LEGAL STUDIES 2019 SYLLABUS
VOLUME 2 - EIGHTH EDITION

LEGAL STUDIES FOR QUEENSLAND

UNITS 3 & 4

LEGAL EAGLE
PUBLICATIONS

ROGER WOODGATE | JEFF BIGGS | KIRSTEN MURRAY

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LEGAL STUDIES 2019 SYLLABUS | VOLUME 2 - EIGHTH EDITION

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

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PREFACE

The authors welcome you to this **Eighth Edition of *Volume 2*** of ***Legal Studies for Queensland*,** which covers **Unit 3 (Law, Governance and Change)** and **Unit 4 (Human Rights in Legal Contexts)** of the ***Queensland Legal Studies 2019 Senior Syllabus***.

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

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

> **[C]** Students are required to **comprehend** legal concepts, principles and processes, retrieving and using details to present meaning and demonstrate understanding.
>
> **[S]** Students are required to **select** from primary and/or secondary sources, making choices based on currency and relevance, and use a recognised system of referencing to document and acknowledge sources.
>
> **[A]** Students **analyse** legal issues, applying concepts, principles and processes to determine the nature and scope of an issue. Students dissect information to compare components or classify parts into relevant elements. Analytical processes build on comprehension and selection of information, enabling examination of viewpoints and consequences.
>
> **[E]** Students **evaluate** legal situations, using knowledge from their analysis of legal issues to present legal alternatives, and to make a decision, or propose recommendations, to resolve a situation. Students synthesise information to discuss and justify decisions, recommendations and their implications, using legal criteria.
>
> **[R]** Students create **responses**, using their knowledge to communicate meaning according to the intended purpose. Students communicate, demonstrating the order, sequencing and development of ideas by using paragraphs and extended responses.

The Inquiry Approach: Students are given a hypothesis/question **(Inquiry Focus)** or form their own, and a number of resources/ activities, encouraging them to go through all stages of cognitive reasoning while continuing to reflect on the given hypothesis. The detailed illustration on page 10 of the 2019 Syllabus describes **Reflecting** as a crucial metacognitive activity connecting the four inquiry components of **Forming, Finding, Analysing and Evaluating.** To encourage the process of **Reflecting,** we have sometimes added remarks at the end of an **Inquiry Focus** to this purpose, which are recognisable because headed by the words **On Reflection.**

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

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

Welcome to our new author, Kirsten Murray, whose enthusiasm and skill has reinvigorated the writing team to meet the challenge of a totally new book written to the requirements of a new syllabus. David Owens was not part of the writing team for this book. We hope he will find an opportunity to rejoin us in the future. His contribution to the book since he started writing in the third edition, has been immeasurable. Thank you, David.

Special thanks are due to our book designer, Jennifer Hillhouse, for her graphic design, and to our office administrator, Sue Woodgate. Thank you also to our marketer, Cathy Owens. Thank you to Janelle Wilmett for typing manuscripts for Jeff Biggs, and thank you to our respective spouses, Sue Woodgate, Robyn Biggs, and Charles Rodger, and the legal firm of Biggs Fitzgerald Pike, for their active support and assistance to publish this new Eighth Edition of Volume 2.

Roger Woodgate, Jeff Biggs, Kirsten Murray,
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UNIT 3

LAW, GOVERNANCE AND CHANGE

In Unit 3, students examine the complexities of the Australian legal system and its capacity to deal with the diversity of competing needs. They explore the role of legal institutions and lawmaking body's in creating laws that reflect the views of society. Students consider the range of forces that create catalysts for change and reform, and how laws are changed or reformed to reflect shifting societal demands. This unit encourages and informs critical thinking about Australian and Queensland laws, and the importance of society and individuals engaging in law-making processes.

Students will study law, governance and change through relevant contemporary issues involving matters of governance and law reform. Examples of issues could arise from areas, for example, family law, technology law, criminal law, counter-terrorism laws, employment law, and corporate law.

TOPIC 1:
GOVERNANCE IN AUSTRALIA

In Topic 1, students consider the processes and roles of government in shaping law in Australia and Queensland. They examine how federal and state or territory legal institutions respond to forces of change and the impact of landmark cases.

TOPIC 2:
LAW REFORM WITHIN A DYNAMIC SOCIETY

In Topic 2, students explore issues and situations where Australian society's changing values, needs, morality, ethics, technology and significant events have acted as impetus for legal change and reform. The focus is on identifying changing Australian values and pressures on legal freedoms and how the application of law creates a balance between competing interests. This topic offers scope to examine current and emerging legal issues in Australia and Queensland that create authentic discussions of viewpoints regarding the need for change.

TOPIC 1: GOVERNANCE IN AUSTRALIA

CHAPTER 1: WHAT IS GOVERNANCE?

FOCUS SUBJECT MATTER

1.1 INTRODUCTION

1.2 AUSTRALIA'S GUN LAWS: GOVERNANCE IN ACTION

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the response of governments to legal and social issues illustrates the meaning of governance;
- governments make laws establishing frameworks for governance; and
- Australian gun laws are an example of successful governance.

1.1 INTRODUCTION

GOVERNANCE:

the way that organisations or countries are managed at the highest level, and the systems for doing this.

SOURCE: CAMBRIDGE ENGLISH DICTIONARY, DICTIONARY.CAMBRIDGE.ORG (DOWNLOADED 7 APRIL 2019)

Establishment of policies, and continuous monitoring of their proper implementation, by the members of the governing body of an organization. It includes the mechanisms required to balance the powers of the members (with the associated accountability), and their primary duty of enhancing the prosperity and viability of the organization.

SOURCE: BUSINESS DICTIONARY, WWW.BUSINESSDICTIONARY.COM (DOWNLOADED 7 APRIL2019)

The above definitions can be applied to the work of governments in Australia, whether it be at a Federal, State or local level. They encompass their obligations to:

- pass laws reflecting the policies expected by the Australian community;
- establish the institutions and organisations needed to apply, regulate, and enforce these laws;
- ensure that they (the governments) themselves and the institutions they have established operate according to the law and in the interests of the Australian community; and
- respond to the views of the community, and to changing circumstances, to introduce new laws and review existing laws when required.

The day to day work of governments reflects their need to respond to and manage the lives of Australian citizens, making decisions in the process of governing. How many times have you browsed the internet, read a newspaper, or listened to news commentary on the television or radio and heard the word '**governance**' used? For example, this textbook is being written just as the Australian Government announces a policy designed to prevent Local Government Councils from holding citizenship ceremonies for prospective Australian citizens at any time other than on 26 January, which is currently our national day, Australia Day. Some councils see this as unfair and are debating the issue, giving various reasons for their point of view, most of which have been taken up by the media. At the same time, in early 2019, thousands of fish have died as the result of an algal bloom in the Menindee Lakes in New South Wales, part of the Murray-Darling River system, which is subject to supervision and control by a statutory authority established by the Federal Government with the cooperation of the States of Queensland, New South Wales, Victoria and South Australia.

Is the decision to stop Local Government Councils from conducting citizenship ceremonies for new Australian citizens on days other than Australia Day an example of governance? If so, how has that decision been made, by whom, and is it an example of **good governance**? Is the death of thousands of fish in the Menindee Lakes a result of the exercise by the Murray-Darling River Basin Authority of its powers to allocate and control the use and flow of water through this massive river system? Is this an example of **failure of governance** or is it caused by drought?

WHAT DO YOU THINK?

Surveys have been conducted to find out what Australians think should happen to Australia Day. In a recent survey 56% of those surveyed indicated they would not object to the Australia Day holiday being moved to a different day. Get permission to survey Year 11 and 12 students at your school. Ask them if they would object to moving the Australia Day holiday to another day. Collate, publish and share the results. How important do you think it is to have evidence supporting policies and proposals that affect the community?

The practical application which follows will help you to see that it is important to have a clear idea about the meaning of governance. Initially you will be exploring the situations and issues in which people say there is a need for governance. You will answer questions and form a view about how to determine the scope and authority of the governance which is exercised.

PRACTICAL APPLICATION

DEAD FISH IN MENINDEE ARE ABOUT MISMANAGEMENT NOT DROUGHT

SOURCE: BARNEY STEVENS, SYDNEY MORNING HERALD, SMH.COM.AU (14 JANUARY 2019) (EXCERPTS)

We are told by ministers and Cotton Australia that it was the drought, not mismanagement or cotton farming that kills fish. But the truth is that since the imperfect Murray-Darling Basin Plan was implemented, the irrigation lobby and their captive politicians have been doing everything in their power to minimise the amount of water going back to the rivers. The idea was that the minimum amount to keep rivers alive would be allowed to go back in. Well, it was less than the minimum.

The Basin Plan was a great leap forward in protecting the environment. But it had a big hole in it, the Darling River. When the Basin Plan was implemented the NSW authorities made sure that the pre-existing rules that allowed irrigators to pump when the River Heights rose, were maintained. This allowed them to pump out of environmental flows unless there was an embargo.

'BIZARRE, HEAVY-HANDED': COUNCILS PUSH BACK ON CHANGES TO AUSTRALIA DAY CITIZENSHIP CEREMONIES

SOURCE: SBS.COM.AU/NEWS (15 JANUARY 2019) (EXCERPTS)

Citizenship ceremonies will now have to take place on January 26, and a Federal government moved to protect Australia Day-but some councils believe public sentiment has shifted. Under changes to the Australian Citizenship Ceremonies Code to be introduced in 2020, councils will also have to hold a second citizenship ceremony on September 17-Australian Citizenship Day-and new citizens will have to abide by a strict dress code that bans board shorts and thongs.

In 2017, two Melbourne councils were stripped of the right to hold citizenship ceremonies after scrapping all Australia Day celebrations to recognise Indigenous sensitivities. Yarra City Council and neighbouring Darebin Council cited a ground swell of popular support for the move but were slapped down by the government.

1. Describe the problem/issue raised in each of the above articles. [C]
2. For each article, identify the stakeholder/s involved in resolving the problem/issue and explain the process which would be involved. [C] [A]
3. Is the process of resolving each problem/issue, in your opinion, a matter of governance? In your view, how could each issue be resolved? [E] [R]

RESEARCH

Go online and obtain information to write a brief history of the use of the term 'governance'. Collect newspaper articles and use online sources to list the different definitions you find as part of your research. Explain why there are a number of different definitions, distinguishing them from each other. Include in your research the dictionary definition of the word. Write up the results of your research. [S] [A]

1.2 AUSTRALIA'S GUN LAWS: GOVERNANCE IN ACTION

The story of how Australia became a country with uniform gun laws that have protected its citizens from the violence and multiple killings which occur quite frequently in the United States of America, illustrates how it is possible for all of the stakeholders in the Australian legal system to come together and be involved in national law reform. This law reform was driven by the Federal government, and is a good example of the exercise of governance in Australia. It introduces you to many of the institutions of government, and how they operate.

PRACTICAL APPLICATION

THE PORT ARTHUR MASSACRE

On the afternoon of 28 April 1996 a man armed with two military style semi-automatic rifles shot dead 35 people and wounded 18 others in and around the historic tourist precinct of Port Arthur, about 100 km from the Tasmanian capital of Hobart.

Most of those killed were tourists on a Sunday visit to Tasmania's busiest tourist site, ruins of a notoriously cruel prison established in 1830. 20 of the 35 were killed inside the Broad Arrow Cafe after the gunman entered, took a semiautomatic weapon from a sports bag and began shooting at people eating their lunch. The shooting rampage lasted about two minutes, during which time the killer laughed aggressively… The gunman was captured the next day and identified as Martin Bryant, a 28-year-old from a Hobart suburb who had no previous criminal record of violence nor any history of diagnosed mental illness. The event generated huge media attention, and for the next three months the nation witnessed an impassioned debate between those who argued that it was unconscionable to allow Australia to continue to 'go down the American path' and those opposed to virtually any form of gun control.

The media response

The Australian media described the massacre as 'the worst massacre by a single gunman in Australian history' and Bryant as 'the world's worst lone mass killer'.

The political response: the Australian government

The day after the murders, Australia's prime minister, John Howard, who had been in office only 57 days following his party's 13 years in opposition, announced his intention to introduce the most sweeping gun control reforms ever contemplated by any Australian government.

The political response: the state governments

The reforms were detailed in an historic agreement between all nine State, Territory and Commonwealth Governments, announced at an emergency meeting of the Australian Police Ministers Council (APMC) on 10 May 1996. The resolution committed every state and territory government to pass laws requiring the following:

PRACTICAL APPLICATION

1. A ban on the importation, ownership, sale, resale, transfer, possession, manufacture or use of:

- *all self- loading centre-fire rifles, whether a military style or not*
- *all self-loading and pump-action shot guns*
- *all self-loading rim-fire rifles.*

There were 7 recommendations altogether, including recommendations for a compensatory 'buy-back' scheme, a licensing system for the registration of all firearms, which allowed a system of exemptions for ownership, such as the need for use on farms to control vermin and membership of an authorised target shooting club.

SOURCE: SIMON CHAPMAN, 'OVER OUR DEAD BODIES', SYDNEY UNIVERSITY PRESS, 1998, 2013 (EXCERPTS)

The community response

Letter to the editor

SOURCE: MARC A. COHEN, THE WEEKEND AUSTRALIAN (11 MAY 1996) (EXCERPTS)

The best living memorial the nation can produce to remember the dead at Port Arthur would be a comprehensive ban on automatic weapons, both pistols and rifles.

The best static remembrance would be a sculpture made of metal from melted weapons to stand in the place of the Broad Arrow Cafe.

Please back bans, says grieving brother

SOURCE: LETTER TO THE EDITOR, THE COURIER MAIL (15 MAY 1996) (EXCERPTS)

The Queensland brother of one of the Port Arthur shooting victims, Brisbane businessmen Rod Moulton, has made a plea for community support for the gun laws in this letter to Queenslanders.

My sister Nanette Mikac and my two nieces Alannah and Madeline were murdered at Port Arthur on 28 April. My attitude towards guns in our society has not changed. I have always believed that (except in the armed services, law enforcement and primary producers) they are not necessary. We do not need them. They should be removed. Sport and self defence are not justification for gun ownership.

The bipartisan decision of the Australian political leaders is to be applauded, but I still can not be convinced that any guns in our society are necessary (except singleshot bolt-action rifles for primary producers).

Gun ownership has been a privilege not a right. The removal of that privilege is a small price to pay if we are to reduce the risk of similar incidents occurring again. People in our society have the right to live life without fear, to have a pleasant Sunday outing, as my sister and her children were having, without fear.

The legislation

Acts of Parliament were passed by the Commonwealth government and each of the State and Territory governments in the same terms and in accordance with the agreement between the governments.

Applying the legislation

Each state in Australia co-ordinated the collection of weapons which were prohibited by the legislation and paid compensation to the individuals who cooperated and handed in their guns.

PRACTICAL APPLICATION CONTINUED...

1. Who are the stakeholders that were involved in the process of responding to the Port Arthur Massacre? [C]
2. Describe and explain the process which led to the passing of new gun laws by all governments in Australia. In your opinion, is this an example of good governance? Give your reasons. [C] [A] [E] [R]

It should be apparent to you that Australia today is a very different Australia from that which existed prior to the enactment of the legislation which created an *Australian Constitution*. The example of the gun law reform which occurred in 1996 should make it very clear that the process of governing at that time, and now, not only involves the modern Australian community of today, but the institutions which came into being with the Australian Constitution. At this point, it would be useful for you to review what you already know from your Year 11 study about the sources of Australian law. See, for example, **Chapter 2: Sources of law in the Australian Legal System,** *Legal Studies for Queensland* (Eighth Edition 2018).

We will now proceed to examine the legal and practical basis of the topic **GOVERNANCE IN AUSTRALIA**, starting with **Chapter 2: the Australian Constitution**.

REVIEW

1. Describe and explain the meaning of **governance**. [C] [A]

TOPIC 1: GOVERNANCE IN AUSTRALIA

CHAPTER 2: THE AUSTRALIAN CONSTITUTION

FOCUS SUBJECT MATTER

2.1 WHAT IS A CONSTITUTION?
2.2 THE AUSTRALIAN CAPITAL TERRITORY
2.3 THE NEED FOR AN AUSTRALIAN CONSTITUTION
2.4 THE KEY FEATURES OF THE AUSTRALIAN CONSTITUTION
2.5 THE ROLE OF THE HIGH COURT OF AUSTRALIA
2.6 CHANGING THE AUSTRALIAN CONSTITUTION
2.7 SEPARATION OF POWERS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the nature of a Constitution;
- the brief historical process by which the Constitution came into being;
- the reasons behind the establishment of the Australian Capital Territory;
- the principal drivers for Federation;
- the division of powers between the Commonwealth and the States;
- the role of the High Court of Australia;
- the referendum process;
- the success of the 1967 referendum; and
- the importance of the separation of powers in the Constitution.

2.1 WHAT IS A CONSTITUTION?

A constitution is a set of rules by which a country or state is run. It sets out the rules that specify the powers, responsibilities and roles of the governing bodies within a state or country. Most countries have constitutions, but not all countries. You will be aware that sporting clubs and other groups to which you may belong almost certainly have a constitution.

PRACTICAL APPLICATION

a. Locate the constitution of a sporting club of which you are a member or some other club that has a constitution. [S]

b. Describe the main features of this constitution. [C]

The *Australian Constitution* is the set of rules by which Australia is governed. The *Australian Constitution* created the Federal Parliament of Australia, which makes laws for the whole of Australia. But, the Federal Parliament can only make laws with respect to certain areas of Australian life with State Parliaments making laws with respect to other areas. **It is the Constitution that tells us which powers are given to the Commonwealth and which are to remain with the States.** What powers were to be given by the States to the Commonwealth was the central question in determining what should be in the Australian Constitution.

Before 1901 Australia did not exist as a nation. It was a collection of six British colonies that were partly self-governing, but were subject to the law-making power of the British Parliament in Westminster. There was a movement among the Australian colonies to establish a Federal government. As a result of that movement there was a series of Constitutional conventions in which all the colonies came together to debate what powers any Federal government should have, and to in fact ultimately draft a Constitution. This would be the document which would establish the Federal Parliament and set out the powers of the Federal government.

PRACTICAL APPLICATION

FEDERATION TIMELINE

SOURCE: PARLIAMENTARY EDUCATION OFFICE, FEDERATION TIMELINE, PEO.GOV.AU/LEARNING, ACCESSED 10 APRIL 2019.

1889	Sir Henry Parkes, Premier of New South Wales, urges the colonies to federate.
1890	The Australasian Federation Conference recommends a national convention be held to draft a constitution for the Commonwealth of Australia.
1891	The first National Australasian Convention is held in Sydney and drafts a constitution.
1891–94	Economic depression means the colonial parliaments lose interest in federation.
1893	A people's conference in Corowa, New South Wales, urges the colonial parliaments to hold a new convention to decide on a draft constitution.

PRACTICAL APPLICATION CONTINUED...

1895	A special premiers' conference agrees to hold a new federation convention.
1896	A second people's conference in Bathurst, New South Wales, renews calls for another federation convention.
1897–98	The second National Australasian Convention meets in Adelaide, Sydney and Melbourne, and agrees to the constitution.
1898	Referendums are held in New South Wales, Victoria, South Australia and Tasmania to approve the constitution. It is endorsed by all but New South Wales.
1899	In January the premiers hold a secret meeting and agree to several changes to the constitution. Between April and July referendums are held in South Australia, New South Wales, Victoria and Tasmania at which a majority vote 'yes' to the bill. In September Queensland voters endorse the constitution.
1900	In March a delegation travels to London to present the constitution to the British Parliament. On 5 July the British Parliament passes the *Commonwealth of Australia Constitution Act 1900 (UK)*. On 9 July Queen Victoria signs the *Commonwealth of Australia Constitution Act 1900 (UK)*. On 31 July Western Australia holds a referendum at which an overwhelming majority of voters approve the Constitution.
1901	On 1 January the Commonwealth of Australia is proclaimed in Centennial Park, Sydney. On 29 and 30 March the first Commonwealth elections are held. On 9 May the Duke of Cornwall and York (later King George V) opens the first Parliament of the Commonwealth of Australia in the Exhibition Building in Melbourne.

1. Describe the process by which a written Constitution was agreed to by the State Governments of Australia set out in the above timeline. [C]
2. Why was it necessary to conduct referenda to approve the draft Constitution? [A]
3. Why did the Constitution need to be presented to, and passed by the British Parliament? [C] [A]

These Constitutional conventions occurred in the 1890s and by 1898 the colonies had agreed on a draft Constitution which was then taken back to their colonial Parliaments to be approved. The final draft of the Constitution was approved by a vote of the people in referendums held in each colony and was then taken to the British Parliament by an Australian delegation. After some changes being negotiated by the British Parliament it passed the Bill in July 1900. The Bill was proclaimed by Queen Victoria on 17 September 1900 and the *Commonwealth of Australia Constitution Act 1900* (UK) came into force. Section 9 of that Act contained the Constitution of Australia and the Act provided that on

and after 1 January 1901 the colonies of New South Wales, Victoria, South Australia, Queensland and Tasmania would become part of the Commonwealth of Australia. At that time Western Australia had not conducted its referendum, which was held on 31 July 1900 two weeks after the Act was passed. However, provision was made in the Act for Western Australia to join the Commonwealth.

By the QUEEN.

A PROCLAMATION.

VICTORIA R.

WHEREAS by an Act of Parliament passed in the Sixty-third and Sixty-fourth Years of Our Reign intituled, "An Act to constitute the Commonwealth of *Australia*," it is enacted that it shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation, that, on and after a day therein appointed, not being later than One Year after the passing of this Act, the people of *New South Wales*, *Victoria*, *South Australia*, *Queensland*, and *Tasmania*, and also, if Her Majesty is satisfied that the people of *Western Australia* have agreed thereto, of *Western Australia*, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

And whereas We are satisfied that the people of *Western Australia* have agreed thereto accordingly.

We therefore, by and with the advice of Our Privy Council, have thought fit to issue this Our Royal Proclamation, and We do hereby declare that on and after the First day of *January* One thousand nine hundred and one, the people of *New South Wales*, *Victoria*, *South Australia*, *Queensland*, *Tasmania*, and *Western Australia* shall be united in a Federal Commonwealth under the name of the Commonwealth of *Australia*.

Given at Our Court at *Balmoral* this Seventeenth day of *September*, in the Year of our Lord One thousand nine hundred, and in the Sixty-fourth Year of Our Reign.

God Save the Queen.

POLLING BOOTH - BRISBANE - FOR REFERENDUM TO APPROVE CONSTITUTION

2.2 THE AUSTRALIAN CAPITAL TERRITORY

The seat of the Federal Government of the Commonwealth of Australia was not initially located in Canberra because there was no Australian Capital Territory in existence in 1901. **The Commonwealth government commenced sitting in Melbourne and continued to sit there until May 1927 when the new Parliament House at Canberra was established.**

The establishment of a territory (now called the Australian Capital Territory) which was to be the seat of government of the Commonwealth of Australia was governed by s125 of the Constitution which states:

> *The seat of government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth and shall be in the State of New South Wales, and be distant not less than 100 miles from Sydney.*
>
> *Such territory shall contain an area of not less than 100 square miles and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.*
>
> *The Parliament shall sit at Melbourne until it meets at the seat of government.*

PRACTICAL APPLICATION

(16) THE PREMIERS' CONFERENCE, 1899.

THE FEDERAL CAPITAL.—With regard to the Federal Capital, the Conference reported thus:—

"It is considered that the fixing of the site of the capital is a question which might well be left to the Parliament to decide; but in view of the strong expression of opinion in relation to this matter in New South Wales, the Premiers have modified the clause, so that while the capital cannot be fixed at Sydney, or in its neighbourhood, provision is made in the Constitution for its establishment in New South Wales at a reasonable distance from that city."

Accordingly the request of New South Wales, that the capital should be in that colony, was granted; but with two conditions which Victoria insisted upon: (1) that it should not be within 100 miles of Sydney; (2) that the Parliament should sit at Melbourne until it met at the seat of Government.

SOURCE: JOHN QUICK AND ROBERT GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH (1901), ANGUS & ROBERTSON, 1901, P. 219.

1. Which state insisted that the capital should be within New South Wales? Why do you think this is? [C] [E]
2. What conditions did Victoria insist upon? [C]
3. Research Washington DC online. What comparison can be drawn between the establishment of the Australian Capital Territory and the establishment of Washington DC in the United States of America? [S] [A]

2.3 THE NEED FOR AN AUSTRALIAN CONSTITUTION

Prior to Federation the six British colonies were partly self-governing. However, they were also subject to the laws passed by the British Parliament. **They acted like six separate countries**. They had their own governments and made their own laws which were different as between the colonies. They each had their own defence force. They each issued their own stamps and their main source of revenue was the collection of tariffs on goods that crossed the border between the colonies, as well as on goods imported from overseas into the colonies. The colonies had customs officials on the borders between the colonies as one now sees operating at the borders of a country. The customs barriers, the different railway gauges that the colonies had chosen and the inter-colony tariffs all restricted the flow of people and commerce between the colonies. For the colonies to prosper there was a general feeling that Federation should occur.

We will now look briefly at three principal drivers for Federation:

(A) THE NEED FOR UNIFORM TARIFFS

In 1800 the colony of New South Wales introduced the first tariffs. These were introduced on the imports of alcoholic beverages, spirits and other strong drinks which were taxed at one shilling per gallon, wine at six pence per gallon and beer at three pence per gallon. About eighteen years later tobacco also became the subject of tariffs. The tariff revenue were the first taxes of any kind levied in the colonies and the revenue raised was used to pay for the construction of Sydney and Parramatta gaols and a bridge across the Tank Stream in Sydney.

After Victoria separated from New South Wales on 1 July 1851, and in the following year, the Victorian government passed its first Customs Act. Like New South Wales tariffs were imposed on alcoholic drinks but also non-alcoholic drinks (tea and coffee), tobacco and other consumables such as sugar and flour.

After the gold rushes in the early 1850's in Victoria very high tariffs were also imposed upon imported opium. New South Wales and other colonies followed the Victorian example by themselves imposing tariffs on opium. (Opium remained a legal import until the Commonwealth government declared it a prohibited import in 1906).

When they were first imposed the tariffs were imposed to raise revenue. In the second half of the 19th century tariffs were imposed also as a means of protecting Australian industry and thus protecting employment in Australia. These tariffs could only be effective if the colonies adopted a uniform approach to tariffs on goods imported from overseas. This shift to tariffs being used for the protection of Australian industry and employment was a significant driver for Federation. In the first parliament (1901-1903) the *Custom Tariff Act 1902* (Cth) and *Excise Tariff Act 1902* (Cth) were passed quickly to provide revenue. For the first ten years, the Commonwealth relied exclusively on its import and excise duties for its revenue.

(B) IMMIGRATION ISSUES

Australia was predominantly white and of European descent at the time of Federation. Most of the population in the Australian colonies was concerned about the influx of Chinese, which had occurred during the gold rushes, and during the second half of the 19th century the Chinese had become very unpopular.

CHINESE PANNING FOR GOLD

There was also a further concern about what had occurred in Queensland where Pacific Islanders had been brought to work in the sugar industry for low pay. The usual arguments about the Pacific Islanders and the Chinese accepting lower wages and thus competing with colonists for jobs were advanced. It became important from the colonials point of view that there should be some form of restriction on immigration and that only a Federal government could achieve this. This view adopted by the colonies at that time was directly opposed to the British colonial view that there should be no discrimination on the grounds of race against a particular nation. It was important at that time (from the British point of view) that any restriction on immigration should not be overtly racist. This was particularly important because at that time Japan was an ally of Britain. It was not surprising therefore that after the Constitution was adopted, one of the first actions of the first parliament of Australia was the passing of the *Immigration Restriction Act 1901* (Cth), the intent of which was to establish a White Australia Policy. The mechanism for the restriction of non-Europeans was the adoption of a dictation test which in fact was specifically designed to keep out non-Europeans. The test is set out in s3(a) of the Act.

> *3. The immigration into the Commonwealth of the persons described in any of the following paragraphs of the section (hereinafter called "prohibited immigrants") is prohibited, namely:-*
>
> *(a) Any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer;*

Initially the dictation test was to be taken in a European language then in the *Immigration Restriction Amendment Act 1905* (Cth) the words '***prescribed language***' were replaced by '***any prescribed language***'. As a result of that change dictation tests could then be given to prospective immigrants in any language. The dictation test was administered 805 times in 1902-1903 with 46 people passing. It was administered 554 times in 1904-1909 with only 6 people passing the test. The dictation test could be given to any migrant during his or her first year of residence. If that person failed he or she was deported. If it was given to a migrant before he or she entered Australia and that migrant failed he or she was refused entry.

WHAT DO YOU THINK?

1. Looking back from today at the adoption of the dictation test would you describe it as being a restriction on immigration which was not 'overtly racist'? In answering that question you should comment on the fairness of the test. [C] [A] [E]

The first parliament of the Commonwealth of Australia also passed in 1901 the *Pacific Island Labourers Act 1901* (Cth).You will see from the number of the Act that this was the 16th Act of Parliament passed by the new Commonwealth Parliament and was in fact passed immediately before the *Immigration Restriction Act* referred to above. The object of the Act was to prevent Pacific Island labourers coming into Australia. The Act states:

No Pacific Island labourer to enter after 31st March, 1904.

3. No Pacific Island labourer shall enter Australia on or after the thirty-first day of March, One thousand nine hundred and four.

Nor before that date, except under a licence

4. No Pacific Island labourer shall enter Australia before the thirty-first day of March, One thousand nine hundred and four except under a licence.

This Act was assented to on the 17 December 1901.

PRACTICAL APPLICATION

1. Who is Mr Barton? [C]
2. Why is Barton calling Queensland 'You Dirty Boy'? [A]
3. Why do you think that the Queensland Kanak Interest is being aggressive? [A]
4. Why does the brush being used by Mr Barton have written on it 'A White Australia'? [A]

SOURCE: THE BULLETIN, SATURDAY, OCTOBER 19, 1901, NATIONAL LIBRARY OF AUSTRALIA

In 1906 the second Commonwealth Parliament of Australia (1903 to 1906) modified the Act by allowing the minister to exempt from deportation a number of categories of Pacific Island natives including those who owned freehold land in Queensland and those who had resided continuously in Australia for 20 years.

C) DEFENCE

Prior to Federation the colonies of Australia had a series of 'scares' which drew attention to the inadequacy of the defence forces of each of the colonies. It became clear to the colonies in the second half of the 19th century that the defence of Australia required a Federal approach.

PRACTICAL APPLICATION

AN ATTACK ON MELBOURNE: A CASE STUDY OF THE DEFENCE OF AUSTRALIA'S MAJOR PORTS IN THE EARLY 1890S

SOURCE: MICHAEL KITSON,JOURNAL OF THE AUSTRALIAN WAR MEMORIAL ISSUE 35, PARAGRAPHS 4, 5 AND 6.

{4} During and after the Crimean War, anxiety in Australia that ports and shipping were open to attack is revealed by the regularity with which 'scare' articles appeared in the press. The anxiety was justified, because so long as ports and coastal shipping remained inadequately defended (or, worse, lay entirely undefended), even a single cruiser could carry out a destructive raid with a minimum of danger to itself. It was thought that if Britain was involved in a war with other naval powers the "gold colonies were tempting baits and perhaps easy triumphs",[4] and also that Australian targets could be taken by surprise. Before the telegraph link with Britain was established in 1872, Britain

PRACTICAL APPLICATION CONTINUED...

(and, therefore, her colonies) might well have been at war a month before news was received in Australia. For all these reasons, even good–will visits by friendly foreign warships, or by individual foreign vessels on surveying work, were regarded with suspicion. [5]

{5} Two major 'war scares' had as profound an effect on the implementation of Australian coastal defence as they did on British imperial defence planning. The first occurred in 1877–78 and the second in 1885; on both occasions Britain came close to declaring war with Russia. Both were a result of Russia's expansion eastwards, first into the Eastern Mediterranean, which threatened the Suez Canal in Turkish Egypt, and then north of India to Vladivostock and the Sea of Japan.

{6} Once telegraph communication with Europe was established, news from that part of the world was received the following day. This immediacy involved Australians in European 'scares' on a day–to–day basis through the press.[6] The long build–up to the Anglo–Russian crisis began with Russia's involvement in the revolutions against the Turks in Bosnia and Bulgaria in April 1877, and was followed avidly by Australians with increasing certainty that Britain would declare war. The crisis came in December when Turkish resistance collapsed at Plevna. Then, fuelled by reports of 'jingoistic'[7] excitement in London, the tension grew with news that a British fleet had forced the Dardanelles in February 1878 to prevent the fall of Constantinople, and of British mobilisation which followed in March. [8]

1. What constituted a temptation to other naval powers? [C]
2. Divide your class into three groups. Each group will research one of the following, describing the relationship between Britain and Russia. [S] [A]
   - The Crimean War
   - The Russo-Turkish War of 1877 to 1878
   - The Panjdeh incident of 1885
3. Describe the threat of a Russian attack as perceived by the colonies of Australia. [C] [A]
4. How do you think the act of Federation might have improved Australia's defences? [C] [A]

Even though each colony had its own militia it was woefully insufficient to defend Australia. Apart from the immediate fear of Russia there was a fear that Australia would be vulnerable to attack from the European countries which had colonised parts of the Pacific, as well as a fear that China and Japan with their larger populations could overrun the colonies.

2.4 THE KEY FEATURES OF THE AUSTRALIAN CONSTITUTION

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

The **original five functions of the Constitution** were:

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

SIR SAMUEL GRIFFITH, CHIEF JUSTICE OF HIGH COURT 1903 - 1919

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

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

EXCLUSIVE POWERS

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

- Section 115 of the Constitution prevents a State from making its own money.
- Section 90 gives exclusive power to the Commonwealth to make laws on customs and excise duties.

- Section 114 prohibits States from having their own armed forces.
- Section 52 gives the Commonwealth exclusive power to make laws for its territories, including the Australian Capital Territory.

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

CONCURRENT POWERS

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

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

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

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

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1900 (UK)

Section 51 *(i.) Trade and commerce with other countries, and among the States:*

(ii.) Taxation; but so as not to discriminate between States or parts of States:

(v.) Postal, telegraphic, telephonic, and other like services:

(vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

(ix.) Quarantine:

(x.) Fisheries in Australian waters beyond territorial limits:

(xi.) Census and statistics:

(xii.) Currency, coinage, and legal tender:

(xviii.) Copyrights, patents of inventions and designs, and trade marks:

(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

(xxi.) Marriage:

(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

(xxvii.) Immigration and emigration:

(xxix.) External affairs:

(xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:

(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

(xxxvii.) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

2.5 THE ROLE OF THE HIGH COURT OF AUSTRALIA

It is the Constitution that established the High Court of Australia as guardian of the Constitution. **Not only is it the court which decides disputes arising from the interpretation of the Constitution but it is the ultimate Court of Appeal for all Australian courts.** In this way it determines the state of the law in Australia binding every citizen. As part of the governance of Australia its role in interpreting the Constitution of Australia is hugely important. **It decides what the meaning of words in the Constitution are.** Both the Commonwealth and State governments are bound by the words of the Constitution and so its significance in the governance of Australia is profound.

There are seven judges of the High Court of Australia. The current Chief Justice of Australia is a Queenslander, Chief Justice Susan Mary Kiefel AC. All judges of the High Court of Australia, must, as a matter of law retire when they reach the age of 70.

To illustrate the importance to governance of the High Court of Australia, the High Court recently had to answer a question fundamental to the government of Australia. That question was whether seven sitting members of the Commonwealth Parliament should continue to sit as members of the Parliament or leave the Parliament, even though they had been elected by the citizens of Australia. That question which the High Court was required to deal with, arose out of s44(1) of the Constitution which sets out circumstances in which such elected members are incapable of sitting as a senator or a member of the House of Representatives.

INQUIRY FOCUS

CAN A MEMBER OF PARLIAMENT BE DEEMED INCAPABLE OF BEING CHOSEN AS OR OF SITTING AS A MEMBER OF SENATE OR THE HOUSE OF REPRESENTATIVES?

PRACTICAL APPLICATION

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1900 (UK) SECTION 44 DISQUALIFICATION

Any person who –

(i) Is under any acknowledgment 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 a citizen of a foreign power; or...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives

SECTION 45 VACANCY ON HAPPENING OF DISQUALIFICATION

If a Senator or Member of the House of the Representatives –

(i) becomes subject to any of the disabilities mentioned in the last preceding Section; or...

his place shall thereupon become vacant.

1. What are the two circumstances set out in s44(i) either of which gives rise to a person being incapable of being chosen as a Member of Parliament or sitting as a Member of Parliament. [C]

2. The first official draft of the Constitution Bill prepared for the convention in 1891 contains this particular section. It then formed part of the Constitution. Can you think of a reason why the fathers of the Australian Constitution considered it important to put s44(i) in the Constitution? In answering this question you might consider the mischief that this section was designed to prevent. [A]

CASE STUDY

Re Canavan; Re Ludlam; Re Waters; Re Roberts [No. 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45 (27 October 2017)

Facts: In this case the High Court of Australia was asked to determine whether seven members of the Australian Parliament elected in 2016, were incapable of being chosen or of sitting as members of Parliament because to do so would be in breach of s44 of the Constitution. The seven members were Senator Matthew Canavan (Senator for Queensland), Mr Scott Ludlam (Senator for Western Australia), Ms Larissa Waters (Senator for Queensland), Mr Malcolm Roberts (Senator for Queensland), Mr Barnaby Joyce (Member of the House of Representatives), Ms Fiona Nash (Senator for New South Wales) and Mr Nick Xenophon (Senator for South Australia).

Legal issue: Before we refer to the decision of the High Court of Australia consider each of the following possibilities in light of s44(i). You should interpret s44(i) yourself in answering each of the following. These questions became legal issues in the case:

1. Would a member of Parliament who is only a citizen of a foreign country and not a citizen of Australia be disqualified by s44(i)? Give your reasons. [A] [E]

CASE STUDY CONTINUED...

2. If an Australian citizen holds a dual citizenship, that is, is a citizen of another country other than Australia, as well as Australia, would such citizen be disqualified by s44(i)? Give your reasons. [A] [E]

3. If an Australian citizen has a close connection to another country, for example, having been born there, but is not a citizen of that country, would he be disqualified by s44(i)? Give your reasons.[A] [E]

4. If an Australian citizen holds dual citizenship but that citizen has not voluntarily obtained (or voluntarily retained that citizenship) is such citizen disqualified by s44(i)? Give your reasons. [A] [E]

5. If a citizen of Australia was born in another country and has become a naturalised Australian but did not take any steps to renounce his or her citizenship of the foreign country would that citizen be disqualified by s44(i)? Give your reasons. [A] [E]

6. If an Australian citizen (by birth) did not know of his or her citizenship of another foreign country which arose as a result of being born in that foreign country (for example having been born there while parents were on holidays) then would that citizen be disqualified by s44(i)? Give your reasons. [A] [E]

7. Would a citizen of Australia who was eligible to be a citizen of another country, then applied for citizenship of that other country and was granted such citizenship, be disqualified by s44(i)? Give your reasons. [A] [E]

8. If a citizen of Australia discovers that he or she has foreign citizenship and then takes all reasonable steps to renounce that citizenship would such citizen be disqualified by virtue of s44(i)? Give your reasons. [A][E]

The High Court of Australia considered similar situations to those referred to above in determining exactly what the meaning of the words in s44(i) were. Some of those situations applied to the members of Parliament being considered.

Decision: The High Court unanimously agreed on the proper meaning and effect of s44(i) of the Constitution. The Court held that:

(i) The section operates to render a person incapable of being chosen, or incapable of sitting, if that person is a subject or citizen of a foreign power.

(ii) Whether such a person is a foreign subject or citizen is determined by the law of the country that has granted the citizenship in question.

(iii) The candidate's knowledge of his or her foreign citizenship or knowledge that she could possibly be a foreign citizen is not necessary to bring about the disqualifying operation of s44(i).

(iv) The candidate who at the time he or she nominates for election is a subject or citizen of a foreign power will be disqualified by reason of s44(i). The only exception to this principle is when such a person has demonstrated that he or she has taken all steps that are reasonably required by the foreign law which grants citizenship, to renounce that citizenship.

Of these seven members under review by the High Court only two, Senator Matthew Canavan and Senator Nick Xenophon were not disqualified by the operation of s44(i). Senator Matthew Canavan was found not to be an Italian citizen as well as an Australian citizen and Senator Nick Xenophon was found not to be a British citizen as well as an Australian citizen. The other five, Mr Scott Ludlum, Ms Larissa Waters, Mr Malcolm Roberts, Mr Barnaby Joyce and Ms Fiona Nash were found to have dual citizenship and thus citizenship of a foreign power and were disqualified pursuant to s44(i).

1. Look back now at the answers to your questions. Do your answers accord with the decision of the High Court? [C] [A]

RESEARCH

Locate the High Court decision on Austlii or the High Court of Australia website above and answer the following questions:

RESEARCH CONTINUED...

Ms Larissa Waters

Look at paragraphs 93 to 98 of the judgment.

1. Why was Ms Waters disqualified under s44(i) by the High Court? [C]
2. Some people might describe Ms Waters' disqualification as being harsh. Set out the reasons why her disqualification could be described in that way? [E]
3. Do you think that the High Court's decision was right in any event? [E]

Mr Barnaby Joyce

See paragraphs 104 to 111 of the judgment.

1. Explain how Mr Joyce was a New Zealand citizen? [C]
2. Mr Joyce had not been aware of the possibility that he held dual citizenship before enquiries in late July 2017 came to his attention and Mr Joyce had never applied to become a New Zealand citizen. Nor had Mr Joyce sought or accepted any privileges as a citizen of New Zealand. Should any of these made any difference to the decision that Mr Joyce was disqualified by virtue of s44(i)? [E]
3. Mr Joyce renounced his New Zealand citizenship on 12 August 2017. Why was that renunciation insufficient to allow him to remain as a member of the Commonwealth Parliament? [C]

In deciding the meaning of the words written in the Constitution, the High Court of Australia has had to decide the meaning of the words contained in the body of s51. **Each decision by the High Court of Australia on the meaning of the words set out in s51 not only influences but decides the extent of the powers of the Commonwealth Government of Australia.** There have been many cases decided by the High Court on the meaning of the words in s51, sometimes to the disappointment of the Commonwealth Government, and sometimes to the disappointment of State Governments. One such example was the Tasmanian Dam Case.

TASMANIAN DAM CASE

This case was decided on the 1 July 1983. **The case arose as a result of a plan by the Tasmanian Hydro-Electric Commission owned by the State Government to construct a dam on the Gordon River below the Franklin River.** The dam would have flooded a large section of the Franklin River in southwest Tasmania. **There was a lot of opposition to the damming of the Gordon River for environmental reasons.** On 22 September 1981 the Premier of Tasmania, Mr Lowe, wrote to then Prime Minister of Australia (Mr Malcolm Fraser) requesting that there be a nomination of the parks (including Cradle Mountain – Lake St Clair National Park and the Franklin Lower Gordon Wild Rivers National Park, and the Southwest National Park) for listing in the World Heritage List. Before the decision as to whether the parks should be listed as a World Heritage Site, legislation was passed in Tasmania enabling the dam to proceed. The new Premier of Tasmania, Mr Gray, requested the Prime Minister to withdraw the nomination of the parks for inclusion in the World Heritage List.
The Prime Minister declined to do so and the Premier strongly objected to the Prime Minister rejecting his request. The World Heritage Committee met in December 1982 and entered the parks area in the World Heritage List.

