested in court.

So please don't tell me Islamophobia doesn't exist. It does and it can kill. What happened in New Zealand was not an isolated attack against Muslims. It is about time we started to hold the media, and those that peddle far-right hatred, to account.

Islamophobia
the fear of, and hatred towards the Islamic region and Muslim people generally, which has grown in the wake of the 'war on terror' since 2001; Islamaphobia is a form of xenophobia, racism, and shares common elements with anti-Semitism; many groups that espouse Islamophobia also are anti-Semitic

It is important that we understand far-right extremism because it represents a serious threat to Australia, New Zealand and the world. Whenever political leaders leverage racial hatred and bigotry to attract support, this creates an environment in which far-right extremism thrives. To dampen far-right extremism, terrorism experts advocate limiting media exposure for far-right extremists in the same way they do for jihadists.

Statements by right-wing populist politicians or commentators provides fertile ground for far-right groups to flourish. One example was Andrew Bolt's assertion in August 2018 that there was a 'tidal wave of immigrants flooding the country' and that these immigrants refused to assimilate. In response, the president of the Australian Jewish community, Jennifer Huppert, warned that, 'There is a rise in ultra-right-wing activity in Victoria and this type of activity can fuel anti-Semitic, anti-Islamic and general racist debate and language in

ISBN 978-1-108-86281-3 Milgate et al.

Research 22.7

1 Access the following article, 'Terror and rage: What makes a mass murderer different to a terrorist?' (by Jeff Sparrow, *The Guardian*, 4 August 2016). After reading this article, attempt the following questions:
   - **a** Explain the autogenic massacres, according to Paul Mullens.
   - **b** Compare the similarities between 'lone wolf' terrorists and 'deranged shooters'.
   - **c** Identify the role war has played in driving both Islamic terrorism and Islamophobia.
   - **d** Identify the 'burning moment' in Julian Grenfell's poem from the Great War.

2 Access the following article, 'What induces man to imitate the Christchurch massacre?' (by Jeff Sparrow, *The Guardian*, 5 August 2019). After reading this article, attempt the following questions:
   - **a** Identify the effect of the ongoing 'War on Terror'.
   - **b** Identify the main beneficiaries of the new racism.
   - **c** Outline what made fascists decide to move from the online to real-world activism.
   - **d** In the author's view, identify what is needed to genuinely counter fascist violence.

Review 22.3

1 Explain the purpose of the Christchurch Call.
2 Identify two terrorist attacks that were inspired by the Christchurch massacre.
3 Outline concerns expressed by experts about the Christchurch massacre.
4 Discuss what we need to understand about far-right extremism.
5 Describe how the Christchurch massacre has increased the threat of far-right terrorism.

our community.' Huppert said that this sort of thing undermined cohesion in society.

Jeff Sparrow, a journalist from *The Guardian* newspaper has been writing about far-right groups for many years. In 2019, he wrote a book called, *Fascists among Us: Online Hate and the Christchurch Massacre*. In this book, he wrote about the nature of contemporary **fascism**:

> If racial murder were gamified murder, terrorism itself could become a meme, a concept that would replicate and spread online, so that fascist gun murders became a constant temptation for the damaged young men already committed to far-right ideas.
>
> (Source: 'The internet SS: How the Halle murders follow a template established in Christchurch', by Jeff Sparrow, *The Guardian*, 16 October 2019.)

fascism
contemporary fascism is an anti-democratic ideology that promotes ultra-nationalism, hatred of immigrants, and the redemptive qualities of war and violence

22.4 Effectiveness of responses

New Zealand's response

In assessing the effectiveness of the responses to the Christchurch terrorist attack, we need to review the actions of the NZ Government led by Prime Minister Jacinda Ardern. Ardern showed admirable leadership in shaping the response of her government and of the people of New Zealand. She took a moral stance from the outset with the following four key elements:

ISBN 978-1-108-86281-3 Milgate et al.

Figure 22.8 On 20 March 2019, Prime Minister Jacinda Ardern spoke to students at Cashmere High School in Christchurch. She asked the students to make New Zealand a place with no tolerance for racism and extremism.

- **Showed empathy for the victims**
  From her first actions and words, Ardern demonstrated empathy for and solidarity with the Muslim community. To counter any possible 'othering' of the victims, in her first press statement she said of the terrorist, 'this is not us' and of the Muslim victims, 'they are us'. Within hours, she identified the massacre as an act of terrorism and went to visit the survivors and relatives. In all of this, Ardern was seeking to ensure that the division the terrorist was seeking to make would not happen. At the funerals and at public gatherings for the first two weeks, Ardern wore a hijab and many women in New Zealand copied this. The NZ Government also paid for relatives of the victims to travel from from overseas to attend the funerals.
- **Identified racism as the cause of the attack**
  Ardern recognised the need to head off a potential culture war in which some may attack New Zealand's immigration policies or to criticise the Muslim community. She sought to ensure that the terrorist would fail in his attempts to sow division and promote hate.
- **Denied publicity to the terrorist**
  From the outset, Ardern chose to never utter the terrorist's name.The New Zealand and Australian governments took measures to shut down websites hosting videos and the terrorist's livestream video. The terrorist's manifesto was also banned in New Zealand. Ardern was successful in directing the media coverage. The media agreed to abide by a code that meant that they would limit coverage of the terrorist at his trial.
- **Identified New Zealand as the target**
  In saying that 'they are us', Ardern identified New Zealand as the target of the attack as well as its Muslim community. This was to counter the prospect of any revenge attacks, at least in New Zealand.

ISBN 978-1-108-86281-3 Milgate et al.

The NZ Government then took practical measures to deal with the aftermath of the attack and the ongoing threat:

- enacted gun-law reform to ban semi-automatic weapons
- initiated a gun buy-back scheme
- established a Royal Commission
- initiated the Christchurch Call, which was taken to international forums, gaining strong support from many world leaders, the United Nations and global tech companies
- directed forceful words to the heads of social media companies to reign in far-right groups that promote hatred and violence.

Australia's response

The response in Australia has lacked the unity of the New Zealand response. There was no rallying around Prime Minister Scott Morrison's response, and within the community, there was fierce debate about the underlying causes of this terrorist attack and how Australia should respond.

Prime Minister Scott Morrison offered full support to New Zealand, and Australian intelligence and police cooperated with their counterparts in New Zealand to deal with the ongoing terrorist threat.

A 20-year-long culture war in Australia over Islamophobia, asylum seekers and immigration was fanned by the terrorist attack. For instance:

- Former One Nation senator, Fraser Anning, blamed the attack on Muslims
- Waleed Aly, from Channel Ten's *The Project*, said 'we all knew this was coming'; Aly criticised Prime Minister Morrison because while he was immigration minister in 2010, he advocated using anti-Muslim sentiment for political gain
- many people were concerned with the racist xenophobic language used within mainstream political debate and by certain sections of the media; there were calls for the Australian Government to do more to counter Islamophobia and divisive speech
- there were calls for the Coalition to do more to counter racism within its own ranks
- there were many protests and rallies against racism and in support of the Muslim community both in New Zealand and Australia.

Global response

The global response has been a mixture of strong and lukewarm support:

- Many countries supported the Christchurch Call. It received strong support from the United Nations, and protocols and mechanisms were established to deal with any future attacks and to counter online groups that promote violence and hatred.
- From global technology companies like Facebook and Google, there were expressions of good intentions and promises to take action. However, though they have successfully been able to counter Islamic extremism from their platforms, they have only just started doing so with far-right and extremist groups.
- US President Trump refused to back the Christchurch Call. In 2017, he had refused to condemn the attack by a far-right terrorist in Charlottesville.
- Many people around the world and in the United States admired the response of Jacinda Ardern and her government to the Christchurch attacks. New Zealand has attracted a lot of goodwill from other countries because of this approach.

The victims

In determining the effectiveness of the responses to the Christchurch terrorist attack, it must be recognised that for the victims, while appreciative of what the government has done, life will never be the same and they will always be affected in some way by this horrific experience.

In an article published in *The Guardian* on 27 November 2019, titled 'Anxious and in pain, survivors of Christchurch massacre call for new approach', journalist Charlotte Graham McLay explained how the survivors of the Christchurch massacre will be affected for the rest of their lives by this horrific experience. The victims are affected in the following ways:

- some victims were paralysed and will have to live the rest of their lives in wheelchairs requiring specialised service and disability appropriate housing

ISBN 978-1-108-86281-3 Milgate et al.

Figure 22.9 Zaid Mustafa who was wounded in the Christchurch massacre, attends the funeral of his father, Khalid Mustafa, and brother, Hamza Mustafa, at the Memorial Park cemetery in Christchurch on 20 March 2019. Zaid will have to deal with the impact of his wounds for the rest of his life as well as mourn the loss of his father and brother.

Review 22.4

1. Describe Jacinda Ardern's response in the first days after the Christchurch massacre.
2. Identify the measures taken to ensure safety and security in New Zealand.
3. Outline the debates in Australia following the Christchurch massacre.
4. Discuss how Jacinda Ardern's response to the Christchurch massacre has influenced the way the world sees New Zealand.
5. Assess what New Zealand learned from Australia.
6. Assess what Australia can now learn from New Zealand.

- some victims have to live with bullet fragments in their bodies and the constant fear that a fragment may shift and they will need emergency surgery
- many victims cannot sleep properly, have panic attacks, and suffer from depression
- many victims have lost incomes or have been forced to close their businesses; many families have lost their main breadwinner; financial stress is now a constant factor for most survivors
- victims may have experienced difficulty in navigating through the various government agencies that they have to deal with; many of these victims are from refugee backgrounds and simply do not understand how the system works
- victims will have to rebuild trust and rebuild supportive communities
- victims will have to deal with the sentencing of the terrorist and the difficult memories that this will revive.

In all of our thinking about the Christchurch massacre, we must never forget the victims.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- The Christchurch terrorist was a self-confessed fascist who aimed to encourage others to carry out similar attacks.
- The Christchurch terrorist had links with far-right groups in Australia and Europe.
- NZ Prime Minister Jacinda Ardern responded with empathy for the Muslim victims and showed a determination to take the necessary steps to prevent future attacks.
- At the funerals and vigils for the victims of the massacre, there were massive outpourings of support for the Muslim community.
- The New Zealand media agreed to a voluntary set of principles to limit the exposure of the terrorist in their coverage of the terrorist's trial.
- The Ardern government quickly passed laws to ban semi-automatic weapons and to implement a buy-back scheme.
- There was concern in Australia that the government was not doing enough to tackle right-wing extremism.
- The Christchurch Call attempts to deal with the promotion of hatred and violence on global internet platforms.
- There have been a number of massacres that have been inspired by the Christchurch massacre.
- Understanding far-right extremism is important to be able to counter this type of terrorism.
- The survivors and relatives of the victims of the Christchurch massacre will be affected for the rest of their lives by this terrorist attack.
- The response of the NZ Government to the Christchurch massacre was seen as being appropriate and effective and a good example for the rest of the world.
- The Australian Government struggled to deal effectively with the implications of the Christchurch massacre being carried out by an Australian.

Questions

Multiple-choice questions

1 The high-powered semi-automatic weapons used by the terrorist on 15 March 2019 were:
   - **a** brought with him from Australia.
   - **b** bought legally in New Zealand.
   - **c** acquired illegally.
   - **d** banned in New Zealand at the time.

2 The terrorist's motive for the Christchurch massacre:
   - **a** was that he had been bullied and abused as a child.
   - **b** was that he had a hatred of foreign tourists.
   - **c** was to encourage others with far-right views to commit similar attacks.
   - **d** is not known for sure.

3 Reforms to New Zealand's gun laws were passed after the Christchurch massacre. These reforms:
   - **a** banned semi-automatic weapons and instituted a gun buy-back scheme.
   - **b** were passed by a small majority in the NZ Parliament.
   - **c** were supported by pro-gun groups in the United States.
   - **d** did not follow the example set by the Australian Government after the Port Arthur massacre in 1996.