The listing of the area as a World Heritage Site was not of itself sufficient to prevent construction of the dam. To prevent the dam being constructed a law of the Commonwealth government was needed to incorporate the protection of the area under international law into Australian domestic law. The Tasmanian Government passed legislation allowing the dam to proceed and commenced preliminary works for the construction of the dam. There was an Australian Federal election in 1983 in which the Labor party under the leadership of Mr Bob Hawke had promised to prevent construction of the dam. The Liberal party at that time lead by Mr Malcolm Fraser refused to use the external affairs power set out in s1(xxix) to intervene to stop the dam. Labor won the election and subsequently in accordance with its promise, passed Acts of Parliament which prohibited clearing, excavation and other activities within the Tasmanian Wilderness World Heritage Area. These Acts of Parliament, principally the *World Heritage Properties Conservation Act* 1983 (Cth) prohibited the clearing, excavation and like activities within the Tasmanian Wilderness World Heritage area. At that stage the Tasmanian Parliament had passed Acts of Parliament which allowed the Tasmanian Hydro-Electric Commission to do the work sufficient to construct the dam and the Commonwealth Act of Parliament expressly prohibited the doing of such works. **The Tasmanian Government refused to halt construction of the dam arguing that the Commonwealth Government did not have the power under the Commonwealth Constitution to stop them constructing the dam.** The Commonwealth Government argued that the external affairs power in s51 of the Constitution gave them the power to legislate and to put into effect legal obligations which arose from Australia entering into agreements and treaties internationally. It then fell to the High Court of Australia to determine the width of the meaning of the words 'external affairs' in s51(xxix) of the Constitution.

CASE STUDY

Commonwealth v Tasmania ('Tasmanian Dam Case') [1983] HCA 21; (1983) CLR 1 (1 July 1983)

Facts (to be read in additional to the summary above): The Tasmanian government authorised by the *Gordon River Hydro-Electric Power Development Act 1982* (Tas) construction of the dam on the Gordon River downstream of its junction with the Franklin River and associated works including the building of a power station. This law came into effect on 12 July 1982. The construction work commenced on 14 July 1982. The Commonwealth Parliament passed the *World Heritage Properties Conservation Act 1983* (Cth) and made regulations pursuant to *National Parks and Wildlife Conservation Act 1975* (Cth) s69, thus rendering it unlawful to construct a dam except with the consent of a Commonwealth Minister.

Legal issue: Whether the *World Heritage Properties Conservation Act 1983* (Cth) was a valid exercise of power by the Commonwealth Government. If valid, is the Commonwealth Act of Parliament inconsistent with the State Act of Parliament, the *Gordon River Hydro-Electric Power Development Act 1982* (Tas).

Decision: Held by majority 4:3. *The World Heritage Properties Conservation Act 1983* (Cth) was a valid exercise of power by the Commonwealth Government.

Section 51(xxix) confers upon the Commonwealth the legislative power necessary for carrying the World Heritage Convention into effect including the power to make laws for procuring the performance within Australia of all or any of the obligations assumed by Australia under the Convention. To the extent that the Tasmanian Act of Parliament the *Gordon River Hydro-Electric Power Development Act 1982* (Tas) was inconsistent with the Commonwealth Act, it was invalid pursuant to s109 of the Constitution.

In his judgment Justice Mason J said:

'Accordingly, it conforms to established principle to say that s51(xxix) was framed as an enduring power and broad in general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900. This circumstance is often overlooked by those who are preoccupied with the impact that the exercise of the power may have in areas of legislation traditionally regarded by the States as their own.'

CASE STUDY CONTINUED...

In his judgment Brennan J said:

'When considering whether obligations had been imposed on Australia by its ratification of the Convention"…. an obligation can be taken to be an obligation for the purposes of s51(xxix) if a failure to act in conformity with those terms is likely to affect Australia's relations with other nations and communities. That can be easily tested. Would those relations be affected if Australia failed to take any step in accordance with Articles 4 and 5 towards the protection and conservation of a property situated in Australia of such outstanding universal value that it is part of the cultural heritage or natural heritage of the world… when a step is needed to avert or minimise damage to the property? Unless Australia were to attribute hypocrisy and cynicism to the international community, only an affirmative answer is possible.'

1. What does s109 of the Constitution state? [C]
2. When the Act of Parliament passed by the Commonwealth government was valid, what was the effect on the Tasmanian government law referred to above? [C]
3. One of the arguments advanced by the Tasmanian Government was that the effect of allowing the Commonwealth Government to enter into any treaty with other countries and then passing domestic legislation, allowed the Commonwealth Government to override a very large amount of state legislation. That is, giving a wide meaning to the words 'external affairs' has the effect of increasing enormously the powers of the Commonwealth Government and reducing the powers of the State governments. What do you think of this argument in light of what Justice Brennan and Justice Mason had to say above? [A] [E]

2.6 CHANGING THE AUSTRALIAN CONSTITUTION

1. The proposed change (amendment) must be passed by a majority (over 50%) in both houses of Federal Parliament

2. Over 50% of Australian voters must vote in favour of the change

3. A majority (four) of the six states must each have over 50% of voters in favour of the change

AUSTRALIAN CONSTITUTION 'CHANGE ROOM'

There have been forty-four referendums held since 1901 and only eight of those have been successful.

The first referendum was in November 1906. The change to the Constitution that was proposed was that elections for both Houses of Parliament, that is the House of Representatives and the Senate, should be held concurrently. This referendum was carried. Every State voted in favour of the referendum and approximately 83% of Australian voters throughout Australia voted yes.

The most successful referenda were put to the Australian voters in April 1967. There was a majority in every state of Australia and almost 91% of Australian voters voted yes to the changes proposed. The referendum involved two main changes to the Constitution. These were changes to s51(xxvi) and the removal of s127 of the Constitution.

Remembering that s51 sets out the powers of the Commonwealth Parliament, s51(xxvi) gave the power to the Commonwealth Parliament to make special laws with respect to the people of any race except the Aboriginal race. Before the referendum, s51(xxvi) and s127 were as follows:

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1900 (UK)

Section 51 Legislative powers of the Parliament

(xxvi) the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws;

127 Aborigines not to be counted in reckoning population

In reckoning the numbers of the people of the Commonwealth, or of a State, or other part of the Commonwealth, aboriginal natives shall not be counted.

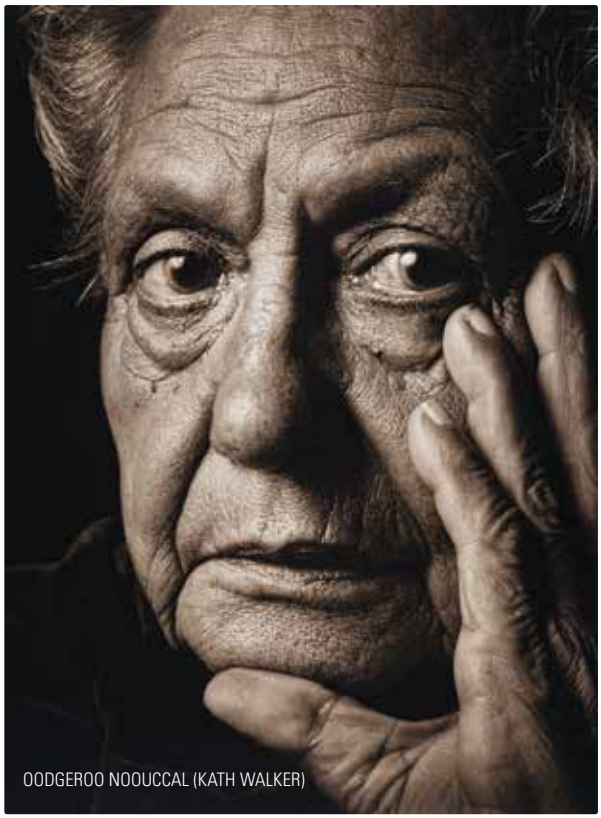
You may wonder why s51(xxvi) was inserted in the Constitution in the first place. The answer which is usually given is that the Commonwealth Parliament should have the power to make laws discriminating against racial groups for the good governance of Australia. You have seen the Commonwealth Parliament exercising such power in the passing of the immigration laws previously referred to concerning the Kanakas in Queensland. It was felt at the time by some that such power should not be exercised against the Aboriginal race in Australia because such laws may well be discriminatory. Generally that argument is the most commonly advanced argument for the insertion of s51(xxvi) in the Constitution. The problem was that the Commonwealth Parliament had no power to make laws for the benefit of Aboriginal persons unless those words were removed from the Constitution. In other words some believed positive discriminatory legislation was prohibited by s51 (xxvi).

The reverse argument was used for many years by many Australians. In particular the Prime Minister of Australia Mr Robert Menzies argued against changing the section stating that if those words were removed, then the Commonwealth Parliament could set up a whole new system of laws dealing only with the Aboriginal race and such laws could be extremely discriminatory. The reverse argument of course was that the Commonwealth Parliament had no power to make laws for the benefit of the Aboriginal persons unless those words were removed from the Constitution. It was only after the long serving Prime Minister Robert Menzies announced his intention to retire (in the second half of 1965) that the referendum gained momentum. The new Prime Minister, Harold Holt announced the holding of the referendum in relation to not only s51(xxvi) but also the removal of s127 which on the face of it in 1960s Australia, clearly severely discounted the role that Aboriginal persons played in Australian life.

Many Aboriginals supported the changes – you might recognise the following two names. Mr Charles Perkins, who was the first Aboriginal man to graduate from university in Australia (Margaret Valadian was the first Aboriginal woman graduate, also in 1966), led the Freedom Rides into north western New South Wales. The Freedom Ride activists blocked the entrance to the Moree swimming pool in 1965 protesting against their racist entrance policies. Aboriginal adults were banned from the pool

and Aboriginal children were only allowed to swim at certain times of the week. There was confrontation between white residents and the activists that required police intervention. The activists, however, led by Charles Perkins prevailed and the Aboriginal residents were allowed to use the pool. Similarly at Walgett Charles Perkins and other activists protested outside the Walgett RSL because of its policy to only accept Aboriginal persons on Anzac Day. The Freedom Rides led by Charles Perkins were a significant event in Australian history.

The other Aboriginal activist who you may recognise was Oodgeroo Noonuccal, a famous poet who was the first Aboriginal Australian to publish a book of verse. She was a Queenslander who was born Kath Ruska (which she changed to Kath Walker when she married in 1943). She was active in Aboriginal rights especially during the referenda held in 1967.



OODGEROO NOOUCCAL (KATH WALKER)

WHAT DO YOU THINK?

1. The two main arguments for both the removal of the words '…other than the Aboriginal race in any State…' and the retaining of those words were based on what was to be good for the Aboriginal people of Australia. What were those two arguments? [C] [A]

2.7 SEPARATION OF POWERS

RESIDUAL POWERS

An important feature of Australia's democratic government established by the Constitution is its adherence to the separation of powers doctrine, which aims to keep separate the powers of legislature, the powers of the executive and the powers of the judiciary, such that each of the those three groups works within its defined area of responsibility, keeping a check on the action of the others. It is no coincidence that the first three chapters of the Constitution are:

Chapter I: The Parliament.

Chapter II: The Executive Government.

Chapter III: The Judicature.

The power to make (the Parliament) put into effect (the Executive) and to interpret (the Judiciary) the laws of Australia are divided between these three groups.

SEPARATION OF POWERS

An important feature of Australia's democratic government established by the Constitution is the separation of powers doctrine, which **aims to keep separate the powers of making, implementing and interpreting law**.

1. The **making of law** is called **legislative power** and rests with the representative governments of the Commonwealth and States, when assembled as parliaments.

2. The **implementing or carrying out of law** is called **executive power** and is handled by the Executive or Cabinet, consisting of the Governor and the Ministers of the Government in the States, and by the Governor General and the Commonwealth Ministers federally. There is an overlap between the legislative and executive powers in our electoral system, as the Executive is made up totally of Ministers elected from the ranks of the political party which gains the greater number of seats in parliament after an election. Police forces and other agencies of enforcement, for example, are directed by the Minister responsible to parliament for the effective maintenance of law and order. This party system of government means that a relatively small group of Cabinet Ministers, largely to the exclusion of other members of parliament, controls what laws will be proposed and passed, as well as being responsible for overseeing public servants in their execution of their duties. This makes a fiction of the purity of the Westminster principle, embodied in Commonwealth and State Constitutions, of the separation of government powers.

   Adding to the fiction is the fact that the High Court judges also are appointed by the Governor-General who is part of the Executive. This also constitutes an overlap of powers. One expects that such judges are appointed on merit and such appointments have no connection whatsoever to the political outlook of a potential judge. If it is otherwise, then there is no effective separation of the executive and judicial powers. As this text is being written there is furore about the appointment of Supreme Court Judges in America by the President of the United States of America, who exercises executive power. It is asserted by the Democrats that the judges being nominated by the President of the United States have political views in line with conservative and/or Republican viewpoints. The President nominated Judge Brett Kavanaugh to become a Justice of the Supreme Court of the United States in mid-2018. The United States Constitution provides that after nomination by the President, a confirmation is required before the nominee is appointed to the Supreme Court by a vote in the Senate. There was a division in the Senate largely on political party lines with the Democrats believing that he would not be a suitable nominee and with the Republicans largely stating that he would be. On October 6 2018 the Senate voted 50 to 48 to confirm Judge Kavanaugh's nomination to the Supreme Court. **In Australia there is no confirmation process by either the House of Representatives or the Senate with respect to nominations to the High Court of Australia. Such persons appointed to the High Court of Australia are appointed by the Governor-General upon advice from the Executive.**

3. The **interpretation of law** is called **judicial power** and is carried out by the the courts and tribunals. Judges are prohibited from being members of parliament or of the executive arm of government. The *Boilermakers'* case (*Attorney-General (Commonwealth) v R; ex parte Boilermakers Society of Australia* (1957) 95 CLR 529) is an important High Court case authority that stresses the vital importance of maintaining the independence of judges from the influence of the parliament or the executive in their passing of judgments based upon their interpretation of the law.

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

Ch 7

CASE STUDY

Wilson v Minister for Aboriginal & Torres Strait Island Affairs ("Hindmarsh Island Bridge case") [1996] HCA18

Facts: The Commonwealth Government in 1984 passed the *Aboriginal & Torres Strait Island Heritage Protection Act 1984* (Cth). The purpose of the Act was to preserve and protect from injury or desecration, areas in Australia and in Australian waters, which were of particular significance to Aboriginals. To give effect to the purposes of the Act the Minister under the Act was given the power to make a declaration under s10, to protect and preserve such areas from injury or desecration. The Minister had received an application seeking the preservation or protection of Goolwa and Hindmarsh Island and the surrounding waters, forming the mouth of the Murray River, in South Australia. In particular one of the actions being proposed was the building of the Hindmarsh Island Bridge. This was opposed by Aboriginal and other Australians. When the Minister received such an application, s10 allowed the Minister to nominate a person to provide a report with respect to those proposals. The Minister nominated Justice Matthews of the Federal Court of Australia to provide the report. Justice Matthews had agreed to provide the report. It was common ground that in providing the report Justice Matthews (she) would not be exercising any judicial function but was simply providing a report. The report was to be provided after considering representations by interested parties setting out the particular significance of the area to Aborigines, the nature and extent of the threat or injury to that area, and the effects of the making of any declaration visited on the property interests of persons other than Aborigines. The report was to make recommendations for any prohibitions and restrictions to be put into effect by the Minister's declaration.

Legal issue: Was the preparation of the report by the judge constitutionally incompatible with the holding of office as a Federal Court of Australia judge?

Decision: The Court held by majority that the appointment of the judge by the Minister under s10 was invalid because it was in breach of the separation of power provisions in the Constitution.. The majority said:

1. The statute must be examined in order to determine first whether the function (to be performed by the judge) is an integral part of or is closely connected with, the functions of the Legislature or the Executive. If the function is not closely connected with the Legislature or the Executive no constitutional incompatibility occurs.

2. The power confirmed by s10 of the Act '*is the power conferred on the Minister to make a declaration*'. The report is a condition precedent to the exercise of the Minister's power to make a declaration. The function (of the report…) is an integral part of the process of the Minister's exercise of power. The performance of such a function (that is writing the report) by a judge places a judge firmly in the echelons of administration. The judge is placed in a position equivalent to that of a ministerial advisor.

3. The report had to look at the competing interests of Aboriginal applicants and others, whose proprietary or pecuniary interests are liable to be affected by the making of a declaration. Such a determination of these competing interests is essentially a political function. The reporter (in this case the judge) may choose to act independently of the Minister in determining which of the competing interests are to be preferred. But the Act does not require the reporter to disregard ministerial instruction, advice or wishes in preparing the report. If the Minister has no policy instructions to give to the reporter, the reporter himself or herself then must make political decisions. For example: '*the extent of the area that should be protected', 'the prohibitions and restrictions to be made'* and *'the duration of the period of the declaration'*. These decisions which would need to be made by the reporter are political in character. The function of reporting is therefore incompatible with the holding of office as a judicial officer because the act of reporting breaches the separation of powers set out in the Constitution.

1. Where is Hindmarsh Island? [C]
2. What is meant by saying that the report was an integral part of the process of the Minister's exercise of power? [C] [A]
3. What political decisions would necessarily have to be made by the reporter? [C] [A]
4. Given that the judge was not acting as a judge but as a reporter, do you think she should have been removed? [E]

REVIEW

1. Describe and explain the following key terms: [C]
    a. The Australian Constitution
    b. Separation of powers doctrine
    c. Referendum
2. Describe and explain the following key sections of the Australian Constitution: [C] [A]
    a. s51
    b. s109
    c. s128
3. Explain the different factors that supported federation to occur. [A]
4. Describe how the powers between the States and Commonwealth are divided. [C]
5. Describe the role of the High Court of Australia. [C]
6. Describe and explain the challenges of changing the Australian Constitution, locating examples of successful and unsuccessful past referenda to support your response. [C] [A]
7. What are the three elements in Austlralia's system of government that shoud be kept separate? [C]

TOPIC 1: GOVERNANCE IN AUSTRALIA

CHAPTER 3: AUSTRALIAN PARLIAMENTARY DEMOCRACY-REPRESENTATIVE GOVERNMENT

FOCUS SUBJECT MATTER

3.1 THE NATURE OF DEMOCRACY
3.2 THE EVOLUTION OF DEMOCRACY
3.3 THE AUSTRALIAN ELECTORAL SYSTEM
3.4 AUSTRALIAN ELECTED GOVERNMENTS
3.5 CURRENT ISSUES OF REPRESENTATION

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the difference between direct democracy and representative democracy;
- the nature of representative democracy in Britain and Australia prior to federation;
- the nature of representative democracy introduced by the *Australian Constitution*;
- the nature of suffrage (entitlement to vote) set out in legislation after Federation;
- the levels of government existing in Australia, and their present form;
- how governments were able to influence voting systems to their advantage;
- the need for, and formation of, independent electoral commissions in the Commonwealth and the States of Australia; and
- the extent of involvement of Aboriginal and Torres Strait Islanders, and women in Australian representative democracy.

3.1 THE NATURE OF DEMOCRACY

Democracy is:

> *government by the people, a form of government in which the supreme power is vested in the people and exercised by them or by their elected agents under a free electoral system.*

SOURCE: MACQUARIE DICTIONARY, SECOND EDITION, PUBLISHED 1991

People who live together in communities have always needed some way of making decisions with which the members of the community agree. Or at least, a majority of the members agree with the decision, and those who do not agree are accommodated in a way which is satisfactory to everyone. As you can imagine, in a small community, it is probably much more likely that the members of the community are well-informed about decisions so that they can participate in a decision in a knowledgeable way. Imagine, for example, if your drama class is expected to produce an item for a school concert and the class is asked to participate in the making of a decision about your performance. Unless your teacher is a dictator, which is unlikely, the class will probably participate in the choosing of the item. If you and your teacher choose some options to consider and a vote is held which determines the item you will do, this would be an example of what we call **direct democracy**. All the eligible members of your class are entitled to vote to choose the item.

So far as the writer is aware ancient Greece was the world's first working democracy. Records from the sixth century BC establish that the male citizens of the city-state of Athens all voted in decisions that concerned them. (Evidently, eligible voters did not include slaves and women). Suppose in our example above of the drama class, it was decided that a committee formed from the members of the class should make a decision on behalf the class to choose the item for performance. Can you think of reasons why this might be the case? Do you think it might be easier to discuss options and whether they were suitable or not? When it became difficult in ancient Greece for every citizen to be present at every vote, a number of male citizen voters were chosen each day to make decisions for a time for the entire city-state. This was an early form of representative democracy.

WHAT DO YOU THINK?

Some characteristics of democratic decision-making are able to be identified from the drama class example. We have listed these below. You should examine them critically and decide if they are appropriate. You may prefer to restate them differently.

- Equality in voting
- Effective participation
- Informed understanding of the issue
- Control of the process (agenda)
- Involvement (inclusion of all members of the class)

Indicate why you think these describe democracy in action, and add any other criteria which occurs to you as being relevant. Give your reasons. [A] [E]

3.2 THE EVOLUTION OF DEMOCRACY

Ch 2.1

To understand how democracy works in Australia today, it is useful to look at some features of the history of English democracy and of the history of the States in Australia prior to federation. This is because they provided examples for the founding fathers when they were writing the Australian Constitution and because the colonial states were to become part of the Federation of Australian States thereby forming the Commonwealth of Australia. Of course, these were not the only examples of democratic governments to which our founding fathers could look. They looked also at the government of the United States of America.

ENGLISH DEMOCRACY

Magna Carta of King John, AD1215

John, by the grace of God, King of England, lord of Ireland, Duke of Normandy and Aquitaine, and count of Anjou, to the archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs, stewards, servants, to all his bailiffs and faithful subjects, greeting…

1. In the first place we have conceded to God, and by this our present charter confirmed for us and our heirs for ever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate, and we wish that it be thus observed…

We have also granted to all free men of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever…

38. In future, no bailiff shall place a man on trial upon his own unsupported words, without credible witnesses being produced to support his word…

39. No freeman shall be arrested or imprisoned or deceased or outlawed or exiled or in any other way harmed. Nor will we (the King) proceed against him, or send others to do so, except according to the lawful sentence of his peers and according to the Common-Law…

45. We will appoint as justices, constables, sheriffs, or bailiffs only those who know the law of the realm and who wish to observe it as well…

51. As soon as peace is restored, we will banish from the kingdom all foreign- born knights, cross-bowmen, their attendants, and mercenaries who have come with horses and arms, to the kingdom's detriment…

An oath has been sworn, on the one hand by us and on the other by the Barons, that all the aforesaid provisions shall be observed in good faith and without evil intent.

SOURCE: THE MAGNA CARTA OF ENGLAND, 1215, WWW.MAGNACARTAPLUS.ORG, DOWNLOADED 5 MAY 2019 (EXCERPTS)

The seeds of English democracy were sown in the *Magna Carta* 1215, which attempted to give the people a voice and to establish rights. The members of parliament in the English Parliament were not elected by a vote of the English population for many years. The very early parliaments represented those chosen by knights and by business people who had the funds to acquire seats in parliament. Gradually the rules changed so that members of parliament were elected by voters, but there were restrictions on who could vote. Initially only male property owners were allowed to vote. Significant changes were made in 1832 by an Act of Parliament called the *Reform Act*. The Act included the following:

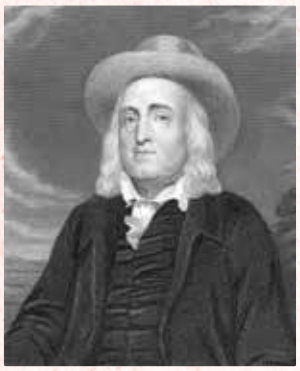
- an increase to the number of voters by **allowing men who rented property above a certain value to vote,** which increased enfranchisement to over 1 million; and
- **changing the mediaeval boundaries of counties and boroughs,** giving a fair representation to the cities that had sprung up during the Industrial Revolution. Before this electorates were of wildly

varying size. Yorkshire had more than 20,000 people, Westminster 12,000, Dunwich 32, and Gatton 7 voters, but each electorate only had one member of Parliament.

Campaigns for women's suffrage (the right to vote) go as far back as 1817 in England, when the utilitarian philosopher Jeremy Bentham wrote *Plan of Parliamentary Reform, in the Form of the Catechism*, with… The Lawbook Exchange, Ltd., advertised Jeremy Bentham's book in the terms set out in the following activity. From 1817, there was a continuous campaign for women to get the vote in England. In 1893 New Zealand became the first self-governing country to allow women to vote. In the early 20th century the Women's Social and Political Union (called suffragettes in a less than complimentary way in a newspaper article at the time) took to direct, and sometimes violent action. They chained themselves to railings, there were arson attacks and even bombings. Many were imprisoned, and some went on hunger strikes. One young woman, Emily Davison, died at the Epsom Derby in 1913.

PRACTICAL APPLICATION

PLAN OF PARLIAMENTARY REFORM, IN THE FORM OF THE CATECHISM, WITH…



Bentham, Jeremy

Bentham, Jeremy. *Plan of Parliamentary Reform, in the Form of the Catechism, with Reasons for Each Article. With an introduction, Shewing the Necessity of Radical, and the Inadequacy of Moderate Reform.* Originally published: London: T.J. Wooler, 1818. Reprinted 2002 by the Lawbook Exchange, Ltd.…

The legendary law reformer points his pen directly at the British class system as it is manifested in the parliament and its processes, calls for expansive democratic reform in the form of 'democratic ascendancy', and praises the United States Constitution. After publication of this volume in 1818, his plea for universal suffrage was criticised by the Edinburgh Review for the expectation that it would lead to attacks on property.

THE EPSOM DERBY (1913)-EMILY DAVISON TRAMPLED BY KING'S HORSE

Emily Davison ran in front of the King's horse, Anmer, holding the banner of the Women's Social and Political Union, trying to reach the horse's bridle and stop it from racing. The horse fell, dislodging the jockey, but Emily Davison was critically injured. The horse and jockey recovered.

SOURCE: U-TUBE/BRITISH PATHE PICTORIAL NEWSREEL

The *Representation of the People Act 1918* (UK) gave women the vote for the first time in England and removed all property restrictions from male voters.

1. In 1901, when the Australian Federation was established, describe the example the founding fathers would have received, about the nature of representation in the English Parliament in accordance with voting rights. [C]

2. There were no women in the English Parliament until after 1918. Do you think that giving women the vote would change this? (In England the first woman to be elected to parliament, was Nancy Astor, representing Plymouth Sutton, in 1920) [C] [E] [R]

STATE DEMOCRACY IN AUSTRALIA BEFORE FEDERATION

In the decade prior to the *Commonwealth of Australia Constitution Act 1900* (Cth), all Australian states had been granted responsible government by the British government, and had passed laws establishing voting systems for Upper and Lower Houses of Parliament. Systems of representation were not the same throughout all of the states of Australia, but were sufficiently similar to enable the founding fathers to negotiate an agreed draft Australian Constitution. The diagram below reflects the electoral system of each state in 1900.

STATE ELECTORAL SYSTEMS (CIRCA 1900)

NSW	**Lower House:** All adult males resident in NSW could vote except paupers, prisoners and persons of unsound mind. Women in NSW could not vote in NSW elections or Commonwealth elections until the *Women's Franchise Act 1902* (NSW) and *Commonwealth Franchise Act 1902* (Cth) were passed. Aborigines could not vote.	**Upper House:** indirectly elected by the members of the Lower House. Aborigines were not eligible to be elected.
QLD	**Lower House:** All adult males resident in QLD could vote except paupers, prisoners, and persons of unsound mind. Adult males owning property in more than one electorate could cast additional votes where they owned property. Women in QLD could not vote in QLD elections or Commonwealth elections until 1905. Aborigines could not vote.	**Upper House:** The Legislative Council members were appointed by the Governor, not elected.
SA	**Lower House:** All adult males resident in South Australia including Aboriginal males were eligible to vote. Adult women were eligible to vote in 1894.	**Upper House:** Voting for the legislative Council was restricted to owners or occupiers of property worth a minimum amount. Voting was not open to all adults until 1973.
VIC	**Lower House:** All adult male ratepayers resident in Victoria could vote. Women and Aborigines were not eligible to vote. Women received the vote in 1911.	**Upper House:** All adult male ratepayers resident in Victoria could vote.
TAS	**Lower House:** All adult male ratepayers could vote. Women and Aborigines could not vote.	**Upper House:** All adult male ratepayers could vote. Women and Aborigines could not vote.

Against the above background, the Australian Constitution enabled the federal government to establish a representative system of government. In 1901 the first federal election of the Commonwealth Parliament was held under state legislation and Edmund Barton became Australia's first Prime Minister. The Commonwealth Parliament met for the first time in Melbourne on 9 May 1901 with 75 members of the House of Representatives and 36 senators (6 for each state). **The voting rights of each State applied at the first federal election.** This meant that disqualification varied according to the state in which an individual resided. Most men over 21 years could vote in New South Wales, Victoria, Queensland and Tasmania. In South Australia and Western Australia, men and women over 21 could vote. At the first Commonwealth elections, voting was voluntary in all states.

WHAT DO YOU THINK?

If you were a member of the new Commonwealth Parliament in 1901 what changes do you think you would want to make to the voting system to ensure that there was a representative democracy operating in Australia which was fair to all voters? [C] [A] [E]

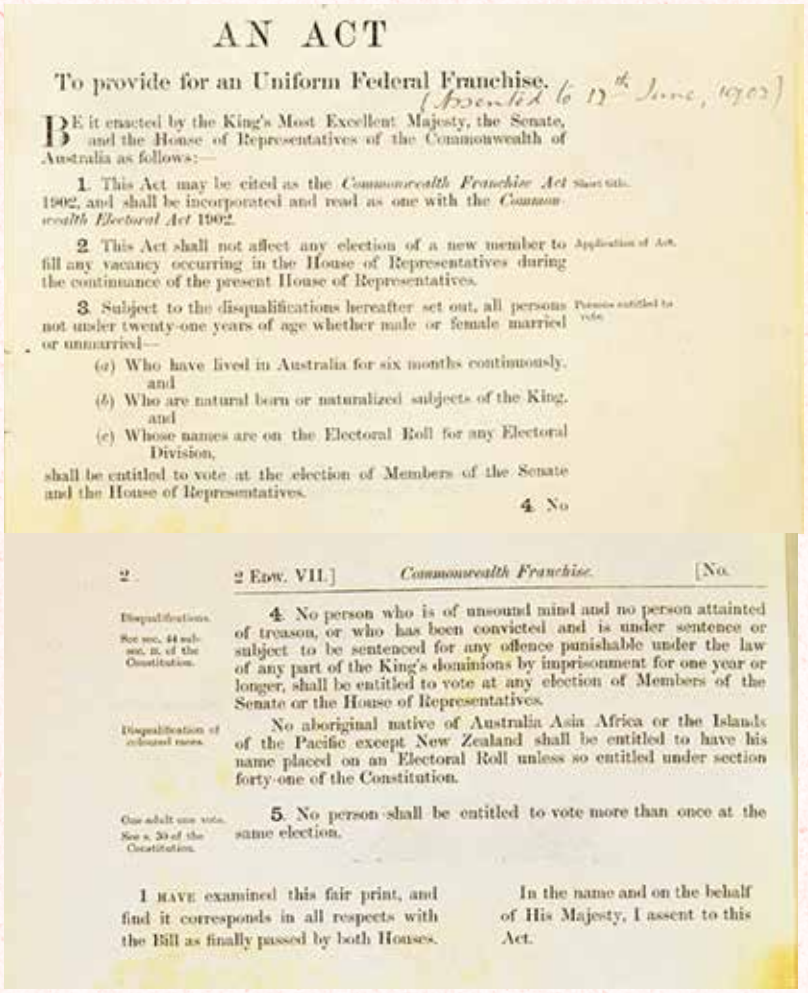
3.3 THE AUSTRALIAN ELECTORAL SYSTEM

One of the first things that the new Commonwealth Parliament did was to pass legislation determining who could vote, and setting up electorates that ensured that whether you voted in any of the Australian states, that as far as possible, **the value of your vote was comparable**. We have already looked at the theory of representative democracy and you can see that this is necessary for a representative government for the whole country to work satisfactorily. The other issue is who is entitled to vote. As you can see above, relying on the persons whom each state was prepared to allow the vote, differed from state to state. As a consequence, the Commonwealth government passed the *Commonwealth Franchise Act 1902* (Cth) and the *Commonwealth Electoral Act 1902* (Cth).

PRACTICAL APPLICATION

COMMONWEALTH FRANCHISE ACT 1902 (CTH)

SOURCE: HTTPS://WWW.FOUNDINGDOCS.GOV.AU



AN ACT

To provide for an Uniform Federal Franchise. [Assented to 12th June, 1902]

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia as follows:—

1. This Act may be cited as the *Commonwealth Franchise Act* 1902, and shall be incorporated and read as one with the *Commonwealth Electoral Act* 1902. Short title.

2. This Act shall not affect any election of a new member to fill any vacancy occurring in the House of Representatives during the continuance of the present House of Representatives. Application of Act.

3. Subject to the disqualifications hereafter set out, all persons not under twenty-one years of age whether male or female married or unmarried— Persons entitled to vote.

(a) Who have lived in Australia for six months continuously, and

(b) Who are natural born or naturalized subjects of the King, and

(c) Whose names are on the Electoral Roll for any Electoral Division,

shall be entitled to vote at the election of Members of the Senate and the House of Representatives.

4. No

2 2 Edw. VII.] *Commonwealth Franchise.* [No.

Disqualifications. See sec. 44 sub-sec. ii. of the Constitution.

4. No person who is of unsound mind and no person attainted of treason, or who has been convicted and is under sentence or subject to be sentenced for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer, shall be entitled to vote at any election of Members of the Senate or the House of Representatives.

Disqualification of coloured races.

No aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution.

One adult one vote. See s. 30 of the Constitution.

5. No person shall be entitled to vote more than once at the same election.

I HAVE examined this fair print, and find it corresponds in all respects with the Bill as finally passed by both Houses.

In the name and on the behalf of His Majesty, I assent to this Act.

PRACTICAL APPLICATION CONTINUED...

COMMONWEALTH ELECTORAL ACT 1902 (CTH)

SOURCE: HTTPS://WWW.FOUNDINGDOCS.GOV.AU

PART III.—ELECTORAL DIVISIONS.

Divisions.

12. Each State shall be distributed into Electoral Divisions equal in number to the number of Members of the House of Representatives to be chosen therein, and one Member of the House of Representatives shall be chosen in each Division.

Commissioner. See N.S.W. 1893, No. 28 s. 5.

13. The Governor-General may appoint one person in each State to be the Commissioner for the purpose of distributing the State into Divisions in accordance with this Act.

Term of office.

14. The Commissioner shall hold office during the pleasure of the Governor-General.

Quota. N.S.W. ib. s. 17 sub-sec. (1).

15. For the purposes of this Act a quota shall be ascertained in each State as follows :—

The whole number of electors in each State, as nearly as can be ascertained, shall be divided by the number of Members of the House of Representatives to be chosen therein.

Until rolls are compiled all persons qualified to have their names placed on a roll shall be deemed to be electors for the purposes of this Part of this Act.

Matters to be considered in distribution of seats. N.S.W. ib. s. 17 (iii.)

16. In making any distribution of States into Divisions the Commissioner shall give due consideration to—

(*a*) Community or diversity of interest,
(*b*) Means of communication,
(*c*) Physical features,
(*d*) Existing boundaries of Divisions ;

and subject thereto the quota of electors shall be the basis for the distribution, and the Commissioner may adopt a margin of allowance, to be used whenever necessary, but in no case shall such quota be departed from to a greater extent than one-fifth more or one-fifth less.

Notice of proposed distribution.

17. Before reporting on the distribution of any State into Divisions the Commissioner shall cause a map of each proposed Division to be exhibited at post-offices in the proposed Division, and shall invite public attention thereto by advertisement in the *Gazette*.

Objections.

18. Objections or suggestions in writing may be lodged with the Commissioner not later than thirty days after the first publication of the proposed distribution, and the Commissioner shall consider all objections and suggestions so lodged before making his report.

Report of Commissioner.

19. The Commissioner shall forthwith, after the expiration of the thirty days above mentioned, forward to the Minister his report upon the distribution of the State into Divisions, and the number of electors residing in each proposed Division, together with a map signed by him showing the names and boundaries of each proposed Division.

Report to be laid before Parliament. N.S.W. 1893, No. 28 s. 15.

20. The report and map shall be laid before both Houses of Parliament within seven days after its receipt if the Parliament is in session, and if not then within seven days after the commencement of the next session.

Proclamation of Divisions. N.S.W. ib. s. 16.

21. If both Houses of Parliament pass a resolution approving of any proposed distribution the Governor-General may by proclamation declare the names and boundaries of the Divisions, and such Divisions shall until altered be the Electoral Divisions for the State in which they are situated.

Fresh distribution.

22. If either House of Parliament passes a resolution disapproving of any proposed distribution, or negatives a motion for the approval of any proposed distribution, the Minister may direct the Commissioner to propose a fresh distribution of the State into Divisions.

Redistribution.

23. A redistribution of any State into Divisions shall be made in the manner hereinbefore provided whenever directed by the Governor-General by proclamation.

PRACTICAL APPLICATION CONTINUED...

1. Describe and explain the purpose of the *Commonwealth Franchise Act 1902* (Cth) (the Franchise Act) and the *Commonwealth Electoral Act 1902* (Cth) (the Electoral Act). [C] [A] [E]
2. Describe who can vote according to s3 of the *Franchise Act*. [C]
3. Describe and explain how according to s12 and s15 of the *Electoral Act* the members of the House of Representatives are distributed into Electoral Divisions in the different states of Australia. [C] [A]
4. Describe the matters which s16 of the *Electoral Act* requires the Commissioner to take into account when determining the boundaries of Electoral Divisions in each state. Are there any other matters which you consider the Commissioner should take into account in the distribution of seats? [C] [A]
5. Describe the process which the *Electoral Act* sets out in ss17-23 to be followed so that Parliament can approve a redistribution in any state of the divisions whenever directed by the Governor-General by proclamation. [C]
6. Do you think that it would be a fairer system, less open to criticism, if the redistribution of any State into Electoral Divisions, was totally independent from, or more independent from the Parliament? Give your reasons? [C] [A] [E]

RESEARCH

It is clear that Aboriginal and Torres Strait Islanders (First Nation Peoples) did not get the vote in 1902. They were not regarded as citizens of Australia. Research online to find out when in fact in the States and Territories, and in the Commonwealth, First Nation Peoples became entitled to vote just like everyone else. In your research, were you able to identify any explanation as to why it took so long for First Nation Peoples to be entitled to vote? [C] [A]

ELECTORAL COMMISSIONS

All Australian States and Territories, and the Commonwealth of Australia, have established Electoral Commissions which now independently carry out the necessary activities to ensure that all governments in Australia are elected by fair systems of representation, without any political interference. These electoral commissions were not established at the same time for various reasons, as in some cases political control and interference ensured that different political parties stayed in power. This was the case in Queensland for many years and we will see what occurred when the Queensland Electoral Commission was established. First, however, we will look at the Australian Electoral Commission (AEC) established by the *Commonwealth Electoral Act 1918* (Cth).

PRACTICAL APPLICATION

The role of the AEC is

> *to deliver the franchise: that is, an Australian citizen's right to vote, as established by the Commonwealth Electoral Act 1918.*

On 21 February 1984 following major amendments to the Commonwealth Electoral Act 1918 (Cth) the AEC was established as an independent statutory authority.

PRACTICAL APPLICATION CONTINUED...

OUR PURPOSE

The AEC is funded to deliver one key outcome:

> *maintain an impartial and independent electoral system for eligible voters through active electoral roll management, efficient delivery of polling services and targeted education and public awareness programs.*

ELECTORAL INTEGRITY FRAMEWORK

In 2014 the AEC created the Electoral Integrity Unit (EIU), with a broad agenda to identify opportunities to enhance integrity in the AEC's practices, processes and policies.

The Framework provides that the AEC's enduring commitment to integrity is based on the four elements of integrity: **accuracy, completeness, entitlement and capability**. It is a cornerstone document for the AEC and is intended to positively frame the ongoing work of the EIU. It affirms the AEC's enduring commitment to integrity in every facet of our operations.

SOURCE: HTTPS://AEC.GOV.AU (DOWNLOADED 6 FEBRUARY 19)

1. How does the AEC intend to maintain an impartial and independent electoral system? [C]
2. Consider the following categories of voters to whom the AEC must deliver polling services and go online to their website at https://www.aec.gov.au which will tell you their initiatives which put into practice their integrity commitment. **Persons of impaired vision (including blind persons), persons who are elderly and unable to attend a polling booth, persons in remote locations, persons with language and reading difficulties (literacy), the First Nation Peoples.**

Outline the initiatives which you find the AEC has taken to meet the needs of voters to enable them to exercise their right to vote. Can you think of additional initiatives which might be necessary? Are you satisfied that the initiatives outlined satisfy the objectives of the AEC? [C] [A] [E]

In the Australian democracy, we place a very high value on achieving results at elections which ensure that the parliamentarians that are elected, truly represent the communities that they serve. We have compulsory voting, we have independent and impartial commissions designed to make participation in voting as easy and painless as possible. The AEC clearly has very good intentions and no doubt achieves a great deal. Notwithstanding, it is important to look at the outcome of its efforts as it seeks to involve **Aboriginal and Torres Strait Islander Peoples** in the political process, as workers for the AEC in elections in First Nation Peoples communities, and as voters.

INQUIRY FOCUS

ARE ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES INVOLVED IN AUSTRALIAN ELECTIONS?

PRACTICAL APPLICATION

ONLY 58% OF INDIGENOUS AUSTRALIANS ARE REGISTERED TO VOTE. WE SHOULD BE ASKING WHY.

The passage to Indigenous enfranchisement has been fraught with hard-won incremental steps but the status quo in 2016 should give us all pause for thought.

SOURCE: PAUL DALEY, THE GUARDIAN, HTTPS://WWW.THEGUARDIAN.COM (30 JUNE 2016) (EXCERPTS)

The last week of the Federal election campaign opened with news that Indigenous people in Western Australia's Kimberley region are seven times more likely to take their own lives than other Australians.

… there is no doubt that the decision to grant Indigenous Australians the vote, state-by-state and then federally, was driven by assimilationist ideology-that Aboriginal people who integrated with the rest of Australia should, in theory, therefore enjoy the same civil and political rights.

In 1961, a federal select committee recommended (after extensive consultation over the 'capacities' of Aboriginal and Torres Strait Islander people to vote responsibly; no such consideration was afforded the capacity of non-Indigenous voters to cast their ballots responsibly) first Australians be enfranchised.

The committee chairman, HG Pearce, said the 1962 legislative change to the *Commonwealth Electoral Act1918* (Cth) would 'be a large step forward in the **assimilation** and **integration** of the Aboriginal people'

As Murray Chapman, Clinical Director of Kimberly Mental Health and Drug Service, wrote about the suicides in his area …

> *prior to colonisation and all that came with it, suicide appears to have been unknown in traditional Indigenous Society. Indigenous suicide has been characterised as one potential outcome of an intergenerational transmission of mass trauma-including massacres, being pushed off traditional lands, policy resulting in the loss of parent/child attachments (Stolen Generations), social inequality and institutionalised racism.*

ELECTION 2016: HALF OF NT'S INDIGENOUS POPULATION NOT ENROLLED TO VOTE, ELECTORAL COMMISSION SAYS

SOURCE: PM BY FELICITY JAMES, HTTPS://WWW.ABC.NET.AU/NEWS (27 MAY 2016) (EXCERPTS)

Half of the Northern Territory's Indigenous population is not enrolled to vote in the upcoming federal election, The Australian Electoral Commission has estimated. AEC NT electoral officer Mick Sherry said community elders have told the staff the electoral system lacks relevance for many Indigenous people in the NT. 'We are of the view that only about 50% of Indigenous people are currently on the roll at the moment,' Mr Sherry said.

Mr Sherry said enrolments remain low despite a small NT-based team dedicated to fixing the problem.

'We're putting significant resources into this area,' he said.

PRACTICAL APPLICATION CONTINUED...

RECONCILIATION ACTION PLAN 2016-2018

SOURCE: AUSTRALIAN ELECTORAL COMMISSION, HTTPS://WWW.AEC.GOV.AU (DOWNLOADED 6 FEBRUARY 2019) (EXCERPTS)

Endorsements

Message from the Electoral Commissioner

Our overarching goal is for our staff to work together with the broader community to address Aboriginal and Torres Strait Islander disadvantage in electoral participation.

This Reconciliation Action Plan applies the lessons learned from our first plan. It outlines the actions we will take on targets we have set to increase opportunities for our Aboriginal and Torres Strait Islander staff and to strengthen and sustain our relationships with communities.

Staff endorsement

Message from Brett Hill

I am proud to support and endorse the Australian Electoral Commission's Reconciliation Action Plan. I have participated in the development and design of the Plan and am delighted to be part of an agency that shares a strong commitment to reconciliation.

Through our individual and collective journeys of increased awareness and understanding of the disadvantage and circumstances of Aboriginal and Torres Strait Islander peoples, together we can make positive decisions that permanently change how we interact and acknowledge our responsibility for reconciliation. This Reconciliation Action Plan uses two years to build relationships, respect diversity and provide opportunities. Our vision for reconciliation is to sit together, talk together and walk together in a positive way and to make informed decisions for a better tomorrow.

Brett is a Noongar man from the wheat belt town of Pingelly in Western Australia. He now lives with his family in the suburbs of Mandurah, south of Perth. Throughout his life Brett has been committed to reconciliation and raising awareness and understanding of the disadvantage and circumstances of Aboriginal and Torres Strait Islander peoples.

1. What proportion of the Northern Territory's Indigenous population was enrolled to vote in the 2016 Federal election? [C]
2. According to Paul Daley of the Guardian, what proportion of Australia's Indigenous population was registered to vote in the 2016 Federal election? [C]
3. What were the reasons for the low level of enrolment to vote by Indigenous Australians in the 2016 federal elections? [C] [A] [E]
4. What organisation is responsible for ensuring that voters are enrolled (including Indigenous Australians) for federal elections? [C]
5. What is the response by Mr Sherry of the Australian Electoral Commission to the information that half of the Northern Territory's Indigenous Australian population is not enrolled to vote? Do you consider his response satisfactory? [C] [A] [E]
6. If you were in charge of the operations of the Australian Electoral Commission in the Northern Territory, what would you recommend in order to achieve a greater rate of participation in voting in federal elections? [A] [E] [R]

THE QUEENSLAND GERRYMANDER

We have seen that fairness in elections is substantially determined by who is entitled to vote, and the procedures put in place to ensure equal representation. In the process we have referred briefly in the historical discussion of the evolution of English democracy, to the situation where electorates or divisions which elected members of parliament had vastly different numbers until there was reform. This clearly meant that the **value of a vote** cast by an elector varied from electorate to electorate.

GERRYMANDER IS DEFINED AS FOLLOWS:

> *an arbitrary arrangement of the political divisions of the constituency, made so as to give one party an unfair advantage in elections.*

SOURCE: MACQUARIE DICTIONARY, SECOND EDITION, PUBLISHED 1991

This clearly means, so far as Queensland is concerned, to set the boundaries of electorates so that one political party is advantaged over another. All major political parties have been guilty of doing this in Queensland, particularly since 1949.

PRACTICAL APPLICATION

ELECTORAL BOUNDARIES

SOURCE: HTTPS://WWW.PARLIAMENT.QLD.GOV.AU,(DOWNLOADED 28 JANUARY 2019) (EXCERPTS)

… In 1949, the Hanlon Labor government increased the Parliament to 75 and introduced a controversial zonal system, whereby the state was divided into four zones-Metropolitan, South-eastern, Northern and Western-with vote weightings ranging from 4000 electors in rural zones to 12,000 in the metropolitan. After the defeat of Labor in 1957, the Country-Liberal coalition, which originally opposed zonal introduction, decided to retain the system and, in 1958, increased the Parliament to 78 members, but reduced the number of zones to 3.

Under Premier Bjelke-Peterson, the four-zonal system was resurrected in 1971 and further refinements on this basis occurred in the redistributions of 1977 and 1985. The number of members also increased to 82 in 1977 and 89 in 1985. Over this period, many criticisms focused on the vote weighting as between the country and the city zones, as well as the artificial demarcation of rural areas away from the provincial cities. However, in 1989 the ALP won government on the electoral boundaries allocated by the 1985 redistribution.…

Electoral reform

In 1989, the Fitzgerald Commission of Inquiry Report recommended an overhaul of Queensland's electoral laws.. the Goss Labor Government… passed legislation and established the Electoral Commission which eliminated the zonal system, reintroduced optional preferential voting, and provided for future redistributions which would maintain electoral equality.

PRACTICAL APPLICATION

THE 1972 ELECTION

PARTY	VOTES CAST	PERCENTAGE	SEATS WON	PERCENT OF SEATS
Labor	424,002	46.7	33	40.2
Liberal	201,596	22.2	21	25
Country	181,404	20	26	31.1
DLP	69,757	7.7	0	0
Independent	23,951	2.6	0	2.4
Other	6236	0.7	0	0
Invalid	14,817	1.6	0	0

1. What was the zonal system introduced by the Hanlon government in 1949? Why was it controversial? Do you think it was a fair system of electoral distribution? Give your reasons. [C] [A] [E]

2. What were the main criticisms of the zonal system used during the Bjelke-Peterson era? Do you think these criticisms were valid and fair? [C] [A] [E]

3. In the table 'THE 1972 ELECTION':

   3.1 Which party received the greatest number of votes? [C]

   3.2 How many votes, on average, did it take for each of the Labor, Liberal, and Country Parties to win a seat in the Queensland Parliament? Which of the parties does this comparison suggest had an unfair advantage electorally? (The Liberal and Country parties formed a coalition in government). [C] [A] [E]

ELECTORAL COMMISSION OF QUEENSLAND

The Electoral Commission of Queensland (ECQ) is established under the *Electoral Act 1992* (Qld) as an independent statutory authority, responsible for the impartial conduct of Queensland elections.

OUR PURPOSE AND VISION

Our purpose is to support the democratic electoral process by preparing for, conducting and reporting elections in Queensland.

STRATEGIC OBJECTIVES

Objective 1. Promote awareness of, and participation in, electoral matters

Objective 2. Ensure equitable representation across Queensland electoral boundaries

Objective 3. Deliver fair and just Queensland elections

Objective 4. Drive improvements to election services

SOURCE QEC: HTTPS://WWW.ECQ.QLD.GOV.AU/ABOUT-US (DOWNLOADED13 FEBRUARY 2019)

WHAT DO YOU THINK?

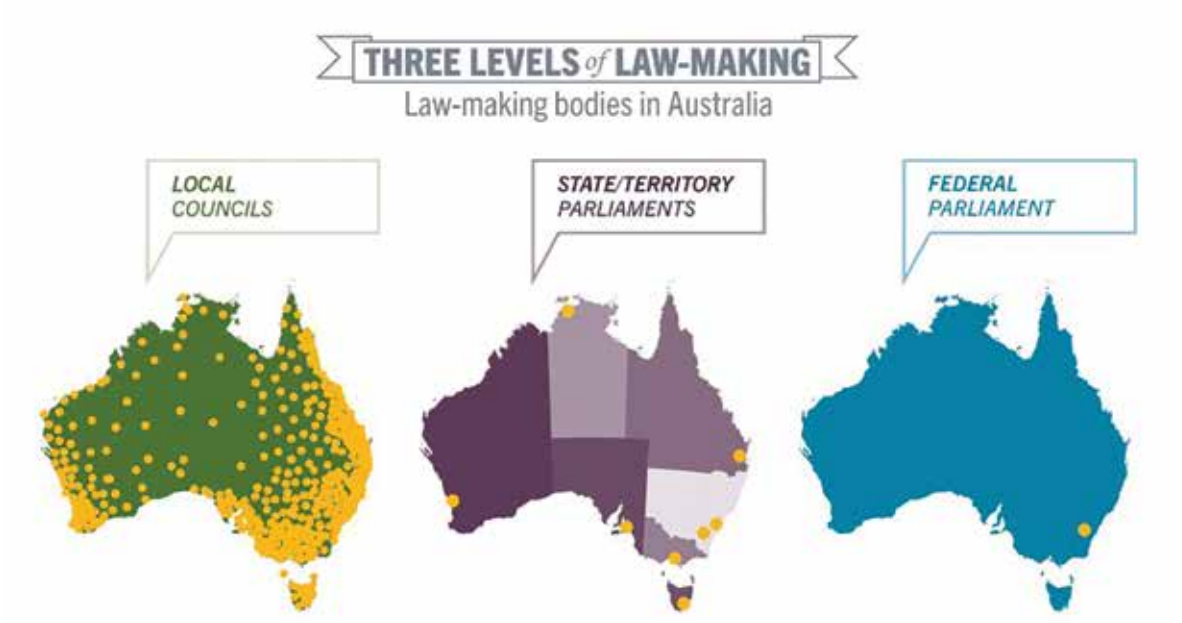
Do you think there is a need in Queensland for an independent statutory authority which is responsible for the impartial conduct of elections? Can you think of any additional objectives to those set out on the website of the Queensland Electoral Commission (QEC)? [C] [A] [R]

3.4 AUSTRALIAN ELECTED GOVERNMENTS

We have seen that in Australia, the Commonwealth government and all State governments and Territories, are elected by systems of representative democracy, and that the systems are now as fair as one would expect them to be, given that they are operated by independent electoral commissions. As a result, unless a government takes away this independence, this fair system will continue into the future. This does not mean that the system is perfect, and there are many issues which you could examine where allegations and suggestions have been made to improve our electoral systems. Some of the issues will be raised in this part of the chapter and others will be looked at in more detail in the final part of the chapter which looks at **current issues.**

THREE LEVELS OF LAWMAKING

Australia has three levels of lawmaking. These are sometimes referred to as three levels of government. We have seen that the Federal Parliament makes laws for the whole of Australia, and that subject to the Australian Constitution, State and Territory Parliaments make laws for their state or territory. Pursuant to state laws, there are over 560 Local Councils, which make local laws, called by-laws, for each regional district. These three levels of government are illustrated below.

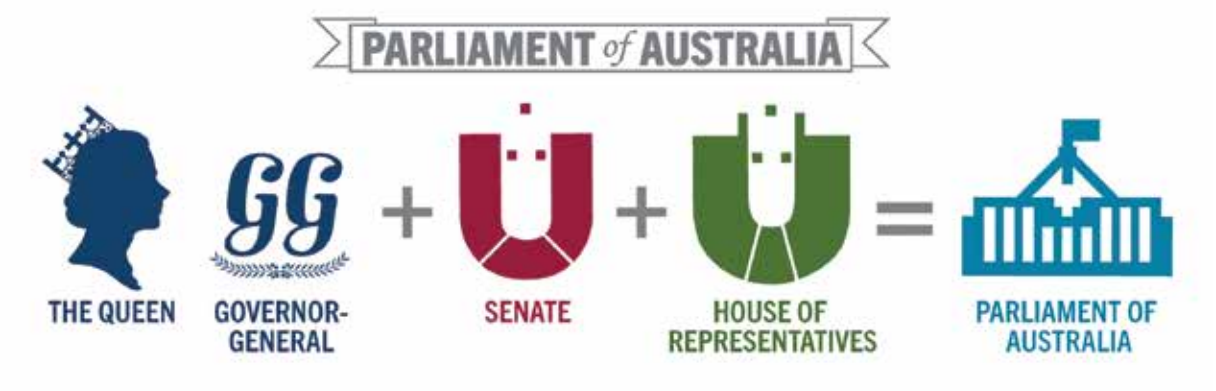


SOURCE PEO: HTTPS://WWW.PEO.GOV.AU/LEARNING (DOWNLOADED 10 FEBRUARY 2019)

This next part confines itself to the Commonwealth and Queensland Parliaments.

THE FEDERAL (COMMONWEALTH) PARLIAMENT OF AUSTRALIA

The Federal (Commonwealth) Parliament is Australia's national lawmaking body, passing laws that apply to all Australians. Located in Canberra, Australia's capital city, the Commonwealth Parliament consists of:



THE CROWN

You would be aware from Chapter 2 of the role of the Australian Constitution in establishing the Federal (Commonwealth) Parliament. You would have understood that Australia is a **constitutional monarchy**, which means that our Constitution states that the people and parliaments of Australia are subject to the ultimate authority of the King or Queen of Great Britain. **The Governor-General is the Queen's representative in Australia**. A new Governor-General is appointed by the Prime Minister every five years. Section 61 of the Constitution states that the

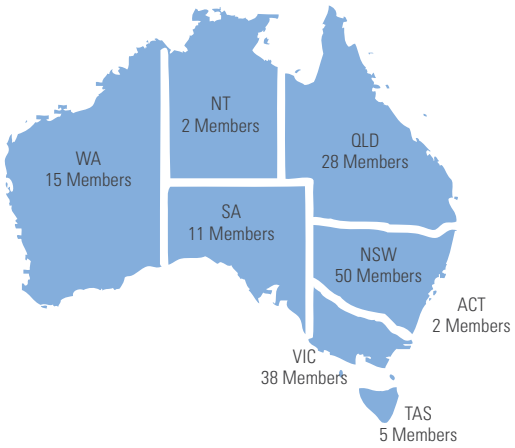
> *the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative.*

Ch 4.5

This means that the Governor-General is a part of the Parliament and the Executive (Prime Minister and Cabinet).The role of the Governor-General as part of a responsible government is examined in the next chapter, **Chapter 4: Australian parliamentary democracy-responsible government**.

B. HOUSE OF REPRESENTATIVES

151 Australian citizens sit in the House of Representatives of the Federal Parliament, also known as the Lower House and the People's House. Each member of the House of Representatives represents approximately 75,000-80,000 voters in a geographical area, called an electorate. This means that the most heavily populated states of New South Wales, Victoria and Queensland have the most representatives in the House of Representatives.



The major functions of the members of the House of Representatives are to:

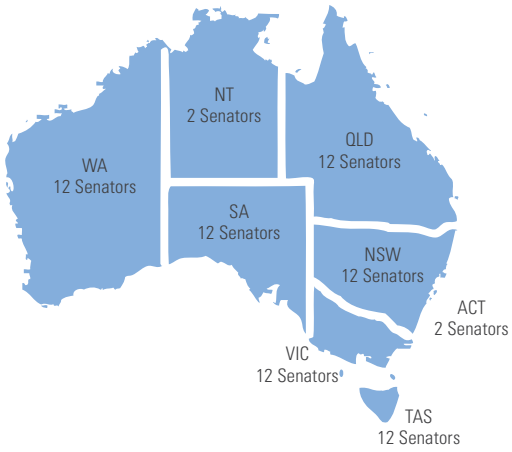
Ch 5.1

- represent the interests of their constituents (the members of their electorates); and
- introduce, debate and then pass or reject proposed laws.

C. SENATE

The Senate is the Upper house of the Federal Parliament. It is also known as the States' house and the House of Review. It is made up of 76 senators. The citizens of each of the six states of Australia elect 12 senators to represent them, while the citizens of the Northern Territory and the Australian Capital Territory (ACT) elect two senators each.

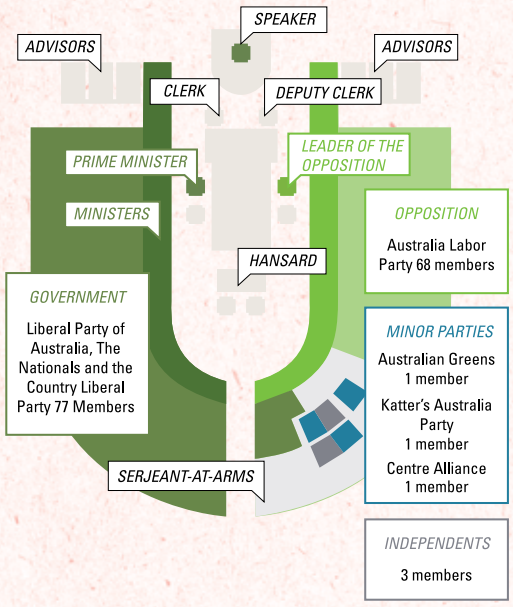
The **Senate** has the following **major functions**:



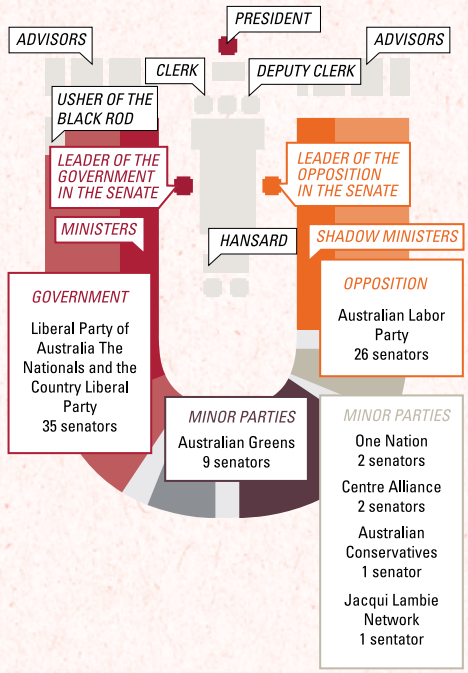
- **each state is represented in equal numbers of members** regardless of the size of each state. The Senate was introduced originally to protect the less populated states from being dominated by the greater number of representatives elected to the House of Representatives from electorates in the larger states such as New South Wales and Victoria;
- also known as the House of Review, the Senate **reviews Bills sent to it from the House of Representatives**. The Senate cannot amend a Bill but it can ask the House of Representatives to change it. The Senate has the power to reject a Bill if a majority of the members of the Senate disagrees with it. The Senate does have the power to introduce a bill to the Federal Parliament but this rarely occurs. Any Bill passed first by the Senate must then be approved by the House of Representatives before it becomes law; and
- the Senate also **makes sure that the Ministers of the Government and their departments are made accountable** to the Parliament and the Australian people for their actions. Members of the Senate are elected by the Senate as a whole to sit on committees which examine whether the government is doing its job properly in areas such as education, social welfare, defence, environment and foreign affairs, as well as investigating topical issues such as the dangers of mobile phones to users. Issues of governance which arise during this process that explain the **accountability process** of responsible government are discussed in more detail in the Chapter 7: Governance in action - accountability

PRACTICAL APPLICATION

HOUSE OF REPRESENTATIVES CHAMBER
(AFTER 2019 FEDERAL ELECTION)



SENATE
(AFTER 2019 FEDERAL ELECTION)



PRACTICAL APPLICATION CONTINUED...

1. Which political party is capable of forming government? How many seats does it hold in the House of Representatives? [C] [A]
2. Which political party will be known as the Opposition? Why is that? [C] [A]
3. Are there minority parties and independents in the House of Representatives? Who are they and which electorates do they represent? [C] [A]
4. Does the party capable of forming government also hold a majority of the seats in the Senate? How many seats does the opposition hold in the Senate, and are there minority party representatives and independents? [C]
5. Describe and explain what is meant by **'the balance of power'** by reference to the Senate. [C] [A]

STATE AND TERRITORY PARLIAMENTS (INCLUDING THE QUEENSLAND PARLIAMENT)

Each Australian State and Territory has its own independent Parliament which makes decisions about how the State or Territory is run. The Queensland Parliament makes laws for everyone within the state. In Queensland, there are 89 representatives elected to the Legislative Assembly (Lower house) of the State Parliament. The Queen's representative in Queensland is the Governor.

QUEENSLAND'S PARLIAMENT-UNIQUELY UNICAMERAL

Queensland's Parliament was a mirror image of the **bicameral** (two house) Commonwealth Parliament until 1922 when the **Upper House**, known as the **Legislative Council**, was **abolished**. Queensland's **unicameral** (one house) Parliament is unique in Australia. Every other Australian state has retained two Houses of Parliament. The Queensland Parliament abolished the Legislative Council based on arguments that it was obstructionist (tended to prevent bills that had already passed through the Lower house from becoming law) and inefficient (a slow process of passing new laws through the parliament).

The main purpose of an Upper House of Parliament is to avoid laws being hastily passed without proper consideration of their effects on all of the competing interest groups in our society. The Upper House is intended to be a check on the government in the Lower House. In the Queensland Parliament, however, it was argued that good quality debate and careful consideration of proposed laws by the Legislative Assembly was adequate protection of the interests of Queensland's citizens. The great expense of retaining the Legislative Council was also a popular reason for abolishing it.

PARLIAMENT OF QUEENSLAND 2017 ELECTION RESULTS

(composition of the Legislative Assembly, 56th Parliament)

Australian Labor Party	48
Liberal National party	39
Katter's Australian party	3
Queensland Greens	1
Pauline Hanson's One Nation	1
Independent	1

LOCAL AUTHORITIES (COUNCILS AND SHIRES)

Each Australian State Parliament has passed *Local Government Acts* to create local councils and shires as a third level of government (Parliament). These local authorities have been given wide powers to make laws for their local areas or regions, without having to seek the approval of their State government for each matter. It is important to note, however, that **local authorities are subject to the higher lawmaking authority of the relevant State government.**

A very interesting question about representative government has been raised in the context of local authorities in New South Wales and Queensland where the governments in power in 2004 and 2008 legislated to reduce the number of local councils and shires by amalgamation. In Queensland, the Beattie government reduced the number of councils from 157 to just 73 in 2008. There was research conducted which is reported in an article by Professor Brian Dollery of the University of New South Wales which is critical of the fact that New South Wales is currently proposing a further round of mergers. The question which this raises is

> ***Does representation at the local government level, where representatives must deal with, in the main, local issues, work better with bigger local councils?***

PRACTICAL APPLICATION

DO MERGERS MAKE FOR BETTER COUNCILS? THE EVIDENCE IS AGAINST 'BIGGER IS BETTER' FOR LOCAL GOVERNMENT

SOURCE: DOLLERY, BRIAN. THE CONVERSATION THE CONVERSATION.COM (20 FEBRUARY 2019) (EXCERPTS)

For example, Joseph Drew, Mike Kortt and I examined the outcomes of forced amalgamations in Queensland in 2008… Our research demonstrated that this resulted in a greater proportion of councils exhibiting diseconomies of scale. That is, mergers created entities that were simply too large to be run efficiently.

Furthermore, of the 31 new councils the mergers created, 58% exhibit decreasing returns to scale. Comparing their efficiency through time, we found merged councils performed worse than unmerged councils.

1. What happens to local councils when two or more councils are amalgamated or merged? [A]
2. What happened to the efficiency of councils which were merged? [C]
3. If you were elected to a position as a local government representative (a local councillor) do you think it would be easier to carry out your responsibilities if the size of the Council area and its population was smaller? [C] [A] [E]

RESEARCH

1. What are the names of the people who currently hold the positions of:
    a. The Prime Minister, Leader of the Opposition and Governor General in the Federal Parliament? [C]
    b. The Premier, Leader of the Opposition and Governor in Queensland? [C]
    c. The mayor of your local council or shire? [C]
2. Are there any independent members in the Federal Parliament or Queensland Parliament? If so, what are their names? [C]
3. What are the current names of:
    a. Five Federal Government departments? [C]
    b. Five Queensland Government departments? [C]
4. What is the name of your electorate for:
    a. The Federal Parliament? [C]
    b. the Queensland Parliament? [C]
    c. Your local council or shire? [C]
5. Who is your local member in:
    a. The Federal Parliament? [C]
    b. The Queensland Parliament? [C]
    c. Your local council or shire? [C]
6. Investigate if there have been any issues of dispute between the Upper and Lower Houses of Parliament in New South Wales, Victoria, or Tasmania in recent years. Have any of the Upper Houses in these jurisdictions blocked or attempted to block legislation which has been passed in the Lower houses? Write a short report setting out the information you have obtained and express your opinion as to whether or not there is justification for maintaining the Upper Houses of Parliament in these States. [S] [C] [A] [E] [R]

3.5 CURRENT ISSUES IN REPRESENTATIVE GOVERNMENT

MEMBERSHIP OF FEDERAL PARLIAMENT

The *Commonwealth Electoral Act 1918* (Cth) as amended sets out the criteria to be satisfied by a person who applies to the Commonwealth Electoral Commission to become a member of Federal Parliament. The applicant must:

- have reached the age of 18 years;
- be an Australian citizen; and
- be an elector, or qualified to become an elector, who is entitled to vote in a House of Representatives election.

Hand-in-hand with eligibility, is the fact that a person who may be eligible may be disqualified from being a member by other reasons. These reasons can be both **constitutional** (see *Commonwealth Constitution Act 1900* (Cth) s44) and/or **statutory** (see *Commonwealth Electoral Act 1918* (Cth) s163).

CONSTITUTION OF AUSTRALIA DISQUALIFICATION

We have already seen in **Chapter 2: the Australian Constitution** how pursuant to s44 (i) that those persons who seek to be members of parliament are disqualified if they do not comply with the section. The response of Parliament to allegations that members of both major political parties and minority parties should be disqualified from sitting in parliament was a long-running issue in the 44th Federal Parliament. In fact, over the years, there have been quite a number of petitions to the High Court, and

referrals by the Houses of Parliament to the High Court sitting as the Court of Disputed Returns, about sitting members. Some of these cases, other than those decided under the citizenship issue in s44 (i) are set out below.

CASE STUDY

High Court (sitting as The Court of Disputed Returns)

1. Mr Rodney Culleton, 3 February 2017. Section 44 (ii)

Facts: The Senate referred the qualifications of Mr Rodney Culleton as a Senator for Western Australia to the Court of Disputed Returns. Prior to his nomination for election Mr Culleton had been convicted in his absence in the Local Court of New South Wales for the offence of larceny, making him liable to be sentenced for a maximum term of two years. The court later granted an annulment of the conviction.

Legal issue: Was Mr Culleton incapable of being chosen as a Senator as a consequence of his being convicted at the time he was chosen pursuant to s44 (ii)?

Decision: The Court of Disputed Returns ruled on 3 February 2017 that, at the date of the 2016 election, Mr Culleton was a person who had been convicted and was subject to be sentenced for an offence punishable by imprisonment for one year or longer, and that the subsequent annulment of the conviction had no effect on that state of affairs. It followed that Mr Culleton was incapable of being chosen as a Senator, and that there was a vacancy in the Senate for the place for which he had been returned.

2. Mr Philip Cleary, 25 November 1992. Section44 (iv)

Facts: On 11 April 1992 Mr Philip Cleary, a teacher, had been on leave without pay at the time of nomination and polling, but had resigned from his teaching position before the declaration of the poll. A petition to the Court of Disputed Returns disputed the election on the ground that Mr Cleary had held an office of profit under the Crown by reason, inter-alia, of his being an officer of the Education Department of Victoria.

Legal issue: Was Mr Cleary duly elected or was his election void because he held an office of profit under the Crown, at the relevant time pursuant to s44 (iv).

Decision: The majority judgement of the court, delivered on 25 November 1992, was that the word 'chosen' in s44 (iv) related to the whole process of being elected, which commenced from and included the day of nomination. Mr Cleary was therefore 'incapable of being chosen' because he was a permanent officer in the teaching service at the relevant time.

3. Mr Robert Day, 5 April 2017,Section 44 (v)

Facts: Mr Robert Day was a Senator for South Australia. On 7 November 2016 the Senate referred his qualification as a Senator to the Court of Disputed Returns. The Court Ruled on 5 April 2017 that, prior to and at the date of the 2016 Federal Election, premises leased by the Commonwealth for use by Mr Day as his electorate office had been owned by a company indirectly associated with Mr Day and the company had directed on 26 February 2016 that rental payments be made to a bank account owned by Mr Day.

Legal issue: Was Mr Day a person who had an indirect pecuniary interest in an agreement with the Public Service of the Commonwealth thereby making him incapable of being chosen or of sitting as a Senator as and from 26 February 2016.

Decision: The Court of Disputed Returns (the High Court) decided that the circumstances amounted to a breach of s44 (v), and that Mr Day was incapable of sitting as a Senator on and after 26 February 2016, making him ineligible for the 45th Parliament.

1. How are the cases of Culleton, Cleary and Day similar and different? [C] [A]
2. What is the purpose of ss44 (ii), (iv) and (v)? In your opinion, in the case studies outlined above, have the decisions ensured that the Constitution has achieved what you consider to be its purpose? [C] [A] [E]

RESEARCH

1. Section 163 of the *Commonwealth Electoral Act 1918* (Cth) sets out the ways in which a person is incapable of being chosen or of sitting as a member of Parliament. Search the act online and read the section. Outline the circumstances in which this section restricts eligibility or disqualifies a sitting member. [C] [A] [S]

2. Section 64 of the *Parliament of Queensland Act 2001* (Qld) sets out the eligibility criteria which an applicant must satisfy to be a candidate for election in the Queensland state government, as well as the criteria which disqualify a person from being eligible. Search the act online and read the section. Outline the circumstances which a person must satisfy and the circumstances/criteria which disqualify a person who wishes to be a state member of Parliament. Compare these criteria to those which apply to persons seeking to be members of the Commonwealth Parliament. [C] [A] [S]

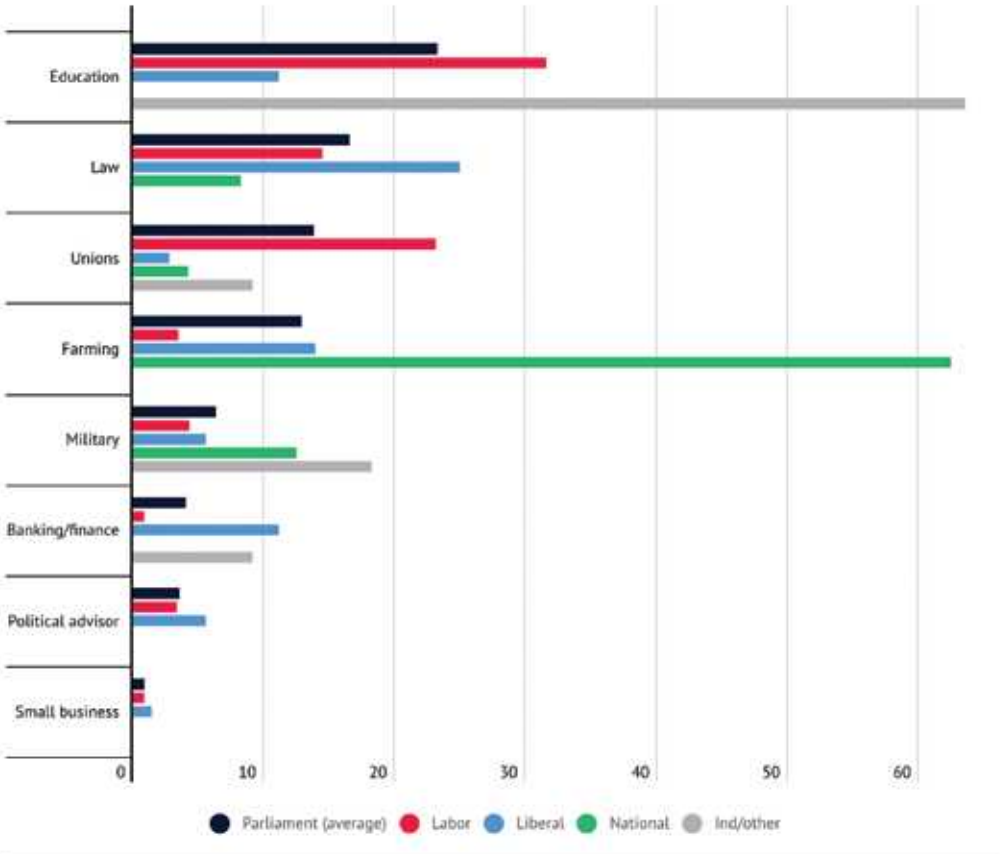
WHO ARE MEMBERS OF PARLIAMENT?

An important way of analysing representative government, is to focus on the background of members of parliament and how they have been elected. This can be a major issue for different groups, some of whom are minority groups in our community, and others who have significant numbers, but may be underrepresented or not represented at all. What, in fact, is the evidence?

PRACTICAL APPLICATION

NO MORE DIVERSITY, LOTS MORE STAFFERS

SOURCE: BAGSHAW, ERYK. SYDNEY MORNING HERALD, 19-20 JANUARY 2019 (EXCERPTS)



PRACTICAL APPLICATION CONTINUED...

Parliament is no more diverse than it was in 1988, as the government and opposition benches swell with white men, political staffers, unionists, lawyers and bankers… Only one side of politics, Labor, has made any real progress on female representation, but overall only a third of federal MPs are women-compared to 51% of the population. The Nationals have only added one female MP in 30 years… The results in the Per Capita report have prompted MPs from both sides of politics to speak out, warning **policy and politics is being compromised** by Parliament's **narrow perspective**, and **lack of empathy** and **real-world experience.**

Liberal MP Jason Falinski said…the ability of Australians to move into Parliament had atrophied over the last 30 years, creating a 'policy elite' that played political theory but did not understand real-world consequences. "It's not just people from staffing backgrounds, it's people from think tanks, it's trade union lawyers, investment bankers and management consultants," he said. "These are all the people who are beneficiaries of new laws. It has become the policy elite."

Outgoing Labor MP Emma Husar… said Parliament needed fewer political 'lifers' who only ever had jobs in the party. (They do not) "give the ordinary punter any comfort that those who seek to represent them have an idea about their life."

Gender

(The change to female representation in Parliament) was driven mostly by the ALP quadrupling its female representation through quotas. The Liberal party increased its female representation from 9.4% to 22.6% without them.

Education

While 66% of Australians went to public schools, only 39% of MPs did. A full quarter of MPs went to a Catholic school-the sector that earlier this year won a $4.6 billion concession on school funding arrangements.

Cultural

"You are immediately labelled as ethnic stackers," Melbourne Labor MP Peter Khalil, whose parents are Egyptian (said), " No one ever says that when you have a couple of white union members voting on an issue together. It is very hard to run for office coming from that background because you get hit with all sorts of racism…"

1. Which were the four most common career routes into Parliament in 1988? [C]
2. Which were the four most common career routes into Parliament in 2018? [C]
3. Which career took over 2018 as the dominant career route into Parliament? [C]
4. What does Liberal MP Jason Falinski say about current Parliamentarians? [C]
5. What does Labor MP Emma Husar say about current Parliamentarians? [C]
6. Compare the views of Jason Falinski and Emma Husar. Why do they hold these viewpoints? Are their views compatible? [C] [A]
7. How has female representation changed in Parliament between 1988 and 2018? What factor appears to be significantly responsible for the increase in female representation? [C] [A]
8. Is there a suggestion that MPs with similar educational backgrounds vote the same way? Why? [C] [A]
9. Are Australians who are migrants underrepresented in Parliament? What does Mr Peter Khalil say makes it hard to run for office? Do the statistics suggest this? [C] [A]

PRE-SELECTING CANDIDATES FOR ELECTION

A person who wishes to stand for election simply needs to meet the qualifications required under the relevant electoral act, whether state or federal, make application and pay the nomination fee. In practice it is quite unusual for people to do this without belonging to a political party. Persons who stand for election and are not members of a political party are called Independents. Most of the time the members of the relevant political party in the electorate decide who the candidate will be to represent their party in their electorate. There are various methods by which political parties do this, some more directly democratic than others, for example, a plebiscite of all members of the party in the particular electorate. In other cases the members are represented by committees which send individuals to a body which considers the applicants and decides who the candidate will be. This sometimes leads to conflict between the individual party members and those persons who have power in the party. Clearly at this level, the choice of a candidate, will ultimately determine the composition of the Commonwealth and State Parliaments, as well as Local Government Authorities.

PRACTICAL APPLICATION

SCOTT MORRISON HITS OUT AT DUMPED GILMORE CANDIDATE WHILE DEFENDING DECISION TO INSTALL WARREN MUNDINE

SOURCE: JADE MACMILLAN, ABC NEWS, WWW.ABC.NET.AU, 23 JANUARY 2019/NEWS/2019-01-23 (EXCERPTS)

Prime Minister Scott Morrison has delivered an extraordinary spray at dumped Gilmore candidate Grant Schultz, while defending the decision to parachute in Indigenous leader Warren Mundine instead. The Liberal party's endorsement of Mr Mundine for the marginal New South Wales seat has angered local members and prompted Mr Schultz to run as an independent… Mr Morrison said the real estate agent should have stepped aside when sitting Liberal MP Ann Sudmalis announced she was quitting politics amidst a messy preselection battle last year.

At the time Ms Sudmalis blamed 'branch-stacking, undermining and leaks' for her decision to withdraw. "The division had actually asked Rachel to step aside, allowed new nominations to be called and we could have that sort of preselection, he chose not to do that," Mr Morrison said. "You don't get to bully your way into a seat in the Liberal party, that's not how it works."

Mr Schultz told the ABC he was actually the victim of bullying, describing the allegations as "completely baseless". "It's very sad when the Prime Minister of our country, a leader of 25 million people, uses his position to make these allegations and bully me," he said. Mr Schultz accused Mr Morrison of treating the Liberal party's process with "complete contempt". "The process-it's open, it's accountable, there are no deals done behind closed doors. "I nominated. I presented and argued my case to 49 selectors and they selected me-the vast majority did ".

A number of local Liberal members have quit the party, disgusted over the decision to dump Mr Schultz, who warned that voters would be angry too.

1. Who was the person selected by the members of the Gilmore electorate to stand in the 2018 election on behalf of the Liberal party? [C]
2. Who was selected by the Liberal party state executive to replace the candidate selected for Gilmore? What reasons were given by Prime Minister Scott Morrison for replacing him? [C] [A]
3. Describe the process which the members of the electorate used to select Mr Schultz as the Liberal party candidate. Does the process appear to be democratic and fair? Give your reasons. [C] [A] [E]
4. What reasons might be appropriate, in your view, for a Prime Minister to use the powers that allow the Liberal party to set aside a decision made by the members of an electorate, and choose an alternative candidate to represent them and the party? [C] [A] [E]

INQUIRY FOCUS

SHOULD THERE BE EQUAL NUMBERS OF MEN AND WOMEN REPRESENTATIVES IN AUSTRALIAN PARLIAMENTS?

To inquire into this question we need to look at a number of different topics, to inform ourselves with the information that will enable us to provide an informed and sensible answer.

You might decide to approach this inquiry in a different manner to the approach taken here. That is a matter for you.

THE CURRENT STATUS OF THE AUSTRALIAN PARLIAMENT

There are 153 men and 73 women members of parliament in the 45th Parliament, that is, in House of Representatives and the Senate. The percentage of women is therefore 32%. The Liberal-National coalition which currently holds power, has 84 men and 21 women members in the 45th Parliament. The Australian Labor Party (the opposition) has 53 men and 42 women in the 45th Parliament. The next largest party, the Australian Greens, has 5 men and 5 women in the 45th Parliament.

SOURCE: PARLIAMENT OF AUSTRALIA, WWW.APH.GOV.AU, ABOUT PARLIAMENT (24 FEBRUARY 2019)

RESEARCH

Go online and investigate the composition of the current Queensland Parliament by gender and the composition of at least one other State Parliament in Australia. Briefly report your findings and identify and acknowledge the source of your information. Compare and contrast the information you have found out about the Queensland Parliament and the other State Parliament you selected with the current composition of the Australian Parliament set out above. [S] [C] [A] [E]

PRESELECTION AND THE LAW

Preselection is the process by which a party selects official candidates to run for it at a particular election. The political parties have constitutions by which they operate, and sets of rules which the members must follow when conducting preselections. These rules vary from party to party, and as we have seen above in the case of the electorate of Gilmore, the rules allow the Central Executive of a party to interfere in a preselection process which has been done according to the rules.

WHAT DO YOU THINK?

The Prime Minister (Scott Morrison) was prepared to disendorse Mr Schultz in the electorate of Gilmore after he had been selected by the branch of the party, and parachute Warren Mundine into the electorate as the endorsed Liberal party candidate. Where the Prime Minister would prefer a woman candidate to stand for the Liberal party in a particular electorate, do you think he should do the same thing or not? Why? [C] [A] [E]

CASE STUDY

Cameron v Hogan (1934) 51 CLR 358

Facts: This is an appeal against the decision of Gavan Duffy J. in favour of Mr Hogan in the Supreme Court of Victoria. Mr Hogan was the plaintiff in an action against the Central Executive of a voluntary association called the 'Australian Labor Party State of Victoria' , of which he was a member. He sought relief against them, amongst other things, because they failed to submit his nomination as a candidate for endorsement by the party for the electorate in which he was already the sitting member.

Gavin Duffy J. held that upon the proper interpretation of the rules of the party, Mr Hogan's complaint was well-founded. He held that the central executive had not submitted Mr Hogan's name to ballot as required by the rules.

Legal issue: Were the rules of the Australian Labor Party in Victoria merely a social agreement and not an enforceable contract as between the members of the party?

Decision: The High Court held that the rules of the Victorian Labor Party were merely a social agreement and not an enforceable contract. An essential element of the contract was missing. There was no evidence in the rules that the members of the party intended them to be enforceable in a court of law. There was a history of cases in England on which the High Court relied. These were 19th century authorities which declared that agreements to associate for scientific, philanthropic, social, or religious purposes were not agreements which courts of law could enforce.

1. If the High Court had decided the rules of the Victorian Labor Party were contractually enforceable as between members of the party, is it likely that it may have supported the original decision of Gavin Duffy J.? [C] [A] [E]

Since *Cameron v Hogan* it has become common to incorporate clubs and societies because of the protection incorporation provides to the members against legal action for negligence. It is also simpler to operate the financial affairs of a club or society when incorporated. As a result, where incorporation has occurred any dispute will be subject to the enforceability of the rules in the courts. Political parties have not followed this trend. There have been quite a number of cases which suggest that the High Court's original decision may be distinguished, but this question is yet to be decided by the High Court.

CASE STUDY

Baldwin v Everingham (1993) 1 QdR 10 (Dowsett J) 10 January 1992

Facts: Mr Baldwin brought an action against the Liberal party executive committee to be restored to the list of nominees for preselection for a federal electorate. The executive excluded him from the list of nominees because some years before he had been charged with forgery and other serious offences. No conviction was recorded but understandably the executive saw the charges themselves as a severe political handicap.

Legal issue: Should the court grant Mr Baldwin a declaration that the executive committee breached the parties rules when it deleted his name from the list of members seeking preselection as a Liberal candidate in the forthcoming federal election?

Decision: Dowsett J. found in favour of the plaintiff. He distinguished (deemed irrelevant to the present case) *Cameron v Hogan* on the basis of 1983 amendments to the *Commonwealth Electoral Act* to allow public funding of political parties' election expenses. The judge decided that legislative recognition makes the rules of registered political parties enforceable at the behest of any and every member, whether or not electoral funds are in issue. He said:

for a very long time the Parliamentary system functioned upon the assumption that parties had no official status... such is no longer the case... On general principles, where an albeit voluntary association fulfils a substantial public

CASE STUDY CONTINUED...

function in our society, it may appear indefensible that questions of construction concerning its Constitution should be beyond judicial resolution.

Other authorities were referred to by Dowsett J., but none of them set a precedent which he was obliged to follow.

1. On what factual circumstances did Dowsett J. rely to distinguish the High Court case of *Cameron v Hogan*? [C] [A]
2. Should political parties be left to run their own disputes about party rules, or is legal action in courts a legitimate means of ensuring fairness in preselections? [C] [A] [E]

INQUIRY FOCUS

THE POLICIES OF THE MAJOR POLITICAL PARTIES.
CAN WOMEN ACHIEVE EQUAL REPRESENTATION IN AUSTRALIAN PARLIAMENTS

PRACTICAL APPLICATION

LIBERAL PARTY GRAPPLING WITH HOW TO BOOST NUMBER OF WOMEN IN FEDERAL PARLIAMENT

SOURCE: LOUISE YAXLEY, ABC NEWS, WWW.ABC.NET.AU, 11 SEPTEMBER 2018 (EXCERPTS)

Federal Labor has quotas… Former frontbencher Craig Laundy… said the Liberals should also try using quotas. The issue is raging again inside the party as it deals with the fallout from the leadership change, where women have reported being bullied. It comes a day after one of the male candidates for Mr Turnbull's seat of Wentworth withdrew, saying a woman should be picked instead.

JULIA BANKS LASHES 'APPALLING' BEHAVIOUR AGAINST WOMEN IN PARLIAMENT

SOURCE: THE GUARDIAN, WWW.THEGUARDIAN.COM, 13 SEPTEMBER 2018 (EXCERPTS)

Victorian MP says politics is decades behind business inequality and calls for quotas

On Wednesday evening the first-term Victorian MP, who is quitting politics at the next election, joined a growing push for quotas to increase female representation in the Liberal party and warned leaders not to sweep bullying allegations 'under the carpet'. The MP for Chisholm announced two weeks ago that she was quitting Parliament after only one term because of the bullying she had witnessed during the Liberal leadership spill.

"[Women] represent half the population and so does the modern Liberal party," Banks told the Lower house on Wednesday night as she endorsed the use of gender quotas. "Quotas are not demeaning to women and nor will women be regarded as the 'quota girl '." Banks said Parliament was a decade behind the business world in promoting women to leadership positions.