4 The Christchurch Call:
   - **a** was supported by the 4chan and 8chan webbites.
   - **b** was totally rejected by Facebook and Google.
   - **c** was strongly supported by the United Nations.
   - **d** was supported by all countries.

5 Contemporary fascism and far-right groups:
   - **a** are no longer a threat after the Christchurch massacre.
   - **b** reject the use of violence to achieve their aims.
   - **c** thrive in an environment where there is Islamophobia.
   - **d** all of the above.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

1 Summarise the events of 15 March 2019 in your own words.
2 Outline the stages in the court process in the prosecution of the terrorist.
3 Discuss what it is about the Christchurch massacre that makes it attractive to other extremists.
4 Outline the role of the internet in radicalising the Christchurch terrorist.
5 Identify the key features of the gun reforms instituted in New Zealand after the Christchurch massacre.
6 Outline the main features of contemporary fascism.
7 Describe the international measures taken to deal with the threat posed by far-right groups.

Extended-response question

Assess the role of the leadership Jacinda Ardern in creating an effective response to the Christchurch massacre.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing.

ISBN 978-1-108-86281-3 Milgate et al.

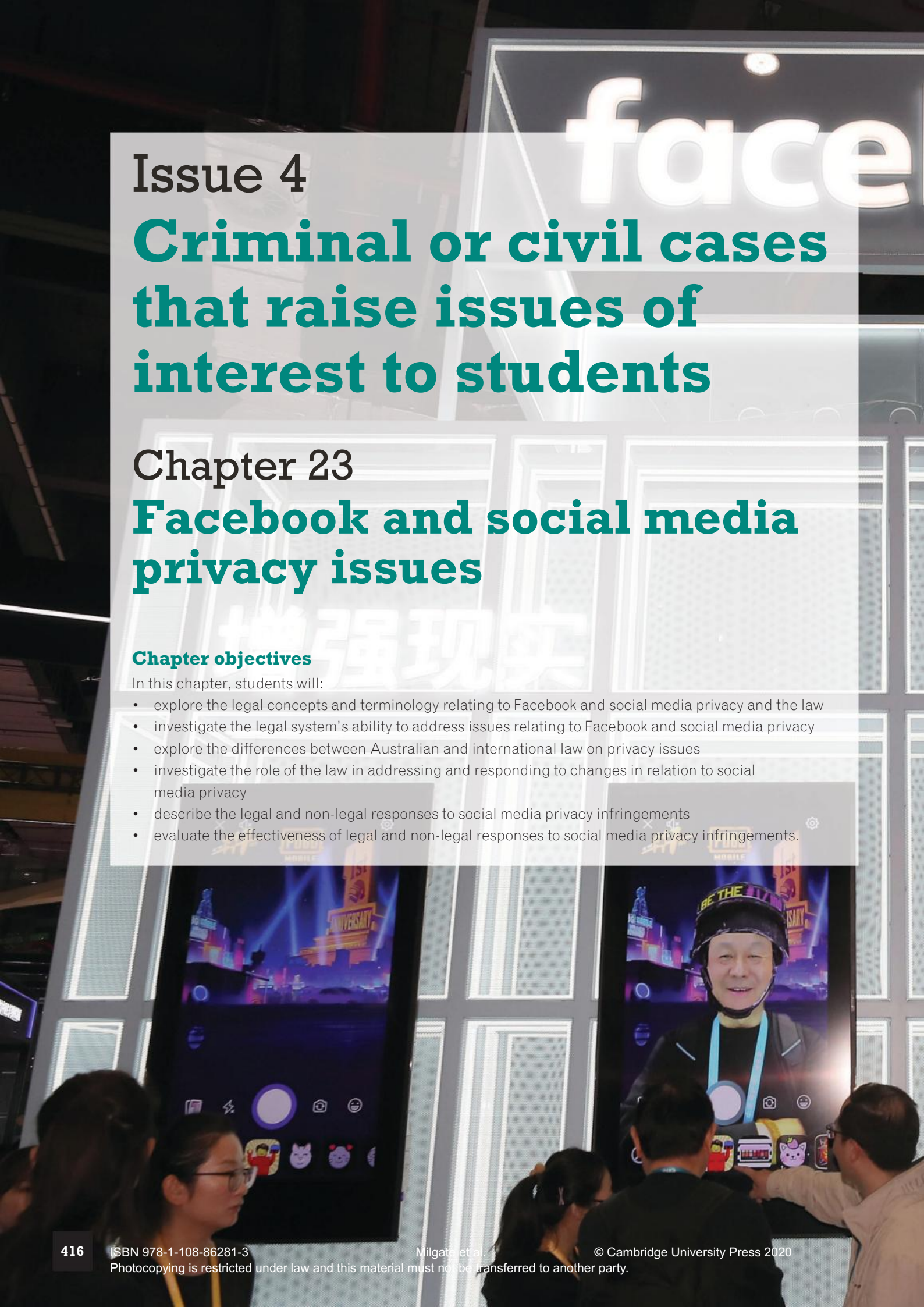
Issue 4
Criminal or civil cases that raise issues of interest to students

Chapter 23
Facebook and social media privacy issues

Chapter objectives

In this chapter, students will:

- explore the legal concepts and terminology relating to Facebook and social media privacy and the law
- investigate the legal system's ability to address issues relating to Facebook and social media privacy
- explore the differences between Australian and international law on privacy issues
- investigate the role of the law in addressing and responding to changes in relation to social media privacy
- describe the legal and non-legal responses to social media privacy infringements
- evaluate the effectiveness of legal and non-legal responses to social media privacy infringements.



ISBN 978-1-108-86281-3 Milgate et al.

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1914 (Cth)
National Health Act 1953 (Cth)
Freedom of Information Act 1982 (Cth)
Telecommunications (Interception and Access) (New South Wales) Act 1987 (NSW)
Privacy Act 1988 (Cth)
Data-matching Program (Assistance and Tax) Act 1990 (Cth)
Criminal Records Act 1991 (NSW)
Telecommunications Act 1997 (Cth)
Privacy and Personal Information Protection Act 1998 (NSW)
State Records Act 1998 (NSW)
Access to Neighbouring Land Act 2000 (NSW)
Crimes (Forensic Procedures) Act 2000 (NSW)
Health Records and Information Privacy Act 2002 (NSW)
Workplace Surveillance Act 2005 (NSW)
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)
Surveillance Devices Act 2007 (NSW)
Government Information (Public Access) Act 2009 (NSW)
Healthcare Identifiers Act 2010 (Cth)
Health Records and Information Privacy Regulation 2017 (NSW)

SIGNIFICANT CASES

Damien O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys [2011] FWA 5311

ISBN 978-1-108-86281-3

23.1 Social media and the law

What is social media?

The term **social media** is heard a lot these days, but what does it mean? A simple definition is the interactions between people in which they create, share, exchange and comment on content among themselves. Two researchers of social media, Andreas Kaplan and Michael Haenlein, define it as 'a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content'.

social media
a web-based form of social interaction where users can share, comment on and discuss topics

Types of social media include blogs, collaborative projects such as Wikipedia, **content communities** such as YouTube and social networking sites such as Facebook and Twitter. The use of social media is a growing. According to the Australian Bureau of Statistics, there are about 9.3 million Facebook users and 1.2 million Twitter users in Australia.

content community
a group of people who upload, share, comment on and discuss content online; for example, YouTube and Tumblr

Social networking has become a powerful source of news updates, and a way to influence decision-making, in the past few years. Businesses and politicians use such forums as Facebook, Twitter, Instagram, LinkedIn, Blogger and Tumblr to sell products and ideas, and musicians, actors and sportspeople use them to keep a high profile in the public eye.

However, social media users are not all corporate. It began – and continues to be – a tool for individuals. Snapchat, a popular video and photo-messaging app, is used among friends to share ordinary events that occur throughout the day and allows users to view different clips from around the world. The messages are intended to be private and are deleted after a set time limit, although external apps have found ways to allow recipients to save messages without the sender knowing. Instagram also allows you to share videos and images, but posts are intended to be shared widely in order to get more 'likes' and all content is displayed on your profile. Followers can like photos and videos, comment and direct-message anyone on their feed. Users with a large amount of followers can be extremely influential and possess a large group of supporters. Brands have caught on to the power these influencers have and many Instagram users have made careers out of promoting brands and product through their photos. For example, digital influencer Nicole Warne built a business posting her outfits and promoting her personal blog on Instagram. Her page, Gary Pepper Girl, now has over 1.7 million followers and she reportedly is paid up to $8000 for featuring a product or brand on her Instagram account.

Despite the explosion of different types of social media, Facebook continues to be the dominant platform, worldwide. An analysis by eBusiness guide eBizMBA found that, as at January 2016, Facebook's estimated number of unique monthly visitors was more than three times the size of the next placed site. In Australia, the use of social media is just as popular; in April 2017, Facebook

TABLE 23.1 Top 10 most popular social networking sites in Australia (October 2018)

Social media platform	Estimated unique monthly visitors
1 Facebook	15 000 000
2 YouTube	15 000 000
3 Instagram	9 000 000
4 WhatsApp	7 000 000
5 Snapchat	6 400 000
6 WordPress	5 700 000
7 Twitter	4 700 000
8 LinkedIn (14s and above)	4 500 000
9 Tumblr	3 700 000
10 Tinder (18s and above)	3 000 000

ISBN 978-1-108-86281-3 Milgate et al.

Figure 23.1 The Facebook logo is one of the most recognisable social media logos.

stated that an average of 12 million people accessed it on a daily basis.

The Facebook story

An American college student, Mark Zuckerberg, founded Facebook with fellow Harvard University students Eduardo Saverin, Andrew McCollum, Dustin Moskovitz and Chris Hughes. It was originally limited in use to only Harvard students, but soon expanded to other colleges in the Boston area. As other university students heard about it, they were also allowed to join. It was eventually opened up to high school students and then to anyone over 13 years of age (which is the minimum user age for most social media platforms). In September 2012, Facebook had over one billion members and over 800 million active users.

As it grew, Facebook became increasingly **commercialised**. In 2007, Microsoft paid $240 million to acquire a 1.6% share, including the rights to place ads on Facebook. In 2012, Facebook listed on the stock exchange and became a public company. In the last decade, more and more businesses have been using Facebook to advertise and sell their products.

commercialise
to make/give an organisation or an activity more public awareness for financial gain

Social media law

As with many things to do with technology, changes to social media occur at a faster rate than laws can develop to protect people using these technologies. It is very hard for lawmakers to be proactive in many areas of society, but is especially difficult in terms of anything that involves using the internet.

Figure 23.2 Facebook co-founder and CEO, Mark Zuckerberg, testifies before the House Financial Services Committee in Washington on 23 October 2019. Zuckerberg gave evidence about Facebook's proposed cryptocurrency, Libra, how his company will handle false and misleading information by political leaders during the 2020 election campaign and how it handles its users' data and privacy.

ISBN 978-1-108-86281-3

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist you to build your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 15–16 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

Review 23.1

1. Define the term 'social media'. Identify four different types of social media.
2. Discuss the popularity of social media in Australia and identify which site is the most popular.
3. Discuss the issues involved in social media use.
4. Assess why it is difficult for the law to protect social media users.

In addition, some of these sites, such as Facebook, are not physically located in Australia, or owned by Australians, so making laws to govern their behaviour is almost impossible; so is enforcing such laws and the outcomes of court cases.

Privacy issues

One of the biggest areas of concern about social media, and especially Facebook, is how to protect the privacy of users.

Social media networks are generally not run by governments, and are rarely run by benevolent people or organisations. Profit-making companies operate most sites (for example, Facebook, Google and LinkedIn), and so have shareholders who expect a return on their investment.