PRACTICAL APPLICATION CONTINUED...

FEDERAL ELECTION 2019: W.A. LIBERALS PRESELECT VINCE CONNOLLY TO CONTEST STIRLING

SOURCE: JOE SPAGNOLO, PERTH NOW, WWW.PERTHNOW.COM.AU, 23 FEBRUARY 2019 (EXCERPTS)

Former army officer Vince Connolly has been preselected to contest Stirling for the Liberals at the May federal election.

Mr Connolly, 40, was selected above four other candidates, who were all women. It took about 30 delegates roughly 5 hours to decide on the candidacy.

LABOR SETS AMBITIOUS NEW TARGETS FOR WOMEN IN PARLIAMENT, ON PUBLIC BOARDS

SOURCE: DAVID CROWE, SYDNEY MORNING HERALD, WWW.SMH.COM.AU, 6 MARCH 2018 (EXCERPTS)

Labor is vowing to put more women into senior public positions and deliver "measurable action" on pay equity, signalling it is open to setting pay targets in government and changing the workplace relations system if needed to get results. Labor deputy leader Tania Plibersek will outline the new targets today in an ambitious gender equality strategy which repudiates critics who claim targets and quotas do not work…

Central to her argument is Labor's record in setting quotas to encourage women into Parliament, starting with a 30% target in 1994 and rising to 50% today if Labor wins the Batman by-election on March 17 and former ACTU president Ged Kearney enters Parliament, 48% of the party's federal MPs will be women.

1. According to Craig Laundy, what issue is raging inside the Liberal party? [C]
2. What reasons did Julia Banks give for resigning her position as a member of Parliament representing the Liberal party? What reasons did Julia Banks give for endorsing the call for the Liberal party to introduce quotas to promote women members of parliament representing the party? [C]
3. If there were quotas established to promote the number of women members of parliament representing the Liberal party, do you think that the outcome of the preselection in Stirling where Mr Vince Connolly was preferred to 4 other women candidates might be different? (To answer this question assume that the women candidates opposing Mr Connolly would make satisfactory candidates). [C] [A] [E]
4. According to Tanya Plibersek, the deputy leader of the Labor Party, quotas have delivered larger numbers of women representing the ALP in parliament. Is this policy fair to the male candidates standing for preselection for the ALP? [C] [A] [E]

PRACTICAL APPLICATION

A PLEA FOR GENDER QUOTAS IN AUSTRALIAN POLITICS: TIME TO GIVE A 'FAIR GO' TO EVERYONE

SOURCE: CHRIS URQUHART, WWW.NEWS.COM.AU, 2 SEPTEMBER 2018 (EXCERPTS)

There is no objective measure that proves one person has "more merit" than the next. In reality, there will be a field of candidates, all of whom could be quite deserving, a field that usually contains both men and women.

When it comes to being the parties picked for safe seats, Liberal women face the same battles that women fight in jobs everywhere else: trying to overcome rusted-on structures and attitudes that favour men over women. There is no fair- go in that.

In preselection battles, there's a vote, sure. But candidates tend to be chosen in the vote because of the factions they belong to, their support among senior politicians and dealmakers, their family connections, their friends, the favours they are owed and sometimes an element of luck. If there is a choice between a man and a woman, more often than not, powerbrokers side with the man. It's as simple as that.

By contrast, nearly half of all federal Labor politicians are women. This didn't happen by accident. It was because the party recognised that it had the same problem, but chose to change it through a quota system, ensuring that women would be chosen to represent the party in a decent proportion of winnable seats. In doing so, the sky hasn't fallen in, nor the party fallen apart. In fact, the ALP has attracted and retained women and the polls have a party in a commanding position ahead of the forthcoming federal election.

Gender quotas and policies are in place in more than 100 countries around the world. Some countries, like Ireland, have even enshrined it in law. Over there, women must make up 30% of the party's field of candidates, otherwise that party misses out on half its funding for the next term of parliament. Naturally, it has seen more women elected to parliament, and by extension, it has seen the Irish parliament become more reflective of the community.

One of the arguments against quotas, is that if they're introduced, inferior female candidates would appear on ballots, simply to make up the numbers, and when elected, they won't be up to the job.

But the international evidence just doesn't support this. In France, a parity law to increase female representation was introduced nearly 20 years ago. At 2010 study found that the fear that parity would give the country a stack of average politicians turned out to be wrong.

1. Set out the views of those that do not support quotas for the preselection of women candidates in politics, and the evidence which supports those views. You can refer to the earlier practical application if relevant. [C] [A]
2. Set out the views of those who do support quotas for the preselection of women candidates in politics, and the evidence which supports those views. You can refer to the earlier practical application if relevant. [C] [A]
3. You have been asked to present a short report to your local branch of your party presenting a point of view for or against quotas for the preselection of women candidates. It is to be delivered orally. Prepare working notes for the report in writing. [C] [A] [E] [R]
4. Conduct a class debate on the following topic: [S] [C] [A] [E] [R]

'The application of affirmative action measures (setting quotas for women) in party preselection is an appropriate way to increase the presence of women and minorities in public office.'

REVIEW

1. Describe the following: [C]

Democracy / direct democracy / representative democracy / gerrymander / the Queensland Parliament / the Commonwealth Parliament / the Crown / the Executive (Cabinet)

2. Describe and explain: [C] [A]

   (a) The characteristics of democratic decision-making.

   (b) The characteristics of representative democracy in Great Britain in 1900.

   (c) The characteristics of representative democracy in Queensland in 1900.

   (d) The characteristics of representative government established by the Australian Constitution.

   (e) The gerrymander in Queensland during the Bjelke Peterson government era.

   (f) The current electoral systems of Queensland and Australia.

   (g) The Commonwealth Electoral Commission. (CEC)

   (h) The Queensland Electoral Commission. (QEC)

3. Describe the current involvement of Aboriginals and Indigenous Australians in the electoral system, and the role of the Commonwealth Electoral Commission in achieving higher levels of enrolment on the electoral role and voting in elections. What should be done to ensure electoral participation by Aboriginal and Indigenous Australians in the electoral system? [C] [A] [E] [R]

4. Outline the arguments for and against a policy which provides for a quota system for preselection of women candidates in a political party. Decide the position that you think is appropriate in the current Australian political system, and summarise your conclusions supporting your view. [C] [A] [E] [R]

TOPIC 1: GOVERNANCE IN AUSTRALIA

CHAPTER 4: AUSTRALIAN PARLIAMENTARY DEMOCRACY – RESPONSIBLE GOVERNMENT

FOCUS SUBJECT MATTER

4.1 FORMING A RESPONSIBLE GOVERNMENT
4.2 FORMING A MINORITY GOVERNMENT
4.3 THE CONCEPT OF RESPONSIBLE GOVERNMENT
4.4 THE ROLE OF PARLIAMENT
4.5 THE ROLE OF THE GOVERNOR-GENERAL
4.6 THE ROLE OF THE JUDICIARY

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- how a Prime Minister is chosen in Australia;
- what is required to form government and its implications for law making;
- the features of responsible government;
- the role and responsibilities of the members of the Federal Executive Council; and
- that governments are held to account by internal and external means.

4.1 FORMING A RESPONSIBLE GOVERNMENT

Before we can proceed to look at **responsible government**, we need to pause and reflect on what we have previously learned about the Australian Constitution and the Westminster System:

- the Westminster System was inherited from Great Britain in the 19th century;
- the Commonwealth Parliament is composed of the Queen, the Senate and the House of Representatives;
- a central feature of this system is that the Executive (more commonly known as the Cabinet) is responsible and accountable to the Legislature (or Parliament);
- the power to make law, administer law and interpret law is separated between different institutions; and
- the Constitution describes and defines the roles of the Governor-General, Parliament and the judiciary.

When considering the question about how government is formed, we need to look at a number of **conventions (or unwritten rules)** established by the Westminster System of Responsible Government. Conventions are an important concept in governance, as the Australian Constitution and other legislation does not cover everything. A convention is:

> *…extra-legal rules of structure or procedure or principle, established by precedent, consolidated by usage and generally observed by all concerned. They will affect the operation of the Constitution and may affect the working of the law but they themselves have not the force of law.*

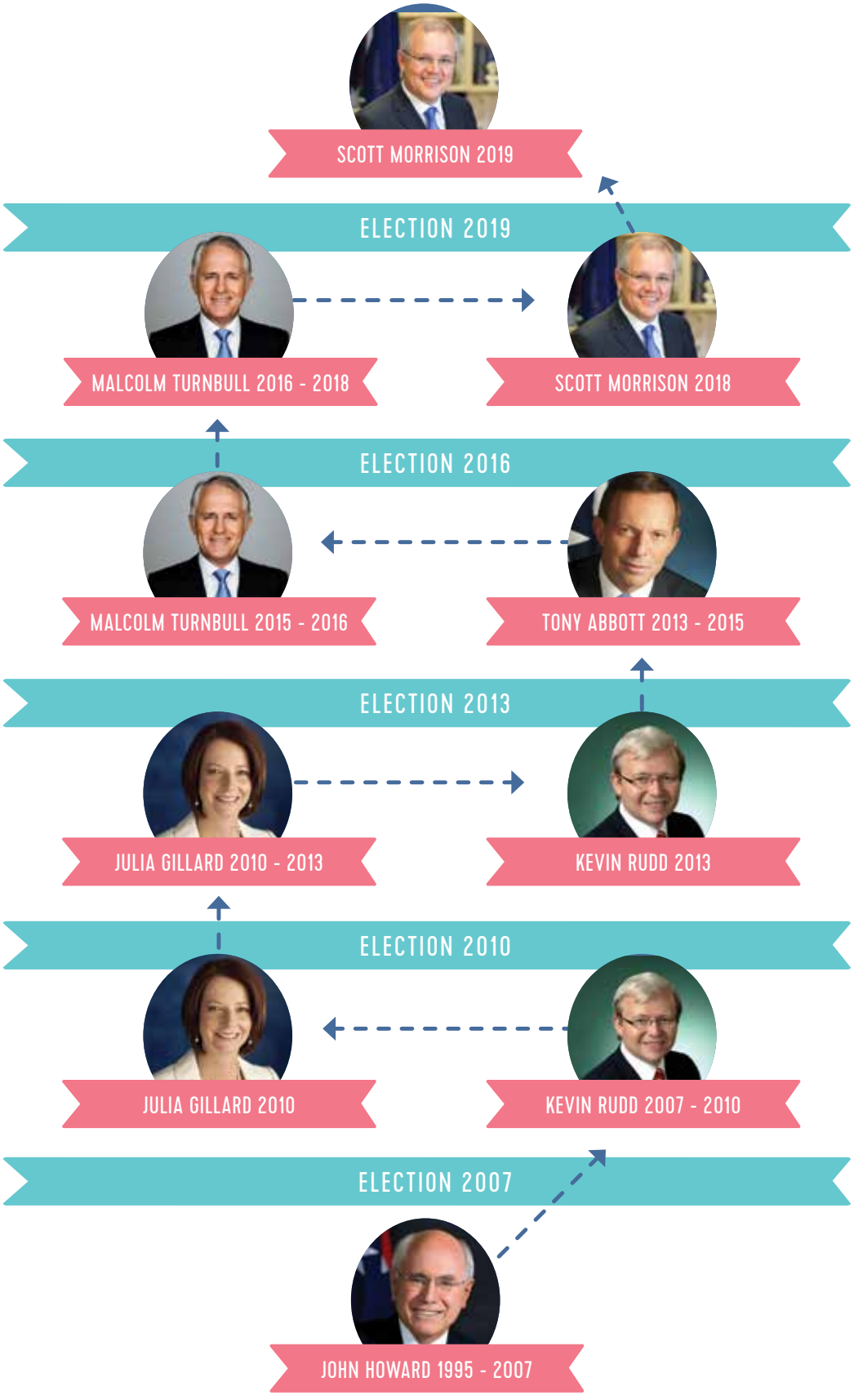
SOURCE: LESLIE CRISP, AUSTRALIAN NATIONAL GOVERNMENT, 5TH EDN, P. 352, (EXCERPTS).

We will now look at each arm of government or position in turn, examining in detail their roles as prescribed by law found in the Australian Constitution and conventions which are part of the Westminster System.

THE PRIME MINISTER

The **Prime Minister** is the leader of the Australian Government. This also means he or she is the leader of Australia. The position of Prime Minister is not mentioned in the Australian Constitution – instead it is **governed by constitutional conventions. The Prime Minister works according to practices and customs developed over a long period of time**. After an election is held the Governor-General calls on the leader of the political party (or in the case of a coalition government, the major party) who wins the majority of seats at a federal election. The Governor-General then commissions he or she to be Prime Minister. This is known as a **majority government**. Sometimes the federal election does not give a clear majority to one of the major parties. We will discuss how government is formed in these circumstances later, but, an important part of forming government is that **it must have the confidence of the House of Representatives** – this is the foundation of responsible government.

PRACTICAL APPLICATION



AUSTRALIAN PRIMEMINSTERS 1995 - 2019

PRACTICAL APPLICATION CONTINUED...

1. How many individuals held the position of Prime Minister during the decade 2008-2018? [C]
2. Three individuals were replaced after leading their party to victory in a federal election. Who were they and who replaced them? [C]
3. Why do you think that three Prime Ministers were replaced between elections? What may have changed socially, politically or economically over the last 20 years to explain this difference? [C] [A]

The **Prime Minister is chosen by the members of the government** – he or she is not chosen by the people of Australia. This process has been criticised in recent times as the Australian public feel their voice is being ignored. It has caused both parties to amend the process of choosing a leader to make it harder to challenge a sitting Prime Minister. We will now look at a series of events which led to Malcolm Turnbull forming government after the 2016 federal election until his departure in 2018. Interestingly, this period also provides an example of where a first-term Prime Minister, who led his party to victory in an election, was replaced by his party before being given the opportunity to face the Australian public at the end of his term.

WHAT DO YOU THINK?

1. Is the winning leader of an election responsible to the people to implement his/her polices? Explain. [A]
2. Should a first-term Prime Minister be given the opportunity by his/her party to face the Australian people at the next election? Justify your opinion. [E]

PRACTICAL APPLICATION

ELECTION 2016: MALCOLM TURNBULL CLAIMS VICTORY AFTER BILL SHORTEN CONCEDES DEFEAT

SOURCE: MONIQUE ROSS & STEPHEN DZIEDZIC, ABC NEWS ONLINE (ABC.NET.AU), 10 JULY 2016 (EXCERPTS).

Prime Minister Malcolm Turnbull has claimed victory in the federal election, as the Coalition edges towards a slim majority in federal parliament.

"This is a great day today," Mr Turnbull told a press conference in Sydney, after Labor leader Bill Shorten conceded defeat.

The Coalition is on track to win at least 74 seats, and is confident it can win two more, giving it enough seats to govern in its own right.

The Prime Minister also said he had had "very constructive" discussions with crossbenchers in both houses of Parliament.

Even if the Government wins a narrow majority in the Lower House, it will be anxious to give itself political cover by courting the five Green and independent MPs in the House of Representatives.

Mr Turnbull indicated that he would give crossbench MPs additional staff and resources, just as Labor did with independents in the hung parliament of 2010.

PRACTICAL APPLICATION CONTINUED...

"It is my commitment to work in every way possible to ensure that the crossbenchers have access to all of the information they need and all of the resources they need to be able to play the role they need in this parliament," he said.

Mr Turnbull is likely to face stiff opposition to his agenda from a raft of new Senators elected a week ago - including senators from One Nation and the Jacqui Lambie Network.

A SUMMARY OF THE RESULT OF THE 2016 FEDERAL ELECTION IN THE HOUSE OF REPRESENTATIVES. TO FORM A MAJORITY GOVERNMENT, A POLITICAL PARTY MUST WIN 76 SEATS IN THE HOUSE OF REPRESENTATIVES.

1. Which political party claimed victory in 2016 and how many seats did it win? [C]
2. Who was the Prime Minister? [C]
3. Was he able to form a majority government? How do you know this? [C]
4. What is the 'crossbench'? [C]
5. What are the implications of a high number of crossbenchers for a government? [A]

THE FEDERAL EXECUTIVE COUNCIL

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1901 (CTH)

Section 62 Federal Executive Council

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

An important part of forming government is the appointment of the **Federal Executive Council.** This body is governed by the Australian Constitution. The Australian Constitution states that **executive power is vested in the Crown and is exercised by its representative, the Governor-General** (s61). The Governor-General presides over the Federal Executive Council (s62). However, in reality executive power is exercised by the Prime Minister and the Cabinet, which is made up of different Ministers (s63). Together they decide major policy and propose legislation. The departments led by these **Ministers have the responsibility to administer the law.** The *Ministers of State Act 1952* (Cth) s4 allows for up to 30 Ministers to be appointed. As illustrated below, after an election is held and a result is called, the Prime Minster and the Cabinet visit the Governor-General at Government House to receive their appointments and swear an oath of allegiance. This occurs because the Constitution provides that the Governor-General appoints those Ministers whose job it is to administer Commonwealth Government departments, and those Ministers are, in turn, nominated by the Governor-General to the Federal Executive Council (s64).

Ch 2.4

FEDERAL EXECUTIVE COUNCIL

CROWN (REPRESENTED BY GOVERNOR-GENERAL)

PRIME MINISTER

MINISTERS

The council of ministers including the Governor-General which can make secondary legislation, and discusses government policies and actions, in accordance with the Australian Constitution.

SOURCE: PARLIAMENTARY EDUCATION OFFICE, GLOSSARY (PEO.GOV.AU/LEARNING), 2018.

PRACTICAL APPLICATION

MALCOLM TURNBULL'S NEW MINISTRY SWORN IN

SOURCE: LEIGH SALES & SABRA LANE, 7.30 REPORT TRANSCRIPT (ABC.NET.AU), 19 JULY 2016 (EXCERPTS).

LEIGH SALES, PRESENTER: Malcolm Turnbull's new ministry was sworn in today and, while some of the new Ministers are racing to get across their new briefs, others have already set their priorities; among them, making adoption easier and rebuilding trust in politicians.

Here's political correspondent Sabra Lane.

(Footage of Peter Cosgrove arriving in meeting room, Government House)

SABRA LANE, REPORTER: When the Governor-General is a former Defence chief, expect any formalities to be run by the clock. Bang on 9:00am, the Prime Minister was sworn into office.

MALCOLM TURNBULL, PRIME MINISTER: I, Malcolm Bligh Turnbull, do swear that I will well and truly serve the people of Australia.

(Applause)

(Montage of Ministers swearing before Governor-General Cosgrove)

GEORGE BRANDIS, ATTORNEY-GENERAL: I, George Henry Brandis...

FIONA NASH, REGIONAL DEVELOPMENT MINISTER: ...do swear that I will well and truly serve the people of Australia...

SCOTT MORRISON, TREASURER: ...in the office of Treasurer; and that I will be faithful and bear true allegiance...

GREG HUNT, ENVIRONMENT MINISTER: ...to Her Majesty Queen Elizabeth II, Queen of Australia, so help me God.

1. Describe the event that was occurring at Government House? [C]
2. To whom do Ministers swear an oath of allegiance? [C]
3. To whom do you think Ministers should be responsible? Why? [A] [E]

4.2 FORMING A MINORITY GOVERNMENT

As we mentioned previously, some elections don't produce a clear majority. When this occurs it is known as a **hung parliament**. The Australian Constitution does not specifically discuss what process is to be followed if a hung parliament occurs. Hung parliaments are resolved by a set of unwritten rules or conventions inherited from the United Kingdom. If this happens a political party will try to form a **minority government** by negotiating support with the Independents or smaller parties to form a stable government. The process for forming majority or minority government is not provided in the Australian Constitution – it is governed by convention.

RESEARCH

In 2010 Julia Gillard gained the support of three non-aligned independents and the Australian Greens to form a minority government. Conduct research and select secondary sources to answer the following questions:

1. What is a confidence and supply agreement? [C] [S]

2. How can this agreement impact the government's decision making? [A] [S]

PRACTICAL APPLICATION

WENTWORTH BY-ELECTION: KERRYN PHELPS CLAIMS VICTORY, GOVERNMENT LOSES MAJORITY

SOURCE: JAMIE MCKINNELL, ABC NEWS ONLINE (ABC.NET.AU), 21 OCTOBER 2018 (EXCERPTS).

Independent candidate Kerryn Phelps has claimed victory in the Wentworth by-election, on a devastating night for the Morrison Government that lost its majority in Canberra.

Prime Minister Scott Morrison said the result was not unexpected and reflected anger in the electorate following the ousting of Malcolm Turnbull in an August leadership coup. Mr Turnbull resigned as the member for Wentworth following the spill.

Mr Murray [the Labor candidate] conceded defeat about 8pm and said the party should be proud of contributing to the largest by-election swing in the history of Federal Parliament.

Mr Morrison previously appealed to voters not to opt for an independent because it would jeopardise the Government's one-seat majority in the lower house, potentially making it difficult to pass legislation.

IN LATE 2018 THE COALITION GOVERNMENT LOST ITS MAJORITY AND BECAME A MINORITY GOVERNMENT.

1. Who was the Prime Minister during the by-election? [C]

2. Why was the by-election called? [C]

3. What is a minority government and how did it occur? [C]

PRACTICAL APPLICATION CONTINUED...

4. Compare and contrast the composition of the House of Representatives in 2016 against the same house in December 2018. What are the similarities and differences? What do you think caused this to occur? [A]
5. Can you explain the implications of a minority government? [A]
6. Do you think a majority or minority government is more effective at creating fair and just law that has the support of most Australians? Justify your response. [E]

WHAT DO YOU THINK?

Could Parliament operate without political parties? How would you organise this system of government? Compare and contrast your model with other students. [E]

4.3 THE CONCEPT OF RESPONSIBLE GOVERNMENT

In *Australian Capital Television Pty. Ltd and Others and The State of New South Wales v The Commonwealth of Australia and Another* [1992] HCA 45, Chief Justice Anthony Mason said:

> *'… the principle of responsible government – the system of government by which the executive is responsible to the legislature … is an integral element in the Constitution'.*

It is important to remember that the concepts of responsible and representative government aren't interchangeable and mean different things – but they do work together to help our democratic system of government operate and guide the law making process.

REPRESENTATIVE GOVERNMENT:

A system in which people vote for candidates to represent them in parliament and make laws on their behalf.

RESPONSIBLE GOVERNMENT:

The principle that the government should be responsible to the Parliament, to ensure that the government does not abuse its power; the government must retain the support of the majority of members of the House of Representatives to stay in power.

SOURCE: PARLIAMENTARY EDUCATION OFFICE, GLOSSARY (PEO.GOV.AU/LEARNING), 2018.

The above definition of responsible government is a simple one. For instance, it doesn't describe the nature of the institutions established by the Australian Constitution whose interrelationships make our system of responsible government work. It also doesn't describe and explain the various **conventions** (remember this is a rule, method or practice established by general consent or usage which is followed by stakeholders in a political system) that enable these institutions to function and operate responsibly.

Ch 2.7

We have already identified the institutions established by the Constitution in Chapter 2, namely, the **Queen** (represented by the **Governor-General**), **Parliament** and the **Judiciary**. These institutions have separate powers that are used to maintain responsible government. We have not yet explained how they

operate within the framework of the different political conventions which the Australian democratic system has inherited from Britain. We will examine the key features of a responsible government and, where appropriate, use an inquiry approach.

4.4 THE ROLE OF PARLIAMENT

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1901 (CTH)

Section 1 Legislative power

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth.

The constitution gives legislative power to the Parliament (s1). The Parliament is made up of the Queen (represented by the Governor General), the House of Representatives and the Senate. The interrelationship between the government and Parliament is the foundation of responsible government. The very notion of responsible government means that the Ministers (who form the Executive) are responsible and accountable to the Parliament. We will see an example of this later. Parliament has many roles and responsibilities. The Parliament:

Ch 2.4

Ch 3.3

- represents the people of Australia (each Member of Parliament represents an electorate)
- determines who forms government (we covered this in the last section)
- determines who will form the official opposition
- scrutinises the actions of the government (with the government also having the ability to discipline its own members)

The government can only remain in power if it holds the confidence of the Parliament. We are going to use an inquiry approach to find out what this means.

INQUIRY FOCUS

DOES LOSING A VOTE ON THE FLOOR OF THE HOUSE OF REPRESENTATIVES ALWAYS MEAN A SITTING GOVERNMENT HAS LOST THE CONFIDENCE OF PARLIAMENT?

When beginning an inquiry, we firstly need to **comprehend legal concepts, principles and processes** within this issue:

What does 'confidence' in the Parliament mean?

According to convention the confidence of Parliament is required to govern. Responsible government ensures Ministers (the Executive) are held accountable to the Parliament (the Legislature). This is

the separation of powers in action – an important feature of the rule of law. This accountability is maintained in many different ways. To remain in government, a political party must maintain the confidence (or support) of the House of Representatives.

To understand this further let's analyse a legal situation that occurred in 2018:

PRACTICAL APPLICATION

PRIME MINISTER SCOTT MORRISON TALKS DOWN THREAT TO COALITION AFTER LOSS IN PARLIAMENT VOTE

SOURCE: BRETT WORTHINGTON, ABC NEWS ONLINE, (ABC.NET.AU), 12 FEBRUARY 2019 (EXCERPTS).

The future of the Coalition's hold on power is at risk with the Federal Government becoming the first to lose a vote on its own legislation in almost 80 years.

The majority of the crossbench and Labor joined forces in the House of Representatives to pass amendments to give doctors a greater say on refugee medical evacuations.

But Prime Minister Scott Morrison has so far refused to buckle to calls for an early election and insists the Coalition retains the ability to govern.

The amendments that passed the House were agreed to by the Senate late last year, after Labor and the crossbench forced a series of measures into a government migration bill.

Labor secured the support of most of the crossbench to win the Lower House vote 75 to 74 on the first sitting day for 2019.

Attorney-General Christian Porter presented legal advice from solicitor-general Stephen Donaghue at the last minute, suggesting the amendments agreed to by the Senate would be unconstitutional.

Manager of Opposition business Tony Burke would not rule out moving a vote of no confidence in the Government, to force an early election.

CONSTITUTIONAL PRECEDENTS ARE NOT 'BUBBLE NONSENSE'

SOURCE: ANNE TWOMEY, THE SYDNEY MORNING HERALD, (SMH.COM.AU), 13 FEBRUARY 2019, (EXCERPTS).

"I am not going to be distracted by all the frankly – I know you don't like the phrase – but the bubble nonsense of people going on about all sorts of precedents, all the rest of it."

But those precedents, and the constitutional conventions that they illustrate, are essential to the very existence of governments and our parliamentary system of responsible government. This is not "bubble nonsense" – it is fundamental to the right to govern.

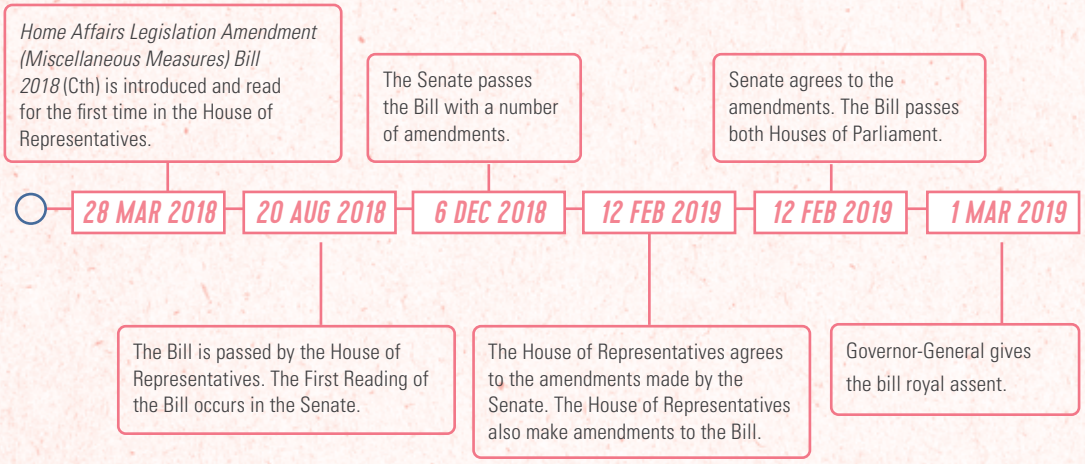
There are no express words in the constitution to say it, but our constitutional system operates on the basis that the government must hold the confidence of the lower house of the Parliament. Critical to confidence and the ability to govern are control over the budget and the ability to secure supply. That is why, in 1941, the Fadden government resigned after its budget was reduced by a symbolic amount of £1. It wasn't the loss of £1 that counted – it was the symbolic loss of control.

It is also why the government's attempt to characterise the Senate's medivac amendments as turning the bill into a money bill was a high-risk manoeuvre. If the bill had passed in that form, there would have been a serious argument that the government had lost control over the budget, threatening its right to continue governing. The amendment moved by Labor to remove the money aspect of the bill rescued the government from that fate.

PRACTICAL APPLICATION CONTINUED...

Labor made a strategic move to avoid turning the bill into a test of confidence in the government, withdrawing part of the medical transfer scheme that required funding to pay for medical experts to review transfers.

The move cut short a furious debate over whether the vote in the lower house could be seen as a vote on a money bill and was therefore a vote of no confidence in the government itself.



A BRIEF SUMMARY OF THE LEGISLATIVE HISTORY OF THE *HOME AFFAIRS LEGISLATION AMENDMENT (MISCELLANEOUS MEASURES) BILL 2018*, NOW *HOME AFFAIRS LEGISLATION AMENDMENT (MISCELLANEOUS MEASURES) ACT 2019* (CTH).

1. What law was passed by the House of Representatives? [C]
2. What strengths and weakness does this situation expose about the reality of responsible government? [A]
3. Do you believe the Morrison Government has lost the ability to govern? Why or why not? [E]

RESEARCH

1. Locate the *Commonwealth of Australia Constitution Act 1901* (Cth) s57. What occurs if the Senate and House of Representatives disagree? [C] [S]
2. Select a secondary source of information to find out what a 'no confidence' motion is and its implications for a government. Could the opposition move a motion of no confidence in this case? [S] [A]

ON REFLECTION

Throughout the inquiry approach, it is important to **reflect:**

1. What do you now understand more deeply about holding the confidence of Parliament?
2. Do you have any further questions – if so, write them down.

RESPONSIBLE MINISTERS

Another important person that must maintain the confidence of the Parliament is a Minister. Holding Ministers responsible for their actions, policy decisions and the departments they oversee is also how we see responsible government in action. It is important that Ministers tell the truth, act honestly and follow any rules or laws – such as Codes of Conduct. Ministerial responsibility is governed by conventions inherited from Westminster. Throughout history some Ministers have not made the right decisions. If a Minister is found to have misled Parliament they usually resign – but not always.

PRACTICAL APPLICATION

ATTORNEY-GENERAL GEORGE BRANDIS URGED TO RESIGN AMID CLAIMS HE MISLED PARLIAMENT

SOURCE: MICHAELA WHITBOURN, SYDNEY MORNING HERALD (SMH.COM.AU), 5 OCTOBER 2016, (EXCERPTS).

Attorney-General George Brandis is facing calls to resign after the government's top legal adviser accused him of misleading Parliament, in a dramatic escalation of a toxic row between the country's two most senior legal officers.

Senator Brandis has come under fire over a contentious move to restrict his ministerial colleagues' ability to seek independent legal advice directly from Solicitor-General Justin Gleeson, SC.

Documents released at a Senate inquiry on Wednesday suggest same-sex marriage laws and a proposal to strip dual nationals involved in terrorism of Australian citizenship were flashpoints in a simmering feud between the two men.

Mr Gleeson, the government's top legal adviser, said in an explosive submission to the inquiry that he had not been consulted about a change requiring all ministers – including the prime minister – to obtain the written approval of Senator Brandis before seeking his advice.

Senator Brandis claimed in Parliament Mr Gleeson was consulted about the legally binding change, made days before the election.

1. Which Minister is facing calls to resign? [C]
2. What did the Minister allegedly do? [C]
3. If the Minister misled Parliament should he resign? Why or why not? [E]

OTHER MECHANISMS OF ACCOUNTABILITY WITHIN PARLIAMENT

OPEN GOVERNMENT

The definition of responsible government encompasses concepts such as **accountability and transparency – key features of the rule of law**. Like the court system, Australia has an open system of government – this means anyone can visit Parliament and observe law being made. The public is also able to have their say on a Bill by making a submission, attending a government inquiry in person or protesting against a government decision. It also means the media can report and openly criticise the government, a law or policy or the actions of a Minister (we'll see an example of this later).

Visit the following websites to find a list of current inquiries:

- Parliament of Australia, aph.gov.au/Parliamentary_Business/Committees/Current_Inquiries
- Queensland Parliament, parliament.qld.gov.au/work-of-committees/inquiries

THE OPPOSITION

The government [has] used the term 'Team Australia' a lot. I'm worried about the emergence of 'Team Idiot'.

Bill Shorten, Leader of the Opposition, 25 September 2014

We know that an important feature of a responsible government is maintaining confidence of Parliament – this is easy if you have a majority government. But, if you rely on the crossbench to pass law or have an effective Opposition, holding confidence can be much more difficult. As the Opposition is the largest political party (or coalition) that does not hold the majority of seats in the House of Representatives it plays an important role in keeping the government accountable and transparent – even an Inquiry into the Salaries and Allowances of Members of the Commonwealth Parliament in 1959-60 noted that, 'An effective Opposition is essential for the proper functioning of a democracy.' The Opposition:

- scrutinises the government's decisions
- criticises and questions the government's actions
- examines the expenditure of the government
- debates bills
- provides Australians with an alternative policy
- sits on committees that review legislation or government policy

RESEARCH

Locate a copy of the Hansard for the last sitting of Federal Parliament from either house or a transcript of the last Senate estimates hearing

1. Identify two examples of the Opposition questioning, criticising or scrutinising the government's actions. [S]
2. Why is an effective Opposition important to maintain accountability and transparency? [E]

Ch 5.1

4.5 THE ROLE OF THE GOVERNOR-GENERAL

GOVERNOR-GENERAL

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1901 (CTH)

Section 2 Governor General

A Governor General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

Australia is a **constitutional monarchy**. This means our Head of State is currently Queen Elizabeth II, who chooses a person to represent her - the Governor-General (s2). This appointment is made on the recommendation of the Prime Minister. The Governor-General is part of the Executive Government and the legislature – a feature of the Westminster system of government. The Governor-General's role and duties are:

…laid on him by the Constitution, some by the Letters Patent and his Commission. Others are placed on him by Acts of the Commonwealth Parliament. Others come to him by conventions established in past centuries in Great Britain or by practices and customs that have developed in Australia.

SOURCE: SIR PAUL HASLUCK, THE OFFICE OF GOVERNOR-GENERAL, MELBOURNE UNIVERSITY PRESS, 1979, P. 10, (EXCERPTS).

In reality, the Governor-General acts on the advice of the Prime Minister and Ministers (the Federal Executive Council). But, the Governor-General also has additional powers that allow him or her to act independently if required. These are known as **reserve powers** that essentially give him or her the ability to make a decision without Ministerial advice. These can include the power to:

- appoint the times for the holding of sessions of Parliament (s5)
- dissolve or refuse to dissolve the House of Representatives (s5)
- issue writs for general elections of the House (s32)
- dissolve Parliament or convene a joint sitting of both Houses (s57)
- assent to bills, withhold the assent of a bill or reserve bills for the Queen's assent (s58)
- appoint or dismiss Ministers (s64)

Ch 2.7

The Governor-General is the Queen's representative in Australia. He or she performs many of the ceremonial functions usually undertaken by the monarchy. We know from the previous section that the Governor-General holds executive power as the head of the Federal Executive Council (s62), but, in reality, this power is carried out by the Prime Minister and Ministers. However, if the government loses the confidence of Parliament, the Governor-General may need to act independently.

Under what circumstances might a Governor-General not take the Prime Minister or Ministers advice? Constitutional experts are not able to provide a clear answer, but the analysis of an event that occurred in 1975 may help you further understand how the legal concept of responsible government works in practice and the role of the Governor-General in this situation.

INQUIRY FOCUS

WHAT CAN A GOVERNOR-GENERAL DO IF THE GOVERNMENT LOSES THE CONFIDENCE OF THE PARLIAMENT?

What powers does the Governor-General possess?

The Governor-General has a range of powers. Some of these powers are regularly used, such as providing royal assent to a bill so it can become a law, appointing a Minister or issuing a writ for an election. All these decisions are usually made on the advice of the Prime Minister or a Minister. But our Constitution also allows the Governor-General to act without advice – such as when a government loses confidence or becomes untenable. Under these circumstances the Governor-General can dismiss a Prime Minister if he or she loses support of the House of Representatives, resigns after losing a vote of no confidence, or if there is no clear majority, after an election is held. He or she can also dissolve the House of Representatives or both Houses.

To understand what a Governor-General can lawfully do if the government loses the confidence of the Parliament we will analyse a legal situation that occurred in 1975 - the last time the Governor-General dismissed a Prime Minister (and the government they led).

PRACTICAL APPLICATION

THE 1975 CONSTITUTIONAL CRISIS – THE DISMISSAL

Source 1: Gough Whitlam's public reaction to the dismissal of his government.

"Ladies and gentlemen, well may we say 'God Save the Queen', because nothing will save the Governor-General. The proclamation you have just heard was countersigned Malcolm Fraser, who will go down in history as Kerr's cur."

Gough Whitlam, November 11, 1975

Source 2: A summary of the 1975 dismissal

In 1974 Prime Minister Gough Whitlam requested the Governor-General to dissolve both houses of Parliament (s57) as the Senate had refused to pass six Bills on two occasions. Whitlam won the election, but the Senate again rejected the Bills that had caused the election to the called. Consequently, the Governor-General called for a joint sitting of the Senate and House of Representatives. This is the only time the Australian Parliament has held a joint sitting of both houses. As the Whitlam government held the majority of all the combined votes, the Bills were passed.

In November 1975 the Governor-General, Sir John Kerr, sacked the sitting Prime Minister Gough Whitlam. He made this decision after the Senate deferred the passage of a bill needed to finance the government. The Senate was dominated by the Liberal and Country (now National) parties, who had formed an alliance. The Democratic Labor Party (DLP), who had five members, often voted with them. A double dissolution election was held and the Whitlam Government was defeated.

This was a significant political event as it was the first time a Governor-General had removed a Prime Minister who held the support of the House of Representatives. Although at the time many Australians called for the system to be changed, the Governor-General retains this power and it can be used today if required.

PRACTICAL APPLICATION CONTINUED...

Source 3: News commentary on the event

AUSTRALIAN POLITICS EXPLAINER: GOUGH WHITLAM'S DISMISSAL AS PRIME MINISTER

SOURCE: PROFESSOR ANNE TWOMEY, THE CONVERSATION (THECONVERSATION.COM), 19 APRIL 2017, (EXCERPTS).

What was its impact?

The reaction was relief for some, and outrage for others. The public and the media, being unfamiliar with constitutional history and the role and powers of vice-regal representatives, saw the Dismissal as unprecedented and shocking.

Many people were influenced by the events of 1975 to support a republic, due to their objection to an unelected representative of the Queen dismissing an elected government that had majority support in the lower house.

Others saw 1975 as revealing the importance of the Senate's power to block supply, and the need for the reserve powers of the governor-general to resolve a crisis.

1. What is a joint sitting of Parliament? [C]
2. Who was the Prime Minister in 1975? [C]
3. What did the Senate do and what impact do you think it could have on Australia? [C] [A]
4. What decision did Governor-General Sir John Kerr make? Could his decision be legally justified (you may need to conduct some research to find this out)? [C] [S] [E]
5. Why was this event significant? [C]
6. Is the Morrison Government in a similar or different situation to the Whitlam Government? After the events of 12 February do you think the Governor-General should dismiss the Morrison Government? Why or why not? [A] [E]
7. Do you think an unelected representative should have the power to sack an elected Prime Minister who leads a majority government? Why or why not? [E]

ON REFLECTION

Reflecting on the standard of your responses can be an important part of the inquiry approach – as you will complete an examination at the end of this topic.

1. If you were the teacher, what comments would you make about the quality of your answers? Why?

READING

In 2018 Professor Jenny Hocking sought access to correspondence between Governor-General Sir John Kerr and the Queen. This was denied by the Federal Court of Australia who held that the letters had been correctly categorised as 'personal records'. To learn more locate the decision *Hocking v Director-General of National Archives of Australia* [2018] FCA 340. The matter is now before the High Court.

4.6 THE ROLE OF THE JUDICIARY

THE ROLE OF THE COURTS

Ch 6.1

We have already covered the important role the High Court of Australia has in resolving disputes between the different levels of government and matters relating to the Australian Constitution (s75-76). The courts (or Judicial arm of government) play an important role in keeping governments and Ministers accountable for their decisions and act as a check against lawful or unconstitutional actions. Judicial power gives the courts the ability to:

- interpret legislation
- apply legislation

The separation of powers ensures that courts are free to make decisions against the government, as they are independent and impartial. A judge isn't elected and can't be removed from the bench if he or she hands down a decision that is unpopular with the government. They are appointed by the Governor-General (acting on the advice of the Prime Minister and Cabinet). Judges can only be removed if both Houses agree on the ground of proved misbehaviour or that they lack capacity. There have been many cases where a citizen has taken action against the government or a Minister. This is an important way a Ministers' integrity and responsible government is maintained. In the case below, we will examine how the Federal Court of Australia held the Department for Immigration and Multicultural and Indigenous Affairs to account for its treatment of an unlawful non-citizen denied asylum.

CASE STUDY

Al Masri v Minister for Immigration & Multicultural and Indigenous Affairs
(2002) 192 ALR 608; [2002] FCA 1009

Facts: The *Migration Act 1958* (Cth) allowed for the Australian government to detain asylum seekers. Al Masri, a Palestinian, arrived in Australia as an unlawful non-citizen. Shortly after his arrival he was placed in the Woomera Detention Centre. He applied for a protection visa, which was denied. After a review failed, he made the decision to return to the Gaza Strip, his home, but Syria refused to allow him to re-enter the country. Neighbouring countries also denied Al Masri's entry. The uncertainty surrounding his future caused Al Masri a great deal of mental distress. He applied to be released pending his removal from Australia.

Legal issue: Does the Minister for Immigration and Multicultural and Indigenous Affairs have the power to detain an unlawful non-citizen when there is no real likelihood of their leaving Australia in the foreseeable future? Does the Minister have a duty under the law to detain Al Masri until he can be removed from Australia?

Decision: The Federal Court of Australia found that a person's indefinite detention has limitations. It can only continue if the Minister has taken all reasonable steps to aid the removal of an unlawful non-citizen as soon as reasonably practicable, and there is a strong likelihood a detainee will be able to leave in the foreseeable future. As there was no real likelihood that Al Masri would be able to leave Australia, he must be released (subject to reporting and other conditions). The court also considered Australia's international obligations when interpreting the law. Al Masri returned to Palestine in September 2002 – before this decision was reached.

This ruling led to the initial release of a small number detainees in a similar situation, but didn't impact the majority of Australia's detainees.

1. Why was Al Masri in detention? [C]
2. What court heard this case? [C]
3. What does the Minister for Immigration and Multicultural and Indigenous Affairs have to show to keep an unlawful non-citizen in detention? [A]
4. What has been the significance of this case for migration law in Australia? [A]

REVIEW

1. Describe the key term 'responsible government'. [C]
2. Describe how a Prime Minister is chosen. [C]
3. Explain the role of the Cabinet. [C]
4. Explain the role of the Crown in Australia. [C]
5. Explain what may happen if a Minister misleads Parliament. [C]
6. Define the key term 'hung parliament'. Explain how government can be formed in these circumstances. [C]
7. Explain the role the separation of powers doctrine plays to ensure responsible government. Critique how effective the doctrine is in the real world. [A]
8. Describe the key term 'double dissolution election'. Explain what circumstances cause a double dissolution to occur. [C] [A]
9. Analyse Sources 1-3 below to determine the implications of minority and majority governments for making law. [A]

SOURCE 1

The past 10 years of Australian politics have been characterised by chaos and internal division, featuring hung parliaments, leadership spills and governments with a minority in the Senate. Most recently, the former prime minister Malcolm Turnbull had to engage in messy negotiations over legislation not just with [the] crossbenches, but with his own party room.