As noted, the fact that Facebook is not an Australian-based business owned by Australians means that making and enforcing laws to cover actions carried out by and on Facebook is very difficult. In addition, the ability of an individual to take **civil action** against an **infringement** of their **privacy rights** is extremely limited in the international arena.

civil action
a lawsuit brought by a collective or a large group of people affected by the same crime

infringe
to disregard or violate an agreement

privacy rights
the natural right of individuals to keep their own affairs private

The legislation that is most relevant to social media is that relating to privacy; however, as is the case with most legal action in Australia, it can be costly in terms of time and money for an individual to prove that their privacy has been compromised. It is often even harder to prove when an intangible thing such as the internet is involved.

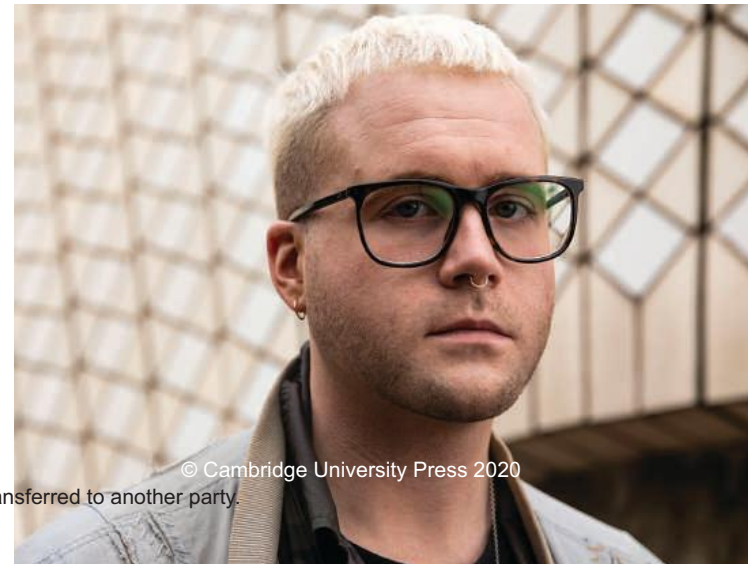
Video

Data breaches

In 2018, Facebook experienced two very public data breaches. In March, it was revealed that consulting firm Cambridge Analytica had mined the personal data of over 80 million Facebook users without their consent (see Chapter 8).

This was followed in September by a discovery that unknown hackers had exploited a vulnerability

Figure 23.3 Christopher Wylie is a Canadian data scientist. On 31 August 2019, Wylie spoke at the Antidote festival in Sydney about his role in exposing the work of Cambridge Analytica, an international marketing consultancy that used personal Facebook data to influence the outcome of the 2016 US presidential election.



ISBN 978-1-108-86281-3 Milgate et al.

Research 23.1

Investigate one social media site, and then respond to the following questions.

1. Identify the owner of the site.
2. List how many users access the site.
3. Assess how easy it is to join the site.
4. Outline the rules that cover its members.
5. Identify how your privacy is protected.
6. Discuss if you would join this social media site. Justify your response.

in the system to steal 'access tokens' which would let them take over other people's accounts. Facebook confirmed that the data of at least 50 million users was at risk, with another 40 million potentially affected. Facebook logged all of these people out of their accounts: when they logged in again, this reset the access token and the previous one could no longer be used.

Social media and privacy in the workplace

As technology progresses, more and more employees have access to the internet as part of their job. It is only natural that many will access their social media sites in the course of their workday. Just as in the past workers would use the office phone to make a call to family or friends, they will now use the office computer or their own phone or tablet to make or get a social media update.

In the same way that workers love social media, businesses are finding that it is a very good vehicle to promote their products. These new areas of **e-communication** have provided terrific channels for information to flow both inside and outside the workplace. Nevertheless, while there are benefits to having an increasingly connected workforce, there are also potentially negative consequences. As the barriers between workplace and personal activities become increasingly blurred, there are concerns that an employer's ability to monitor staff can border on the invasive.

e-communication
(electronic communication) any transmission of communication using computers or other digital products

Problems arise when businesses are seen to invade their workers' rights by accessing the information and messages sent by them through electronic media, and when workers are seen to use social media to bring their employer's reputation into disrepute. Employers may be able to access messages sent by staff to friends and family, and this may affect a manager's opinion about the worker. Supervisors may become 'friends' with employees on Facebook and then take exception to comments made or make inappropriate comments themselves. A worker may post a derogatory comment after a bad day at work. This can damage workplace relationships and affect future employment opportunities. Sometimes these actions can constitute an **invasion of privacy**.

invasion of privacy
to violate an individual's privacy by intruding into their private affairs

23.2 Legal responses

Federal and state privacy laws

As is the case with many areas of law in Australia, not all federal **privacy legislation** regulates state or territory agencies, except for the Australian Capital Territory. Each state has its own laws for these purposes.

privacy legislation
laws to set, uphold and protect the privacy rights of individuals

In Australia and New South Wales, the following laws cover privacy:

- **Commonwealth**:
  - *Crimes Act 1914* (Cth)
  - *National Health Act 1953* (Cth)
  - *Privacy Act 1988* (Cth)
  - *Data-matching Program (Assistance and Tax) Act 1990* (Cth)

ISBN 978-1-108-86281-3 Milgate et al.

- *Telecommunications Act 1997* (Cth)
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
- *Healthcare Identifiers Act 2010* (Cth)

- **New South Wales**:
  - *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW)
  - *Criminal Records Act 1991* (NSW)
  - *Privacy and Personal Information Protection Act 1998* (NSW)
  - *State Records Act 1998* (NSW)
  - *Access to Neighbouring Land Act 2000* (NSW)
  - *Crimes (Forensic Procedures) Act 2000* (NSW)
  - *Health Records and Information Privacy Act 2002* (NSW)
  - *Workplace Surveillance Act 2005* (NSW)
  - *Surveillance Devices Act 2007* (NSW)
  - *Government Information (Public Access) Act 2009* (NSW)
  - *Health Records and Information Privacy Regulation 2017* (NSW).

Australian privacy law tries to protect Australian users of global social media in two ways:

- giving **extraterritorial application** to the *Privacy Act 1988* (Cth)
- regulating **trans-border** data flow.

extraterritorial application
the ability of a government to exercise authority outside its borders

trans-border
beyond the border

Extraterritorial jurisdiction

Extraterritorial **jurisdiction** is where a government can legally exercise authority outside its normal boundaries. In Australia, extraterritorial jurisdiction of the state parliaments is authorised by section 2 of the *Australia Act 1986* (Cth).

jurisdiction
the powers of a court, depending on its geographic area, the type of matters than can be decided, and the type of remedies that can be sought

The extraterritorial operation of the *Privacy Act 1988* (Cth) (s5B) is aimed at regulating acts done, or practices engaged in, outside Australia by an organisation seeking personal information about an Australian citizen or permanent resident. It also aims to stop organisations avoiding their obligations under the Act by transferring the handling of personal information to countries with lower privacy protection standards. The Act cannot override the privacy laws of another country. Now, this Act only serves as a watchdog, reminding businesses to behave in an ethical way – it is yet to be tested in an international court of law.

Trans-border data flows

Embodied within the *Privacy Act 1988* (Cth) are 13 Australian Privacy Principles (APPs). These APPs are the baseline privacy standards for organisations that hold personal information. All private sector health service providers, as well as some other private sector organisations, need to comply with these principles.

Principle 8 covers the sharing of personal information across borders; however, as most of the principles relate to collection of personal data, it can be argued that they are all applicable, because these days most people share huge amount of personal details on their social media sites. This has allowed businesses to access a huge amount of information about individuals and market products to them.

Legal Links

The website of the Office of the Australian Information Commissioner (OAIC) has a Privacy Law section, which contains details of the *Privacy Act 1988* (Cth) and other relevant legislation.

The OAIC's website provides advice to people about the appropriate use of social media, their rights in regards to this use (and abuse) and actions to take in dealing with issues. There is an underlying message of using caution and common sense.

However, once again, these principles only serve as a deterrent, and only apply to businesses that operate in Australia. It has not yet been tested in an Australian or international court.

ISBN 978-1-108-86281-3 Milgate et al.

Review 23.2

1 Australian federal and state privacy laws cover many areas. Identify the laws that are relevant to social media.
2 Outline which areas of privacy are covered by laws in all Australian states and territories. Assess if it would be more relevant to just have federal laws. Justify your answer.
3 Describe how the Australian Government has tried to make the *Privacy Act 1988* (Cth) relevant to social media use. Assess the practicalities of this.

Research 23.2

1 View the website of the Office of the Australian Information Commissioner (OAIC). Outline the responsibilities of the OAIC. Discuss how easy it is to make a privacy complaint.
2 Investigate two privacy laws and then complete the following tasks:
   a Outline the actions covered by these laws.
   b Identify what penalties are incurred for disobeying these laws.
   c Identify if there are any reported prosecutions under these laws. If there are, write a brief summary of one case.

Workplace social media policies

Business owners and managers can ban their staff from using social media at work, but if the business is using Facebook to promote products, this would seem hypocritical. Just as with all other areas of law, a proactive approach to employee use of social media is the best policy. Most human resource experts are telling businesses that having a workplace policy on social media is the most appropriate way to handle this issue.

SmartCompany, an online business website based in Melbourne, reported that a survey carried out by Hays Personnel showed that workers wanted access to social media while at work. Of 840 workers surveyed, 19.7% said they would turn down a job if told that 'reasonable access' was not allowed.

Figure 23.4 At a protest at police headquarters in Philadelphia, United States, on 7 June 2019, council-member Dereck Green joins community members and activists to demand the removal of 330 police officers from street duty. Philadelphia Police Department Commissioner, Richard Ross, announced that an outside law firm would review racist or offensive social media posts by (past and current) police officers.

ISBN 978-1-108-86281-3 Milgate et al.

Of the businesses surveyed, 44% stated that they felt allowing access to social media created staff satisfaction and thus retention.

The report stated that the workplace policy needs to 'not only detail how social media can be used during work hours, and if it will be monitored, but if employees can use their work emails for social media accounts and how complaints about the company should be handled'. A solid policy, containing appropriate grievance procedures and an adequate training program, should be able to resolve many social media usage problems in the workplace.

This is especially needed now as employees have complained about bullying and harassment from work colleagues within social media. The Fair Work Commission has adjudicated on several matters regarding this issue, with the commission's anti-bullying jurisdiction, which began on 1 January 2014, allowing a person who believes they have been bullied at work to apply for an order to stop the behaviour. Interestingly, the posts do not have to be made during work time or at the workplace to be seen as offensive.

Employers are not only concerned about what their employees may say about them on social media. An individual's social media profile may include the name of their employer, and thus their online behaviour, and the personal values this demonstrates, may reflect back on the employer.

In Court

***Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444**

In this case, a disgruntled employee had vented his anger at his supervisors on his Facebook page. Unfortunately, some of his colleagues who were his Facebook friends were not happy with these comments and reported him to their employer. His employer argued that the employee's use of derogatory terms was discriminatory and brought the business into disrepute and so dismissed him.

The worker took the case to Fair Work Australia (FWA) and was successful in his complaint of unfair dismissal. FWA upheld the employee's complaint because, among other reasons, the company did not have a social media policy. Thus, company's employees had no guidelines to follow in regard to their use of social media, especially when discussing issues related to the company using this platform.

Another relevant case is *Damien O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311.

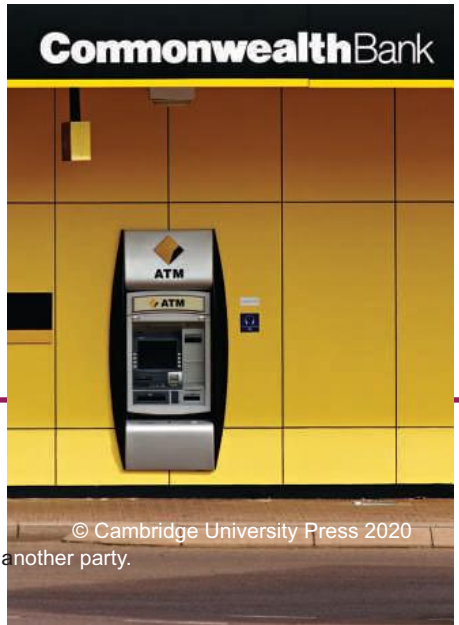
Case Study

Commonwealth Bank social media policy causes problems

The importance of management understanding social media can be seen in a case involving the Commonwealth Bank. Its social media policy required workers to inform the bank if they saw any negative commentary about the bank on social media. This included comments on employees' own Facebook pages. Failure to do so would lead to termination of employment. Employees were upset by this as they felt they were always on duty.