SOURCE: EVERSHED, N 2018, 'TURNBULL SCORES LOWER THAN ABBOTT, GILLARD AND RUDD ON PRODUCTIVITY IN PARLIAMENT', THE GUARDIAN, HTTPS://WWW.THEGUARDIAN.COM/AUSTRALIA-NEWS/DATABLOG/2018/DEC/23/TURNBULL-SCORES-LOWER-THAN-ABBOTT-GILLARD-AND-RUDD-ON-PRODUCTIVITY-IN-PARLIAMENT

SOURCE 2

The record of the Gillard government is mixed. Despite being a minority government it guided 561 of its bills through the parliament to Royal Assent. Significant elements of its legislative agenda were delivered but there were also less successful outcomes.

SOURCE: SINGLETON, G 2013, 'GILLARD GOVERNMENT'S ACHIEVEMENTS AND FAILURES', AUSTRALIAN POLITICAL INSTITUTIONS, WEBBLOG, HTTPS://SINGLETONAUSPOL.WORDPRESS.COM/2013/08/16/GILLARD-GOVERNMENTS-ACHIEVEMENTS-AND-FAILURES/

SOURCE 3

When the Senate has a majority [at] the same [the] as the House of Representatives, it becomes a rubber stamp, as it was for the Howard government after the 2004 election result. Alternatively, when the Opposition occasionally controls the Senate, it can simply block legislation, which it is able to do because constitutionally the two houses have almost equal power.

The third possibility is the one that will greet the Abbott Government from July this year. That is a balance of power held by a handful of senators from outside the established parties. This results in some of the worst kinds of deal making and repeated serving of vested interests, and is perhaps best encapsulated in the memory of Tasmanian Senator Brian Harradine.

SOURCE: LELLIOTT, J 2014, 'WHAT AUSTRALIA NEEDS IS A GENUINE HOUSE OF REVIEW, ABC NEWS, HTTPS://WWW.ABC.NET.AU/NEWS/2014-01-03/LELLIOTT-GETTING-RID-OF-THE-SENATE/5183256

10. Describe and explain the conventions that surround the formation of government in Australia. [C] [A]
11. Explain how *Al Masri v Mininister for Immigration and Multicultural and Indigenous Affairs* (2002) impacts migration law in Australia. [C] [A]
12. Select one additional mechanism that holds the government to account. Evaluate whether it achieves its objective and how well it contributes to the fair, just and ethical system of governance. [E]

TOPIC 1: GOVERNANCE IN AUSTRALIA

CHAPTER 5: GOVERNANCE IN ACTION - THE LEGISLATIVE PROCESS

FOCUS SUBJECT MATTER

5.1 HOW LAW IS MADE BY PARLIAMENT

5.2 THE APPLICATION AND ENFORCEMENT OF THE LAW

5.3 THE FEATURES OF A 'JUST AND EQUITABLE' LAW IN AUSTRALIA

5.4 CHALLENGING AN UNJUST LAW

5.5 STRENGTHS AND WEAKNESSES OF THE LEGISLATIVE PROCESS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the process used by Australian Parliaments to make laws;
- the process of governance includes the proper application and enforcement of our laws;
- there are well-established criteria that can be used to determine if particular laws require reform; and
- how to balance the advantages and disadvantages of our legislative process.

5.1 HOW LAW IS MADE BY PARLIAMENT

Ch 2.4

The main duty of Parliament is to make laws. In Chapter 2, we looked at the **division of lawmaking powers between the Commonwealth and the States** that were set out in the Commonwealth Constitution at Federation in 1901. The powers to pass laws are divided so that State Parliaments could pass laws on all matters that had not been exclusively given to the Federal Parliament. In turn, the **Queensland Parliament delegates many of its more local lawmaking powers to the Queensland local councils and shires.**

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

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

WHAT DO YOU THINK?

Does the increased efficiency in the making of regulations, and changing them when required quickly, increase the difficulty of finding out what the law is that is governed by those regulations? [A] [E]

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

- **Pass new laws.** An example is the *Summary Offences Act 2004* (Qld), which superseded the V*agrants, Gaming and Offences Act 1931* (Qld), retaining laws against acts such as wilful exposure and being drunk in a public place, while adding offences such as trespass without permission on business premises and possession of an implement that could be used in a burglary or assault without a good explanation. These new offences are designed to assist police to tackle lower-level offences. *The Federal Euthanasia Laws Act 1997* (Cth) was passed by the Federal Parliament to abolish the Northern Territory's *Rights of the Terminally Ill Act 1996* (NT), which had contained the world's first laws legalising euthanasia.
- **Amend (change) existing laws.** In 2006, the Federal Parliament passed *the Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006* (Cth), which changed the law to allow embryonic stem cell research (therapeutic cloning). An example of a change to Queensland criminal law is is the 1997 Amendment to the *Criminal Code*, which added a specific section on graffiti offences (s496). The Code was also amended in 1997 to introduce the crime of computer fraud.
- **Repeal (remove or cancel) laws.** The section of the *Criminal Code 1899* (Qld) allowing the death penalty was repealed in 1922. Section 655 of the *Criminal Code 1899* (Qld) which stated that an

offender could be sentenced to **whipping, was repealed in 1986**, which means that whipping no longer exists as a possible sentence for convicted persons in Queensland. *The Vagrants, Gaming and Other Offences Act 1931* (Qld) was repealed in 2004, abolishing archaic laws such as **carrying dark lanterns, and pretending to tell fortunes.**

DEMAND FOR CHANGE

For there to be new or amended legislation, there must be a demand or desire for it. Much of the legislation Parliament produces is a product of a **government's desire to implement its own policies**. The process by which this demand is generated outside of the policy platform of political parties, and indeed, as part of the forming of a political party's policies, is addressed later In **Topic 2: Law reform within a dynamic society**. What happens inside the Houses of Parliament of the Commonwealth is set out below. The process is identical in the State of Queensland, except for the fact that there is no Upper House, and the Governor of Queensland gives Royal Assent to the bill instead of the Governor General.

1. BILL

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

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

However, an individual member who is not a minister, nor even a government member, can introduce a Bill. This is called a '**Private Members' Bill**'. Over the years, Private Members' Bills have become less common as there is no guarantee that the Bill will be passed when it lacks the support of the party in power. However, many Private Members' Bills have been important because they have raised controversial matters, where members of parliament have been allowed by their parties to vote according to conscience rather than party policy. An example was the *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006* (Cth), which was presented to the Federal Senate by Liberal backbencher Kay Patterson. This Bill was passed by a conscience vote in each House of Parliament. The last person to be hanged in Australia was Ronald Ryan. Following his execution, capital punishment was abolished in Victoria as a result of the passage of a Private Members' Bill.

2. FIRST READING

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

3. SECOND READING

At this stage, the **detailed discussion of the Bill begins**. The member who proposed the Bill makes a speech explaining the benefits for the community if the Bill becomes law. A member of the opposition may oppose the Bill and will seek to amend it, thereby delaying the Bill's passage through Parliament.

Speeches made in Parliamentary debates are recorded in official reports, known as '**Hansard**'. These reports are named after Thomas Curson Hansard, a printer, who started an official report of British Parliamentary debates in 1803.

4. COMMITTEE STAGE

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

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

5. THIRD READING

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

5. ROYAL ASSENT

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

A section of an Act will usually state when it will commence or come into force (take effect as law). It can be from the date of signing by the Governor or Governor-General, or from a stated future date. It may state that it will come into effect on a date to be proclaimed, which means that there is not an exact starting date, but Parliament will proclaim a precise date at a later time. **In rare situations, Acts have come into force from a past date, that is, retrospectively. Retrospective acts are generally considered to be unfair,** especially if the period of retrospectivity is considerable. The commencement date of an Act of Parliament will always be notified in the Government Gazette. The Act will be printed by the Government Printing Office. These days a PDF version of the Act can usually be located online at the relevant government department.

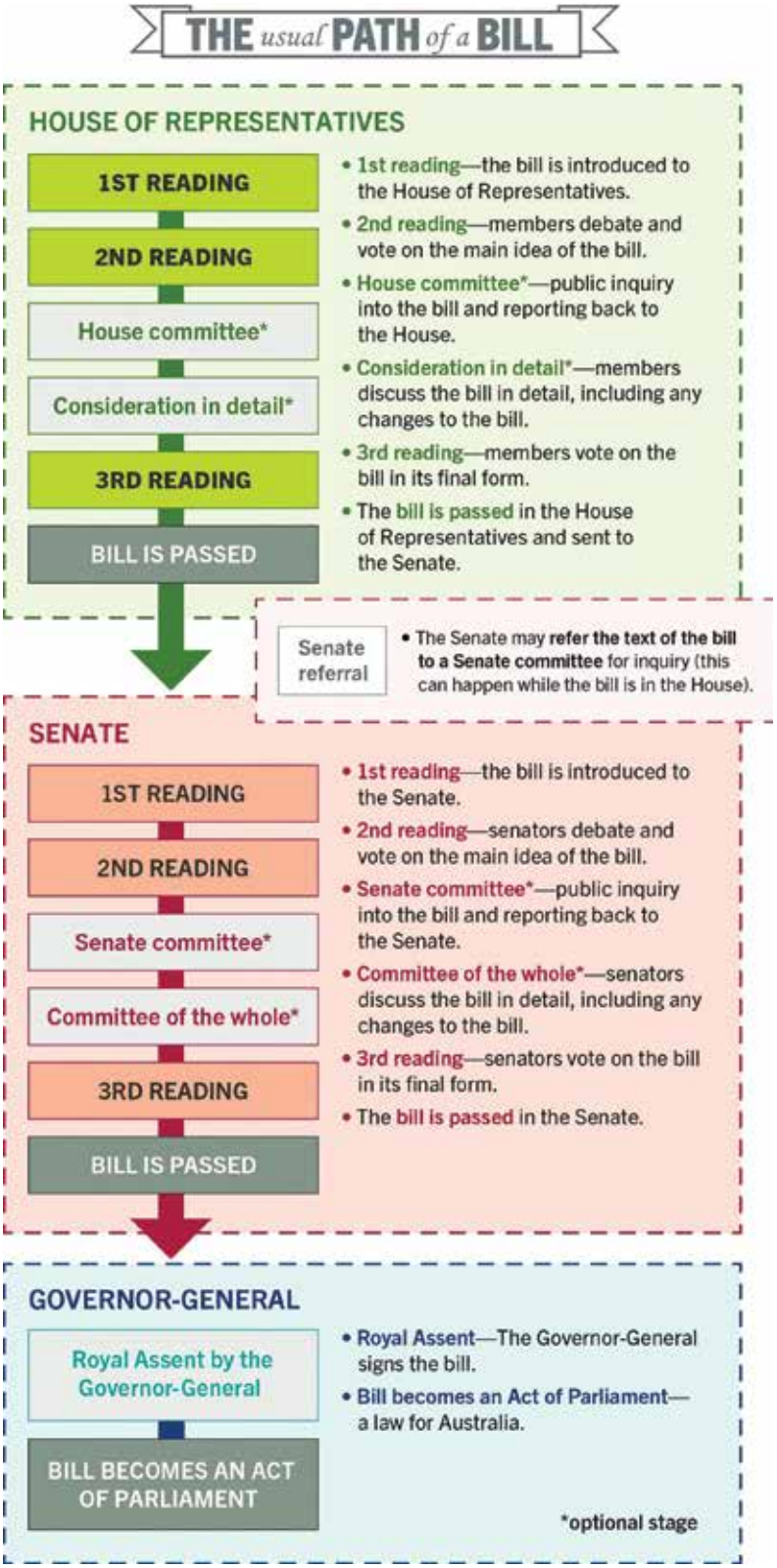
In a practical sense, understanding what happens in the process of passing a Bill through Parliament, so that it emerges as legislation (laws) which are accepted and supported by the community is important. Communicating that to you as students would probably best be done by your attending Parliament or reading Hansard to get the complete picture. A snapshot of what happened in the committee stage of the *Weapons Amendment Act 1996* (Qld) follows in a practical application. A recent mass-shooting event in Christchurch, New Zealand make such legislation, which was passed in Australia in 1996, and the lack of such legislation in the United States of America, very relevant today.

QUEENSLAND GOVERNOR THE HON. P. DE JERSEY. AC QC

PRACTICAL APPLICATION

THE USUAL PATH OF A BILL'

SOURCE: PARLIAMENTARY EDUCATION OFFICE, WWW.PEO.GOV.AU



PRACTICAL APPLICATION

AMENDING THE *WEAPONS ACT 1990* (QLD)

1. DRAFT BILL

1996
A BILL
FOR

An Act to amend the *Weapons Act* 1990, and for related purposes
Weapons Amendment
The Parliament of Queensland enacts-
PART 1-PRELIMINARY

Short title
Clause 1. This Act may be cited as the Weapons Amendment Act 1996.

Commencement
Clause 2. (1) This Act commences on the day to be fixed by proclamation.

2. FIRST READING

From Hansard

Hon. T.R. COOPER (Crows Nest-Minister for Police and Corrective Services and Minister for Racing) (11:54 a.m.), by leave, without notice:

I move-

"That leave be granted to bring in a Bill for an Act to amend the Weapons Act 1990 and for related purposes."

Motion agreed to.

First reading

Bill and Explanatory Notes presented and Bill, on motion of Mr Cooper, read a first time

3. SECOND READING

'From Hansard

Second Reading

Hon. T. R. COOPER I move-

"That the Bill be now read a second time."

The appalling tragedy of the Port Arthur massacre shocked the nation. It had the most profound impact as the nation sought to grapple with the awesome, almost unbelievable contemplation of such a chilling atrocity. Firstly, there was shock, horror and grief and then a firm, resolute determination that the nation's law-makers had a clear and urgent duty to respond.

4. COMMITTEE STAGE

From Hansard

Committee

Hon. T. R. Cooper in charge of the Bill.

Clauses 1 to 4, as read, agreed to.

Clause 5--

I move the following amendment--

"at page 9, line 13, after "and " insert—' automatic and self- loading'. "

Amendment agreed to.

Clause 5, as amended, agreed to.

MR BARTON (5.04 p.m.): I seek some clarification from the Minister. On page 11, the bill provides a definition of "landowners". I'm a little concerned about what an owner of rural land means and the meaning of, as stated in the Bill—" a person authorised by the owner or occupier to act on the owner's or occupier's behalf in the general management or control of land."

I raised this issue in my speech in the second reading debate and I am sure that the Minister is familiar with it. Advertisements have appeared in some newspapers which go to the heart of the issue of people collectively purchasing land so that they can say that they are legitimate landowners for the purposes of holding licenses. We are concerned that this may allow for inappropriate land to be purchased or may simply give some innovative real estate agents a capacity to sell land that they are having trouble selling. Are there mechanisms in the Bill they can adequately cover that situation? I know it may well be covered by the regulations, but I would like the Minister's response on whether, in his view, the definition is adequate to prevent inappropriate land being purchased for that reason-- a concern that I know he has also expressed.

MR COOPER. I take on board the comments of the honourable member for Waterford. Firstly, I will comment

PRACTICAL APPLICATION CONTINUED...

on the issue of the definition of "landowner" and then I will turn to that of 'rural land'.

5. THIRD READING

From Hansard

Bill, on motion of Mr Cooper, by leave, read a third time.

6. ROYAL ASSENT

MR SPEAKER (Hon.N. J. Turner, NickIln) read prayers and took the chair at 9:30 a.m.

MR SPEAKER. Order! I have to inform the House that I have received from Her Excellency the Governor letters in respect of assent to certain Bills, the contents of which will be incorporated in the records of Parliament--

GOVERNMENT HOUSE QUEENSLAND

THE HONOURABLE N, J. Turner, MLA

Speaker of the Legislative Assembly

Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Speaker

I hereby acquaint the Legislative Assembly that the following Bills, having been passed by the Legislative Assembly and having been presented for the Royal Assent, were assented to in the name of Her Majesty the Queen on 7 November, 1996.

"A bill for an Act to amend the Weapons Act 1990, and for related purposes.

A Bill for an Act to amend the Fire Services Act 1990. "

The Bills are hereby transmitted to the Legislative Assembly, to be numbered and forwarded to the proper Officer for enrolment, in the manner required by law.

Yours sincerely

(Sgd) Leneen Forde

Governor

1. Describe the purpose/purposes of taking a Bill through the different stages set out in the above diagram. Do you think what happens to a Bill would ensure that the nature of the legislation is the best it can be? Give your reasons. [C] [A] [E]

2. In the Federal Parliament, in the committee stage of considering a Bill, the Senate conducts committee hearings in public as part of the process. In Queensland, because there is no Upper House, that is not possible. Do you think establishing a smaller committee, including members of parliament from all the parties represented in the parliament, to conduct a hearing into a draft Bill which was open to the public, would give our politicians and the public more confidence in the process of legislating? [C] [A] [E]

5.2 THE APPLICATION AND ENFORCEMENT OF THE LAW IN AUSTRALIA

There is a broad distinction in Australia between the laws which are enforced by the police as enforcement officers and those laws which are generally about compliance obligations enforced by regulatory agencies. The former, of course include:

- Australian Border Force (ABF)
- Australian Federal Police (AFP)
- Royal Australian Air Force Police
- Royal Australian Corps of Military Police
- Royal Australian Naval Police

The latter, include:

- Australian Communications and Media Authority (ACMA)
- Australian Competition and Consumer Commission (ACCC)
- Australian Criminal Intelligence Commission (ACIC)
- Australian Energy Market Commission (AEMC)
- Australian Fisheries Management Authority
- Australian National Audit Office
- Australian Taxation Office (ATO)
- Australian Securities and Investments Commission (ASIC)
- Australian Prudential Regulation Authority (APRA)
- Civil Aviation Safety Authority (CASA)

There are many more examples - this list is not exhuastive. Many of them have no equivalent at the State or Local Government level, for example, the Royal Australian Air Force Police and the Australian Taxation Office. Others, such as the Australian Federal Police and the Australian Fisheries Management Authority have state equivalents such as the Queensland Police Service and the Queensland Boating and Fisheries Patrol.

The above lists are only the tip of the iceberg. In addition to those organisations we have referred to above as agencies, there are government departments which administer the laws made by Parliament, and there are statutory authorities established by Acts of Parliament (such as the ***Great Barrier Reef Marine Park Authority***) which are funded by government but operate independently under a charter set out in the relevant legislation. Another well-known such authority is the ***Australian Broadcasting Authority*** (the ABC).

RESEARCH

If you studied legal studies in year 11, you will have already studied many of the organisations which apply and enforce the law.

- Select one Federal and one State agency or government department. Investigate each of them by going online. [S]
- Identify the legislation passed to establish your chosen organisations. [C]
- Describe the role they play generally, and select a particular aspect of each which affects the community or the relevant private organisations in the community. Describe and explain how this occurs. [C] [A] [E]

PRACTICAL APPLICATION

BOEING 737 MAX 8 OPERATIONS SUSPENDED IN AUSTRALIA AFTER ETHIOPIAN AIRLINES CRASH

SOURCE: ABC NEWS, WWW.ABC.NET.AU, 13 MARCH 2019 (EXCERPTS)

Australia's Civil Aviation Authority (CASA) says it is suspending operations of the Boeing 737 MAX 8 plane in Australia after a deadly crash killed 157 people in Ethiopia at the weekend.

On Sunday an Ethiopian Airlines 737 MAX 8 crashed shortly after take-off from Addis Ababa, killing all 157 people aboard.

PRACTICAL APPLICATION CONTINUED...

Safety concerns about the model were first raised in October 2018 after a Lion Air flight in Indonesia crashed killing all 189 people aboard.

CASA director of aviation safety Shane Carmody said in a statement that the temporary suspension of Boeing 737 MAX 8 planes in Australia was in the best interests of safety.

"This is a temporary suspension while we wait for more information to review the safety risks of continued operations of the Boeing 737 MAX to and from Australia," he said. "CASA regrets any inconvenience to passengers but believes it is important to always put safety first."

The organisation said it was closely monitoring the situation and said the suspension would be reviewed as relevant safety information became available from Boeing, the United States Federal Aviation Administration and accident investigators.

1. What happened to the Ethiopian Airline 737 MAX 8? [C]
2. What happened to the Lion Air flight in Indonesia in October 2018? [C]
3. What concerns have been raised about the Boeing 737 MAX 8? [C]
4. Based on the information in this article describe and explain the role of CASA in the Australian aviation industry. [C] [A]
5. Do you think that CASA has made the appropriate decision? [A] [E]

Recently the Federal Government established the Banking Royal Commission, and the Commissioner, former High Court Judge Haynes, handed down his report in October 2018. Later in Chapter 7, there will be some discussion about how commissions are used in significant areas to maintain the transparency and good governance of our institutions. In Haynes' report, there was criticism of the two agencies, the **Australian Prudential Regulatory Authority (APRA)** and the **Australian Securities Investment Commission (ASIC)**, as Commissioner Haynes did not think they were doing a good a job of applying the law which formed part of their responsibility. This is illustrated in the following practical application.

Ch 7.3

Ch 9.3

PRACTICAL APPLICATION

APRA BOSS SAYS REGULATORS SHOULD DO MORE TO SUPERVISE BANKING CONDUCT

SOURCE: SARAH DANCKERT, SYDNEY MORNING HERALD, WWW.SMH.COM.AU, 11 OCTOBER 2018 (EXCERPTS)

The litany of misconduct revealed at the banking Royal commission has prompted the head of the superannuation and banking regulator to concede it might need to do more to crackdown on poor behaviour in the sector…

APRA deputy chair Helen Rowell was taken to task during the commission's superannuation hearings when she admitted the regulator had taken legal action only once in the past 10 years… Much of the conduct in the financial services sector is the responsibility of the Australian Securities and Investments Commission (ASIC) but neither ASIC

PRACTICAL APPLICATION CONTINUED...

nor APRA cover conduct in the superannuation sector due to a lack of specific laws clearly giving either regulator the power to do so.

APRA (chairman Mr Wayne Byres) pointed to regulatory changes that were already in APRA's pipeline, including the new Banking Executive Accountability Regime, which gives APRA oversight of banker pay.

"Regulatory initiatives in the pipeline-accountability statements, remuneration restrictions, strengthened governance requirements, greater attention to organisational culture, and more forceful enforcement-will drive change," Mr Byres said.

1. What did APRA deputy chair Helen Rowell admit to the commission? [C]
2. What regulatory changes does Mr Byres say are being considered by APRA? What does he consider will be the outcome of these changes? [C] [A]
3. Why do you think the lack of legal action in the past 10 years by APRA has occurred? [C] [A]
4. Do you think that laws should be passed by Federal Parliament to ensure that APRA has the necessary powers to take legal action to prevent 'misconduct' in the superannuation industry? [E]

Ch 6.4

RESIDENTIAL TENANCIES AND ROOMING ACCOMMODATION ACT 2008 (QLD)

Many people live in rented accommodation. All Australian parliaments have passed laws applying to the arrangements between the owners of rented property (called '**lessors**') and their tenants. The relationship between lessors and tenants is governed by the Act. When it is necessary, generally because of a dispute between a lessor and a tenant, the dispute is heard in the *Queensland Commercial and Administrative Tribunal* (QCAT). However, the Act establishes the Residential Tenancies Authority, which performs many functions required by the Act.

THE RENTAL BOND

A **rental bond** is:

- An amount of money paid to the lessor in advance.

It is paid to protect the lessor if the tenant breaches the agreement. Under the Act, it must be paid by the lessor to the authority within 10 days of receiving it. Most lessors expect the tenant to provide at least one month's rent in advance which is held until the end of the tenancy. The money is kept by the authority on behalf of the lessor. Any interest earned by the bond money is paid to the authority. The interest earned is used for purposes authorized by the Act, including the costs of the Authority.

REFUND OF THE BOND IF YOU AGREE

The authority will repay the bond money to a tenant or lessor if:

- a Refund of Rental Bond (Form 4) is filled out;
- all the people who signed the original Bond Lodgement Form 2 sign the Form 4;
- the Form 4 is lodged at the post office or at the authority;
- you provide identification if going to the post office when the Form 4 is processed; and

- any arrangements about payment to which you have agreed (e.g. splitting the bond) are shown on the Form 4 before it is signed.

REFUND OF THE BOND IF YOU DO NOT AGREE

The authority will:

- send a Notice of Claim and a Dispute Resolution Request (Form 16) to the lessor; and
- pay the bond as directed on the Form 4 if the lessor does not respond within 14 days.

If the lessor does respond, the authority will:

- help the tenant and lessor try to resolve the dispute; and
- send a Notice of Unresolved Dispute to the lessor when the dispute is not able to be resolved.

The lessor then is responsible for making an application to QCAT to contest the return of the bond to the tenant.

Where the lessor sends in the Refund of Rental Bond (Form 4) before it is lodged by the tenant, the process which occurs is the same as if the tenant lodged the Form 4 first, **but the roles are reversed.**

Tenants sometimes think that there is no way they will get the bond back, so they just stop paying rent four weeks before they move out. If you do this, you are breaking your tenancy agreement. The lessor/agent could apply to the tribunal for an order stating that the tenant must pay rent until handover day. If this happens, the tenant might end up paying the rent owed and still have a claim made against the bond for the other costs.

It is always better to get the bond back rather than to just stop paying rent. Tenants should remember that the bond money is theirs, and that they will get it back unless the lessor/agent has a good reason to keep some of it.

WHAT DO YOU THINK?

Generally most commentators consider that the work that the *Residential Tenancies Authority* does in relation to finalizing rental bond issues for lessors and tenants is a worthwhile contribution to the operation and efficiency of the *Residential Tenancies Act 2008* (Qld). Do you consider that the way in which the Act has been structured and applied is appropriate and worthwhile for lessors and tenants? Give your reasons. [A] [E]

RESEARCH

Choose an area of law of interest to you which is regulated by a Commonwealth or a State Act of Parliament. You may have studied a number of these in year 11, for example, the Office of Fair Trading Queensland (*Australian Consumer Law*), and the Medical Assessment Tribunal (*Workplace Health and Safety Act* (Qld).

Outline how some aspect of the area of law you have chosen has established an organization which assists members of the community to understand and to apply the law to their own personal circumstances, including reviewing their complaints. Describe and explain the nature of the organization you have chosen and indicate if you think its role is worthwhile. [S] [C] [A] [E]

5.3 THE FEATURES OF A 'JUST AND EQUITABLE 'LAW IN AUSTRALIA

For a law to be considered '**just and equitable**' it needs to contribute fairly and in a non-discriminatory way to the well-being of all citizens in our society. The following features need to be present.

1. LAW MUST FAIRLY BALANCE INDIVIDUAL RIGHTS WITH THE COMMUNITY GOOD

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

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

WHAT DO YOU THINK?

1. What positive reactions do you think some individuals and groups in our society would have had to the above advertisement? [R]
2. What concerns would some individuals and groups have had about it? [R]
3. Which of the above reactions would you have been most likely to have had to the advertisement? Why? [R]

2. LAW SHOULD BE CLEAR

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

3.LAWS SHOULD BE CONSISTENT AND STABLE

CONFIDENCE AND CERTAINTY IN THE LAW

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

LAW SHOULD BE PROSPECTIVE (TAKE EFFECT IN THE FUTURE)

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

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

PRACTICAL APPLICATION

LABOR PLEDGES TO OVERHAUL NEGATIVE GEARING BY 1 JANUARY 2020

SOURCE: PAUL KARP, THE GUARDIAN, WWW.THEGUARDIAN.COM, 31 MARCH 2019 (EXCERPTS)

Chris Bowen says signature housing policies, including capital gains tax changes, won't be rushed through.

Labor plans for changes to capital gains tax and negative gearing are to take effect by 1 January if it is elected at the May election.

On Friday the shadow treasurer, Chris Bowen, announced Labor will take just seven months to consult on and pass its signature housing tax policies and add a new measure to improve tax concessions for build-to-rent schemes.

If Labor is elected, the capital gains tax discount for investments entered into after 1 January 2020 would be halved and from that date only new investment properties will qualify for negative gearing, which allows rental losses to be deducted from other income. The measures are estimated to raise $2.9 billion over four years or $35.1 billion over 10.

Labor first proposed cutting the housing tax concessions in February 2016. The proposals were rejected by the Turnbull government and became one of the major points of difference between the major parties at the 2016 election.

PRACTICAL APPLICATION CONTINUED...

The Property Council of Australia said it was 'relieved' Labor would not be trying to introduce the measures by 1 July if it wins government because to do so 'would have required retrospective legislation, rushed drafting and no opportunity to take expert advice from Treasury and stakeholders'.

1. What decision has Chris Bowen, the shadow treasurer, announced? [C]
2. What reasons underly the decision of the shadow treasurer to announce the date on which the negative gearing legislation would take effect? [A]
3. What reasons were given by the Property Council of Australia for supporting Chris Bowen's decision to announce the date of the legislation coming into effect as 1 January 2020? Is this an appropriate way to deal with new legislation? [A] [E]

4.LAW SHOULD APPLY EQUALLY TO ALL

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

SOURCE: QUOTE ATTRIBUTED TO AMERICAN INDIAN CHIEF JOSEPH,1840-1904

For a law to enjoy the **confidence and support of the people**, it should apply to all citizens equally. Members of parliament, judges and public servants should not be exempted from the law. Nor should media celebrities be treated more leniently or more harshly than others.

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

5.LAW SHOULD BE CAPABLE OF BEING ENFORCED

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

WHAT DO YOU THINK?

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

5.4 CHALLENGING AN UNJUST LAW

INQUIRY FOCUS

WERE THE LAWS WHICH PROHIBITED THE RIGHTS OF MOTORCYCLE GANG MEMBERS TO FREELY ASSOCIATE, AND WHICH PUNISHED THEM, UNJUST?

RESEARCH

The laws which we are about to examine were passed by the Queensland government in response to significant community outrage about the behavior of bikie gangs. Google 'bikie gangs Qld 2011'and read the articles in the media describing the antisocial and criminal activities of bikie gangs at this time. Make notes to support the need for passing laws to punish this behavior. [C] [A]

THE VICIOUS LAWLESS ASSOCIATIONS DISESTABLISHMENT ACT2013 (QLD) (RELEVANT EXCERPTS)

Section 3 – association means

(d) any other group of three or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal.

*Section 4 – a person is a '**participant**' in the affairs of an association if the person*

(a) (whether by words or conduct or in any other way) asserts, declares or advertises his or her membership of or association with the association.

*Section 5 – a person is a '**vicious lawless associate**' if this person*

(a) commits a declared offence, and

(b) at the time the offence is committed, or during the course of the commission of the offence, is a participant in the affairs of the association (relevant association), and

(c) did or omitted to do the act that constituted the declared offence for the purposes of or in the course of participating in the affairs of the relevant association.

*Section 7 – **Sentencing***

(1) A court sentencing a vicious lawless associate for a declared offence must impose all of the following sentences on the vicious lawless associate–

(a) a sentence for the offence under the law apart from this Act and without regard to any further punishment that may or will be imposed under this Act;

(b) a further sentence of 15 years imprisonment served wholly in the corrective services facility;

(c) if… an office bearer of the relevant association—a further sentence of 10 years imprisonment... which must be served cumulatively with the further sentence mentioned in paragraph (b).

(2)a further sentence-

(a)must not be mitigated or reduced under any other Act or law; and

(b) must be ordered to be served cumulatively with the base sentence imposed.

(3) however, if the base sentence does not-

(a) impose a term of imprisonment on the vicious lawless associate; or

(b) require the associate to immediately serve a term of imprisonment in a corrective services facility; then the associate is to immediately begin to serve the further sentence mentioned in subsection (1) (b) and the base sentence is to have effect, so far as is practicable, at the end of the further sentence or sentences.

SCHEDULE 1

DECLARED OFFENCES (Criminal Code)…

Section 323 (Wounding)
Section 328 A (4) (Dangerous operation of a vehicle)
Section 339 (Assaults occasioning bodily harm)
Section 340 (Serious assaults)
Section 9 (possessing dangerous drugs) Drugs Misuse Act
Section 6 (supplying dangerous drugs)

(There are 69 declared offences in this Schedule from the Criminal Code including the above)

Criminal Code (Criminal Organizations Regulation 2012 (Qld)

Section 2 ***Entities declared to be criminal organizations***

The following entities are declared to be criminal organizations

The motorcycle club known as the Rebels

(As at 2 September 2014 there were 26 motorcycle clubs listed as criminal organizations including the Rebels)

CRIMINAL CODE 1899 (QLD)

Section 60A *Participants in a criminal organization being knowingly present in public places*

1) Any person who is a participant in a criminal organization and is knowingly present in a public place with two or more other persons who are participants in a criminal organization commit an offence.

Minimum penalty—6 months imprisonment served wholly in a corrective services facility

Maximum penalty-3 years imprisonment

HYPOTHETICAL

Consider the following scenario:

Rebels Bikie A puts on his jacket displaying the rebels insignia and meets two other rebels B and C at the local hotel for a social drink. The police arrest all three of them and charge them under Criminal Code s60A. A is currently on bail pending trial on a charge of serious assault. After being arrested the police search B's home and take possession of some dangerous drugs. B is then charged with possessing dangerous drugs. C is not subject to charge at the time, although he is an officer in the Rebels bikie gang.

1. Are A, B or C subject to the VLAD Act? Give your reasons. [C] [A]
2. If A is convicted of serious assault and B is acquitted of the charge of possessing dangerous drugs, what difference do these facts make to your answer? [C] [A]

PRACTICAL APPLICATION

CRIME STATS PROVIDE REALITY CHECK IN QUEENSLAND'S BIKIE CRACKDOWN

SOURCE: TERRY GOLDSWORTHY, WWW.BRISBANETIMES.COM.AU, 1 SEPTEMBER 2014 (EXCERPTS)

Not all bikies are criminals

One of the strongest arguments to support the Queensland government's crackdown is that the overwhelming majority of bikies are supposedly hardened criminals.

However, data I obtained through Right to Information provides a more accurate picture of criminality within outlaw motorcycle gangs (OMCGs). This data shows that the majority of bikies in the majority of clubs have no criminal history. If you include all OMCGs listed in the government data, it shows that approximately 60% of all members have no criminal history. The highest level of criminality is limited to just two clubs, the Bandidos and the Lone Wolves. A number of the clubs prescribed by the legislation as criminal organizations don't even feature on the government data. The data examined both confirmed and unconfirmed gang members under the generic term 'participants'.

The lack of criminal enterprise in the gang structure

One of the premises used as justification for the crackdown was that OMCGs commit high-level, serious organized crime, and that they do that within the structure of the gang.

There has been a concerning failure of the VLAD laws to illustrate the criminal enterprise taking place within the gangs. Senior police struggle to provide any correlational evidence linking OMCGs to the epicenter of organized crime. Rather, they are just bit players-like many other criminal gangs. As the Australian Crime Commission says:

They are just one part of the organized crime picture in Australia.

In estimates hearings last month, Queensland Premier Campbell Newman admitted that only 11 bikies-or 1%- of 1113 criminal gang participants had been charged under the provisions of the VLAD laws as having conducted criminal activity on behalf of the gangs.

Recent decreases in crime not linked to the bikie war

… public comments by government MPs have attempted to link the bikie laws to rate reductions in general crime categories such as unlawful entry offences, robberies, assaults and frauds.

However, an examination of five months of police data from January 2013 to May 2013 for the Gold Coast and Logan areas reveals almost no bikie involvement in these crime categories. These figures were before the bikie crackdown, when bikie activity could be expected to show higher levels of criminality.

PRACTICAL APPLICATION CONTINUED...

Also of interest is that 60% of these arrests were attributed by police to non-members-termed 'associates' . Minor charges such as drug and utensil possession, breach of bail and unlicensed driving made up 42% of the total charges.

1. Describe the extent of criminality in OMCGs. [C]
2. Describe the extent to which bikies have been charged under the VLAD laws with having conducted criminal activity on behalf of a gang. [C]
3. Describe the recent decreases in crime on the Gold Coast and in the Logan area. [C]
4. Describe and explain why the information provided by the author of the article is a 'reality check' to the VLAD laws. Do you agree that this is the case. Give your reasons. [A] [E]

PRACTICAL APPLICATION

ABC RADIO BROADCAST 19/3/2014

SOURCE: SARAH FERGUSON/DAVID LEWIS, TRANSCRIPT (EXCERPTS)

Sarah Ferguson: You might think that the bikies would be the last people you'd expect to see in court defending the rights of the public, but today motorcycle clubs lodged an application for a High Court challenge to Queensland's controversial anti-bikie laws. The barristers argue the laws are unconstitutional and amount to attack on the Judiciary, freedom of speech and the right to associate. The Queensland government says the unprecedented crackdown on organized crime is having the desired effect, keeping the state safe.

David Lewis: Stefan Buczborski considers himself more of a free spirit than an outlaw. The 44-year-old tattooist originally from Poland, is a member of the Hells Angels, with a minor drug possession conviction. Stefan is the applicant to the High Court. Why did you…

Stefan Buczborski: I strongly believe in it. I want to live in a democracy. I want to live in a free country. I've seen what hate and racism does. I lived through it when I was young in Communist Poland.

David Lewis: It was the shooting of an innocent bystander in a Gold Coast shopping mall in 2012 that brought the national spotlight on Queensland bikie gangs. A violent brawl in the same city a year later prompted a legislative crackdown.

Jarrod Bleijie, Queensland Attorney General: these laws are working. We've had at the Gold Coast a 45% reduction in armed robberies. We've had a 25% reduction in assaults on individuals and that's because these gangs are too scared to go out on the streets…

Wayne Baffsky, barrister: The laws personally offend me. I think they're unnecessary. I think they are unfair and I frankly think they are counter-productive.

David Lewis: The barristers are seeking to overturn more than a dozen changes to the law. Of particular concern are tough, new mandatory jail terms of between 15 and 25 years for gang-related crimes. That punishment is imposed on top of the usual sentence. The legal team is also hoping to strike down new laws that make it an offence for three or more members of a criminal organization to knowingly meet in public. While we were filming one of three Rebel bikies had to stay on the street. Stefan and his mate were inside the tattoo parlour. Last year, five men with alleged links to bikie groups were arrested and charged after meeting for a drink at a pub on the Sunshine Coast hinterland.

Stefan Buczborski: They are not in jail for stealing or robbing… They are in jail for going to a pub to have a beer.

PRACTICAL APPLICATION CONTINUED...

1. Describe the facts from the broadcast which make out the case that the new laws restrict freedom of association. [C] [A]
2. Describe and explain another legal issue which the broadcast raises for you. [C] [A]
3. What does the broadcast say Stefan has done to challenge the new anti-bikie laws? [C]

The challenge to the anti-bikie laws in the High Court did not succeed. The High Court refused to hear the constitutional arguments because Stefan did not have the status to bring the application. He had not been charged under the VLAD laws and therefore lacked the standing to bring the application. This meant the doubt about the constitutionality of the laws remained. In 2014 Queensland had a new Labor government. It had promised to examine quite a number of law and order issues if elected, including the objectionable parts of the VLAD laws. The government set up a Commission of Inquiry to make inquiry into the extent and nature of organized crime in Queensland and its economic and societal impacts. At the same time the Queensland Attorney General established a Taskforce to conduct a review of the suite of legislation introduced in October and November 2013 to combat organized crime (the VLAD laws), in particular outlaw motorcycle gangs (OMCGs).

The Taskforce recommended that the offences and punishment regime which are the subject of our inquiry should be repealed or redeployed elsewhere in Queensland in an organized crime legislative framework.

PRACTICAL APPLICATION

SERIOUS AND ORGANIZED CRIME LEGISLATION AMENDMENT BILL 2016 (QLD)

SOURCE: WWW.JUSTICE. QLD. GOV. AU, DOWNLOADED 3 APRIL 2019 (EXCERPTS)

Explanatory Notes

The majority of the Taskforce recommended that the offences under ss60A (the 'anti-association offence'), 60B (the 'clubhouse offence') and 60C (the 'recruitment offence ') of the *Criminal Code* be repealed. The majority of the Taskforce believed that because of the inherent unfairness of the offences, difficulties experienced (and anticipated) in prosecuting them, and their constitutional vulnerability, the retention of these three offences could not be justified.

.. the new consorting offence and the new Organized Crime Control Orders are intended to replace the anti-association offence (section 60A); and the combination of orders under the new Public Safety Protection Order scheme is intended to replace the clubhouse offence (section 60B) under the Organized Crime Regime.

Creation of a new offence of habitually consorting with recognized offenders

... The Taskforce majority recommended that the anti-association offence (s60A) be replaced with a… consorting offence as it would provide a more constitutionally robust, fairer, efficient and effective approach as compared to the 2013 anti-Association offence.

Repeal of the 2013 circumstances of aggravation

The 2013 VLAD laws introduced five new circumstances of aggravation into the *Criminal Code* which created harsher penalties for participants in a criminal organization committing the existing *Criminal Code* offences of affray, misconduct in relation to a public office, grievous bodily harm, serious assault and obtaining or dealing with identification

PRACTICAL APPLICATION CONTINUED...

information. The Bill reflects the unanimous recommendation of the Taskforce (recommendation 21) to repeal all of the circumstances of aggravation created in the *Criminal Code* by the 2013 suite.

The consorting offencel… will be a misdemeanor (i.e. an indictable offence) for a person to consort with two *recognized offenders* after having been given an official warning by police with respect to each of those individuals. The offence carries a maximum penalty of three years imprisonment or 300 penalty units, or both.

1. What has happened to the VLAD laws? [C] [A]
2. What law has been introduced to replace the anti-association offence under s60A of the *Criminal Code*? Explain how the new law has created a different offence? [C] [A]
3. What has happened to the mandatory punishment regime under the previous VLAD laws? Do you consider this to be a fairer outcome than the previous sentencing regime? [C] [A] [E]

ON REFLECTION

How often do laws which target the rights of groups or individuals unfairly and without consultation, seem as unjust? [S] [E]

5.5 STRENGTHS AND WEAKNESSES OF THE LEGISLATIVE PROCESS

PRACTICAL APPLICATION

'RAMMED-THROUGH' MEDIA LAW DISAPPOINTS AUSTRALIA'S PEAK LEGAL BODY

SOURCE: SOL DOLOR, AUSTRALASIAN LAWYER, WWW.AUSTRALASIANLAWYER.COM.AU, 4 APRIL 2019 (EXCERPTS)

The nation's peak body for the legal profession has slammed the country's new law on violent content on social media, saying that it threatens media freedom and whistleblowing of atrocities in Australia and beyond.

The ***Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019*** passed both houses of parliament today, enabling Australia to punish social media companies and their executives if violent content is not "expeditiously" taken down. The companies can be fined up to 10% of their worldwide turnover and their executives can be jailed for up to 3 years for flouting the law.

The Law Council of Australia said that the process taken by the government to enact the law is rushed and flawed, which could lead to the possibility of it creating negative consequences." Media freedom and whistleblowing of atrocities here and overseas have been put at risk by the ill-informed livestream laws passed by the Federal Parliament," said Arthur Moses SC, Law Council President. The Law Council is disappointed and concerned these 'world first laws', which were rammed through in 24 hours without scrutiny and consultation, will have negative unintended consequences.

PRACTICAL APPLICATION CONTINUED...

The Law Council earlier warned that the then-proposed bill would set a dangerous precedent. It may also be unconstitutional and would create difficulties in sentencing and setting appropriate punishment for offences committed. The Law Council has now said that the law can lead to censorship.

"We now have a situation where important news can be censored across social media platforms, which is contrary to the democratic principle of a free press, which exists to hold governments to account," Moses said.

The top body said that while it agrees that action needs to be taken to combat the weaponization of social media and the proliferation of violent content on these platforms, the process should have been thorough as consultation was required. "These laws should have been subject to the committee process," Moses said, "when Parliament returns after the Federal election these laws must be reviewed and amendments made to deal with the negative impacts they have the potential of causing."

1. The above article is generally critical of Parliament for having passed the legislation it refers to. Set out below is a list in summary form of the strengths which the authors consider Parliament has as a lawmaking body. Consider each of them individually and think of the alternative point of view. Where possible, use the criticisms made by the Law Council of Australia to show that despite its strengths, there may be occasions when legislation passed by Parliament fails to meet the highest of standards. [C] [A] [E] [R]

PARLIAMENT'S STRENGTHS AS A LAWMAKING BODY.