The Financial Services Union (FSU) negotiated with the bank to change the wording of the policy as it made

Figure 23.5 The Commonwealth Bank has adjusted its social media policy.



ISBN 978-1-108-86281-3 Milgate et al.

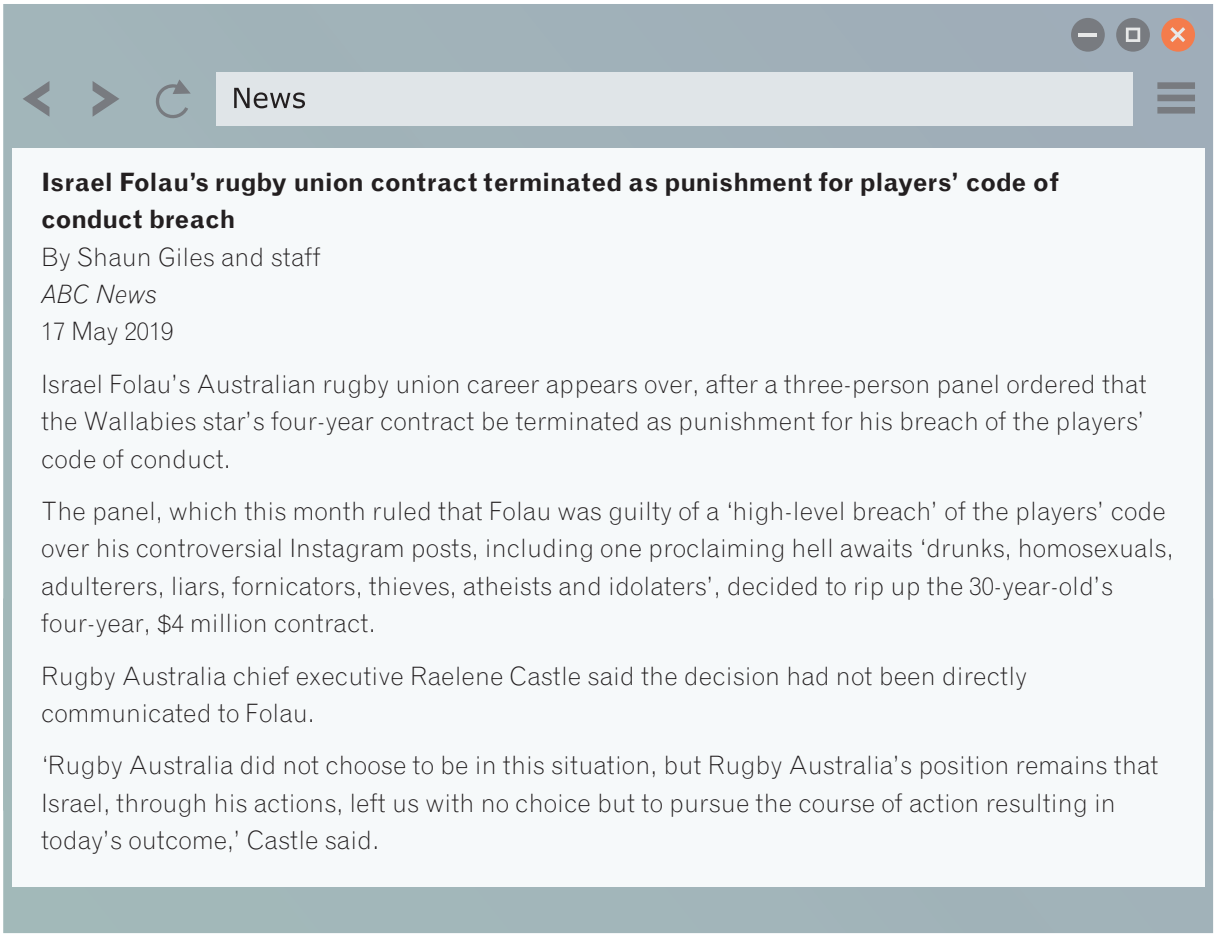
Case Study (continued)

employees responsible for comments made by others and blurred the distinction between being on duty and off duty. The bank softened its stance: negative comments should still be reported, but failure to do so would not lead to dismissal. The FSU representative, Mr Carter, urged union members to take care with their own online postings, since employers or potential employers could be watching.

Case Study

NSW Police Force policy

The NSW Police Force has taken a strong approach to the use of social media by its employees. This is stated in its 'Personal Use of Social Media Policy and Guidelines' and 'Official Use of Social Media Policy' documents (both are publically available online). The NSW Police Force does not ban employees from using social media but it does set out what they can and cannot comment on. The NSW Police Force has realised that social media can play a vital part in carrying out police work.



Israel Folau's rugby union contract terminated as punishment for players' code of conduct breach

By Shaun Giles and staff
ABC News
17 May 2019

Israel Folau's Australian rugby union career appears over, after a three-person panel ordered that the Wallabies star's four-year contract be terminated as punishment for his breach of the players' code of conduct.

The panel, which this month ruled that Folau was guilty of a 'high-level breach' of the players' code over his controversial Instagram posts, including one proclaiming hell awaits 'drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters', decided to rip up the 30-year-old's four-year, $4 million contract.

Rugby Australia chief executive Raelene Castle said the decision had not been directly communicated to Folau.

'Rugby Australia did not choose to be in this situation, but Rugby Australia's position remains that Israel, through his actions, left us with no choice but to pursue the course of action resulting in today's outcome,' Castle said.

ISBN 978-1-108-86281-3 Milgate et al.

News (continued)

'People need to feel safe and welcomed in the game, regardless of their race, background or sexuality.'

Castle confirmed Folau has 72 hours to appeal the decision, but would not comment on reports he plans to take the case to the Supreme Court.

She said the Wallabies star knew his social media posts would have wider implications 'when he pressed that button'.

'This is a decision that will change the landscape for sport across Australia and perhaps internationally', she said.

'It will be landmark, it will be important, and it is a big decision.'

'He is a very important player in our game and he has been for a long period of time and we wanted to make sure we took the time to get it right.'

Review 23.3

1. Discuss the issues associated with employees using social media in their workplace.
2. Outline why employees of the Commonwealth Bank were unhappy with the bank's social media policy.
3. Explain why it is important that a company/organisation has a social media policy. Identify some key components you believe should be in such a policy.
4. Read the article ('Israel Folau's rugby union contract terminated as punishment for players' code of conduct breach') and explain why the Rugby Union panel terminated Israel Folau's contract.

23.3 Non-legal responses

Electronic Frontier Foundation

The Electronic Frontier Foundation (EFF) is a non-profit organisation that was established in the United States in 1990, initially to protect freedom of speech. However, with the growth of the internet, it has moved into the protection of privacy. It runs campaigns to educate users on how to protect themselves when using the internet, including social media. EFF also 'names and shames' businesses that are seen to use the internet inappropriately to gain information about users.

Research 23.3

View the Electronic Frontier Foundation's website and complete the following tasks.

1. Outline the activities carried out by the Electronic Frontier Foundation.
2. Go to the 'Our work' section of the site and check out their legal cases. Choose a case and describe why it has been nominated.

ISBN 978-1-108-86281-3 Milgate et al.

23.4 Effectiveness of responses

Taking legal action in Australia against Facebook is very difficult and so, as with much consumer law, it is a case of 'let the buyer beware' when it comes to protecting individual rights.

There have been few cases of legal action being taken in other countries against Facebook, and they have had little success. However, where legal action has been threatened, the owners of Facebook have responded by fixing the problem being complained about.

In 2011, the US Federal Trade Commission investigated privacy complaints against Facebook. It found Facebook to be seriously lacking in this area – there were eight serious complaints – and demanded that the problems be remedied. Although it did not fine the owners of Facebook, it noted that any future violations of the terms of the settlement would see Facebook liable for a penalty of $16 000 per day for each count.

Employer–employee privacy

Evidence suggests that many workers are a bit too relaxed in their attitude to using social media in the workplace. In 2012, Monash University and the University of Tasmania published research into employees' attitudes to **electronic monitoring** and surveillance by employers across Australia.

electronic monitoring
any form of surveillance using electronic devices such as cameras, microphones and computers

A number of employee attitudes towards privacy, personal data and social media concerned the report *The Electronic Workplace*: 31% of those surveyed admitted to using social networking sites during work hours. Facebook was the most used site at work (94%) and only 14% acknowledged using social media solely for work-related activities, with 42% using it just for personal (non-work related) activities, a three to one ratio.

Of those surveyed, 45% used social media for both work and personal activities, highlighting the issue of blurring the workplace/private space boundaries and the work and private life boundaries. Only 35% of respondents reported the presence of a policy or statement concerning the use of social media at work and less than one-third indicated they had received training around the use and intent of such a policy.

An underlying theme associated with this research is the issue of employee privacy. Along with the development of technology within the digital workplace, the amount of information an employer holds on an employee continues to increase. With this in mind, during their study, the research team asked employees about their views on the information their employer holds on them.

In terms of an employee's rights to access their own personal information held by the employer, 72% reported they understood their access rights on this important issue. Yet only 51% understood what this personal information was used for, and only 53% knew who within the organisation had to it.

Of the respondents, 62% indicated they were not at all concerned about how their employer used this personal information; a further 20% were only a 'little' concerned.

Only 57% of organisations were reported to have a privacy policy or statement for employees and, in these organisations, only around six out of 10 respondents had read the policy or statement.

These results indicate that use of social media and workplace privacy is likely to be a growing area for conflict between employees and their employers. The amount of information that employers obtain on employees is increasing, and employers want to exercise greater control over the manner and purposes for which their employees use electronic media. The desire by individuals to discuss their personal and professional lives on social networking sites can increasingly lead to clashes with their employers.

It is difficult to garner accurate numbers on worker use of social media during work hours as many employees will not admit to using it, and if they do use it, many will use their own device to access it. However, a Google search of 'social media in the workplace' indicates that more and more organisations are implementing policies in this area. In fact, Monash University has a Law course unit called 'Digital workplace law', which 'analyses the contemporary employment and labour law issues relating to the modern workplace in the electronic era'.

ISBN 978-1-108-86281-3

Figure 23.6 Employees work at the headquarters of security system developer, Staqu Technologies, in Gurugram, Haryana, India, on 10 September 2019. India is planning to set up one of the world's largest facial-recognition systems, which is a lucrative opportunity for surveillance companies and a nightmare for privacy advocates.

Personal privacy

Users of Facebook must remember the Latin expression ***caveat emptor*** when using Facebook, and be aware that online, every conversation, every photo uploaded, every item shared and even every web search goes into a **database**.

caveat emptor
(Latin) 'buyer beware'; buyers are responsible for their actions

database
the place or program where collected data is organised and stored

Businesses will pay for this data, so sites such as Google and Facebook make their money by giving advertisers access to their enormous databases. With this information, advertisers can target people making specific searches or discussing specific topics.

Facebook has been globally criticised for the fact that its settings allow access to personal information and thus invasion of privacy. Young people, especially, seem to have a nonchalant attitude to posting information about their everyday activities on Facebook. This makes them especially vulnerable to being targeted by businesses, stalkers, cyberbullies and identity thieves.

Consumers must use common sense if they do not want to be pestered by businesses and other groups who have used the same websites to find their target markets. Part of this involves users of social media setting their privacy settings high, so that only those they want to see the information can access it. Alternatively, they could take a deep breath and not post the information at all, because if it is not on Facebook, no one can use Facebook to find it.

Following the Cambridge Analytica scandal in March 2018, the hashtag #DeleteFacebook started trending on Twitter, and users around the world made the decision to completely shut down their accounts. This included a number of public figures, such as Elon Musk, Cher and Brian Acton (founder of WhatsApp, which had been acquired by Facebook in 2014). Websites began giving step-by-step instructions on how to completely close a Facebook account (as distinct from deactivating it), as this is not a straightforward process.

ISBN 978-1-108-86281-3 Milgate et al.

Figure 23.7 A person tries Facebook gaming during the 2019 Thailand Game Show in Bangkok, Thailand, on 26 October 2019.

Review 23.4

1. Describe the ways in which Australian workers may be too carefree in their use of social media.
2. Define *caveat emptor*. Discuss why this term is important for users of social media.
3. Describe all the ways that an individual can place himself or herself at risk by using social media sites such as Facebook.
4. Construct a list of five important personal rules for someone using Facebook.

ISBN 978-1-108-86281-3 Milgate et al.

Chapter summary

- The use of social media is growing, with Facebook being the most popular site.
- Because of the fast rate of change in the area of the internet, and the international nature of social media, it is difficult to create and enforce laws related to its use.
- Privacy laws go some way to protecting users of social media.
- The use of social media in the workplace has created new problems that need to be addressed by workplace policies.
- Consumer awareness provides the best protection for those using social media.

Questions

Multiple-choice questions

1 Which of the following is a meaning for 'social media'?
   - **a** Social media is a website to organise parties.
   - **b** Social media is a website where people can create, share and exchange content and comments.
   - **c** Social media is a newspaper where people can create, share and exchange content and comments.
   - **d** Social media is a blog where people can create, share and exchange content and comments.

2 Why is it difficult to make and enforce laws about social media use?
   - **a** the owners of social media are outside Australia
   - **b** technology moves so fast
   - **c** technology changes rapidly and the owners often are not Australian-based
   - **d** the internet is intangible and technology moves so fast

3 How has the Australian Government tried to deal with the international dimension of privacy and social media?
   - **a** by giving the *Privacy Act 1988* (Cth) extraterritorial application and regulating trans-border data flow
   - **b** by signing an agreement with the United Nations and by giving the *Privacy Act 1988* (Cth) extraterritorial application
   - **c** by signing an agreement with the United Nations and by regulating trans-border data flow
   - **d** by having all international businesses sign an agreement that they will do the right thing

4 Which of the following statements about the Fair Work Commission's role is accurate?
   - **a** The Fair Work Commission investigates allegations of wrong behaviour by employees when using social media in the workplace.
   - **b** The Fair Work Commission investigates allegations of wrong behaviour by employers when using social media in the workplace.
   - **c** The Fair Work Commission investigates the advantages and disadvantages of using social media in the workplace.
   - **d** The Fair Work Commission investigates allegations and makes decisions about unfair dismissal in the workplace.

5 What does *caveat emptor* mean for users of social media?
   - **a** It is difficult to apply the law to social media, so wise decision-making is needed.
   - **b** The government is not able to legislate for social media users so wise decision-making is needed.
   - **c** Consumers need to take responsibility for their social media use.
   - **d** Social media owners just want to make a profit from users.

ISBN 978-1-108-86281-3 Milgate et al.

Short-answer questions

1 Identify the domestic and international protection that is provided for Australians in relation to social media privacy.
2 Discuss with your class why there are issues with social media and the workplace.
3 List other sectors where social media and privacy could be an issue.
4 Define the term *caveat emptor*.
5 Discuss the way *caveat emptor* allows social media networks to deny or refuse any responsibility concerning the distribution of their users' personal details.
6 Assess why the use of social media and workplace privacy is likely to be a growing area for conflict between employees and their employers.
7 Discuss why making and enforcing laws to cover actions carried out by and on Facebook is very difficult.

Extended-response question

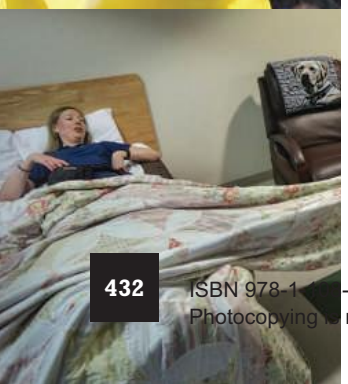
' "Let the buyer beware" is the best form of legal redress for social media users.' Discuss this statement with reference to the responsibility of the law in relation to social media and privacy issues.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

ISBN 978-1-108-86281-3 Milgate et al.







Answers to multiple-choice questions

Part I

Chapter 1
1 A 2 B 3 C 4 C 5 C

Chapter 2
1 D 2 A 3 B 4 B 5 C

Chapter 3
1 B 2 B 3 A 4 A 5 C

Chapter 4
1 C 2 B 3 B 4 B 5 C

Chapter 5
Topic 1: 1 A 2 B 3 B 4 A 5 B
Topic 2: 1 C 2 D 3 B 4 B 5 D
Topic 3: 1 D 2 A 3 C 4 B 5 B
Topic 4: 1 B 2 A 3 D 4 B 5 B

Part II

Chapter 6
1 C 2 A 3 C 4 C 5 D

Chapter 7
1 B 2 A 3 C 4 C 5 A

Chapter 8
1 B 2 B 3 D 4 B 5 D

Part III

Chapter 9
1 C 2 C 3 C 4 C 5 C

Chapter 10
1 D 2 C 3 B 4 D 5 D

Chapter 11 (digital only)
1 A 2 D 3 C 4 B 5 A

Chapter 12 (digital only)
1 A 2 A 3 A 4 C 5 C

Chapter 13 (digital only)
1 C 2 A 3 B 4 D 5 A

Chapter 14
1 A 2 C 3 B 4 A 5 A

Chapter 15 (digital only)
1 A 2 C 3 A 4 D 5 B

Chapter 16
1 B 2 D 3 C 4 C 5 D

Chapter 17
1 A 2 A 3 A 4 B 5 B

Chapter 18 (digital only)
1 A 2 C 3 A 4 D 5 D

Chapter 19
1 B 2 B 3 B 4 C 5 A

Chapter 20 (digital only)
1 C 2 A 3 B 4 D 5 A

Chapter 21 (digital only)
1 B 2 C 3 A 4 C 5 A

Chapter 22
1 B 2 C 3 A 4 C 5 C

Chapter 23
1 B 2 C 3 A 4 D 5 A

ISBN 978-1-[illegible]-86281-3

Glossary

access
the right or opportunity to make use of something

Act of Parliament
statute law, resulting from a Bill successfully passing through parliament and gaining royal assent

adoption order
a court order that establishes a new legal relationship between potential adoptive parents and a child eligible for adoption; an adoption order also severs the legal relationship that existed between the adoptive child and his or her natural or legally recognised parents or guardians prior to the adoption process

adversarial system
a system of resolving legal conflicts – used in common law countries such as England and Australia – that relies on the skill of representatives for each side (e.g. defence and prosecution lawyers) who present their cases to an impartial decision-maker

affirmative action
a policy designed to address past discrimination and thus improve the economic and educational opportunities of women and minority groups

alternative dispute resolution
dispute resolution processes, such as mediation, arbitration and conciliation, that do not involve courts

anarchy
the absence of laws and government

appeal
an application to have a higher court reconsider a lower court's decision, on the basis of an error of law

appellate jurisdiction
the ability or power of a court to hear appeals of the decisions of lower courts and to reject, affirm or modify those decisions

Apprehended Domestic Violence Order
a court order used for the protection of a person involved in an intimate, spousal or de facto relationship

Apprehended Violence Order
a court order to protect a person who fears violence or harassment from a particular person; in New South Wales, Apprehended Personal Violence Orders prohibit violence between members of the public and Apprehended Domestic Violence Orders prohibit violence between family members

arbitration
a form of alternative dispute resolution in which the disputing parties present their cases before an arbitrator, who makes a decision that is binding on the parties

assimilation
a policy based on the idea that the minority group should adopt the language and traditions of the majority group

asylum
protection granted by a state

asylum seeker
someone who is seeking protection as a refugee

Australian Federal Police
the federal police agency of the Commonwealth of Australia, set up to enforce the federal laws and to protect the interests of Australia both domestically and internationally

balance of power
the power held by the political party whose vote is needed to pass legislation; under the Westminster system of government in Australia, usually determined in the upper House of Parliament

balance of probabilities
the standard of proof required in a civil case for a plaintiff to succeed in proving the case against the defendant

beyond reasonable doubt
the standard of proof required in a criminal case for the prosecution (the state) to obtain a conviction against the accused

bicameral
containing two chambers or houses of parliament

Bill
a drafted law that has not yet been passed by parliament

Bill of Rights
a statement of basic human rights and privileges

bipartisan
having the support of the two major political parties

blood-alcohol concentration (BAC)
blood-alcohol concentration measured in grams of alcohol per 100 millilitres of blood

bookmaking
the activity of calculating odds on sporting and other events and taking bets

border protection
the name given to the policy of preventing asylum seekers arriving in Australia for the reason that they represent a threat to national security

bridging visa
a permit to stay in Australia for a temporary period of time so that arrangements can be made either to leave the country or to apply for permanent residency

burden of proof
the responsibility of a party to prove a case in court

C-class licence
C stands for car; an unrestricted driver licence often known as a 'black' or 'full' licence in terms of restrictions on speed, mobile phone use, passengers carried and blood-alcohol readings

ISBN 978-1-108-86281-3

capital punishment
the practice of sentencing a person to death by judicial process; also referred to as the 'death penalty'

caution
a formal notice given to a young offender where the offence is more serious than one appropriately dealt with by a warning

caveat emptor
(Latin) 'buyer beware'; buyers are responsible for their actions

chapter
a local branch of a motorcycle club

children
generally, persons aged 15 years and younger, depending on the legal context

civil action
a lawsuit brought by a collective or a large group of people affected by the same crime

civil jurisdiction
the power of a court to hear matters involving disputes between private individuals and to award civil remedies

civil liberties
basic rights of individuals that are protected by law; for example, freedom of religion and freedom of speech

civil litigation
court action brought to remedy a wrong or a breach of contract law

coercive powers
special powers sometimes given to a commission or police task force that allow it to summon any witness to give evidence or produce any documents – these powers are usually only vested in courts

collateral
(damage) in a military context, damage to or destruction of things other than the intended target such as civilian property and civilians

colours
a motorcycle club's standard vest showing the club's patches on the back as a mark of identification

commercialise
to make/give an organisation or an activity more public awareness for financial gain

committal hearing
an inquiry held in the Local Court or Magistrate's Court to determine whether there is enough evidence against the defendant to warrant a trial in a higher court (this is called establishing a *prima facie* case)

common law
law made by courts; historically, law common to England

Commonwealth Director of Public Prosecutions
independent prosecuting agency established by a federal Act to prosecute alleged offences under federal laws

complainant
a person making a formal complaint in a court of law

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes an active role advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for the parties

concurrent powers
existing at the same time; powers held by both state and federal parliaments

consent
free and voluntary agreement by a rational person who is able to understand and make a decision about the matter to which he or she agrees

conspiracy theory
speculation that there is a cover-up of the information surrounding a significant event by the government or other authorities

content community
a group of people who upload, share, comment on and discuss content online; for example, YouTube and Tumblr

control order
an order made by a court, government official or police officer to restrict an individual's liberty; for example, from doing a specified act or being in a specified place

conveyancer
a person who deals professionally with the legal and practical matters involved in the transfer of titles to property when real estate is sold and purchased

copyright
an exclusive right to publish, copy, publicly perform, broadcast or make an adaptation of certain forms of expression; namely sounds, words or visual images

coronial inquest
an investigation into a death that has occurred in unusual circumstances, held in the Coroner's Court and overseen by a magistrate called the coroner

corporal punishment
the physical punishment of people, especially of children, by hitting them

corporations law
legislation that regulates corporations and the securities and futures industry in Australia; it is administered by the Australian Securities and Investments Commission

correctional patient
someone on remand, or serving a term of imprisonment, who is transferred to a mental health facility, who is not a forensic patient, and who the NSW Mental Health Review Tribunal has not classified as an involuntary patient