(a) Parliament is able to make laws representing the majority of society because it is elected by the people.

(b) Generally, because the government is formed by the political party which holds a majority of members in the Lower House of Parliament, its policies have been presented at an election, and laws passed to put them into action are usually well supported by the community.

(c) Parliament has the resources to investigate any proposed laws, including any issues that these might raise for the community.

(d) Once the legislative process has started in Parliament, its progress usually involves a lot of debate and discussion, both within the Parliament itself and in the community, in the media, and among the different groups interested in the outcome of the laws being passed.

(e) There is a diversity of views in Parliament. This means that during debate and discussion as a Bill progresses through the Parliament it is scrutinized thoroughly meaning there is a low chance of an unjust law resulting.

(f) Parliament can act quickly if needed. A good example of this is when in response to the Global Financial Crisis, then Prime Minister Kevin Rudd passed legislation for his Economic Stimulus Package a mere 10 days after he announced the plan to the public.

(g) The Parliament has the power to delegate to subordinate authorities the powers to put legislation into effect in regulations.

REVIEW

1. Describe and explain the Parliamentary legislative process, using the following headings:
   - Bill, First Reading, Second Reading, Committee Stage, Royal Assent, Act. [C] [A]
2. Select and describe an **enforcement agency** and a **regulating authority**, one of which exercises its powers pursuant to Commonwealth legislation, and the other which does so pursuant to State legislation. [C] [A]
3. Describe a responsibility of each of the *Rental Bond Authority, Civil Aviation Safety Authority* and the *Australian Prudential Regulation Authority*. Do the powers of each of these authorities, exercised properly, advance the cause of good governance in Australia? [C] [A]
4. Describe and explain why the VLAD laws were considered to be 'unjust' when first legislated. [A]
5. Describe and explain three potential weaknesses of the system of Parliamentary legislation and how it is possible for Parliament to overcome these. [C] [A]

TOPIC 1: GOVERNANCE IN AUSTRALIA

CHAPTER 6: GOVERNANCE IN ACTION – THE JUDICIAL SYSTEM

FOCUS SUBJECT MATTER

6.1 THE INDEPENDENCE OF JUDICIAL POWER

6.2 THE RELATIONSHIP BETWEEN LEGISLATION AND CASE LAW

6.3 LANDMARK DECISIONS, LEGAL CHANGE AND LAW REFORM

6.4 SPECIALIST COURTS AND TRIBUNALS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- judicial power is separate to executive and legislative power;
- the court system plays an important role in good governance;
- judicial officers are free to make independent and impartial decisions that the government may not agree with;
- courts make law in two ways, through interpreting statute law and developing precedent;
- there are a number of specialist courts in both the state and federal jurisdictions; and
- court decisions can influence legal change or law reform.

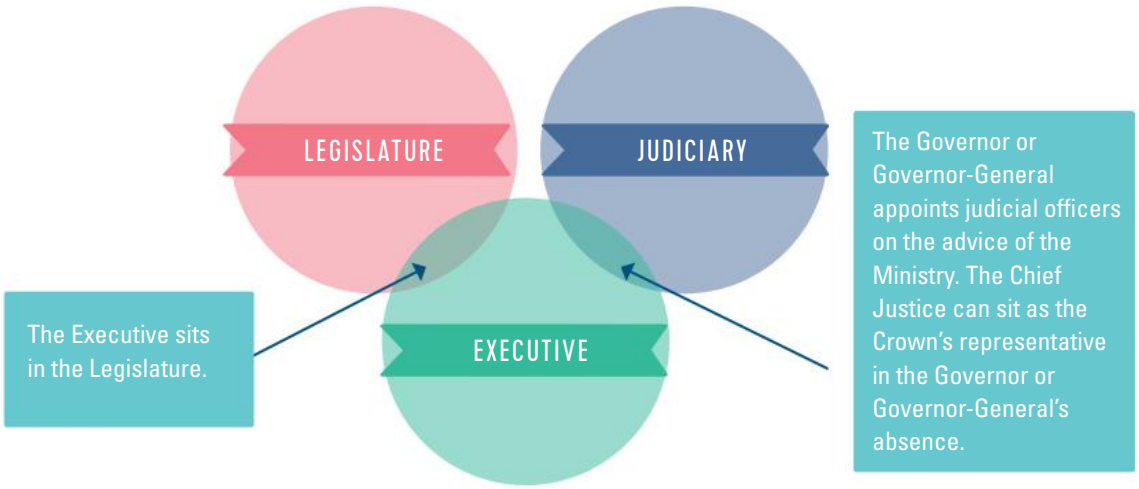
The judicial system plays an important role in holding the Parliament and Executive to account – **it acts as a check against unlawful use of power.** The rule of law, a fundamental principle in our legal system, means that any citizen can file a case against the government – as it must also follow the law and is not above it. Throughout this chapter we will examine the role and effectiveness of specialist courts, the impact of landmark cases and explore how legislation and case law interact to create catalysts for change and reform.

6.1 THE INDEPENDENCE OF JUDICIAL POWER

JUDICIAL INDEPENDENCE

Ch 2.7

We have previously referred to the separation of power doctrine in earlier chapters but our focus will now shift to the role of judicial officers in governance in Australia. As was noted previously in the discussion of the topic separation of powers there is not a complete separation between the Parliament (Legislature) and the Executive Government (consisting of the Governor-General of Australia and the Ministers of the Federal government). It was pointed out that the appointment of judges is carried out by the Executive. **Given that judges are appointed by the Executive there is no complete separation of powers between the Executive Government and the Judiciary.**



Ch 2.5

This does not mean that the Judiciary is not independent. However, it does mean that decisions of judges are often criticised by various stakeholders, particularly politicians, when they do not uphold a government's policy. We have already seen in the Tasmanian dam case, how a High Court decision frustrated the policies of the Tasmanian Government in 1983. Another prominent example involves Aboriginal and Torres Strait Islander peoples' land rights, which are set out later in this chapter.

WHAT DO YOU THINK?

Should Australia adopt a more clear distinction to stop the overlap between the legislature, executive and judiciary? Why or why not? You may like to recommend a new model. [E]

Notwithstanding the form of appointment of judges **it is imperative that judicial independence is maintained.** The key way in which such **independence is maintained is through job security.** Judges are appointed until they reach the mandatory age of retirement, 70 years. **Before the retirement of a judge it is extremely difficult to remove a judge from office. The reason it should be difficult is that a judge should be free from any improper influence arising from an unjustified threat of removal by the executive or legislature.**

In Queensland controversy arose in 1922 because of animosity between the government and the judges of the Supreme Court of Queensland.

1. Parliament passed the *Judges Retirement Act 1921* (Qld). This act provided that existing judges who had attained the age of 70 years, were to retire from office. Prior to this act there was no set retirement age.
2. The Hon. Justice Pope Cooper, Chief Justice of Queensland resigned.
3. The Hon. Justice Real and the Hon. Justice Chubb also resigned.

PRACTICAL APPLICATION

CARMODY CRISIS: A CASE OF HISTORY REPEATING

SOURCE: NATALIE BICHENSKI, BRISBANE (BRISBANETIMES.COM.AU), 16 JUNE 2014 (EXCERPTS)

A bust up over the influence of the executive arm of government, a judge with links to a political party, a fracas in the legal fraternity… it is all just a case of history repeating [itself].

The controversy surrounding the appointment of Tim Carmody as Queensland's 18th Chief Justice has shone a light on a similarly turbulent time in State politics more than 90 years ago. Thomas McCawley was Queensland's fifth Chief Justice, who came under fire for his inexperience in practice at the bar and links to the Australian Labor Party. The timing of his appointment was curiously convenient. Rumours flew that the *Retirement Act* had been passed purely to secure Judge McCawley's appointment and that Labor was shoring up allies in the judiciary in case it was booted out of office.

Associate Professor from the UQ School of Law, Anthony Cassimatis said it prompted strong opposition in the legal fraternity, still smarting from Judge McCawley's appointment to the Supreme Court in 1917 aged just 35. 'When the Labor government in the 1920s abolished the upper house, the very next thing it did was move against the judiciary - it forced half the judges to resign' he said. 'Essentially it was removing the other obstacle to the power of the executive in the 1920s. That's why Queensland of all places, ensuring that the executive branch does not have undue influence over the judiciary is so important, because there are no other checks'.

Judge McCawley may have had enemies but he was no doubt a dedicated worker. On April 16 1925, he suffered a fatal heart attack at the Roma Street train station while en route to circuit court sittings in Ipswich. He was just 43.

1. How were the Chief Justice and the two Supreme Court judges removed from office? [C]
2. What was the rumoured reason as to why the *Retirement Act* had been passed? [C]
3. If it was true that the Queensland legislature removed the judges for the reasons stated in this article, what comment would you make about such removal? What would be the effect of such a removal on our system of governance in Queensland? [A] [E]

REMOVING JUDICIAL OFFICERS

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1901 (CTH)

Section 72(ii) Judges' appointment, tenure and remuneration

The Justices of the High Court and of the other courts created by the parliament –

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

There has never been a judge removed pursuant to s72 of the Constitution. The closest judge to being removed was The Honourable Justice Lionel Murphy, a judge of the High Court of Australia. In July 1985 he was first convicted of attempting to pervert the course of justice in relation to charges against a Sydney solicitor whom he knew, Mr Morgan Ryan. This conviction, however, was quashed on appeal. Justice Murphy was found not guilty at a later trial.

The Commonwealth Parliament then passed legislation to establish a Parliamentary Commission of Inquiry to enquire into allegations concerning the conduct of Justice Murphy. In particular the enquiry was into whether Justice Murphy had conducted himself in a way that constituted **proved misbehaviour.** However, Justice Murphy was diagnosed with a terminal illness, dying shortly after and the Commission of Inquiry ceased.

In Queensland Supreme Court judge Mr Angelo Vasta was removed from office by the Queensland Parliament in 1989 on the recommendation of a Commission of Inquiry, established by the Queensland Parliament consisting of three judges headed by Sir Harry Gibbs, the former Chief Justice of the High Court of Australia.

The Commission of Inquiry found that Mr Vasta:

(a) Gave false evidence during a defamation hearing.

(b) Made and maintained allegations that the then Chief Justice, the Attorney-General and Mr Fitzgerald QC had conspired to injure him.

(c) Falsely stated to the accountant who was preparing the income tax returns of a company that the costs of the company's plant was $14 million and knowing that the company had been deceiving authorities with regard to the cost of the plant, taking no steps to end the deception.

(d) Arranged sham transactions to gain economic tax advantage.

(e) Made false claims for taxation deductions in respect of the lease of the library.

After the Commission's report was received the judge was permitted to address the Queensland Legislative Assembly. After a lengthy and detailed address by the judge, the Parliament debated a motion requesting the Governor to remove the judge from office on the grounds of alleged misconduct in his private dealings. The motion was passed by the Legislative Assembly and the judge was removed from office. It has been the only time since Federation that an Australian Parliament had removed a Supreme Court judge from office.

It is extremely important that judges not be able to be removed easily from office. **The most important feature of the judiciary is its independence. That is the judiciary should be able to make decisions for or against ministers of the government, arms of government and more generally politicians without fear or favour.**

It is extremely important also that the Executive along with the legislature not do anything to weaken the public confidence in the judiciary. That is a fundamental principle of the separation of powers. The judiciary have powers in the event that this occurs.

INQUIRY FOCUS

HOW CAN THE COURTS PROTECT THEIR INDEPENDENCE AND RETAIN THE PUBLIC'S CONFIDENCE IN THE JUDICIARY?

CASE STUDY

DPP (Cth) v Besim; DPP (Cth) v MHK (No 2) [2017] VSCA 165

Facts: Besim and MHK had received sentences for terrorism offences in the Supreme Court of Victoria. The Commonwealth Director of Prosecutions appealed both sentences on the grounds that the each sentence was manifestly inadequate. Before the Victorian Court of Appeal delivered its judgment on the appeal, *The Australian* published comments made by three Ministers of the Commonwealth Government, the Honourable Greg Hunt MP, the Honourable Michael Sukkar MP and the Honourable Alan Tudge MP. The comments included describing judges as 'hard-left activists', 'divorced from reality', and that they were conducting an 'ideological experiment'. The Victorian Court of Appeal convened a mention after the comments came to their attention. At the commencement of that hearing the court stated that the statements on their face:

a. Failed to respect the doctrine of separation of powers;

b. Breached the principle of *sub judice*;

c. Reflected a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government.

The court told the parties at the mention that it was gravely concerned that there was a prima facie case that the Ministers and *The Australian* had committed a contempt of court. The court explained to the parties the following:

> *There are important principles of law that arise when anyone speaks about a court's decision or its conduct during a hearing, before the decision is delivered. We would add, in the strongest terms, the legal notions of contempt of court do not exist to protect judges or their personal reputations. These laws exist to protect the independence of the judiciary in making decisions that bind governments and citizens alike. These laws further exist to protect public confidence in the judiciary.*

The legal representative of the ministers read a joint statement prepared by the ministers for the court that stated:

> *While we intended to make legitimate comment on that particular issue, we did not intend our remarks to undermine public confidence in the judiciary. Nor did we intend to suggest or imply that the court would not apply the law in disposing of the matters before it. In retrospect, we regret using language that was capable of conveying that meaning when no such meaning was intended. Nor did we intend that our statements would pressure this court in relation to the manner in which it disposed of the appeal concerning Mr Besim. Nor had we ever believed that it would be possible that our statements could influence this court.*

After that statement was read out the court repeatedly noted that there was no apology or retraction by the three Ministers – who were former lawyers. Also present at the

CASE STUDY CONTINUED...

mention in court was the legal representatives for both respondents to the appeals, Mr Besim and MHK. They made short submissions expressing their concern about the contempt that had been perpetrated by the article and the risk and fears of their respective clients. The court then reserved its decision. On the 20 June 2017 the Court Registrar received a letter from the legal representatives of the Ministers informing the court:

> *Having reflected further on the matters raised during that mention, the Ministers wish to offer an apology to the court. They would be grateful if the matter could either be relisted for that purpose or, if it would be more convenient to the Court, if they could be given leave to submit a written statement to the court containing that apology.*

Legal issue: Whether the three Ministers and the Australian parties should be prosecuted by the Court of Appeal in Victoria for contempt of the court.

Decision: The court formed the view that there was a strong prima facie case with respect to the Ministers and that the publication and their statements involved a serious breach of the *sub judice rule*. The *sub judice rule* is designed to protect litigants' right to have their cases decided on their merits without external intervention, influence and commentary. It was of significant concern to the court that three Ministers would make the statements that they did. The legal representative of the Ministers appeared before the court making a full and unqualified apology for the statements and retracted the statements in their entirety. The court said the apology and retraction was not made at an early opportunity. Such admission and retraction only came after a stern discussion between the bench and the legal representatives of the Ministers. The delay by the Ministers was regrettable and aggravated the contempt. However, the court accepted that the Ministers had sufficiently acknowledged and accepted their contempt of the court and sufficiently purged their contempt.

In relation to *The Australian*, they had made a full apology and retraction at an early opportunity. But, the court did not accept the position adopted by newspaper that they were merely 'the messenger' for the Ministers' statements. The court considered that the publication by The Australian was very serious and the court was satisfied that there was prima facie breach of the *sub judice rule*. However, the court accepted their apology. The court made the following statement:

The court states in the strongest terms that it is expected there will be no repetition of this type of appalling behaviour. It was fundamentally wrong. It would be a grave matter for the administration of justice if it were to reoccur. This court will not hesitate to uphold the rights of citizens who are protected by the sub judice rule.

On 23 June 2017 the Victorian Court of Appeal increased the sentences of Besim and MHK.

1. At the mention of this case before the Victorian Court of Appeal what was the court gravely concerned about? [C]
2. What did the Ministers (through their legal representatives) refuse to do at the mention of the case? [C]
3. Is it an important fact in the consideration of whether the Ministers should be prosecuted for contempt or not, that the Victorian Court of Appeal had not yet delivered their decision by the time the comments were made by the Ministers to *The Australian*? Why? [C] [A]
4. The Ministers said in their statement to the court that they did not intend their remarks to undermine public confidence in the judiciary. What were the remarks published in *The Australian*? Is this more or less credible in light of the fact that each of the Ministers were lawyers? [C] [E]
5. Do you think the statements made by the Ministers could undermine the public confidence in the judiciary? Why or why not? [E]
6. How finally did the Ministers acknowledge and accept their contempt and sufficiently purge their contempt in the eyes of the Victorian Court of Appeal? [C] [A]

To further appreciate the issues this case raised about the importance of the separation of powers doctrine after the case was finalised, read a judge's comment on the case over the page.

PRACTICAL APPLICATION

THE INDEPENDENT, LOW PROFILE THIRD ARM OF GOVERNMENT

SOURCE: THE HON. JUSTICE EMILIOS KYROU, LAW INSTITUTE OF VICTORIA (LIV.ASN.AU), EDITED VERSION OF A SPEECH DELIVERED ON 17 AUGUST 2017, 1 DECEMBER 2017 (EXCERPTS)

A role of the courts is to protect fundamental human rights by ensuring other arms of government do not exceed or abuse their powers.

In June this year three federal ministers were required by the Victorian Court of Appeal to show cause why they should not be charged with criminal contempt of court.

At the mention, the Solicitor-General read out a joint statement of the ministers in which they offered an unconditional apology to the Court and unreservedly withdrew all the comments they had made. The statement also said that the ministers intended "to exercise greater care in the future to avoid making any remarks that might be thought to interfere with the due administration of justice either generally or in particular cases".

As a result of the ministers' change of position and the earlier apology by the parties associated with The Australian, the Court decided not to initiate contempt of court proceedings. The incident is a very dramatic manifestation of the powers that the courts possess and their willingness to exercise them to protect their independence. The incident also illustrates that, in deciding whether to exercise their powers, it is immaterial to the courts whether the parties are rich or poor, powerful or vulnerable. The Supreme Court has the power to charge anyone with contempt of court where there are grounds to do so and to punish anyone found guilty of contempt of court, including by imposing a term of imprisonment.

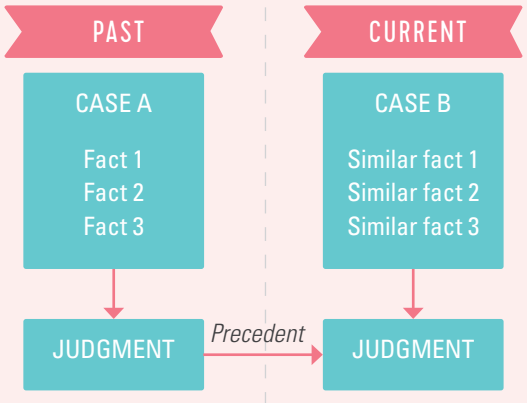
1. How does this example show the rule of law in action? [A]
2. What implications could occur if the other arms of government could interfere in the decision making process of the courts? [A]
3. Are there any circumstances where it would be acceptable for the Executive or Legislature to criticise a court decision? Explain your point of view. [A] [E]

6.2 THE RELATIONSHIP BETWEEN LEGISLATION AND CASE LAW

STATUTORY INTERPRETATION AND THE DOCTRINE OF PRECEDENT: A RECAP

Judicial precedent: a **formalised and enforced system**, whereby **judges are obliged to follow the decision of earlier cases in higher courts when the factual circumstances are essentially the same. Two important questions** that need to be asked to determine whether a judge must follow (is legally bound by) the decision made by a court in an earlier case dealing with similar legal principles are as follows:

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



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If both of these questions are answered with a 'yes' (in the affirmative), the *ratio decidendi* (Latin for 'reason for deciding') of the earlier court decision is a precedent or case authority that is legally binding on the court deciding the later case.

Statutory interpretation: A process by which a judge decides the **meaning of statute law as it applies to the case in dispute in their court**. **The fundamental rule** is that judges are required to interpret the statute by **determining what parliament would have intended at the time the law was passed.**

If the explanations above appear familiar that is because you have seen them before. This topic was covered extensively in Year 11, so the summary above is simply a reminder about how judges make law and its impact on future cases. Whether it involves the application or interpretation of legislation, judge made law, like legislation, can influence legal change or law reform. To understand the relationship between legislation and case law, we will employ an inquiry approach.

INQUIRY FOCUS

WHAT IS THE RELATIONSHIP BETWEEN LEGISLATION AND CASE LAW AND HOW DOES IT CONTRIBUTE TO LAW REFORM?

RELATIONSHIP BETWEEN LEGISLATION AND CASE LAW

Many decisions a judge makes involve the application or interpretation of legislation; therefore, legislation and case law share a close relationship. Sometimes a judge will be required to interpret a specific section of an Act as its wording may be vague or ambiguous. Other cases simply involve a judge applying the law to a specific scenario – as it is impossible for the legislation to cover every circumstance that may arise. However, it is important to remember that an Act of Parliament is the superior source of law, as it can overrule any decision made by a judge. The relationship between case law and legislation, as well as good governance is perhaps best illustrated by the case below. This case also highlights how a decision can contribute to an area of law reform.

CASE STUDY

The Attorney-General for the Commonwealth v 'Kevin and Jennifer' & Human Rights and Equal Opportunity Commission (2003) 172 FLR 300; [2003] FamCA 94

Facts: Kevin had been born female, but had identified as a male since childhood. Kevin had undergone several medical procedures to become a male, including hormone treatment, a total hysterectomy and breast reduction surgery. Kevin had not undergone phalloplastic surgery (where a penis is constructed). Kevin had changed his gender on his birth certificate to be a male. He was perceived as a male at work, socially and in his family. When Kevin and his wife sought to legally clarify their marriage was valid, the Attorney-General declared that their marriage was not valid, as they had both been born female. The *Marriage Act 1961* (Cth) did not define the terms 'man' or "woman" that was central to the definition of marriage. The Attorney-General cited the English case *Corbett v Corbett* [1971] P 83 to support the decision, which had determined that gender was decided biologically at birth by a person's genital, gonadal and chromosomal characteristics.

The case was first heard by a single judge in the Family Court of Australia. At trial Chisholm J ruled that Kevin was a man. Chisholm J held that biology alone was an insufficient measure of gender, as it ignored social and psychological factors. The Attorney-General for the Commonwealth of Australia appealed this decision.

CASE STUDY CONTINUED...

Issue: How should "man" be defined for the purpose of marriage law?

Decision: The Full Court of Family Court of Australia held that Kevin was a man within the ordinary contemporary meaning of the word. The court further decided that whether a person is man or a woman for the purpose of the marriage law of Australia should be determined on the date of the marriage. The judgment set out a broad and undefined range of both biological and cultural characteristics that can be used to decide a person's common law sex, moving beyond the biological factors used in the *Corbett* decision. The judgment of the trial judge Chisholm J was upheld.

1. Which court heard the case in the first instance? What court did the Attorney-General seek leave to appeal to? [C]
2. What precedent did the Attorney-General cite to support his argument? Is the case considered binding or persuasive? [C] [A]
3. What was the decision of the Full Court of the Family Court of Australia and did it depart from the precedent relied on by the Attorney General? [C]
4. Why was a court required to make a decision about how gender should be defined? Could this decision be overruled by Federal Parliament – if so, how? [A]
5. Do you agree or disagree with this decision? Why or why not? Consider the implications of your decision. [E]

PRACTICAL APPLICATION

TRANSSEXUAL'S MARRIAGE LEGITIMATE, SAYS COURT

SOURCE: THE SYDNEY MORNING HERALD (SMH.COM.AU) FEBRUARY 22 2003 (EXCERPTS)

The decision yesterday by three judges upholding the marriage arose from the Attorney-General's appeal to the full bench of the Family Court.

Mr Williams is now considering whether to appeal to the High Court, saying the decision raises serious concerns about the role of Parliament in determining the meaning of marriage.

The couple's solicitor, Rachel Wallbank, herself a transsexual, said the decision meant Australia led the way in embracing people with differences and put pressure on the British Government to introduce laws on the rights of married couples.

Macquarie University law lecturer Andrew Sharpe said the judgement was a bold decision.

"The Kevin decision is also a first in global terms because Kevin had not undergone phalloplastic surgery [where a penis is constructed]," he said. "In that sense it ... puts Australia at the forefront of judicial law reform," he said.

1. This decision is considered to be significant one in the context of law reform. Why do you think this decision is so significant and what are its social implications? [A] [E]

PRECEDENT

The case of *Re Kevin* shows how judges make law in the absence of clear legislative provisions. But, how does this decision lead to law reform and impact other parties in a similar situation? **Precedent refers to a principle or rule made in a previous decision that is either binding or persuasive on other courts** deciding matters which are factually the same or similar. If you walk into any courtroom around Australia you will see legal counsel referring to other cases to support their submissions – precedent is fundamental to our legal system. In this case, the Full Court of the Family Court of Australia was binding on courts situated below it – only the High Court of Australia had the power to overrule its decision. The decision *Re: Kevin* had a legal impact beyond Australia and was cited in cases in England (shown below) and America. It set a legal precedent that gender should be defined in a modern and contemporary way. It gave people hope that transgender persons could receive equal civil rights in a number of areas.

PRACTICAL APPLICATION

Christine Goodwin v The United Kingdom (2002) 35 EHRR 18; [2002] ECHR 588 (EXTRACT)

56. In its follow up study submitted on 17 January 2002, Liberty noted that while there had not been a statistical increase in States giving full legal recognition of gender re-assignment within Europe, information from outside Europe showed developments in this direction. For example, there had been statutory recognition of gender re-assignment in Singapore, and a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America. It cited in particular the cases of *Attorney-General v. Otahuhu Family Court* [1995] 1 NZLR 60 and *Re Kevin* [2001] FamCA 1074 where in New Zealand and Australia transsexual persons' assigned sex was recognised for the purposes of validating their marriages: In the latter case, Mr Justice Chisholm held:

I see no basis in legal principle or policy why Australian law should follow the decision in Corbett. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to [its] development in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society...

1. Select either a primary or secondary source that discusses this case. What was the case about? [C] [S]

2. Why was *Re Kevin* used in this case before the European Council of Human Rights? [A]

6.3 LANDMARK DECISIONS, LEGAL CHANGE AND LAW REFORM

Quite often the courts make decisions which are progressive, in the sense that the decision reflects a more modern and up-to-date view of what the community expects. Having done so, it waits for Parliament to either agree with its decision or not. Sometimes the political system find it too difficult to change the law and it may take some time before Parliament is able to do so.

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Two examples are abortion law, which has only recently been changed in Queensland in October 2018 and same-sex marriage, which also became legal in Australia in 2018.

To explore how legislation and case law interact to create catalysts for change and reform we will investigate the legal area of native title. When Australia was colonised by Britain, British law was immediately applied to the colony as it was categorised as terra nullius (the land of no-one). This ignored the fact that Aboriginal and Torres Strait Islander peoples had organised social institutions, their own system of law and their own relationship with the land. From the moment of British settlement of Australia, the land became the property of the British Crown. Aboriginal and Torres

Strait Islander peoples would wait two centuries before a court was asked to make a decision about the recognition of native title.

INQUIRY FOCUS

HOW DO LANDMARK DECISIONS CONTRIBUTE TO LEGAL CHANGE AND LAW REFORM?

While reading about native title law you should also continue to consider the relationship between legislation and case law and how it contributes to law reform.

CASE STUDY

Mabo v Queensland (Mabo No. 2) (1992) 107 ALR 1; 175 CLR 1

Facts: Eddie Mabo, a member of the Meriam people, lived on Murray Island (Mer) in the Torres Strait. The islands were annexed by Queensland in 1879, becoming part of the colony of Queensland. Eddie Mabo and four other plaintiffs claimed that Mer should be the subject of native title. The plaintiff's could not show any grant by the Queensland or Australian Governments of any title to the land but proved they had continuously inhabited Mer and had lived in permanent communities with their own social and political organisations.

Legal issue: Did native title exist in Australia at the time of British settlement and does it still exist, especially in relation to Mer? If it did exist, had native title been extinguished on Mer?

Decision: The seven judges of the High Court of Australia held (six to one) that:

- the doctrine of *terra nullius* did not apply and that Aboriginal and Torres Strait Islander peoples did have native title of their traditional lands. The court accepted that Australia was not 'practically unoccupied' or vacant, but was occupied by Aboriginal and Torres Strait Islander peoples who had their own traditions and customs and, more importantly, their own relationship with the land.
- the earlier Australian view of Indigenous society as being of less worth than the introduced British society was essentially racist.
- given that native title existed, Aboriginal and Torres Strait Islander peoples retained their native title, unless the Crown took action inconsistent with the continuation of such native title. This could include when freehold land had been granted or when certain leasehold interests in land had been granted. Where

CASE STUDY CONTINUED...

the Crown had taken action in the past granting such interests, then native title was extinguished and no compensatory damages were to be paid.

- native title did exist in Mer and the Meriam people were entitled to the possession, occupation, use and enjoyment of the land. It had not been extinguished.
- any attempt by the States to extinguish native title was subject to overriding Commonwealth legislation – the *Racial Discrimination Act 1975* (Cth).

1. What impact did the application of *terra nullius* have on Aboriginal and Torres Strait Islander peoples? [C]
2. Who was Eddie Mabo? [C]
3. What did the court decide with regard to native title on Mer? [C]
4. The decision held that States could not extinguish native title through legislation contrary to the *Racial Discrimination Act 1975* (Cth). Conduct research to find out what Queensland did in 1985 in anticipation of the Mabo decision. [S]
5. The Mabo case is considered to be a landmark legal decision. Why do you think this decision was significant for all Australians? [E]

After the *Mabo* decision the Australian Government took steps to resolve some outstanding issues. Some of these issues involved establishing a process by which native title claims could be decided and a system of compensation. Mining and pastoral lease holders were two groups in particular that were concerned about the impact of the *Mabo* decision on their activities.

The *Native Title Act 1993* (Cth) came into effect on 1 January 1994.

PRACTICAL APPLICATION

NATIVE TITLE ACT 1993 (CTH)

Preamble (Extract)

This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race....

PRACTICAL APPLICATION CONTINUED...

The High Court has:

(a) rejected the doctrine that Australia was terra nullius (land belonging to no one) at the time of European settlement; and

(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and

(c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire….

Section 3 Objects

Main objects

The main objects of this Act are:

(a) to provide for the recognition and protection of native title; and

(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and

(c) to establish a mechanism for determining claims to native title; and

(d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title

1. Describe the broad objective of the *Native Title Act 1993* (Cth) in one sentence. [C]
2. Is there anything contained in the Preamble that surprised you? Why or why not? [E]
3. How does the Mabo decision demonstrate how case law contributed to legal change? [E]

Native title law is constantly evolving as new issues arise and the provisions within the legislation require further interpretation. The courts have been required to make other decisions in the area of native title that have continued to contribute to further law reform. The Mabo decision did not deal in any way with pastoral leases as there were not any in the Torres Strait Islands. The question of whether pastoral leases extinguished native title was addressed by the High Court in the following case.

CASE STUDY

Wik Peoples v State of Queensland (1996) 187 CLR 1; [1996] HCA 40

Facts: Two pastoral leases existed on Cape York Peninsula in Queensland. The first of these was 1119 square miles in area. It was granted in 1945 and extended in 1975 until the year 2004. It was not permanently occupied or fenced. The lease contained provisions requiring the lessees to improve some of the land, sow a seed production area and fence some of the land.

The second of these was 535 square miles. An initial lease was granted in 1915 but the lessees never took possession and it was forfeited in 1918 for non-payment of rent. Another lease was granted in 1919 and forfeited again in 1921. In 1922, the area became an Aboriginal reserve. Aboriginal people were in continuous occupation of the area.

In December 1993, the Wik peoples made a claim for native title in the Federal Court of Australia. The Thayorre peoples joined the action also claiming native title rights to an area which partly overlapped the Wik peoples' claim. Both the Wik peoples' and Thayorre peoples' claims included land covered by the two areas of pastoral leases.

The case was initially heard in the Federal Court of Australia which held that the grant of pastoral leases under Queensland law had extinguished the native title rights. An appeal was made to the High Court of Australia.

Legal issue: Did the granting of two pastoral leases extinguish native title?

Decision: In a majority decision four to three, the High Court of Australia held that pastoral leases did not extinguish native title, as the Queensland Parliament did not clearly intend to extinguish native title when granting the Wik pastoral lease. It re-affirmed the *Mabo* view that native title can only be extinguished by a written law or an Act of the Government which shows the clear intention to extinguish native title.

However, the High Court of Australia also stated that if there is a conflict in the exercise of the right by the pastoralist with the exercise of the native title right then the native title right would yield to a pastoralist's right.

1. Which court heard the original case? What did the court decide? [C]
2. If there was a conflict between the pastoralist's rights and the exercise of native title rights, which right prevails? [C]
3. How was the issue in this case different to the *Mabo* decision? [A]
4. Why is this case considered to be also legally significant? [E]

The fact is that the Wik decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre.

SOURCE: PRIME MINISTER JOHN HOWARD, PRESS RELEASE – 'AMENDED WIK 10 POINT PLAN', 8 MAY 1997.

After the *Wik* decision, the Howard led Coalition Government amended the *Native Title Act 1993* (Cth) to incorporate a '10 Point Plan' that placed some restrictions on native title claims. The plan included the introduction of a registration test imposed on all claimants, time limits being placed on claims and additional protections given to government, mining and pastoral leases. The *Native Title Amendment Act 1998* (Cth) is the longest debated bill in Australian Parliament to date (it was debated for 105 hours and 56 minutes) and was only passed when Independent Senator Brian Harradine supported its passage.

The area of native title law continues to involve both case law and legislation. These two types of law continually interact with each other as judges are required to interpret provisions of the *Native Title Act 1993* (Cth) in relation to new native title claims and compensation for extinguishment by the *Native Title Act* that involved previously unresolved issues. This can be seen below in a case that was decided by the High Court of Australia in 2019, which was the first occasion the High Court was required to determine a claim for compensation by a Native Title holder.

The test case – described as one of the biggest since Mabo – brought the High Court to the Northern Territory for the first time in its history. It was the first time the High Court had examined the Native Title Act's compensation provisions…

CASE STUDY

HIgh Court awards Timber Creek Native Title Holders $2.5M partly for 'Spiritual Harm'

SOURCE: FELICITY JAMES, ABC NEWS ONLINE (ABC.NET.AU), 13 MARCH 2019.

Northern Territory and Mr A. Griffiths (deceased) & Lorraine Jones on behalf of the Ngaliwurru & Nungali Peoples [2019] HCA 7 (13 March 2019)

Facts: Timber Creek is a tributary of the Victoria River situated in the north-western corner of the Northern Territory. A number of pastoral leases were granted in the district including over some of the land subject to native title. The Ngaliwurru and Nungali Peoples (the Claimants) had some native title rights and interests that allowed the claimants to use the land in accordance with their traditional laws and customs, such as the right to hunt, fish and forage on the land and the right to engage in cultural activities and conduct ceremonies on the land. But, these rights were non-exclusive – for instance, the Claimants had no power to prevent other persons entering or using the land. The Northern Territory Government had also done acts which impaired or extinguished native title rights such as granting of a Crown lease or constructing public works.

The Claimants sought compensation for the loss and impairment of their native title rights over land in the area. The compensation payable to the Claimants under the *Native Title Act 1993* (Cth) was to be paid in two parts to them, including:

i. Compensation for economic loss (including interest from the date of extinguishment of the Native Title); and

ii. Compensation for non-economic loss.

In the original trial the judge determined that the compensation for economic loss should be set at 80% of the freehold value of the affected land and determined that the non-economic loss compensation should be payable in the amount of $1.3 million. On appeal to the Full Court of the Federal Court it held that the assessment of economic loss should be set at 65% of the freehold value of the affected land. The Full Court also held that the compensation of non-economic loss should remain at $1.3 million.

Legal issue: How should the compensation for economic loss be assessed and what should the non-economic loss be that was payable to the Claimants.

Decision: The High Court of Australia decided that the compensation for economic loss should be $320,250.00 (50% of the freehold value of the land) plus interest. It was held also that the compensation payable for the cultural loss (non-economic loss) should remain $1.3 million. The compensation for cultural loss was to be paid on top of the compensation for economic loss.

Further discussion:

The compensation for the non-economic loss – best described as the cultural loss – exceeded the compensation for the economic loss. To be able to understand the depth of the cultural or spiritual loss to the Claimants you need to look at evidence given to the trial judge in this case. The trial judge referenced an expert anthropologists report by Kingsley Palmer and Wendy Asche on the rights and duties of the Claimant under Ngaliwurru and Nungali law and custom to look after and speak for the country in the initial judgment.

Among other things, the report explained sites of significance in and around the claim area and very importantly the travels of major Dreamings through that area. The anthropologists explained the effect harming their

CASE STUDY CONTINUED...

country had on Aboriginal peoples under their traditional laws and customs. They did that by reference to events that had occurred in Timber Creek. Their report referred to one of the compensable acts of building a swimming pool on land with one site of significance and how such acts interfered with the Dingo Dreaming track *Wirip* (Dingo Dreaming). The Claimants gave evidence of the effect of this action. It made them feel bad. Simply, they did not want the rock under the water. They wanted it on the water. One Claimant gave evidence that the concrete causeway built to create the pool at that site:

> *Blocked the tunnel and cut the life out of the Dreaming. It is still there, but you can't see it anymore. That Wirip Dreaming is very important to us. We use that Dreaming story when we have initiation for the young fellas. Now it's damaged for good and we can't tell the young fellas the full story. If they can't see the Dreaming it's hard for us older fellas to tell them the full Dreaming story they need to learn to grow up.*
>
> *Each group has to look after its bit of the Dreaming. If something goes wrong with our part, others feel we are no good. That's what happened when all of these things have been built in the town. Other Aboriginal people complain about it and say we are letting them down.*
>
> *It hurts my feelings when Gardia (white men) do these things. They go ahead without talking to the old fella or me. When I see the Dreaming being damaged, I feel for my old people. I feel ashamed, like I've done the wrong thing myself in not looking after the country, the sites and the Dreaming……*

After this evidence was received the trial judge concluded that the Aboriginal peoples had not only a duty, but also a concern to look after the country and that they had a genuinely held deep connection to the country. He found that the evidence supported by the report of the anthropologists was that the loss of, and damage to country, caused an emotional, gut-wrenching pain and deep or primary emotions accompanied by anxiety. The judge concluded that the consequence of the compensable acts affected the Aboriginals perception of and an engagement with the Dreamings. The Dreamings are not site specific but run through a large area of the land, and that a person's connection with country, came with it, an obligation to care for it, there is a resulting sense of failed responsibility when it's damaged or affected in a way which cuts through the Dreamings. The spiritual or cultural effect on the Claimants was devastating.

1. What were the actions of the Northern Territory Government and what impact did this have on the Ngaliwurru and Nungali peoples' rights? [C]
2. What did the Federal Court of Australia award the Ngaliwurru and Nungali peoples' in compensation? How did this change on appeal before the High Court of Australia? [C]
3. Why do you think this case may be significant from a law reform perspective? [E]
4. A formula to decide the value of compensation was not specially addressed in the *Native Title Act 1993* (Cth). Do you think the Government should address compensation more directly in the Act? Why or why not? [E]

6.4 SPECIALIST COURTS AND TRIBUNALS

As the needs of our society change so does our court system. **Many of the courts and tribunals discussed below were established as the result of significant law reform** in a particular legal area (such as the Family Law Court), to improve efficiency (such as the Queensland Civil and Administrative Tribunal) or due to the recognition of a particular need for specialisation (such as the Murri Court).

SPECIALIST QUEENSLAND COURTS TRIBUNALS

When Queensland was established in 1859 it only had two courts, the Supreme Court of Queensland and the Court of Petty Sessions. Over time, many new courts have been established for varying reasons. We will now examine the Childrens Court, Murri Court and Queensland Civil and Administrative Tribunal (QCAT). These courts should be familiar to you, as you covered them in much detail in Year 11.

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CHILDRENS COURT

We covered how children are recognised under criminal law extensively in Year 11. Remember that under Queensland law a child is considered to be a person under the age of 18 – but prior to 2018 it was under 17 years. The *Criminal Code 1899* (Qld) s29(a) states that a person under the age of 10 is not held to be criminally responsible, but not every child over the age of 10 faces court if they break the law. Section 29(b) further points out that a person under the age of 14 is not criminally responsible for an act unless the prosecution can show the child had the capacity to know what they did or didn't do was against the law. **Matters involving children are heard by either a special Magistrates Court called Childrens Court or a special form of the District Court called the Childrens Court of Queensland depending on the seriousness of the offence.** For example, if a child committed the criminal offence of shoplifting, the matter would be heard by a magistrate, whereas a more serious criminal offence such as armed robbery would be heard by a judge of the District Court of Queensland. However, **if the offence is heard by the Supreme Court, it is sentenced by that court** (*Youth Justice Act 1992* (Qld) s91). **Children's Courts also hear child protection, parentage orders and adoption matters.**

SUPREME COURT OF QUEENSLAND

Appellate jurisdiction

- Court of Appeal hears appeals from the decision of a single Supreme Court or District Court judge

Original jurisdiction

- Indictable offences that would usually fall under the jurisdiction of the court such as homicide

CHILDRENS COURT OF QUEENSLAND (DISTRICT COURT)

Appellate jurisdiction

- Hears appeals from the Childrens Court in the Magistrates Court of Queensland

Original jurisdiction

- Indictable offences, such as rape, arson, armed robbery and assault occasioning grievous bodily harm
  - Parentage orders and the discharge of parentage orders

CHILDRENS COURT (MAGISTRATES COURT)

- Minor criminal (summary or regulatory) offences such as simple assault, shoplifting and wilful damage to property.
- Committal hearings
  - Child protection
    - Adoption

RESEARCH

One of Amnesty International's current campaigns centres on raising the age of criminal responsibility.

Research shows that at this young age, children's brains are still developing and they are not able to understand the consequences of their behaviour. Locking young kids up also increases the likelihood they will get in trouble later in life, with children arrested before the age of 14 three times more likely to commit offences as adults than children arrested after 14.

SOURCE: AMNESTY INTERNATIONAL, 'RAISE THE AGE: GIVE KIDS THE BEST CHANCE TO THRIVE', (AMNESTY.ORG.AU), 23 JULY 2018. (EXCERPT)

1. Select a range of secondary sources to outline at least two arguments for and against this reform. Do you support this reform? Why or why not? [S] [A] [E]

Matters involving children are largely governed by the *Youth Justice Act 1992* (Qld). Matters are usually heard in a closed court. The court is required to check that a child has had access to legal representation if they are unrepresented (s79). A child can elect to have a judge alone or jury trial (s98) and identifying information is not usually published (s301). There are special arrangements which can be made to facilitate the hearing of a trial involving a child witness, such as the pre-recording of evidence. There is also a focus on a child receiving a non-custodial order if sentenced by a court with a caution and restorative justice processes being identified as the preferred approach throughout the Act.

MURRI COURT

In Year 11 you learned a little about customary law and how it is recognised in Australia. Customary law is the Aboriginal and Torres Strait Islander peoples' traditions and rules, including ceremonies, songs, stories; a way of life governed by a system of beliefs. **The Murri Court is an example of the application of customary law to the hearing and sentencing of indigenous defendants. The Murri Court is a specialist court situated in the Magistrates Court of Queensland, with a magistrate presiding over the court.** It was first established in 2002, before being abolished by the Liberal-National Government in 2012. It was reinstated in 2016 by the Labor Government. Murri Court is governed by a number of pieces of legislation including *Youth Justice Act 1992* (Qld), *Bail Act 1980* (Qld), *Penalties and Sentencing Act 1992* (Qld) and *Aboriginal and Torres Strait Islander Communities (Justice, Land and other matters) Act 1984* (Qld). The Murri Court **only applies to criminal offences that can be dealt with in the Magistrates or Children's Court – it is not available for serious indictable offences. The magistrate is assisted by Elders or Respected Persons from the community** to help the magistrate understand a defendant's personal, economic, social and cultural circumstances. The Murri Court links Aboriginal and Torres Strait Islander defendants to a number of cultural and support services to help them address the underlying reasons for their offending and facilitate improvements to the defendant's physical and psychological health. It is only after the defendant accesses and utilises the support services that the magistrate will sentence the defendant, with the sentence taking into account the changes the defendant has made.