ISBN 978-1-108-86281-3 Milgate et al.

credibility
trustworthiness, reliability, believability

cross-examination
questioning of a witness called by the other side to produce information relevant to one's case or to call the witness's credibility into question

customary law
principles and procedures that have developed through general usage according to the customs of a people or nation, or groups of nations, and are treated as obligatory

customs
collective habits or traditions that have developed in a society over a long period of time

cyberbullying
harassment using digital media such as websites, email, chat rooms, social networking pages or instant messaging

cyberspace
the 'environment' in which electronic communication occurs; the culture of the internet

cyberstalking
repeated harassment using email, text messaging or other digital media with the intention of causing fear or intimidation

damages
monetary compensation for harm or loss suffered

database
the place or program where collected data is organised and stored

de facto relationship
(Latin) 'existing in fact'; a relationship between two adults who are not married but are living together as a couple

declaration
a formal statement of a party's position on a particular issue; a declaration is not legally binding under international law

defamation
the act of making statements or suggestions that cause damage to a person's reputation in the community

defendant
the person who is accused of a crime or a civil wrong; in a criminal case, the defendant is also referred to as 'the accused'

deinstitutionalise
to remove people from long-stay psychiatric hospitals and provide outpatient mental health care for them in their communities (they visit the health professional and then return home, rather than staying in a hospital)

delegated legislation
laws made by authorities other than parliament, which are delegated the power to do this by an Act of parliament

digital dossier
all the types of information about a person that he or she has deliberately or unintentionally put onto the internet, held in multiple locations

digital piracy
unauthorised reproduction and distribution of digital music, software, videos or other material, often for profit

digital technology
computerised devices, connected to the internet, that are used to generate, store and process data

direct discrimination
a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of sex, race, national or ethnic origin, age, sexuality or other characteristic

disability
mental or physical impairment that can limit a person physically, emotionally and psychologically

Disability Support Pension
financial support for people who suffer from mental illness and/or intellectual disability

discrimination
the unjust treatment of a person or a particular group of people based on their race, sex, sexuality, marital status, disability and other factors

disinhibition effect
the tendency to say and do things in cyberspace that the person would not ordinarily say or do in the face-to-face world

dispersal
the distribution of people over a wide area

dispossession
the removal or expulsion of people from their traditional lands

doli incapax
(Latin) 'incapable of wrong'; the presumption that a child under 10 years of age cannot be held legally responsible for his or her actions and cannot be guilty of a criminal or civil offence

domestic environment
the household a person lives in

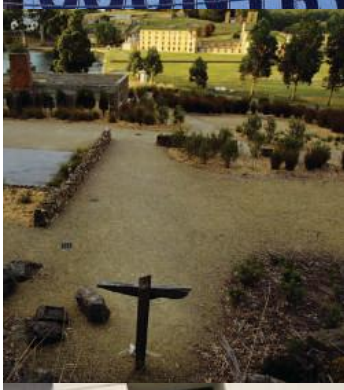
domestic law
the law of a state

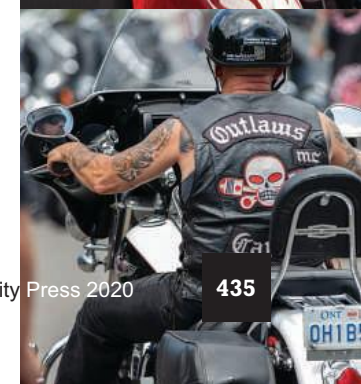
draconian laws
laws that are excessively harsh or severe – from Draco, a Greek legislator (seventh century BCE) whose laws imposed cruel and severe penalties for crimes

Dreaming, The
the source of Aboriginal peoples customary law

drug mule
a person who transports drugs; either by concealing drugs in their luggage, by ingesting drugs in pouches, or strapping drugs to their body, or concealing them in some other way





ISBN 978-1-108-86281-3






e-communication
(electronic communication) any transmission of communication using computers or other digital products

elder abuse
an act or failure to act to the disadvantage of an older person occurring in a relationship of trust

elders
older men and women of recognised wisdom and authority, who are the keepers of traditional knowledge within Aboriginal and Torres Strait Islander communities; they are responsible for such things as initiations and the handing down of punishments when community laws are broken

electronic monitoring
any form of surveillance using electronic devices such as cameras, microphones and computers

entered into force
(of a treaty) having become binding on those states that have consented to be bound by it

equal opportunity
the right to equivalent opportunities regardless of race, colour, sex, national origin, etc.

equality
the state or quality of being equal; that is, of having the same rights or status

equity
the body of law that supplements the common law and corrects injustices by judging each case on its merits and applying principles of fairness

espionage
the use of spies or spying to obtain information

estate
all of the property that a person leaves upon death

ethics
(1) rules or standards directing the behaviour of a person or the members of a profession; (2) a major branch of philosophy that investigates the nature of values and of right and wrong conduct

ex-nuptial children
children born of parents who are not legally married

examination in chief
questioning of a witness by the barrister who called that witness

exclusive powers
powers that can be exercised only by the federal parliament

exemption
being immune from certain duties and obligations

express consent
consent given directly, either orally or in writing

express rights
civil and political rights that are clearly and absolutely outlined in the *Australian Constitution*

external affairs power
the power of the Commonwealth to legislate on international matters involving Australia; interpreted by the High Court to mean that when the Commonwealth signs an international treaty or convention, it has the authority to enact laws to give effect to this international law within Australia

extortion
obtaining money or property from a person or group by force, intimidation or illegal power

extradition
the handing over of a person accused of a crime by the authorities of the country where he or she has taken refuge to the authorities of the country where the crime was committed

extraterritorial application
the ability of a government to exercise authority outside its borders

fairness
freedom from bias, dishonesty or injustice; a concept commonly related to everyday activities

far right
(politics) similar to 'extreme right' – this describes right-wing political groups that are willing to institute extreme measures to deal with the perceived ills of society

fascism
contemporary fascism is an anti-democratic ideology that promotes ultra-nationalism, hatred of immigrants, and the redemptive qualities of war and violence

federation
the process of uniting several states to form a single national government

feminism
the advocacy of rights for women on the basis of the equality of men and women; there are many varieties of feminist ideas in political and social thought

feme sole
(French) a single woman

First Australians
Aboriginal and Torres Strait Islander peoples; the original inhabitants of Australia

forensic
relating to the detection and investigation of crime

forensic patient
a person who is confined in an institution such as a mental health facility or correctional centre, or who is released from custody subject to conditions

foundling
a deserted infant whose parents' identity is unknown

fraud
a dishonest act, done intentionally in order to deceive

ISBN 978-1-108-86281-3

freedom of information
the principle that people should be able to have access to information relating to the administration of government decision-making and information held by the government; freedom of information legislation governs the process of obtaining this information, at state and federal level

freedom of speech
where citizens of a country are not restricted or controlled by government censorship regarding what they say (except in terms of vilification, incitement and defamation)

freedom of the press
where the news services and media outlets of a country are not restricted or controlled by government (except in terms of vilification, incitement and defamation)

gender segregation
the separation of people according to their gender

General Assembly
the main body of the United Nations, made up of all of the member states

glass ceiling
an invisible barrier that prevents women from rising in an organisation through promotion; on the face of it, a company may not directly discriminate, but subtle practices may still discourage women or prevent them from being promoted to more responsible and better-paid positions

graduated licensing system
a licensing system in which drivers pass through stages leading to the granting of a full C-class licence

guarantor
a person who gives a formal promise that someone else's contract will be fulfilled, often backed by some form of asset that will stand as collateral to secure the promise

guardian
a person who is legally responsible for another person who is unable to take care of themselves

guilt by association
criminal liability imposed for associating with another person who commits a crime, rather than for committing that crime oneself

Hansard
a full account of what is said in parliament or in parliamentary inquiries; named after the English printer, T. C. Hansard (1776–1833), who first printed a parliamentary transcript

harmonisation
agreement among the laws of different jurisdictions

healthcare system
the network of facilities and other agencies that organise and meet the healthcare needs of people

homelands
small communities that were established so that Aboriginal and Torres Strait Islander peoples can maintain their connection to their land and culture

homicide
the act of killing another human being

hung jury
a jury that is unable to reach agreement

identitarianism
a recent extreme right-wing ideology that slickly repackages old fascist ideas into more socially acceptable forms; often espouses the exclusion of Muslims and other minority groups

identity theft
obtaining or using the identity of another person in order to commit a range of fraudulent activities, usually to obtain financial gain

implied rights
civil and political rights that can be inferred from the *Australian Constitution*, rather than being expressly stated

in camera
(Latin) 'privately'; only specified persons (e.g. a judge) can be present during the testimony or proceeding

incarceration
being detained or imprisoned as punishment for committing a crime

identitarianism
a recent extreme right-wing ideology that slickly repackages old fascist ideas into more socially acceptable forms; often espouses the exclusion of Muslims and other minority groups

indictable offence
a serious criminal offence that requires an indictment (a formal, written charge) and a preliminary hearing; it is typically tried before a judge and jury and is subject to greater penalties than non-indictable offences

indictment
information presented for the prosecution of one or more criminal offences; a formal written charge

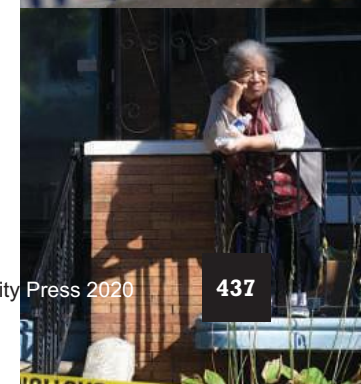
indirect discrimination
a practice or policy that appears to treat everyone in the same manner, but which adversely affects a higher proportion of people from one particular group

Indonesia National Police
in Indonesia, the police force is called the Kepolisian Negara Republik Indonesia (POLRI)

infringe
to disregard or violate an agreement

injunction
a court order requiring an individual or organisation to perform, or (more commonly) not to perform, a particular action

inquisitorial system
a legal system where the court or a part of the court (e.g. the judge) is actively involved in conducting the trial and determining what questions to ask; used in some countries that have civil legal systems rather than common law systems



ISBN 978-1-108-86281-3

intellectual property
intangible property that has commercial value and can be protected by law; for example, text, images, designs, inventions and computer programs

internet
a global network of interconnected computer networks that allows users to obtain and share information in a number of ways

Internet Service Providers (ISPs)
companies that offer customers access to the internet

invasion of privacy
to violate an individual's privacy by intruding into their private affairs