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Murri Court aims to:

- encourage members of the Aboriginal and Torres Strait Islander community to participate in the Murri Court process
- deliver a culturally appropriate court process that respects and acknowledges Aboriginal and Torres Strait Islander cultures
- refer defendants to support services that address the underlying contributors to their offending
- give magistrates detailed information about defendants' personal and cultural circumstances.

SOURCE: QUEENSLAND COURTS, 2019, COURTS.QLD.GOV.AU/COURTS/MURRI-COURT/ABOUT-MURRI-COURT (EXCERPT)

PRACTICAL APPLICATION

INDIGENOUS ELDERS JOIN MAGISTRATES IN SPECIAL COURT FOR OFFENDERS WILLING TO REHABILITATE

SOURCE: EMILIA TERZON, ABC NEWS ONLINE (ABC.NET.AU) 7 JUNE 2017 (EXCERPTS)

The Queensland court program was set up in 2002 to tackle the state's staggeringly disproportionate rates of Indigenous incarceration.

It today operates in 14 courts across the state and hears about the cases of about 800 people a year.

It only admits indigenous offenders who are pleading guilty, and it requires them to meet regularly with volunteer elders for months before they are sentenced by the courts.

It is a vastly different approach to the churn of mainstream courts, where there is far less time for pre-sentencing intervention and prison time can be dished out in minutes.

David Daffey is a Kuku Yalanji man who, after years of repeat offending and court appearances, went through the "totally different" Murri Court system in Cairns.

"It was my mob, my people. You feel more at ease," he said.

Some may argue the Murri Court goes easy on offenders, but Mr Daffey said it was the opposite, because it forced him to contemplate his actions.

"All in all, I would never reoffend again. I know that for sure," he said.

Despite its anecdotal success, Mr Black said the Murri Court was not for everybody and there are still those who dropped out, re-offended or expected leniency for nothing.

He also acknowledged the Indigenous incarceration rate remained unacceptably high in Queensland.

1. When was the Murri Court established? How many Murri Courts are there today? [C]
2. What are some of the differences the Murri Court has to mainstream courts? [C]
3. Analyse the viewpoint of David Daffey. What is his opinion of the Murri Court? [A]
4. Why was the Murri Court set up? Has the court achieved its purpose? Why do you think this is the case? [C] [E]

Government data shows that when compared to non-Indigenous Australians, Indigenous Australians are:

- imprisoned at more than 12 times the rate of imprisonment;
- more likely to serve short sentences of imprisonment;
- more likely to be imprisoned or charged with assault or another violent offence; and
- when imprisoned, more likely to have been imprisoned previously

SOURCE: ANDREW BUSHNELL, 2017, INSTITUTE OF PUBLIC AFFAIRS (ALRC.GOV.AU) (EXCERPT)

Indigenous sentencing courts, such as the Murri Court, have been established in many jurisdictions in response to the failure of the criminal justice system to respond to indigenous over-representation as they help to promote cultural awareness in the justice system and help address recidivism. The evidence clearly demonstrates that Aboriginal and Torres Strait Islander Peoples are over-represented in the criminal justice system – in 2017 the Australian Law Reform Commission (ALRC) *Pathways to Justice Inquiry* reported that Aboriginal and Torres Strait Islander peoples make up 27 per cent of the Australian prison population. Despite the introduction of indigenous sentencing courts, the Inquiry found that the criminal justice system did not provide enough sentencing options and diversionary programs for Aboriginal and Torres Strait Islander offenders. An evaluation of the Murri Court was undertaken in 2017 by the Australian Institute of Criminology. Whilst positive, reports and inquiries into indigenous peoples and the criminal justice system suggest further room for improvement.

PRACTICAL APPLICATION

EVALUATION OF THE QUEENSLAND MURRI COURT: FINAL REPORT

SOURCE: ANTHONY MORGAN AND ERIN LOUIS, AUSTRALIAN INSTITUTE OF CRIMINOLOGY (AIC.GOV.AU) 2017 (EXCERPTS)

Overall, the evaluation has shown that the Murri Court has been successful in achieving many of these objectives. The court has had considerable success in improving its relationship with indigenous communities to deal with Indigenous justice issues and in delivering a range of benefits to those directly involved in the program. It was clear from the evaluation that the court is highly valued among stakeholders involved in the program and that it has considerable support among the wider Indigenous community. Given that the support of stakeholders and the Indigenous community (particularly that of Elders), is integral to the ongoing operation of these court programs, this was a welcome finding.

Further, it was found that the court improved court appearance rates among both adults and juveniles and provided greater opportunities for adult offenders to participate in rehabilitative programs in the community pre- and post-sentence. While the current evaluation found that the Murri Court had not had a short-term impact upon the rate of reoffending among indigenous offenders, the Court did appear well-placed to take on a more intervention-focused approach to dealing with indigenous offending.

1. Outline the benefits and limitations of the Murri Court [A]
2. Do you think the Murri Court's failure to decrease the rate of reoffending means the court is not effective? Justify your viewpoint. [E]

FURTHER READING

To gain a detailed understanding of how the Murri Court operates, you may like to download the court's Procedural Manual, courts.qld.gov.au/courts/murri-court/resources. The manual discusses the sentencing process, the roles and responsibilities of each party, the pre-sentence process and program eligibility.

Queensland Civil and Administrative Tribunal (QCAT)

QCAT brings civil justice to the lives of everyday Queenslanders.

THE HON JUSTICE MARTIN DAUBNEY AM, 2018 QCAT PRESIDENT

QCAT commenced in 2009 and is governed by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). At the time of its introduction Attorney General Cameron Dick stated that QCAT, 'represented the most significant structural reform to Queensland's justice system in 50 years.' The tribunal brought together 18 tribunals and 23 jurisdictions – which was viewed in a review by the Department of Justice and Attorney-General to be inefficient and fragmented - into one court. The purpose of QCAT is to provide an accessible, quick, informal and inexpensive way to resolve disputes between parties and make decisions. QCAT has a wide range of jurisdictions, including:

- civil disputes involving up to $25 000 (e.g. building, neighbourhood, bodies corporate and retail shop lease disputes;
- applications in relation to appointments of administrators and guardians (e.g. where an adult has impaired decision making capacity);
- administrative review of government and statutory authority decisions (e.g. Queensland Building and Construction Commission, liquor licensing, blue cards, child protection, weapons licensing and racing);
- occupational regulation (e.g. referrals and reviews involving lawyers, health practitioners, police, teachers, veterinary surgeons and engineers);
- minor civil disputes (e.g. residential tenancy disputes, minor debt and consumer law); and
- referrals by the Anti-Discrimination Commission Queensland (e.g. complaints of alleged unlawful discrimination, sexual harassment, vilification and victimisation).

Its decisions are sometimes reported on the Supreme Court Library Queensland CaseLaw page (sclqld.org.au/caselaw). People who have a matter heard by QCAT represent themselves – but lawyers can become involved if it is in the interest of justice but only with the leave of the tribunal (s43).

WHAT DO YOU THINK?

Do you think lawyers should be more widely used in disputes heard before QCAT? Explain your point of view. [E]

PRACTICAL APPLICATION

Service performance criteria	2014-15	2015-16	2016-17	2017-18
Cases lodged	28666	30073	30858	31229
Cases finalised	31104	30029	29736	31326
1300 calls managed	103718	112370	103313	112515
Call response time (average)	9.02 minutes	3.17 minutes	3.53 minutes	15.51 minutes
Search request of QCAT records	17572	16772	16136	15866
Counter enquiries	10623	11955	10803	13418
Proceedings scheduled*	17428	17607	17728	18428
Cost per matter (average)	^653	$721	$728	$717
Interpreter and translation services provided	266	290	347	347
Complaint rate	0.8%	0.9%	0.7%	0.9%
User satisfaction rating	71%	82%	82%	81%

Table1: Overview of operations. Proceedings exclude minor civil disputes

SOURCE: QCAT ANNUAL REPORT 2017-18, PG. 12.

1. How many cases were lodged in 2017-18? What general trend can you see regarding the amount of cases lodged at QCAT? [C]
2. What is the call response time in 2017-18 compared to 2014-15? Why might the time have changed? [C] [A]
3. How much does a QCAT matter cost in 2017-18? Do you think this is cost-efficient? [C] [A]
4. Is QCAT being used more or less over time? How do you know this? What implications might this have for the future [C] [A]
5. How do the majority of users view QCAT? What does this demonstrate? [C]

PRACTICAL APPLICATION

PRESSURE COOKER TRIBUNAL SQUEEZED FOR CASH AHEAD OF LEMON LAWS

SOURCE: FELICITY CALDWELL, BRISBANE TIMES (BRISBANETIMES.COM.AU) 29 JANUARY 2019 (EXCERPTS)

The Palaszczuk government has been warned its proposal to make it easier for drivers stuck with "lemons" to take action against car sellers could stretch the Queensland Civil and Administrative Tribunal to breaking point.

The government has proposed new laws that would raise the limit for motor vehicle claims in QCAT from $25,000 to $100,000, as part of its crackdown on "lemon" cars and caravans.

Queensland Law Society president Bill Potts said QCAT was already in a "very poor position financially".

"By that, I mean, it does not have the resources to deal with the [lemon laws] legislation," he told a parliamentary committee considering the government's bill.

Mr Potts' argument came after scathing comments by QCAT president Martin Daubney, who said members and registry staff had been "stretched beyond all reasonable and proper levels of tolerance".

When the government's bill was introduced into Parliament last year, Ashton Wood, from Facebook group Consumer Laws Australia, said owners of faulty cars in Queensland that cost more than $25,000 could not use the QCAT tribunal, and instead had to pursue their claim in the Magistrates Court.

"(This resulted) in many consumers on-selling their problematic vehicles or just putting up with the inconvenience of an unreliable vehicle rather than the expense of the Magistrates Court," he said.

1. What new laws may become part of QCAT's jurisdiction? [C]
2. Analyse the viewpoints of two opposing stakeholders. What benefits and limitations do they raise? [A]
3. Recommend and justify a further action that could respond to these concerns. [E]

SPECIALIST AUSTRALIAN COURTS AND TRIBUNALS

Like Queensland, Australian courts have evolved with the needs of society. The High Court of Australia was established in 1901 when the colonies federated. Since that time, many other courts have been developed, the most notable being the Family Court of Australia. **The Family Court has reflected and incorporated broad and rapid social, moral and cultural changes that have occurred since its inception in 1975. As the family unit is considered to be the central and fundamental institution of society** the decisions made by the Family Court often raise important questions about gender roles, power, property, relationships and the nurturing of children.

FAMILY COURT OF AUSTRALIA

The *Commonwealth of Australia Constitution Act 1901* (Cth) s77 gave the Commonwealth Parliament the power to define the jurisdiction of any federal court. At the time of federation divorce was uncommon and difficult, people living together as an unmarried couple was rare and few family types existed. The laws concerning marriage and divorce were largely inherited from England—including the system of fault-based divorce. In this system one party needed to prove the marriage had failed because the actions of her spouse satisfied a specific ground of fault in order to be granted a divorce.

PRACTICAL APPLICATION

It was not until 1923 that the sexes were put on an equal footing. In that year a wife was enabled to divorce her husband for adultery without having to prove cruelty or desertion, just as he was entitled to divorce her for adultery. No one could doubt the justice of this. A husband should keep as high a standard himself as that which he expects his wife to keep: but after 1923 there was an increase in the number of collusive divorces. When a marriage had hopelessly broken down, and the parties were both anxious for divorce, they would arrange that the husband should 'provide the grounds for divorce' which meant that he would go to a hotel with a woman and send the hotel bill afterwards to his wife. The courts would, on such evidence, infer adultery. In fact, however, it might never have taken place. The woman he took might be his sister, or a woman who made a business of going to a hotel with a man for money but on the strict understanding that there was to be no adultery. Lord Merrivale was so uneasy about the position that he declined to act on hotel evidence, at any rate if the woman was unnamed: but the Court of Appeal overruled him. The Court of Appeal had in mind, no doubt, the considerable number of cases where the man declined to give the name of a woman with whom he had in fact committed adultery, so that it should not become public: but in so doing, it gave considerable scope to collusive divorces. When I sat as a divorce judge in 1944, we had hundreds of 'hotel bill' cases.

They all went through 'on the nod'.

SOURCE: LORD DENNING – LANDMARKS IN THE LAW

1. What does 'providing the grounds for divorce' mean? [C]
2. What did the Court of Appeal decide? [C]
3. What was the ground for divorce relied upon in these 'hotel bill' cases? [C]
4. Do you think that Lord Denning was satisfied with the state of the law? Why? Why not? [A] [E]
5. Do you think that this judicial approach would have helped bring on 'no fault divorce'? Why? Why not? [A] [E]

THE *FAMILY LAW ACT 1975* (CTH) (FLA)

In 1975 the Whitlam Labor Government enacted one of the biggest social reforms of that time—no-fault divorce, as part of the *Family Law Act 1975* (Cth) (FLA). It is important to note here that the **FLA has been amended several times since its enactment as the concept of family has changed significantly over time,** with many of these changes also being influenced by the political climate (something we will discuss later on).

The FLA was also important as it created the Family Court of Australia (s21) which commenced operation on 5 January 1976. At the time of its creation the Senate Standing Committee on Constitutional and Legal Affairs believed the court would be '**essential to give substance to [the] reconciliation provisions**' of the FLA; and the creation of a new court was justified because, '**existing courts had been found to be unsuitable and ill-equipped to deal sympathetically and helpfully with the particular problems of family disputes**' (ALRC, 2019). It was described by the Hon Justice Nicholson AO RFD and Margaret Harrison as being a, '**bold experiment and is still seen in that light in comparison with overseas jurisdictions.**'

The Family Court is a highly specialised court that assists Australians to resolve complex legal family disputes. The Hon Justice Nicholson AO RFD and Margaret Harrison note that the, 'somewhat confused legal regulation of family-related disputes reflects the complex nature of family life itself.' Examples of these matters include:

- parenting cases that involve child welfare issues including; family violence, abuse and/or mental health issues
- parenting cases that involve multiple parties
- parenting cases that might result in a parent being unable to communicate or spend time with their child
- international child abduction under the *Hague Convention* or relocation.
- financial cases that involve multiple parties or complex family interests
- multiple expert witnesses
- complex questions of law
- jurisdictional issues
- appeals from the Federal Circuit Court of Australia (which also has a family law jurisdiction and hears less complex family disputes).

Changes to the FLA have had a huge impact on the types of matters and structure of the court. It is important to note that many of these changes have focused on what is best for children and couples and has always attempted to give litigants the best possible pathways to resolve conflict, including the use of conciliation and mediation (with court being a last resort). These key principles continue to inform future changes, with the area of family law being the most recently investigated by the Australian Law Reform Commission (ALRC).

PRACTICAL APPLICATION

KEY FAMILY LAW REFORM AMENDMENTS

1975: The *Family Law Act 1975* (Cth) introduced no-fault divorce. Couples no longer need to prove fault, only that the marriage had broken down irretrievably.

1995: The *Family Law Reform Act 1995* (Cth) saw a movements away from parents' rights towards parental responsibility. The focus was that the best interests of the child were important.

2002: The *Family Law Legislation Amendment (Superannuation) Act* 2001 (Cth) allowed superannuation to be treated as property and divided between divorcing couples.

2006: The *Family Law (Shared Parental Responsibility) Act 2006* (Cth) stipulated that couples undergo compulsory mediation before applying to court for an order regarding children.

2008: The *Family Law Amendment (De Facto Financial Matters and other Measures Act 2008* (Cth) gave de-facto and same sex couples the same property rights as married couples.

2011: The definition of 'violence' was expanded under the *Family Law Amendment Act (Family Violence and Other Measures) Act 2011* (Cth)

CAPTION: THIS TIMELINE DEPICTS SOME KEY FAMILY LAW REFORMS THAT HAVE BEEN INTRODUCED IN AUSTRALIA SINCE 1975.

1. Choose one of the reforms listed about and undertake research to complete the following task:
   a. What was the objective of the reform? What issues did it address? [C] [A] [S]
   b. Which stakeholders do you believe benefited from the reform the most? [A] [S]

PRACTICAL APPLICATION

SWEEPING CHANGES TO FAMILY COURT ANNOUNCED AS BROADER REVIEW OF STRAINED SYSTEM CONTINUES

SOURCE: MATTHEW DORAN, ABC NEWS (ABC.NET.AU), 30 MAY 2018 (EXCERPTS)

The Family Court and Federal Circuit Court will be combined as part of sweeping changes to the financially and emotionally crippling family law system, in an announcement by the Attorney-General Christian Porter today.

"We have two parallel courts, different rules, forms, procedures, individuals who are in the system get bounced around like Family Law footballs from one court to the other — terrible outcomes for them," Mr Porter told the ABC's AM program.

Some 22,000 cases are filed across the two courts each year, and Mr Porter said delays in the family law system meant most cases were taking almost a year and a half just to reach trial.

It is unclear whether the changes will satisfy critics of the way the family law system, who argue funding pressures and delays in appointing judges to the bench are key reasons why the system is inefficient and struggling to cope with case loads.

The former attorney-general, George Brandis, announced a "long overdue" review of the family law system in September — the first since the dedicated court was established in the late 1970s.

The Australian Law Reform Commission is due to report back to the Government by March 2019.

Mr Porter defended making the announcement before those findings were delivered.

"It was a matter of such obviousness that the present structure was not working and was causing inefficiencies and duplications and delays that we considered that we could make the structural change," he said.

1. What was announced by former Attorney-General George Brandis in September? [C]
2. What is Attorney-General Christian Porter proposing should happen to the Family Court and Federal Circuit Court? What reasons are provided to support this proposal? [C]
3. What criticisms does the article raise about the family law system? [C]
4. Should Mr Porter have waited for the Australian Law Reform Commission to hand down their report before announcing this reform? Why or why not? [E]

PRACTICAL APPLICATION

CHRISTIAN PORTER COMPROMISES IN LAST-DITCH BID TO MERGE FAMILY COURT

SOURCE: MICHAELA WHITBOURN, THE SYDNEY MORNING HERALD (SMH.COM.AU), 25 FEBRUARY 2019 (EXCERPTS)

Federal Attorney-General Christian Porter has agreed to "significant" changes to his proposed merger of the Federal Circuit and Family Courts in a bid to convince the crossbench to agree to the plan in the final sitting days before the federal election.

The bill to abolish the Family Court of Australia as a stand-alone court and merge it with the lower-level Federal Circuit Court, which handles some family law matters alongside migration cases, has been roundly criticised by Labor and senior figures in the legal profession.

PRACTICAL APPLICATION CONTINUED...

Critics had warned the abolition of the Family Court's appeal division would lead to a loss of expertise on the bench.

(He) said the first bill was "awful law" which "sought to de-specialise the Family Court" by effectively abolishing it and "shifting the appellate jurisdiction to the Federal Court".

The South Australian Centre Alliance Senator said the new plan "retains the specialisation of the Family Court", including the appointment of new judges to the court in recent days.

But Law Council of Australia president Arthur Moses, SC, said the council "firmly maintains its position that the proposed merger of the two courts is misconceived" and it "will create real difficulties for members of the community who need the specialist services" of the Family Court.

1. Why has Federal Attorney-General Christian Porter agreed to change his initial Bill? [C]
2. What criticisms were raised about the proposed merger? Analyse the implications of one of these. [C] [A]

PRACTICAL APPLICATION

FAMILY LAW DELAYS UNACCEPTABLE, SAYS CHIEF JUSTICE

SOURCE: NICOLA BERKOVIC, THE AUSTRALIAN (THEAUSTRALIAN.COM.AU), 8 APRIL 2019 (EXCERPTS)

Family Court Chief Justice Will Alstergren has said there has "been a long history of unacceptable delays" in the family law system, while announcing steps to ensure there is less confusion for those who bounce between the two courts that handle family law.

Chief Justice Alstergren has ¬appointed a retired judge to help harmonise rules and processes in the Family Court and lower-level Federal Circuit Court. About 1200 cases a year are estimated to switch between the two courts.

The announcement comes after the Senate last week blocked the Morrison government's controversial attempt to merge the two family law courts. The reform was aimed at streamlining the system, which currently has a backlog of about 20,000 cases.

Chief Justice Alstergren, who is also chief of the Federal Circuit Court, which handles almost 90 per cent of family law cases, said the current family law system had been criticised as confusing and inefficient. He said this was partly ¬because there were different rules, forms and processes in the two courts handling family law.

Last month, retiring Family Court judge Peter Murphy lashed out at judges who were "finger puppets" for the government. He told a packed courtroom that had gathered to mark his retirement that the leaders of the court should "hang their heads in shame" for not defending it.

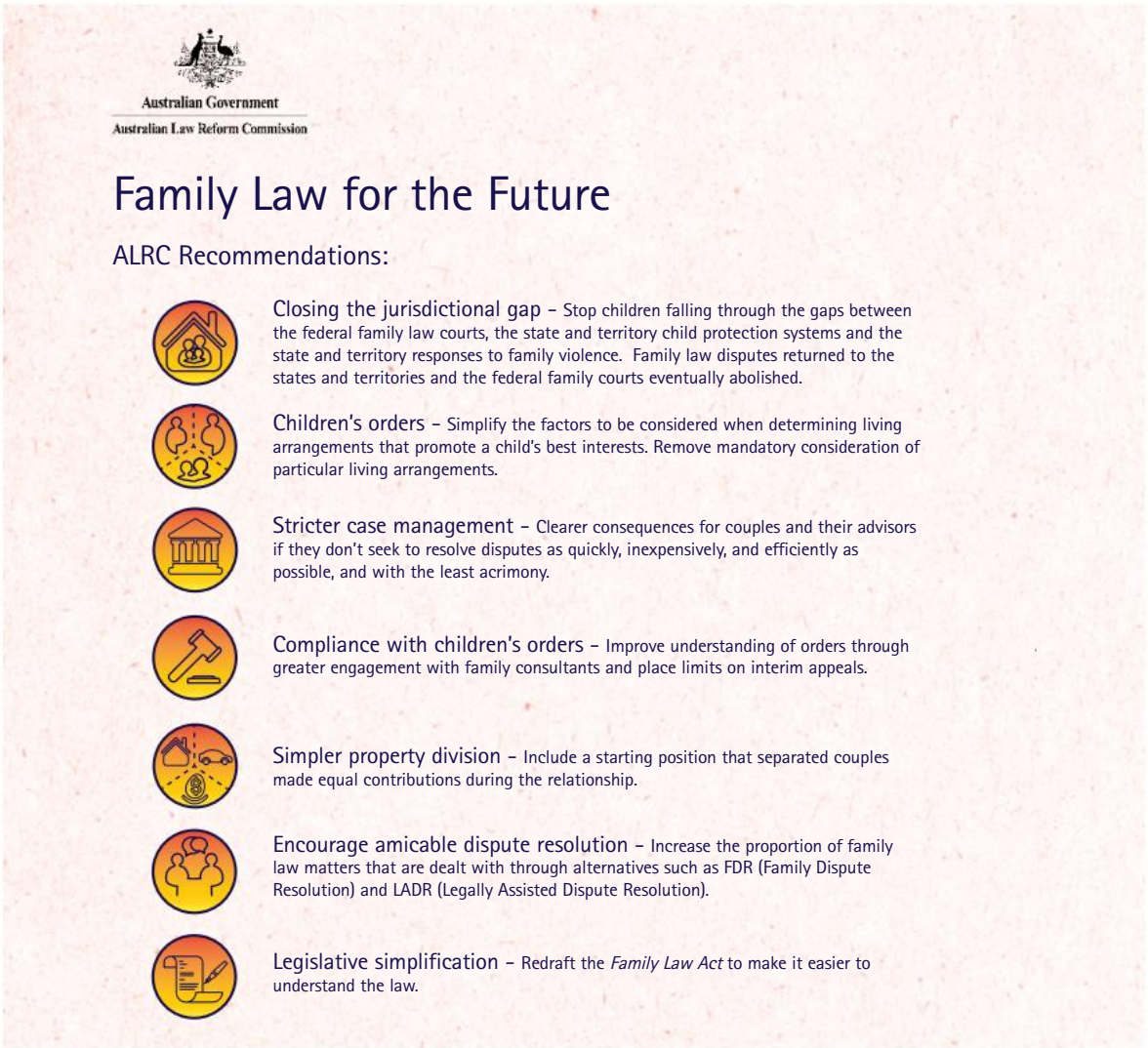
1. What occurred to the Bill that attempted to merge the Family Court and Federal Circuit Court? [C]
2. What announcement did Family Court Chief Justice Alstergren make? What does the plan hope to achieve? What benefits may this provide to families? [C] [A]
3. What did former Family Court judge Peter Murphy say at his retirement? Why can judges not comment on government policy? Should they be able to? [C] [E]

These recommendations seek to ensure families have access to a dignified and efficient process that resolves disputes effectively and at the lowest cost financially, emotional and psychologically, while also giving primacy to the interests and safety of children affected by those disputes.

ALRC PRESIDENT, THE HON JUSTICE SARAH DERRINGTON
SOURCE: AUSTRALIAN LAW REFORM COMMISSION, MEDIA RELEASE (ALRC.GOV.AU), 10 APRIL 2019 (EXCERPTS)

The result of the ALRC review was a report entitled *Family Law for the Future: An Inquiry into the Family Law System*, which was tabled in early 2019. It made 60 recommendations for reform. During the inquiry the ALRC held 179 consultations across Australia and received over 1200 written contributions, including 440 public submissions. If these recommendations are enacted, the Family Court of Australia will continue to evolve. However, it is important to note that the Family Court of Australia faces an uncertain future as the impact of the 2018 election is unknown.

PRACTICAL APPLICATION



SOURCE: AUSTRALIAN LAW REFORM COMMISSION, (ALRC.GOV.AU), 10 APRIL 2019.

Ch 5.3

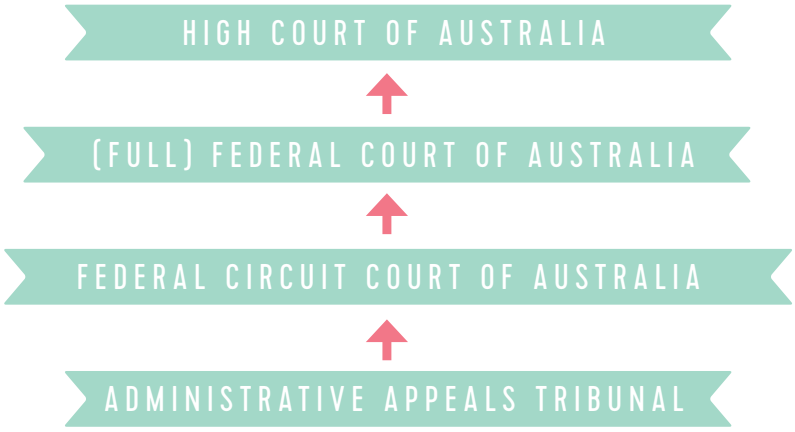
1. One of the reforms listed involved making the *Family Law Act 1975* (Cth) simpler to understand. How does this contribute to an effective law? Provide two-three reasons supporting or disagreeing with this reform. [A] [E]

ADMINISTRATIVE APPEALS TRIBUNAL (AAT)

Each day ministers, departments and agencies make administrative decisions. For example, a visa application or social security entitlement could be denied. To ensure transparency and accountability it is important that there is a process for these executive decisions to be reviewed by the judicial arm of government. The AAT was established by the *Administrative Appeals Tribunal Act 1975* (Cth) and in 2015 it expanded to include the **Migration Review Tribunal, Refugee Review Tribunal** and **Social Security Appeals Tribunal**. This means the AAT can review a wide range of decisions about:

- child support
- Commonwealth workers' compensation
- family assistance, paid parental leave, social security and student assistance
- migration and refugee visas and visa-related decisions
- taxation
- veterans' entitlements
- Australian citizenship
- bankruptcy
- civil aviation
- corporations and financial services regulation
- customs
- freedom of information
- the National Disability Insurance Scheme
- passports
- security assessments by the Australian Security Intelligence Organisation

THE APPEAL PROCESS FOR THE AAT



PRACTICAL APPLICATION

WHAT IS THE ADMINISTRATIVE APPEALS TRIBUNAL AND HOW DOES IT WORK

SOURCE: KEITH MOOR, HERALD SUN (HERALDSUN.COM.AU) 26 APRIL 2018, (EXCERPTS)

THE Administrative Appeals Tribunal now has 304 members and is budgeted to get $156 million in Federal Government funding in 2017-18.

It is made up of 35 judges and deputy presidents, 28 full-time senior members, 22 part-time senior members, 69 full-time members and 150 part-time members — plus 630 support staff.

PRACTICAL APPLICATION CONTINUED...

In the 2016-17 financial year, AAT members in the migration division reviewed 13,755 visa decisions made by delegates for Immigration Minister Peter Dutton and overturned 5276 of them while only affirming 5110.

The rest were either withdrawn by the applicant, dismissed by the AAT or the AAT had no jurisdiction to hear the cases.

A visa may be refused or cancelled under section 501 of the Migration Act 1958 on the basis that a person does not pass the character test.

The Herald Sun has identified 164 cases in the past eight years where the AAT has overturned visa decisions made on character grounds by ministerial delegates.

If an applicant or a decision-maker thinks a decision made by the AAT is incorrect in law then a judicial review application, or an appeal on a question of law, can be lodged with the Federal Circuit Court or Federal Court.

1. What is the make-up of the AAT? [C]
2. How many visa decisions were overturned by the AAT in the 2016-17 financial year? [C]
3. What point do you think the author of this article is trying to make? [A]
4. Which courts can hear an appeal of an AAT decision? [C]

REVIEW

1. Define judicial power. [C]
2. Explain the two ways courts make law. [C]
3. Create an infographic that shows the relationship within the federal court system, including specialist courts and tribunals. [C]
4. Explain the reasons behind the establishment of the [C]:
   a. Murri Court
   b. Queensland Civil and Administrative Tribunal (QCAT)
   c. Family Court
5. Select one of the cases discussed in the chapter and explain its' role in influencing law reform and creating just and equitable outcomes in society. [A]
6. Evaluate how the courts contribute to good governance through the separation of powers. [E]

TOPIC 1: GOVERNANCE IN AUSTRALIA

CHAPTER 7: GOVERNANCE IN ACTION – ACCOUNTABILITY

FOCUS SUBJECT MATTER

7.1 UNDERSTANDING ACCOUNTABILITY

7.2 INTERNAL MECHANISMS OF ACCOUNTABILITY

7.3 INQUIRIES AND COMMISSIONS

7.4 WHISTLEBLOWERS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- concerns about corruption in Australia are growing;
- governments should be held accountable for their decisions and actions;
- parliaments have internal mechanisms to hold the government to account, including the use of estimate hearings and parliamentary committees;
- a government can order an inquiry into an issue of great importance;
- the Fitzgerald Inquiry was one of the most significant royal commissions into corruption undertaken in Australia;
- independent commissions, such as the Crime and Corruption Commission in Queensland, have been developed to investigate misconduct and corruption; and
- whistleblowers can play an important role in uncovering misconduct or corruption, although some disclosures involving matters concerning Australia's national security are against the law.

7.1 UNDERSTANDING ACCOUNTABILITY

Ch 3.3

As we begin to conclude the **key concept of Governance**, we return to many of the key concepts raised in previous chapters. Our system of government in Australia has many checks and balances to ensure no one arm of government has too much power. As citizens we can hold the Parliament or Executive to account by exercising our right to vote – we either vote for a member of parliament to retain their seat or against them. But, voting is not the only way we make sure Parliament and the government is operating lawfully, ethically, efficiently and in the best interests of its citizens. In this chapter we will investigate a number of mechanisms that can hold the government to account, including:

- **parliamentary committees** to examine unethical behaviour;
- holding **estimate hearings** to scrutinise ministerial decisions or money spent;
- the implications of calling an **inquiry** or **royal commission** into a specific issue on government processes and policy;
- the creation of **independent anti-corruption statutory bodies** that investigate allegations of corruption and misconduct;
- the legal protections provided to **whistleblowers** to encourage the reporting of unlawful actions and decisions; and
- the importance of encouraging a **free press**, as the media make the public aware of questionable behaviour.

These mechanisms often work together to maintain an open and transparent government. Some have a legislative basis, but others are based on long established customs, parliamentary rules and conventions. It is important to remember that this chapter does not provide an exhaustive list of the methods used to hold governments to account – as you come across other mechanisms of accountability it is important you continue to inquire and investigate how they contribute to good governance, as well as their limitations.

WHAT IS 'ACCOUNTABILITY'?

Accountability is fundamental to good government. It is one of the cornerstone values of a modern, open society. At its simplest, accountability involves being called to account to some authority for one's actions.

SOURCE: AUSTRALIAN PUBLIC SERVICE COMMISSION, 2018, DELIVERING PERFORMANCE AND ACCOUNTABILITY, (APSC.GOV.AU/DELIVERING-PERFORMANCE-AND-ACCOUNTABILITY.) (EXCERPTS)

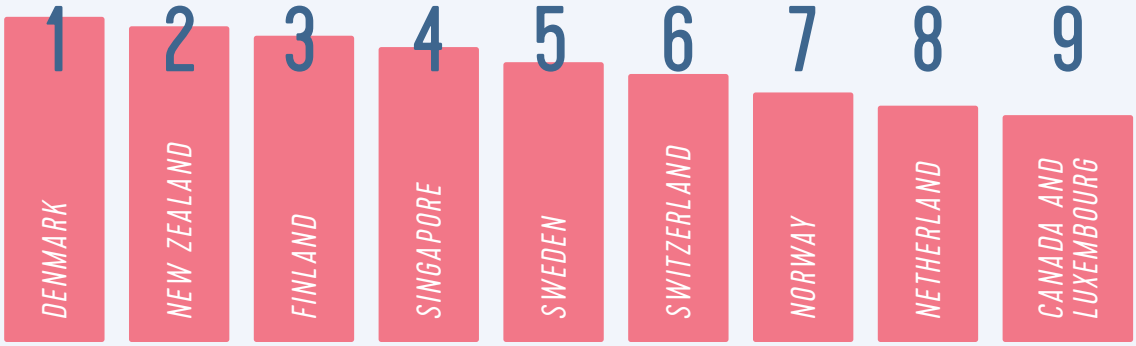
Accountability is the foundation concept of this chapter. Accountability is difficult to define in a precise way, but we have all experienced it in one way or another. Being held accountable for your actions (or being held responsible) is something your parents or teachers may talk to you about when they hand down a consequence for doing something wrong. It helps us make good decisions.

We continue to be held accountable as we become adults – for instance, if we are caught driving under the influence of an illegal drug, we will lose our drivers license for a period of time. It is the same for members of parliament. We expect our representatives to show integrity, acknowledge conflicts of interest, act lawfully and to represent us effectively.

WHAT DO YOU THINK?

In 2018, Transparency International (a global non-government organisation) ranked Australia as the 13th least corrupt nation. The score is based on peoples' perceptions of the level of corruption in a particular country.

Most transparent nations according to Transparency International survey



SOURCE: TRANSPARENCY INTERNATIONAL, 2018, (TRANSPARENCY.ORG/CPI2018)

1. What may have be the reasons behind our score? What is causing some people to believe Australia is more corrupt than these nations? [E]
2. Do you feel Australia is becoming more corrupt? Why do you feel this way? [E]

ACCOUNTABILITY AND ELECTIONS

At federal elections, Australians choose members of parliament to represent their views and interests, in the House of Representatives and the Senate. In this way, federal Parliament serves Australians and is accountable to them.

SOURCE: PARLIAMENTARY EDUCATION OFFICE, 2018, FEDERAL ELECTIONS, (PEO.GOV.AU/LEARNING)

In Chapter 2 we discussed the concept of representative government and the right to vote. When the government calls an election citizens are asked to **judge the actions and decisions of the government.** When we cast our vote at an election we will either vote for the sitting member or another candidate based on our belief about how well they represent us.

PRACTICAL APPLICATION

IT'S TIME TO VOTE OUT ACCIDENTAL SENATOR FRASER ANNING

SOURCE: SARAH VOGLER, THE SUNDAY MAIL (WWW.COURIERMAIL.COM.AU), 17 MARCH 2019 (EXCERPTS)

QUEENSLAND voters never chose Fraser Anning to represent them.

He is our accidental Senator, called up off One Nation's electoral bench when former senator Malcolm Roberts fell foul of the Constitution during the dual-citizenship crisis.

Senator Anning's handful of speeches in the chamber representing the needs and views of Queensland farmers have been far too few. He would rather focus on fighting an ideological war instead.

A war that, while it may appeal to some sections of society, does not further the interests of his constituents.

A war that, more often than not, has disgraced his home state. A state that relies heavily on tourism and international trade.

It is time for Queensland voters to choose someone who will spend more time fighting for them in Canberra, rather than someone more focused on fighting to build their personal brand by whatever means possible in order to save their political skin.

1. Which state does Fraser Anning represent? [C]
2. How was Fraser Anning elected? [C]
3. What reasons does the article provide to explain why the current member should not be reelected at the next election? [C]
4. Do you believe a member of parliament has the responsibility to represent the views of their electorate even if it conflicts with their personal beliefs? Why or why not? [E]

7.2 INTERNAL MECHANISMS OF ACCOUNTABILITY

PARLIAMENTARY COMMITTEES

A parliamentary committee is a group of Members or Senators (or both in the case of joint committees) appointed by one or both Houses of Parliament to undertake certain specified tasks.

SOURCE: PARLIAMENT OF AUSTRALIA, 2018, INFOSHEET 4 – COMMITTEES, (APH.GOV.AU/ABOUT_PARLIAMENT)

Ch 4.4

An important part of maintaining the confidence of parliament (the foundation of responsible government) involves the integrity of the ministry. Holding Ministers responsible for their actions, policy decisions and the departments they oversee is how we see responsible government in action. It is important that Ministers tell the truth, act honestly and follow any rules or laws.

Throughout history many Ministers have not made the right decisions. **Parliaments have developed internal ways of dealing with complaints against particular members. Complaints are investigated by a committee made up of a cross section of different members of parliament from different political parties** – an attempt to address any perceived bias and promote impartiality. For example, the Senate Standing Committee of Privileges (which we'll see in action later) investigates conduct which is

apprehended to obstruct the work of the Senate. It was established by standing order 18 (standing orders are rules used in parliament that guide the way the houses operate) and applies legislation, specifically the *Parliamentary Privileges Act 1987* (Cth). In Queensland the *Parliament of Queensland Act 2001* (Qld) s102 establishes the Ethics Committee which deals with similar types of complaints, as well as dealing with the ethical conduct of particular members.

These complaints might be about the violation of the code of conduct, question the ethical conduct of a Minister or involve a breach of parliamentary privilege (this provides legal immunity to a member of parliament under certain circumstances). How does this process work in practice? Let's look at two examples.

PRACTICAL APPLICATION

JO-ANN MILLER QUITS CABINET AFTER DEMOTION FROM POLICE MINISTER

SOURCE: ABC NEWS ONLINE (ABC.NET.AU), 4 DECEMBER 2015 (EXCERPTS)

Jo-Ann Miller has quit Cabinet following her demotion as Police and Emergency Services Minister by Queensland Premier Annastacia Palaszczuk.

Ms Miller's demotion came after yesterday's report from Parliament's ethics committee found Ms Miller demonstrated a pattern of reckless conduct which was not of ministerial or parliamentary standard.

The Queensland Police Union said Ms Miller was out of her depth and destructive to the force.

"Right from the outset it became apparent that Jo-Ann Miller was out of her depth, she made a lot of poor decisions and was certainly destructive to the police department.

"It became unworkable, I hope whoever comes into the ministry has the foresight to be able to work with people and make their own decisions.

"I've got to say in some ways it's not entirely her fault, it's the poor advice she got from her advisers and the police department."

1. Who tendered her resignation from Cabinet and what department did she lead? [C]
2. What reasons were given to support the loss of her ministry? [C]
3. Which stakeholder spoke out supporting the decision? What did he say? [C]
4. What does this teach you about what skills are necessary to work effectively in a management position? What can you learn from this situation? [E]

PETER DUTTON MISLED PARLIAMENT OVER AU PAIR SAGA, SENATE COMMITTEE FINDS

SOURCE: MATTHEW DORAN, ABC NEWS ONLINE (ABC.NET.AU), 20 SEPTEMBER 2018 (EXCERPTS)

A Senate committee has recommended the Upper House consider censuring Home Affairs Minister Peter Dutton after an inquiry into his handling of the au pair saga found he misled Parliament.

The Labor/Greens-dominated committee argued there was clear evidence Mr Dutton's personal connections with the two families hoping to host au pairs in Brisbane and Adelaide influenced his decision to intervene in their cases, granting them visas and releasing them from detention.

PRACTICAL APPLICATION CONTINUED...

A former Queensland police officer, who served alongside Mr Dutton 20 years ago, had contacted the Minister's office requesting help in the case of an Italian woman detained at Brisbane airport in June 2015.

A second case caught Mr Dutton's attention in November 2015, when AFL boss Gillon McLachlan contacted the Minister's office on behalf of his second cousin, when a French woman hoping to work for him was detained at Adelaide airport.

"This undermines the integrity of Australia's immigration program," committee chair and Labor senator Louise Pratt told the Senate.

"The reason there has been so much public interest, and public debate about this, is because Australians have a right to be rightly alarmed and upset when someone with personal connections is treated differently in the kinds of decisions they receive from government.

Unsurprisingly, the Government senators' dissenting report calls on Parliament to ignore those demands.

1. Which Minister did the committee believe should resign? [C]
2. Did everyone on the committee support this recommendation? Why or why not? [C]
3. What did the Minister allegedly do? [C]
4. Do you believe the Minister misled Parliament? Should the Minister resign? Why or why not? [E]
5. What happens when a Minister refuses to resign after being found to have misled Parliament? You may need to conduct some additional research to find the answer. [A] [S]

ESTIMATE COMMITTEES

Another type of parliamentary committee that exists in both State and Commonwealth Parliament oversees estimate hearings. As we discussed in the previous section parliamentary committees (of which estimate committees are one type) are established by both legislation, such as the *Parliament of Queensland Act 2001* (Qld) s88 and standing orders. Estimate hearings allow members of parliament to scrutinise how executive government is spending taxpayers' money and the decisions they make. It can also allow for scrutiny of government agencies and authorities, such as the Australian Broadcasting Commission (ABC), Murray-Darling Basin Authority (MDBA) or the Great Barrier Reef Marine Park Authority (GBRMPA). For example, in early 2019, members of the Senate estimate hearings questioned the ABC about the out of court settlement made to sacked former Managing Director Michelle Guthrie and political interference. They are open for the public to attend and transcripts can be downloaded online – a tenet of open government. Like ethics committees estimate hearings are made up of members of the government, the opposition and members of a minor party or an independent. Both Ministers and public servants can be called to answer questions.

So how do estimate hearings maintain accountability? This process is another example of responsible government in action – it checks how the government plans to collect and spend money so it can maintain the confidence of parliament. The questions can uncover practices previously unknown to the public and may prompt the government to change a policy or improve the way a department is run.

PRACTICAL APPLICATION

QUEENSLAND PARLIAMENT: STATE BUDGET ESTIMATES ROLLING COVERAGE

SOURCE: SARAH VOGLER, DOMANII CAMERON, TRENTON AKERS, JACK MCKAY AND AAP, THE COURIER MAIL (THECOURIERMAIL.COM.AU), 27 JULY 2018 (EXCERPTS)

Housing and Public Works Minister Mick de Brenni has defended the government's decision to appoint CFMEU official Jade Ingham to the Queensland Building and Construction Commission board.

Mr de Brenni was quizzed about the appointment at Budget Estimates today after *The Courier-Mail* revealed Mr Ingham's appointment earlier this week.

The Minister said everybody he had spoken to in the construction industry was "fine with the appointment".

LNP Industrial Relations spokesman Jarrod Bleijie has previously criticised Mr Ingham's appointment as " completely inappropriate".

QUEENSLAND Rail spent more than $40,000 a day last year paying consultants to provide advice on how best to restore train services.

It has been revealed, through a parliamentary estimates inquiry, that $15.37 million was paid to consultancy giants Deloitte to help implement recommendations from the Strachan Report.

QR CEO Nick Easy today revealed the figure, saying Deloitte has been brought in to provide "additional expertise and support" to additional QR staff.