Islamophobia
the fear of, and hatred towards the Islamic region and Muslim people generally, which has grown in the wake of the 'war on terror' since 2001; Islamaphobia is a form of xenophobia, racism, and shares common elements with anti-Semitism; many groups that espouse Islamophobia also are anti-Semitic

jurisdiction
the powers of a court, depending on its geographic area, the type of matters that can be decided, and the type of remedies that can be sought

jury
a group of people who listen to all of the evidence in a court case and decide on the verdict

justice
the legal principle of upholding generally accepted rights and enforcing responsibilities, ensuring that equal outcomes are achieved for those involved

juvenile
a child or young person, generally under 18 years of age, although this may vary depending on the context

kinship
family relationships, including all extended family relationships; an important part of Aboriginal and Torres Strait Islander cultures and values, which dictate how all people in the group behave towards each other

kyriarchy
a social system based on domination, oppression and submission

laissez-faire
(French) 'allow to do'; may be used in a broad sense of minimal government intervention in most aspects of society

larceny
taking another person's property with the intention of permanently depriving them of it; also known as stealing

law
a set of rules imposed on all members of a community that are officially recognised, binding and enforceable by persons or organisations such as the police and/or courts

law enforcement agencies
those bodies that have the role of enforcing the law; they are created by Acts of parliament and include the police and some government departments

legal system
the system of courts, prosecutors and police within a country

legislative power
the legal power or capacity to make laws

lockout laws
a general term used to describe the liquor licensing reforms that were brought in to deal with the issue of alcohol and violence in the Kings Cross area in Sydney

mandamus
a court order compelling a government official or organisation to perform a particular task

mandatory reporting
a person working in child-related employment must, by law, report to care and protection agencies a child who he or she believes to be at 'risk of harm'

martial law
law enforced by the military over civilian affairs; overrides civil law

massacre
the intentional killing of a large number of people

mediation
a form of alternative dispute resolution designed to help two (or more) parties, in the presence of a neutral third party, to reach an agreement

mental illness
an illness of the mind that affects the psychological, emotional and behavioural state of a person

merits review
analysis of the facts presented in a case, and often the policy choices that led to the decision

metadata
the data about data; it is information that identifies individuals through phone and internet activity giving a detailed picture of their lives and relationships

ministerial discretion
power granted to a minister under an Act to make a specified decision or order

mitigation
making the severity of an offence or a sentence milder or less severe

money laundering
disguising money obtained from illegal activities to make it appear legal

ISBN 978-1-108-86281-3 Milgate et al.

mule recruitment
the attempt to procure a person (the 'mule') to receive and deliver illegal funds to criminals abroad or at home without the knowledge of the 'mule'; this is usually done through a fake company and may involve getting an unsuspecting employee to sign a contract and transfer funds on behalf of organised criminals

native title
the right of Aboriginal and Torres Strait Islander peoples to their traditional lands

negligence
carelessness; a tort that involves breach of a duty of care resulting in harm that could be foreseen

negotiation
any dialogue intended to resolve disputes and/or produce an agreement on further courses of action

nomadic
a term used to describe people who tend to travel and change settlements frequently

obiter dicta
(Latin) comments from a judge in a case that are not directly relevant to the case and, therefore, not legally binding (singular: *obiter dictum*)

on remand
(of an accused) in custody pending and/or during his or her trial

one-hit punch
(also known as a 'king hit' or a 'coward's punch') a blow made with a closed fist, usually made without warning so that the recipient has no time to prepare or defend him or herself

one-punch laws
general term used to refer to changes to mandatory sentencing in response to alcohol-related violence

online predator
a person with malicious intent (e.g. a sex offender or paedophile) who gives false and misleading identities with the aim of enticing their victims into harmful encounters online or in real life

onus
the burden or duty of proving a case to a court

opened for signature
(of a treaty) negotiations have concluded and the treaty is ready for parties' signatures; many treaties, especially those convened by the United Nations, will be open for signature only until a certain date; others, such as the Geneva Conventions, are open for signature indefinitely

operational area
a local government area that can apply for police to be given additional powers under the *Children (Protection and Parental Responsibility) Act 1997* (NSW)

opinio juris sive necessitatis
(Latin) 'opinion that an act is necessary by rule of law'; the principle that for the practice of a state to be customary international law, the state must believe that international law requires it

optional protocol
an addendum to a treaty, agreed to by the parties at a later date, to create enforcement provisions or to interpret the treaty in light of later developments

organised crime
illegal activities organised by criminal groups or enterprises, most commonly for the purpose of generating financial profit

original jurisdiction
the ability or power of a court to hear a case in the first instance

outlaw motorcycle gangs
organisations whose members use the structure of a motorcycle club as a front for criminal activity

over-stayer
a person who comes to Australia on a temporary visa but continues to stay when their visa expires

P1
red provisional plates

P2
green provisional plates

pastoralists
farmers raising sheep or cattle, usually on large areas of land

patch
a symbol or club logo attached to the back of a motorcycle club member's vest

patents
rights granted for a device, method, substance or process that is new, inventive or useful

penalty unit
a statutory financial penalty for an offence, arrived at by multiplying a monetary amount by the number of penalty units for the offence; the monetary amount can change over time without requiring amendments to the statute

people smuggling
the organised illegal movement of people across international borders, usually for a fee

permit system
a system that requires people to have permits to enter or remain on Aboriginal and Torres Strait Islander peoples' land

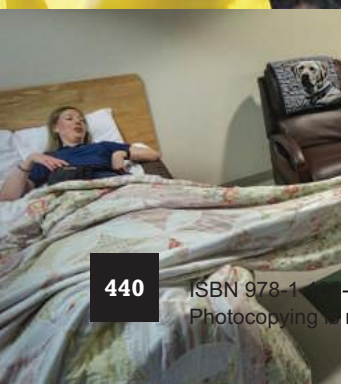
plaintiff
the person who initiates a civil action

plea in mitigation
any type of information that can help the court decide on an appropriate sentence

pleadings
written statements of the parties to a civil dispute that set out the issues to be decided by the court

political asylum
a fundamental human right affirmed by Article 14 of *The Universal Declaration of Human Rights* (1948), 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'

ISBN 978-1-108-86281-3



political autonomy
self-determination, independence

portfolio
a key area of government responsibility headed by a minister

poverty line
the minimum level of income needed to meet basic necessities and below which a household is defined as poor; the poverty line is different in different countries

precedent
a judgment that is authority for a legal principle and that serves to provide guidance for deciding cases that have similar facts

presumption of parentage
outlines a specific condition whereby a man and/or a woman are presumed to be the parents of a child

prima facie
(Latin) 'on the face'; at first sight, having sufficient evidence established against a defendant to warrant a trial in a higher court of law

privacy legislation
laws to set, uphold and protect the privacy rights of individuals

privacy rights
the natural right of individuals to keep their own affairs private

private law
the body of law governing relationships between individuals; for example, contract law, torts, family law and property law

pro bono
(Latin) 'for the public good'; used to describe work that is done by a lawyer or barrister on a voluntary basis and without payment, where there are issues of community concern or significant effect on disadvantaged groups

procedural fairness
the body of principles used to ensure the fairness and justice of the decision-making procedures of courts; in Australia, it generally refers to the right to know the case against you and to present your case, the right to freedom from bias by decision-makers and the right to a decision based on relevant evidence

prohibited person
a person prohibited from working in child-related employment because of a conviction of a serious sex offence, murder of a child, or an offence involving violence towards a child

prohibition
a court order that forbids a lower level court from hearing or taking further action in a case or matter

prosecutor
the person formally conducting legal proceedings against someone accused of a criminal offence; the prosecutor acts on behalf of the state or the Crown

protectionism
a government's power to control and limit the behaviour of a group of people in the name of protecting them

public law
the body of law governing relationships between individuals and the state, and the structure and operation of government itself; for example, criminal, administrative and constitutional law

public morality
standards of behaviour generally agreed upon by the community

public space
areas set aside in which members of the community can associate and assemble

quarantining
a system under which the government can allocate a portion of welfare income for specific uses such as food and clothing

question of law
a disputed legal contention that is left for the judge to decide; for example, whether certain evidence is admissible

racial hatred
abuse or denigration of a person because of his or her race, or verbal abuse or denigration of a race generally

racial vilification
a public act based on the race, colour, national or ethnic origin of a person or group of people that is likely to offend, insult, humiliate or intimidate; types of behaviour can include racist graffiti, speeches, posters or abuse in public

rail gauge
the distance between the inner sides of the two rails of a train track

ratify
to formally confirm that the country intends to be bound by the treaty

ratio decidendi
(Latin) the legal reason for a judge's decision

real property
property consisting of land and the buildings on it

reckless
able to foresee negative consequences of doing something but carrying on with the act regardless; recklessness implies a state of mind that is not as strong as an intention to do something; for some criminal offences, recklessness is considered equivalent to intention for the purpose of establishing fault

reconciliation
getting two parties to correspond, or make peace

ISBN 978-1-[illegible]-86281-3 Milgate et al.

red notice
a request for the arrest and extradition of an individual for whom an arrest warrant has been issued in the requesting country; distributed by Interpol, the international police authority; Osama Bin Laden had a red notice issued by the US Government before he was captured and killed in 2011, and Julian Assange is currently subject to a red notice

referendum
the referral of a particular issue to the electorate for a vote

refugee
A person who has been forced to leave their home area due to a well-founded fear of persecution based on religion, race, political opinion, nationality, ethnic or social group

reservation a statement made by a state when signing or ratifying a treaty that allows it to exclude certain provisions or modify them as they apply to the state's own practice

residual powers
those matters on which the states can legislate, as they are not referred to in the *Australian Constitution*

responsibilities
legal or moral obligations to others

rights
legal or moral entitlements or permissions

risk of harm
concerns about the safety, welfare and wellbeing of a child or young person because of sexual, physical or emotional abuse and/or neglect

rule of law
the principle that nobody is above the law; this can be seen in the requirement that governmental authority must be used in line with written, publicly disclosed laws, for which established procedural steps (due process) have been taken in the adoption and enforcement

rules
regulations or principles governing procedure or controlling conduct

sanction
a penalty imposed on those who break the law, usually in the form of a fine or punishment

Security Council
the arm of the United Nations responsible for maintaining world peace and security

self-determination
the right of people to determine their political status or how they will be governed based on territory or national grouping

self-executing
(of a treaty) automatically becoming binding on a state party to the treaty as soon as the treaty has been ratified

separation of powers
the doctrine that the powers and functions of the judiciary are separate from those of the legislature and the executive

sexual assault
a general term for criminal offences involving unwanted sexual contact; acts include unwanted touching or groping, indecent acts of other kinds, and rape

sexual harassment
any unwelcome sexual behaviour, such as sexual advances, suggestive comments, unwanted touching, written communications or gestures, especially in the workplace

social media
a web-based form of social interaction where users can share, comment on and discuss topics

social values
ethical standards that guide people in their thinking about aspects of their society

special leave
where the High Court grants approval for the case to come before it in its appellate jurisdiction

specific performance
an order requiring the defendant to perform the acts that the contract obliged him or her to perform

sponsorship
the support of an individual, event or organisation financially or through the provision of products or services

standard of proof
the degree or level of proof required for the plaintiff (in a civil case) or the prosecution (in a criminal case) to prove their case

stare decisis
(Latin)'the decision stands'; the doctrine that a decision must be followed by all lower courts

state
a politically independent country

state police
law enforcement agencies with state-wide jurisdiction

statute law
law made by parliament

suffrage
the right to vote, guaranteed by the law

suffragette
a term used to describe a supporter (whether male or female) of the suffrage movement

suicide
the intentional taking of one's own life

summary offence
a criminal offence that can be dealt with by a single judge without a jury and does not require a preliminary hearing

ISBN 978-1-108-86281-3






surety
a sum of money provided to support an accused person's undertaking that he or she will return to court for a hearing at a later date, as a condition of granting bail; it is agreed that the money will be forfeited if the accused fails to appear

table
to place on the table for discussion

tariff
a tax that must be paid on imports or exports

task force
a special group or committee of experts formed for the express purpose of studying a particular problem

terms of reference
a set of guidelines used to define the purpose and scope of an inquiry

terrorism
violence or the threat of violence, directed at a group of people for the purpose of coercing another party, such as a government, into a course of action that it would not otherwise pursue

the state
a term that is used to refer to the government and the people that it governs

tort law
the body of law that deals with civil wrongs including negligence, defamation, trespass and nuisance

tortious
wrongful; constituting a tort or breach of duty to others

trademarks
words, names, symbols or devices, used individually or in combination, to identify and distinguish the goods or services of one company from those of another

trans-border
beyond the border

transnational crime
crime that occurs across international borders, either in origin or effect

treaty
defined by the *Vienna Convention on the Law of Treaties* (1969) as 'an international agreement concluded between states in written form and governed by international law'; treaties may also be referred to as conventions or covenants

trespass to the person
a tort involving direct contact with a person's body without that person's consent

tyranny
rule by a single leader holding absolute power in a state

ultra vires
(Latin) beyond the power or authority legally held by a person, institution or statute to perform an act

United Nations (UN)
a world organisation dedicated to world peace and the sovereignty and equality of all its members

unito caro
(Latin) 'one in flesh'; meaning that when a woman married, in the eyes of the law, she assumed the legal identity of her husband

values
principles, standards or qualities considered worthwhile or desirable within a society

warning
a formal notice given to a young offender, usually for a first minor offence

whistleblower
a person who raises a concern about wrongdoing occurring in an organisation, company or government department

White Australia Policy
the government policy of allowing only Europeans and English-speaking people to immigrate to Australia; so-called 'undesirables' were kept out by use of the infamous 'Dictation Test'

whole of government response
actions that go beyond just changing laws and include all areas of government such as transport and policing

WikiLeaks
an international organisation (originating in Australia) committed to anonymously publishing documents that are unavailable to the public

working with children check
a check by the NSW Office of the Children's Guardian on the appropriateness of a person in New South Wales to work in child-related employment

young people
in New South Wales, persons aged between 16 and 18 years

Youth Justice Conference
a meeting of all the people who may be affected by a crime committed by a young offender; used to help the offender to accept responsibility for their actions while avoiding the court system

ISBN 978-1-108-86281-3 Milgate et al.

Acknowledgements

The author and publisher wish to thank the following sources for permission to reproduce material:

Images: © Getty Images / William West, Chapter 1 Opener / AFP Contributor, p.3 / Jeff Greenberg, 1.1 / Peter Parks, 1.2 / Brendon Thorne, 1.3 / Saheed Khan, 1.4, p.163, Chapter 6 Opener / Billy H.C. Kwok, 1.5 / SOPA Images, p.15 / Drew Angerer, p.16 / Torsten Blackwood, Chapter 2 Opener, 4.8 / Ryan Pierse, 2.1 / Sony Tumbelaka, 2.2 / William West, 2.3, 3.1, 9.4, 11.3, 16.7, 19.8 / Mark Metcalfe, 2.5 / Tracey Nearman, 2.6 / Scott Barbour, 2.11 /Ted Mead, 2.12/ George Lipman/The Sydney Morning Herald/Fairfax Media, 2.13 / Arterra/Universal Images Group, 2.15 / Alex Ellinghausen/The Sydney Morning Herald, 2.17 / Abdullah Asiran/Anadolu Agency, 2.18 / Fabrice Coffrini, 2.20 / Fairfax Media, Chapter 3 Opener / Fairfax Media, 3.2, 20.7 / Paul Jeffers, 3.3 / Saeed Khan, 3.4, p.110 / Lane Turner/The Boston Globe, 3.6 / Pscar K.Barroso/Europa, 3.7 / PhotoNews International Inc, p.82 / James Gourley, Chapter 4 Opener /Daniel Munoz, 4.1 / California Department of Corrections and Rehabilitation, 4.2 / Jennifer Polixenni Brankin/WireImage, 4.3 / Lisa Maree Williams, p.94 / Kathryn Scott Osler/The Denver Post, 4.4 / Tracey Nearmy, 4.5 / Quinn Rooney, 4.6 / Fairfax Media, 4.7 / Anadolu Agency, p.105 / Brook Mitchell, Chapter 5 Opener / DEA/ICAS94, 5.1 / Fairfax Media, 5.2 / John Borren, 5.3 / Daniel Berehulak, 5.4 / Mark Baker-Pool, 5.5 / Anthony Au-Yeung, p.126 / Darrian Traynor, 5.6 / Adhley Feder, 5.7 / Michael Dodge, 5.8 / Charly Triballeau, 5.12 / Amal Hindustan Times, 5.14 / Beto Barata, 5.14 / Education Images/Universal Images Group, p.152 / Jerry Driendl, 5.15 / Baden Herbertson Mullaney/Fairfax Media, 5.17 / Mayall/ullstein bild, 5.19 / Mark Kolbe, 6.1 / Sean Davey, 6.2 / Getty, 6.3 / Darrian Traynor, 6.4 / Lev Radin/Pacific Press/LightRocket, 6.5 /Jenny Evans, 6.6 / Bastiaan Slabbers/NurPhoto, Chapter 7 Opener / Wendell Teodoro, 7.1, 7.7 / Peer Parks, 7.2 / Anwar Amro, 7.3 / Hyoung Change/The Denver Post, 7.4 / Fairfax Media, 7.5, 19.6, 19.7 / Fabrice Coffrini, 7.8 / Alex Brandon-Pool, Chapter 8 Opener / Christopher Morris/Corbis, 8.1 /. Peter Macdiarmid, 8.2 / Adek Berry, 8.3 / Chip Somodevilla, 8.4 / Frederick Florin, 8.5 / Mandel Ngan, 8.6 / Emmanuel Dunand, 8.7 / Rosdiana Ciaravolo, 8.8 / Kirill Kukhmar, 8.9 / Paul Hennessy/SOPA Images/LightRocket, 8.10 / Valery Sharifulin, p.226 / Jenny Evans, Chapter 9 Opener / Jakovo, p.231 / Bettman, 9.1 / Juancho Torres/Anadolu Agency, 9.2 / Frederick J. Brown, 9.5 / Peter Kneffel/DPA, 9.6 / Matt Jelonek/Wire Image, 9.8 / Susan Stocker/Sun Sentinel/Tribune News Service, 9.9 / Mehedi Hasan/ NurPhoto, 9.10 / Luiz Rampelotto/NurPhoto, 9.11 / Pedro Pardo, p.225 /Cait Miers/WSL, Chapter 10 Opener / H. Armstrong Roberts/ClassicStock, 10.1 / Jeff Greenberg/Universal Images Group, 10.2 / Leisa Tyler/LightRocket, 10.3 / Steve Christo – Corbis, 10.4 / Altan Gocher/NurPhoto, 10.6 / Monica Schipper/FilmMagic, 10.8 / Jung Yeon-Je, 10.11 / Erik McGregor/LightRocket, 10.12 / Carlos Mandujano, 10.14 / Marvin Joseph/The Washington Post, 10.15 / Speed Media/Icon Sportswire, Chapter 11 Opener / Getty, p.298 / James D. Morgan, 11.1 / James Gourley Pool, 11.2 / Sean Davey, 11.4 / Peter Parks, 11.5 / Stringer, 11.6 / Michael Dodge, 11.7 / Asanka Ratnayuake, 11.8 / Bay Ismoyo 11.9 / Spencer Platt, 11.10 / Greg Wood, 11.11, 11.13 / Erik McGregor/Pacific Press/LightRocket/, 11.12 / Rohan Thompson, p.299 / Don Arnold, Chapter 12 Opener / Hulton Archive, 12.1 / Peter Rae/The Sydney Morning Herald/Fairfax Media, 12.2 / Justin McManus/Fairfax Media, 12.3 / Chris Hopkins, 12.4 / Alex Ellinghausen/The Sydney Morning Herald, 12.5 / Justin McManus/Fairfax Media/, 12.6 / Peter Morris/Fairfax Media, 12.7 / Brook Mitchell, 12.8 / Richard Milnes/Pacific Press/LightRocket, 12.9; Robert Nickelsberg, p.300 / Saeed Khan, Chapter 13 Opener / David L. Ryan/The Boston Globe, 13.1 / Lisa Maree Williams, 13.4 / Peter Rae/The Sydney Morning Herald, 13.5 / Daniel Vorley, 13.6 / Noorullah Shizada, 13.7 / Dimas Ardian, Chapter 14 Opener / Jewel Samad/ AFP, 14.1, 14.2 / Dimas Ardian, 14.2 / Jason Child, 14.5 / Ulet Ifansasti, 14.7 / Scott Barbour, 14.9 / Bay Ismoyo/AFP, 14.11 / Yida A Riyanto/AFP, 14.12 / Matt Blyth, p.323 / Saeed Khan, Chapter 15 Opener / Richard Ashen/Pacific Press/LightRocket, 15.3 / Cole Bennetts, 15.6 / Fairfax Media, Chapter 16 Opener, 16.2, 16.5, 16.6 / Spencer Platt, 16.1 / Bruce Postle/Fairfax Media, 16.3 / Michael Nigro/Pacific Press/LightRocket, 16.8 / Bradley Kanaris, 16.9 / Leon Neal, Chapter 16 Opener / Bildquelle/ullstein bild, 17.1 / Tolga Akmen/AFP, 17.2 / Jack Taylor, 17.3 / Jorg Carstensen/DPA/AFP, 17.5 / Andres Pantoja/SOPA Images/LightRocket, 17.6 / Paul J. Richards/AFP, 17.7 / Jack Taylor, p.363 / Peter Summers, p.362 / Geoff Robins, p.367, Chapter 18 Opener / Getty, 18.1 / Joye Marshall/Fort Worth Star-Telegram/Tribune News Service, 18.2 / Adrian Dennis, 18.3 / Bruce Milton Miller/Fairfax Media/, 18.4 / Tobias Schwarz, 18.5 / Robin Van Lonkhuijsen, 18.5 / Tobias Schwarz, 18.5 / Robin Van Lonkhuijsen, 18.6 / Sergio Dionisio, 18.8 / Muhammad Farooq, 19.3 / Jonas Gratzer/LightRocket, 19.4 / Tayfun Coskun/Anadolu Agency, 19.5 / Tracey Nearmy, 19.9 / Peter Parks, 19.10 / KM Asad/Lightrocker, 19.11 / Ryan Pierse, 19.12 / Dibyangshu Sarkar, p.391, Chapter 20 Opener / Bri Heppel, 20.1 / Strdel 20.2 / Jeremy Hogan/SOPA Images/LightRocket, 20.3 / Bradley Kanari, 20.4 / Heather Faulkner, 20.5 / Dibyangshu Sarkar, 20.6 / Alex Ellinghausen/The Sydney Morning Herald, Chapter 21 Opener / Jason South/The AGE/Fairfax Media, 21.1 / Ian Waldie, 21.2, 21.3 / Saeed Khan, 21.4 / Greg Wood, 21.5 / Carl Court, 22.1 / Hagen Hopkins, 22.2, 22.3, 22.5 / CBS, 22.4 / Charles Platiau, 22.6 / Frazer Harrison, 22.7 / Peter Adones/Anadolu Agency, 22.8 / Anthony Wallace, 22.9 / VCG, Chapter 23 Opener / Chesnot, 23.1 / Dominic Lorrimer/The Sydney Morning Herald, 23.3 / Bastiaan Slabbers/NurPhoto, 23.4 / Mayall/ullstein bild, 23.5 / Sompong Rattanakunchon, 23.6 / Anusak Laowilas/NurPhoto, 23.7 / Barcroft Media, 17.2a / Nurphoto, p.63 / James D. Morgan, p.159 / Ryan Pierse, 15.1. © AIATSIS, 2.16; © Kydpl Kyodo, AAP, p.140; © Safework Australia / CC BY 4.0 International Licence, p.3; © WGEA, 10.9; Kim Sith / Newspix, 14.10; © Fiona Morris / Fairfax, 15.2; © Ewina Picles / FAIRFAX, 15.4 / © Gary Ramage / Newspix, 16.4.

Text: *'Jury duty explained: From allowances to exemptions, here's what you need to know*', ABC Life / By Patrick Wright. Used by permission of ABC Library Sales © ABC. All rights reserved, pp.20–23; *'Commonwealth government legislative powers* section 51', CC BY 3.0 ND, pp.39–40; *'Coles to pay $300 000 to woman after supermarket slip',* By Emma Partridge, 22 February 2016 © SMH, p.72; '*M.D. Kirby, Reform the Law: Essays on the renewal of*

ISBN 978-1-108-86281-3

Index

ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3 Milgate et al.

ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3 Milgate et al.

ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3 Milgate et al.

ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3 Milgate et al.

ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3

ISBN 978-1-108-86281-3