1. Who was questioned in the estimate hearings? [C]
2. What actions or decisions are they attempting to scrutinise? [C]
3. What is the purpose of estimate hearings? [C]
4. Do you think it is important that members of parliament can question Ministers in a place other than on the floor of parliament? Why or why not? [E]

7.3 INQUIRIES AND COMMISSIONS

ROYAL COMMISSIONS

Ch 9

The *Royal Commissions Act 1902* (Cth), s1A states commissions are:

> *…connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.*

Over the last few years there have been a number of royal commissions. The **Royal Commission into Institutional Responses to Child Sexual Abuse** and the **Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry** are some examples that you may have seen on the news. But, what exactly is a royal commission?

A royal commission is a **formal public inquiry into an issue of great importance**. It is issued by the Governor-General (but, in reality it is the Prime Minister). The commissioner (who leads the inquiry and is usually a judge or barrister) has many powers, including the power to collect evidence – either oral or written and to offer protection to people who co-operate. Witnesses can face criminal penalties if they fail to attend or answer questions. However, it is not free to investigate any area – a commission's inquiry is defined by specific **terms of reference**.

We will now examine a contemporary and historical example to understand how royal commissions contribute to good governance, transparency and accountability. Both were prompted by some good investigative reporting – perhaps illustrating the important contribution the media can make in holding governments to account.

PRACTICAL APPLICATION

YOUTH DETENTION ROYAL COMMISSION: NT'S DON DALE CENTRE SHOULD BE CLOSED, REPORT RECOMMENDS

SOURCE: NEDA VANOVAC, ABC NEWS ONLINE (ABC.NET.AU) 17 NOVEMBER 2017 (EXCERPTS)

The high security unit of Darwin's Don Dale youth detention centre should be shut immediately and there should be a plan for closing the entire centre within three months, an inquiry has recommended.

The Royal Commission into the Protection and Detention of Children in the Northern Territory also called for the age of criminal responsibility to be raised from 10 to 12.

The $54 million inquiry, which was prompted by ABC's Four Corners report on the Don Dale Youth Detention Centre, investigated conditions in the [Northern Territory's] NT's detention centres.

NT Chief Minister Michael Gunner apologised for the failings of successive NT governments, calling it "a stain on the NT's reputation" and announced a comprehensive overhaul of the youth justice and child protection systems.

They said their investigation had found "shocking and systemic failures occurred over many years and were known and ignored at the highest levels".

"Children and young people were subjected to regular, repeated and distressing mistreatment in detention and there was a failure to follow the procedures and requirements of the law in many instances," they added.

Children were also dared or bribed to carry out degrading and humiliating acts, or to commit acts of violence on one other.

1. What was the name of the royal commission and what did it investigate? [C]
2. What prompted former Prime Minister Malcolm Turnbull to call the royal commission? [C]
3. What were some of the recommendations made by the royal commission? [C]
4. What criticisms did the royal commission make of the actions of the government and its departments? Did the criticisms appear justified? [C] [A] [E]
5. The royal commission did not call for anyone to face criminal prosecution for their actions. Based on the information in the article should they have? Why or why not? [A] [E]

RESEARCH

After recommendations are made by a royal commission a progress report is often generated by the government. A media release prepared by the Northern Territory Government outlines what has occurred in the 12 months since the report was handed down. The media release can be found here: rmo.nt.gov.au/updates/royal-commission-into-the-protection-and-detention-of-children-in-the-nt-first-progress-report

Read the media release and answer the following questions:

1. How many recommendations were made by the commission? How many have been put into effect? [C]

2. What does this example raise about the limitations of royal commissions? [A]

THE FITZGERALD INQUIRY

Many Australian States have also created an independent anti-corruption body (separate from the government) that investigates complaints made against the public service or a member of parliament (the Morrison Government has just announced the establishment of a federal body)– but this didn't always exist. In Queensland, this body was born out of a period of great political and legal upheaval. It was created by a recommendation of one of the most significant and far-reaching inquiries into corruption, **The Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct** (more commonly known as the **Fitzgerald Inquiry**). To learn about the history behind this body, how it works today and what form a national commission might take, we will use an inquiry approach.

INQUIRY FOCUS

HOW DO INDEPENDENT, EXTERNAL INQUIRIES AND COMMISSIONS COMBAT CORRUPTION AND UPHOLD THE RULE OF LAW?

We have already unpacked the key concepts of accountability and transparency that are central to this inquiry. To begin, we need to understand what the Fitzgerald Inquiry was and the ramifications it had on our political system.

PRACTICAL APPLICATION

SOURCE 1: A BRIEF SUMMARY OF THE FITZGERALD INQUIRY

In late 1986 *Courier Mail* journalist Phillip Dickie wrote a series of articles about a number of illegal brothels that the Queensland police were allowing to operate. This was followed by an investigation by the *ABC Four Corners* program 'The Moonlight State', which also reported that the police had ignored illegal gambling, organised prostitution and drug trafficking. In response, Acting Queensland Premier Bill Gunn ordered a commission of inquiry into possible police corruption. It would be headed by Mr Gerald Edward 'Tony' Fitzgerald QC. The inquiry, known as the Fitzgerald Inquiry, would spend two years uncovering significant and systemic corruption involving the police and politicians. What made the inquiry effective were its powers and broad terms of reference (this refers to what areas it could investigate). The inquiry used tools such as indemnity from prosecution – which was relatively innovative for its time and influenced how other inquires operated. The Fitzgerald Inquiry made over 100 recommendations, led to four ministers being jailed and many police officers, including former Police Commissioner Sir Terence Lewis, being convicted of numerous offences. Even former Premier Sir Joh Bjelke-Petersen was charged with perjury – although this ended in a hung jury.

PRACTICAL APPLICATION CONTINUED...

SOURCE 2: A QUOTE FROM JACK HERBERT, A FORMER QUEENSLAND POLICE OFFICER

"We believed no-one could touch us."

Herbert, known as 'the Bagman', collected protection money from illegal gambling and prostitution businesses. He would later become the Fitzgerald Inquiry's key witness. He received immunity from prosecution.

SOURCE 3: TONY FITZGERALD QC HANDING OVER THE BOUND COPY OF THE FITZGERALD REPORT ON CORRUPTION IN QUEENSLAND ON 7 JULY 1989, TO THE QUEENSLAND PREMIER MIKE AHERN

SOURCE 4: ABC REPORTER CHRIS MASTERS REFLECTS ON 'THE MOONLIGHT STATE'

CHRIS CONTINUES TO MASTER INFAMOUS TIME IN QUEENSLAND HISTORY

SOURCE: NANCE HAXTON, GRIFFITH NEWS (GRIFFITH.EDU.AU/NEWS), 4 JULY 2018 (EXCERPTS)

Reflecting on the 30th anniversary of The Moonlight State and Fitzgerald Inquiry, one of Australia's best investigative journalists says it's an apt time to celebrate what journalism can achieve.

He says the ramifications of the Fitzgerald Inquiry were still being felt not only in Queensland, but throughout the country.

"I've done lots of programs as a reporter, for Four Corners I did probably over 100, and most of them are forgotten," Mr Masters said.

PRACTICAL APPLICATION CONTINUED...

"This one is not forgotten, and that kind of surprises me a little bit. I often stop and wonder why."

"But I guess it's because the Fitzgerald era was pivotal. It was a landmark inquiry and it did bring about the opportunity for significant reform that occurred not only in Queensland but around Australia."

"I think journalism is about good citizenship, and when you look at the various people who stood up, some of them working at the very fringe of society in ugly trades like prostitution, they proved to demonstrate good citizenship too," he said.

1. Use the Cornell Note-Taking System (the structure has been provided to you below) to answer the following questions:

Questions	Notes
When did the Fitzgerald Inquiry occur? [C]	
Why was it called the Fitzgerald Inquiry? [C]	
What were the consequences of the Fitzgerald Inquiry? [C]	

2. Do you think the inquiry was necessary? Why or why not? [A] [E]

3. What does Chris Masters mean when he states that 'journalism is about good citizenship'? Do you agree or disagree with this viewpoint? Why? [A] [E]

QUEENSLAND: CRIME AND CORRUPTION COMMISSION (CCC)

Our Purpose: The CCC is an independent agency combating major crime and reducing corruption for the benefit of the Queensland community.

SOURCE: CCC, 2018-2020 STRATEGIC PLAN, (CCC.QLD.GOV.AU) (EXCERPT)

The CCC began as the Criminal Justice Commission (CJC), which was established after the Fitzgerald Inquiry recommended setting up a body to fight organised crime and corruption. It is governed by the *Crime and Corruption Act 2001* (Qld) and the *Police Powers and Responsibilities Act 2000* (Qld). The CCC has coercive powers, meaning witnesses have no right to silence – they must attend hearings and give evidence (*Crime and Corruption Act 2001* (Qld) s82). The CCC also has the power to compel people and agencies to produce records or other items if asked (*Crime and Corruption Act 2001* (Qld) s72). Its hearings can be open or closed (*Crime and Corruption Act 2001* (Qld) s177).

WHAT DO YOU THINK?

Do you agree or disagree that the right to silence should be denied to a witness as part of a CCC inquiry? Justify your answer. [E]

In its *2017-18 Annual Report*, the CCC highlighted that:

- **38 people** were charged with **176 criminal offences** relating to corruption investigations;

- there were **63 days of hearings** related to corruption investigations;
- **19 recommendations** for disciplinary action were made from the CCC's corruption investigations relating to **7 people**; and
- the CCC focused on three high-risk corruption areas – **the excessive use of force, misuse of confidential information** and **fraud.**

PRACTICAL APPLICATION CONTINUED...

20 YEARS AFTER HISTORIC FITZGERALD INQUIRY, DARK FORCES RETURN TO QUEENSLAND

SOURCE: MICHAEL MCKENNA & SARAH ELKS (NEWS.COM.AU), 17 AUGUST 2009 (EXCERPTS)

QUEENSLAND'S police service was rocked yesterday by revelations that 25 officers were involved in illegal and improper dealings with prisoners, including a convicted double murderer, provoking a warning from the state's top corruption fighter that the lessons of the Fitzgerald inquiry had been forgotten.

The report by the Crime and Misconduct Commission, released on the heels of the 20th anniversary of the landmark report by commissioner Tony Fitzgerald QC and coming only a week after the jailing of former state government minister Gordon Nuttall for taking bribes, sparked a political row over whether Queensland was sliding back into its notorious era of political and police corruption.

But while Mr Needham said the corruption was 'nowhere' near that of the 1970s and 80s, the lessons learned from the Fitzgerald report were fading among Queensland police.

Instead, the report showed a type of 'noble corruption', where police were willing to break the law to solve crimes.

In its report, the CMC defended the absence of charges against many of the officers, saying it had become apparent early in the investigation that it would be difficult to prosecute, despite evidence of criminal behaviour.

The CMC said this was because the star witnesses in many cases against police were criminals, often having been previously convicted of dishonesty offences.

It also said evidence taken from the CMC's 'star chamber' examinations - where witnesses give evidence under oath or face jail - was inadmissible in court.

1. Which government service behaved in a corrupt way? What did they do? [C]
2. The article also mentions the imprisonment of a former government minister. Who was he? Outline the facts behind the case and explain how his actions reflected corruption. You will need to locate a secondary source of information to do this. [C] [S] [A]
3. How does the imprisonment of the former government minister reflect the application of the rule of law? [A]
4. The report showed a type of 'noble corruption'. Do you believe corruption can be justified? Explain your perspective. In addition, describe and explain an opposing viewpoint. [A] [E]
5. Should evidence taken from 'star chamber' examinations be inadmissible in court? Why or why not? [E]

AN AUSTRALIAN INTEGRITY COMMISSION?

Concerns about corruption in Australia are growing. Australia's ranking in Transparency International's global corruption index has been falling – three years ago we were in the top 10 and in 2018 we ranked 13th . An Australian Public Service survey found that one in 20 believes a colleague has acted in a corrupt manner – a figure that has risen.

Unlike Queensland, the **Commonwealth government does not have an independent agency that is tasked with investigating allegations of corruption a**gainst members of parliament or public servants. **Calls to create a national integrity body have been resisted for some time – but in 2018 this changed** with the Leader of the Opposition Bill Shorten committing to introduce a national integrity body if the Australian Labor Party formed government. By the end of that year Independent Member for Parliament Cathy McGowan introduced a Private Members Bill to create a national integrity commission and the Morrison Government announced it would introduce a Commonwealth Integrity Commission (CIC).

Whichever model is eventually enacted, there is strong public support for a national integrity commission – a Griffith University survey into citizens trust in governance found two-thirds (67%) of Australians favour its introduction.

We will now investigate the Morrison government model a little further. When thinking about whether this approach will be effective, slightly adapt the overarching inquiry question we raised at the beginning of this sub-section – will this model combat corruption and uphold the rule of law?

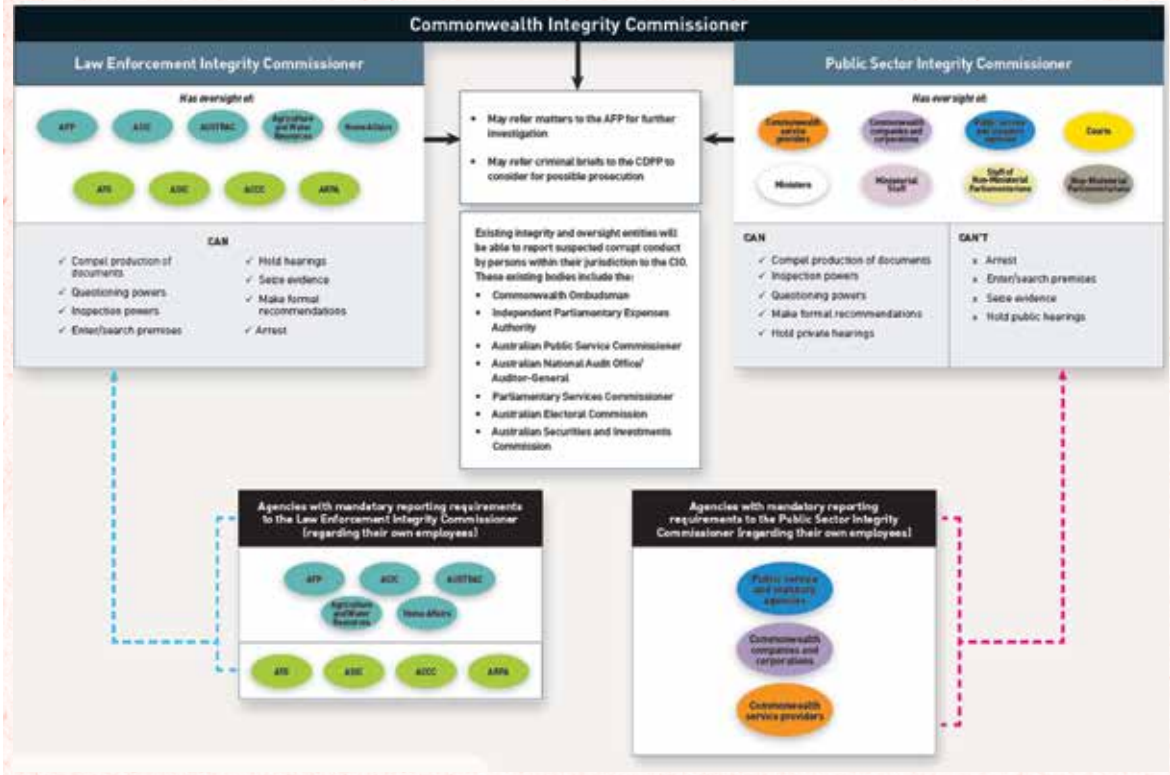
INQUIRY FOCUS

WILL THE PROPOSED CIC COMBAT CORRUPTION AND UPHOLD THE RULE OF LAW?

PRACTICAL APPLICATION

SOURCE 1: PROPOSAL COMMONWEALTH INTEGRITY COMMISSION (CIC) MODEL, MORRISON GOVERNMENT.

SOURCE: AUSTRALIAN GOVERNMENT ATTORNEY GENERAL'S DEPARTMENT (AG.GOV.AU) ACCESSED 9 MARCH 2019



A graphic representation of the CIC proposed by the Morrison Government, which will have two divisions - a law enforcement integrity division and a public sector integrity division.

PRACTICAL APPLICATION CONTINUED...

SOURCE 2: MEDIA RELEASE

SOURCE: OFFICE OF THE PRIME MINISTER OF AUSTRALIA (PM.GOV.AU/MEDIA) 13 DECEMBER 2018 (EXCERPTS)

A new Commonwealth Integrity Commission will take the lead on detecting and stamping out any corrupt and criminal behaviour by Commonwealth employees.

The new CIC will be the lead body in Australia's successful multi-agency anti-corruption framework

This is a serious new Commission with teeth, resources and proper processes that will protect the integrity of Australia's Commonwealth public administration, while avoiding the pitfalls, weaknesses and abuses of systems introduced by state jurisdictions and being proposed in alternative models.

The CIC will be a well-resourced, centralised and specialist centre that will investigate criminal corruption across the Commonwealth. It will be an independent statutory agency led by a commissioner and two deputy commissioners, with public sector and law enforcement integrity divisions.

SOURCE 3: ONLINE ARTICLE RESPONDING TO THE CIC MODEL.

THE PROPOSED NATIONAL INTEGRITY COMMISSION IS A WATERED-DOWN VERSION OF A FEDERAL ICAC

SOURCE: YEE-FUI NG, THE CONVERSATION (THECONVERSATION.COM) DECEMBER 13 2018 (EXCERPTS)

The proposed model is a watered-down version of an anti-corruption commission, with limited powers.

The Commonwealth Integrity Commission will have the power to conduct public hearings only through its law enforcement division.

Conversely, the public sector integrity division with the broader remit will not have the power to make public findings of corruption. Instead, it will be tasked with investigating and referring potential criminal conduct to the Commonwealth Director of Public Prosecutions.

This is a far more limited jurisdiction compared to its equivalent state counterparts, such as the New South Wales Independent Commission Against Corruption (ICAC), which has the ability to conduct public hearings and make findings of corruption in the public sector.

Although it is envisaged that the Commonwealth Integrity Commission will play a role in preventing corruption, this model lacks a dedicated corruption prevention division. This is a pro-integrity function that monitors major corruption risks across all sectors.

1. Who will the CIC target? [C]
2. What are the two divisions? Explain their roles. [C] [A]
3. Explain some of the powers one of the divisions does and does not possess [C]
4. What criticisms does the Ng article raise about the CIC model? Analyse the implications of these concerns. [C] [A]
5. Locate and explain one additional criticism of the CIC from another secondary source. [C] [S]
6. One of the principles of the rule of law concerns checks and balances on the use of power. Do you believe the CIC will achieve this aim? Why or why not? [E]

7.4 WHISTLEBLOWERS

PUBLIC INTEREST DISCLOSURE ACT 2010 (QLD)

Section 3 Main Objects of the Act

The main objects of this Act are—

(a) to promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector; and

(b) to ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with; and

(c) to ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure; and

(d) to afford protection from reprisals to persons making public interest disclosures.

Whistleblowers are people **who disclose information about suspected wrongdoing or corruption** that they have witnessed. They can play an important role in uncovering misconduct and corruption despite the personal, social and economic costs associated with revealing the truth. Whistleblowing can occur in both the government and business environment. For example in 2015, a 7 Eleven employee blew the whistle on systemic wage fraud being carried out by the business that saw employees paid below the award rate. The laws surrounding whistleblowers vary between different jurisdictions. In Queensland public sector employers are protected by the *Public Interest Disclosure Act 2010* (Qld). This Act recognises that whistleblowers need to be protected from retribution or reprisal and be compensated for their actions (s40, s41, s42).

WHAT DO YOU THINK?

1. John Wilson wrote an article entitled, 'Whistleblowing isn't dobbing. It supports our democracy' (The Sydney Morning Herald, 3 February 2018). Do you agree or disagree with this headline? Why or why not? [A] [E]

SECRECY LAWS

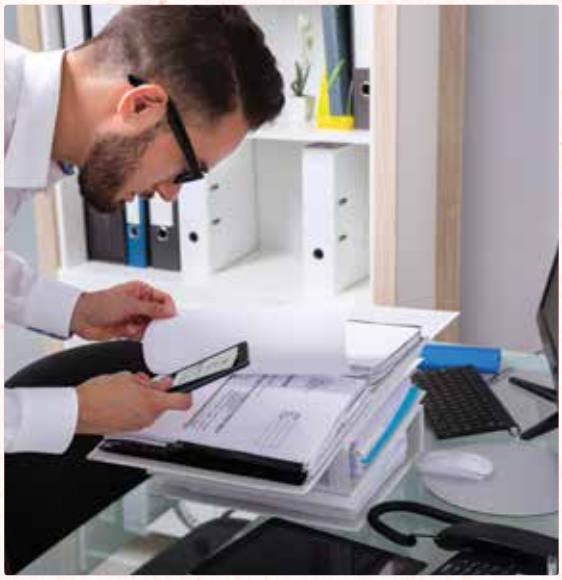
But, **some disclosures can be against the law.** These disclosures usually involve matters concerning Australia's national security. For example, the *Border Force Act 2015* (Cth) s42 makes it an offence for an Australian Border Force employee to disclose 'protected information'. However, it is worth noting that there hasn't been a case before the courts to test whether the *Public Interest Disclosure Act 2013* (Cth) or other Acts would protect them. As well, there are exceptions that provide protection from prosecution – for example, the law allows someone to disclose concerns under the direction of a court. These protections don't dispel the concerns people have about the lack of protection for persons blowing the whistle on corrupt or unlawful behaviour in areas such as defense or immigration. How do secrecy laws operate in the real world? Let's look at the following Australian example.

PRACTICAL APPLICATION

'I'M NOT AFRAID OF GOING TO JAIL': EX-DEFENSE LAWYER CHARGED OVER DOCUMENT LEAK

SOURCE: ALEXANDRA BACK, THE CANBERRA TIMES (CANBERRATIMES.COM.AU) 7 MARCH 2019 (EXCERPTS)

A former Australian military lawyer and captain in Britain's elite Special Air Service has been charged over the leak of documents exposing alleged unlawful government conduct.



David William McBride, 55, appeared in the ACT Magistrates Court on Thursday where he was charged with the leaks to journalists Dan Oakes, Andrew Clark and Chris Masters.

Speaking outside court, Mr McBride said he had admitted handing over the documents but would defend the charge on legal grounds.

"I saw something illegally being done by the government and I did something about it," he said.

"I'm seeking to have the case looking purely at whether the government broke the law and whether it was my duty as a lawyer to report that fact."

Mr McBride is charged with theft and three counts of breaching the Defence Act, for being a person who is a member of the the defence force and communicating a plan, document or information.

Mr McBride said he first sought an internal inquiry through defence and then went to police. When police did not act he went to the media.

The prosecution of Mr McBride will draw inevitable comparisons with that of the former Australian spy Witness K and his lawyer Bernard Collaery.

The pair are also being pursued by the Commonwealth Director of Public Prosecutions accused of revealing information about the Australian Secret Intelligence Service.

Witness K revealed an illegal bugging operation by the Australian government on East Timor during negotiations over an oil and gas treaty.

A preliminary hearing for that case will be heard in secret.

1. Who was charged with leaking documents and what was his position in the Defence Force? [C]
2. Which department is responsible for prosecuting this case? [C]
3. Locate the specific section of the *Defence Act 1903* (Cth) that the defendant has been charged under. What is the maximum penalty for this offence? [S]
4. Do you believe persons should be penalised for leaking defence information to expose misconduct or corruption? Why or why not? [E]
5. The defendant undertook a number of steps before he leaked the documents. What were they? If you were a member of a jury hearing this case do you believe this justifies or excuses his actions? [C] [E]
6. Locate information on the Witness K case. Outline the key facts of the case. [C] [S] [A]

RESEARCH

To further understand recent amendments made to Commonwealth whistleblower protection laws in corporate, public and not-for-profit sectors you may like to read the Parliamentary Joint Committee on whistleblower protections (in particular focus on reading the submissions to understand different stakeholder viewpoints): aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections. [S] [C] [A]

REVIEW

1. Define the term 'accountability'. [C]
2. What evidence supports the belief that the Australian peoples' concerns about corruption are growing? [C]
3. Describe how our election process holds the government to account. [C]
4. What is an ethics committee and what does it investigate? [C]
5. What is the purpose of an estimate hearing? How do they support a parliament's confidence in the government? [C] [A]
6. What was the Fitzgerald Inquiry? [C]
7. What impact did the Fitzgerald Inquiry have on Queensland? [A]
8. What are the advantages and concerns raised about processes independent bodies such as the Crime and Corruption Commission use to investigate complaints? [A]
9. What disclosures made by whistleblowers are against the law? Analyse an argument for and against this legal positon [C] [A]
10. What is the most effective way to maintain our system of government's accountability and integrity – internal, external and independent or a combination of them? Justify your position. Is there anything further we could do? [A] [E]

TOPIC 2: LAW REFORM WITHIN A DYNAMIC SOCIETY

CHAPTER 8: WHY DO LAWS CHANGE?

FOCUS SUBJECT MATTER

8.1 INTRODUCTION

8.2 SOCIAL PRESSURES FOR CHANGE

8.3 LOBBY, ADVOCACY GROUPS AND THE MEDIA: SAME-SEX MARRIAGE AND ABORTION LAW REFORM

8.4 PATTERNS OF CRIMES AND CIVIL OFFENCES: DOMESTIC AND FAMILY VIOLENCE, ALCOHOL FUELLED VIOLENCE AND MEDICAL NEGLIGENCE

8.5 LAW REFORM DUE TO TECHNOLOGICAL ADVANCES: ROMANCE SCAMS, CATFISHING, CYBERSTALKING

8.6 TRANSNATIONAL CRIME AND ORGANISED CRIME

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the major contributors to, and stakeholders in, legal change;
- the process of legal change is complex;
- the final step in the process of legal change is legislation;
- changes in technology challenge existing laws and create new laws; and
- money-laundering supports other forms of organised crime.

8.1 INTRODUCTION

Laws change to reflect the needs and values of the members of a society. Laws can tell us a great deal about a particular society, especially what is or was important to the people. The oldest written code (collection of laws) discovered is the *Sumerian Code of Lipit-Ishtar (1868- 1857 BC)*. The Hebrew people (Israelites) also put their religious and social laws into a code, which reflected many of the teachings of their prophet, Moses. In the Christian *Bible*, the *Ten Commandments*, given by God to Moses, were also included. These ten moral rules have had considerable impact on the moral content of law in Christian civilisations. In a similar way, the *Quran*, dictated by Allah (God) through the angel Gabriel to the Prophet Mohammad, is the primary source of the law for Muslims. The ancient Greeks and Romans also developed quite complex and sophisticated legal systems, as did the great civilisations of China and Japan.

PRACTICAL APPLICATION

Below are some of the laws set down in the *Code of Hammurabi* (a Sumerian king) in about 1700BC. He was one of the great law makers of history. He codified the laws '...in order that the strong should not oppress the weak, and that widows and orphans should be rightly dealt with in Babylon.' Underneath are the *Ten Commandments* (NIV Bible) which were given by Moses to the Hebrew people at a similar time in history.

THE CODE OF HAMMURABI

- If a man accuse a man, and charge him with murder, but cannot convict him, the accuser shall be put to death.
- If a man steal an ox or sheep, ass or pig, or boat – if it belonged to god or palace, he shall pay thirty-fold; if it belonged to a common man, he shall restore tenfold. If the thief have nothing wherewith to pay, he shall be put to death.
- f the wife of a man be taken in lying with another man, they shall bind them and throw them into the water. If the husband of the woman spare her life, the king shall spare the life of his servant.
- If a man knock out a tooth of a man of his own rank, they shall knock out his tooth.
- If a man knock out a tooth of a common man, he shall pay one–third mina of silver.
- If an ox when passing through the street gore a man and brings about his death, that case has no penalty.
- f a priestess or a nun open a wineshop or enter a wineshop for a drink, they shall burn that woman.

THE TEN COMMANDMENTS

I. You shall have no other gods before me.

II. You shall not make for yourself an idol in the form of anything in heaven above or on the earth beneath or in the waters below. You shall not bow down to them or worship them; for I, the LORD your God, am a jealous God …

III. You shall not misuse the name of the LORD your God, for the LORD will not hold anyone guiltless who misuses his name.

IV. Remember the Sabbath day by keeping it holy. Six days you shall labour and do all your work, but the seventh day is a Sabbath to the LORD your God. On it you shall not do any work …

PRACTICAL APPLICATION CONTINUED...

V. Honour your father and your mother, so that you may live long in the land the LORD your God is giving you.

VI. You shall not murder.

VII. You shall not commit adultery.

VIII. You shall not steal.

IX. You shall not give false testimony against your neighbour.

X. You shall not covet your neighbour's house. You shall not covet your neighbour's wife, or his manservant or maidservant, his ox or donkey, or anything that belongs to your neighbour.

1. Write down similarities and differences between the *Code of Hammurabi* and the *Ten Commandments*. [A]
2. Which of the *Code of Hammurabi* and the *Ten Commandments* would not be considered as fair or just in modern-day Australia? [A] [E]

8.2 SOCIAL PRESSURES FOR CHANGE

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

Ch 9.1

Public opinion can, of course, have considerable influence on the policies adopted by political parties. Pressure for new or amended laws can also come from other sources.The Public Service may make recommendations on how laws could be improved. For example, if the Australian Taxation Office (ATO) finds a particular loophole in the taxation legislation, the Commissioner of that Department may recommend an amendment to close the loophole. **Royal Commissions and law reform groups**, from time to time, make recommendations for legislative change. Royal Commissions are set up to inquire into a particular issue and then report on their findings to Parliament, usually with recommendations that will involve some changes to existing legislation. The *Royal Commission on Aboriginal Deaths in Custody* made recommendations, some of which were adopted by State governments, while others were not. Law reform groups review whole areas of law and make recommendations that they consider will be of benefit to citizens. An example was the 2005 *Queensland Public Hospitals Commission* of Inquiry, including investigations into the medical practice of Dr Jayant Patel at Bundaberg Base Hospital. Public submissions were also invited from across Queensland by the 2011 *Queensland Floods Commission of Inquiry*.

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

limit non-smokers' exposure to second-hand smoke, which can kill through heart disease and serious respiratory and cardiovascular illness.

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

PRACTICAL APPLICATION

1. Identify the lobby groups represented by the following statements. [C]
2. Based on your reading of these statements, do you believe the Queensland Government should pass legislation to amend the *Criminal Code 1899* (Qld) and totally ban the smacking of children? [E] [R]

IS IT OKAY TO SMACK YOUR CHILDREN?

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

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

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

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

RESEARCH

1. What are some current pressure (lobby) groups in Queensland or Australia? [C]

2. What are examples of specific issues about which they try to influence members of parliament? [C]

It is not always possible to identify a single cause or impetus for each example of law reform. Quite often there are multiple causes, or a number of different contributors, especially as there is a process to law reform which requires legislative change and a vote in the relevant Houses of Parliament. Nevertheless, we will set out examples of law reform and try to identify how each of them came about. These are grouped together under the syllabus headings. Once you have conducted an inquiry into each of the examples set out below, you will make your own assessment about the importance of different influences that brought about change in each case.

8.3 LOBBY, ADVOCACY GROUPS AND THE MEDIA: SAME-SEX MARRIAGE AND ABORTION LAW REFORM

There is no doubt that over a long period of time the influence of lobby and advocacy groups was a key factor in changing the law to introduce same-sex marriage and for changes to abortion law. In the inquiries which follow you will have the opportunity to assess this influence for yourselves. It is probably not possible to either tell the complete story or do adequate justice to the people involved in these campaigns in this textbook because of constraints of space. However, you will be able to extend your studies in these areas based on the following inquiries.

INQUIRY FOCUS

THE PROCESS OF CHANGING PUBLIC OPINION AND OVERCOMING PARLIAMENTARY OPPOSITION SO THAT MARRIAGE LAWS WERE CHANGED, LEGALISING SAME-SEX MARRIAGE

PRACTICAL APPLICATION

WOLFENDEN REPORT

SOURCE: UK PARLIAMENT, WWW.PARLIAMENT.UK, DOWNLOADED10 MAY 2019 (EXCERPTS)

In 1885 in the United Kingdom the *Criminal Law Amendment Act* made homosexual acts between men illegal and by 1954 the number of men imprisoned for homosexual acts had risen to over 1000 a year. This led to calls for an inquiry into the legality of homosexuality and prostitution. In August 1954 the UK government set up the Wolfenden committee, named after its chairman, John Wolfenden. The report was published 5 September 1957 and attracted a large amount of publicity. The report proposed that there 'must remain a realm of private morality and immorality which is, in brief and crude terms, not the laws business,' and recommended that homosexual acts between two consenting adults should no longer be a criminal offence. The report's findings were debated in parliament but a motion in 1960 to implement the report's findings was lost and efforts to implement the report's findings were stalled.

1. What led to the formation of the Wolfenden committee? [C]

2. Did its recommendation to decriminalise homosexuality immediately lead to a change in the laws in the United Kingdom? [C]

PRACTICAL APPLICATION

20TH CENTURY GAY RIGHTS MOVEMENT

SOURCE: WIKIPEDIA.ORG/LGBT HISTORY IN AUSTRALIA, DOWNLOADED 8 MAY 2019 (EXCERPTS)

Although British influences on Australian political culture were still noticeable in the 1960s, there does not seem to have been any local response to the Wolfenden committee and its hesitant recommendation of the decriminalisation of male homosexuality in the United Kingdom.

Gay and lesbian rights movement groups were not organised in Australia until the late 1960s. The **ACT Homosexual Law Reform Society**, a humanist organisation based in Canberra which was formed in mid 1969, and an Australian arm of the **Daughters of Billitis,** which formed in Melbourne in January 1970, are considered Australia's first **gay rights organisations**. However, it was a Sydney organisation, the **Campaign against Moral Persecution** (CAMP), which was founded in Sydney in June 1970 that was to galvanise the early gay-rights movement in Australia. John Ware and Christabel Poll announced the formation of an organisation called CAMP in an article on the front page of the magazine section of the Australian newspaper on 19 September 1970. Within about 12 months local CAMP groups had formed in each capital city and in many of the universities, soon creating an informed gay-rights network around Australia.

40TH ANNIVERSARY OF DECRIMINALISATION OF HOMOSEXUALITY

SOURCE: MUSEUM OF AUSTRALIAN DEMOCRACY, WWW.MOADOPH.GOV.AU, DOWNLOADED 10 MAY 2019 (EXCERPTS)

On 27 August 1975, South Australia became the first Australian State to fully decriminalise homosexual acts. For many years…the maximum penalty was life in prison. Gradually, the penalties were reduced, though in Victoria death remained a maximum penalty until 1949. Change came slowly and individuals were still being arrested, charged and convicted for homosexual acts during the 1970s.

In 1994, the federal government…legislated…to implement Australia's international treaty obligations under the ***International Covenant on Civil and Political Rights*** (ICC PR). *The Human Rights (Sexual Conduct) Act 1994* (Cth) had a real consequence in highlighting the incompatibility of Tasmania's state law on homosexuality and Australia's treaty obligations. Following South Australia's example, other states (and Territories) gradually reformed their laws… the Australian Capital Territory (1976), Victoria (1980), the Northern Territory (1983), New South Wales (1984), Western Australia (1989), Queensland (1990) and Tasmania 1997). The fact that the Australian government was a signatory to the ICCPR meant that an act passed in domestic law in Australia as a consequence of the treaty was valid, as was found in the Tasmanian Dam Case.

Gay rights organisations were established during the late 1960s and early 1970s in Australia, a period of wider radical social change… Today, there may be debates about same-sex marriage but no one advocates the re-criminalisation of homosexuality.

1. Draw up a time-line which illustrates when Australian governments, state and federal, decriminalised homosexuality. [A]
2. How important do you think it would have been to the debate about treating people equally irrespective of their sexuality to have the federal government pass laws to implement Australia's obligations under the *International Covenant on Civil and Political Rights?* [A] [E]

PRACTICAL APPLICATION

PUBLIC OPINION OF SAME-SEX MARRIAGE IN AUSTRALIA

SOURCE: WIKIPEDIA, EN.WIKIPEDIA.ORG, DOWNLOADED 15 MAY 2019

OPINION POLLS

Pollster	Date	% Support	% Opposed	% Undecided
Newspoll	2004	38%	44%	18%
Galaxy	2007	57%	37%	6%
Galaxy	2009	60%	36%	4%
Galaxy	2010	62%	33%	5%
Ipsos	2013	54%	N/A	N/A
Nielson Polling	2013	65%	28%	N/A
Crosby Textor	2014	72%	21%	N/A
Newspoll	2014	66.6%	N/A	N/A
Ipsos	2015	68%	25%	7%

1. Describe the trend in the support for same-sex marriage from 2004 to 2015. [C] [A]
2. Is it reasonable to describe the level of support for same-sex marriage between 2009 and 2015 as high and stable? Give your reasons. [A] [E]

RESEARCH

Conduct research to test the proposition that 'despite the support for same-sex marriage in the opinion polls, the elected members of parliament after the 2010 federal election, did not support a change to the marriage laws '. Describe and explain how such a circumstance might affect the legislative process. [C] [A]

THE POLITICAL AND LEGISLATIVE PROCESS

PRACTICAL APPLICATION

SAME-SEX MARRIAGE: DISAPPOINTMENT AND ANGER AS COALITION PARTY ROOM REJECTS FREE VOTE

SOURCE: DANIEL HURST, THE GUARDIAN, WWW.THEGUARDIAN.COM/AUSTRALIA, 11 AUGUST 2015 (EXCERPTS)

The push for same-sex marriage to be legalised in Australia has suffered a setback after the governing Coalition decided against allowing its members a free vote in the current term of Parliament.

But Tony Abbott, who firmly opposes same-sex marriage, conceded after a six-hour meeting of his colleagues that it was the last Parliamentary term in which the coalition could maintain its current position.

PRACTICAL APPLICATION CONTINUED...

The Prime Minister held out the possibility of a free vote or alternatively a plebiscite of the entire population during the next term of parliament-a position seen by supporters of same-sex marriage as a stalling tactic.

Abbott called the combined meeting of the Liberals and Nationals in Canberra on Tuesday afternoon to discuss the Coalitions stance ahead of the introduction of a cross-party bill to allow same-sex couples to marry.

The Prime Minister's decision to include the Nationals-who are more deeply opposed to same-sex marriage-angered numerous Liberals, including the leader of the house, Christopher Pyne, who reportedly likened it to 'branch stacking'.

The Labor Party immediately sought to capitalise on the decision, tweeting that a Shorten Labor government would introduce a bill for marriage equality within its first 100 days.

PM TURNBULL PROMISES SAME-SEX MARRIAGE LEGALISATION, PENDING PLEBISCITE

SOURCE: 9NEWS.COM.AU WWW.MSN.COM, 22 OCTOBER 2015 (EXCERPTS)

Prime Minister Malcolm Turnbull has claimed same-sex marriage will be legalised if the public votes in favour of it at a plebiscite following the next election.

1. What does the Prime Minister Tony Abbott mean by a 'free vote '? [C]
2. Why were many Liberal members of Parliament angered by the Prime Minister Tony Abbott calling a combined meeting of the Liberal and National parties to discuss same-sex marriage? What did Christopher Pyne mean when he likened what Mr Abbott did to 'branch stacking'? [C] [A]
3. What did supporters of same-sex marriage see Mr Abbott's tactical position to mean? [C]
4. Do you think the Labor opposition would have supported an immediate vote to legalise same-sex marriage? Why? [A] [E]
5. Given public opinion, do you think it was necessary for a national plebiscite to be held in order to establish whether or not to legalise same-sex marriage by a vote in the Parliament? [E]

PLEBISCITE OR POSTAL SURVEY

PRACTICAL APPLICATION

SAME-SEX MARRIAGE: LIBERAL MEMBERS OPPOSING PLEBISCITE WARNED THEY RISK 'DESTROYING' THE COALITION

SOURCE: LOUISE YAXLEY AND STEPHEN DZIEDZIC, ABC NEWS, WWW.ABC.NET.AU , 2 AUGUST 2017 (EXCERPTS)

ON Wednesday morning Queensland Liberal MP Warren Entsch hit out angrily at what he said were 'veiled threats' made against Coalition members who wanted to abandon the policy of a plebiscite.

Mr Entsch is one of a group of liberals calling for the coalition to allow a conscience vote on the issue when Parliament resumes next week.

PRACTICAL APPLICATION CONTINUED...

But conservatives hit back. Queensland Nationals Senator Barry O'Sullivan accused Mr Entsch and other MPs of 'quite treasonous' behaviour.

'This is just a smattering of people who are just going to go and go until they get what they want… it's completely wrong.' Sen O'Sullivan said.

The senator said he was particularly angry about the suggestion some Coalition MPs could cross the floor to interrupt Parliament and bring on the vote on same-sex marriage.

'They will destroy the government in the process' he said.

Sen O'Sullivan said the coalition had made a 'solemn promise' to pursue a plebiscite on same-sex marriage, and it would be a 'massive breach of trust' to abandon it.

The former prime minister Tony Abbott also weighed in on the debate saying any Coalition MPs who crossed the floor on a procedural motion would be betraying voters.

SAME-SEX MARRIAGE: MALCOLM TURNBULL SETS DATE FOR $122 MILLION POSTAL VOTE AS DOOMED PLEBISCITE HEADS TO THE SENATE

SOURCE: ABC NEWS, WWW.ABC.NET.AU, 8 AUGUST 2017 (EXCERPTS)

Going postal will cost the country $122 million. Prime Minister Malcolm Turnbull says he won't break an election commitment to hold a national vote on same-sex marriage and will pay more than $120 million to do so. The coalition will send its plebiscite bill back to a hostile Senate this week, despite it facing an almost certain political death. It was rejected last year, and will likely be rejected again.

Knowing that, Mr Turnbull has announced a $122 million backup plan, a voluntary postal vote that could be issued as soon as September 12. The votes would be due back by November 7, which gives about eight weeks to return papers. We would know the result, with a voluntary or compulsory vote on November 25.

THOUSANDS RALLY FOR GAY MARRIAGE IN AUSTRALIA AHEAD OF VOTE

SOURCE: BENJAMIN COOPER, REUTERS, WWW.REUTERS.COM, 26 AUGUST 2017 (EXCERPTS)

Thousands of people rallied for marriage equality in Australia's second biggest city of Melbourne on Saturday ahead of a postal survey on same-sex marriage which could lead to its legalisation.

Australia is one of the only developed English speaking countries not to have legalised same-sex marriage, despite strong popular support and the backing of a majority of lawmakers.

Shadow Attorney General Mark Dreyfus, of the opposition Labor Party, called on the Conservative Liberal party led government to do more to ensure the debate did not turn violent ahead of the postal survey next month.

Prime Minister Malcolm Turnbull last week urged supporters and opponents of same-sex marriage to show mutual respect as their campaigns turned increasingly vitriolic.

Rally organiser Anthony Wallace from activist group Equal Love said 15,000 people attended the event, making it one of the largest gay-rights rallies in Australian history.

PRACTICAL APPLICATION CONTINUED...

The rally is an annual event, which this year began and ended at the Victorian State library, where a mass same-sex wedding ceremony was held.

Same-sex marriage is supported by 61% of Australians, eight 2016 Gallup opinion polls showed, but the issue has fractured the Turnbull government and damaged his standing with voters, now at a six-month low.

1. What did the Liberal/National coalition promise to do if they won the 2016 election? [C]
2. What was going to happen to the government's proposed legislation to conduct a plebiscite? [C]
3. What alternative did then Prime Minister Malcolm Turnbull propose to a plebiscite? [C]
4. What did those members of the Liberal party who supported same-sex marriage propose should happen instead? [C]
5. How many Gallup polls have been conducted showing 61% support for same-sex marriage? [C]
6. You are a Liberal member of Parliament who supports same-sex marriage and wants a conscience vote held without spending money on a postal survey. Prepare a speech in support of your position to give in the party room meeting arguing for your point of view. You can assume that the head-count of all parliamentarians would mean that a Bill to legalise same-sex marriage would pass in both Houses of Parliament. If you prefer, adopt the position of a member who wants the postal survey carried out. [A] [R]

THE LEGISLATIVE PROCESS

PRACTICAL APPLICATION

CHRONOLOGY OF SAME-SEX MARRIAGE BILLS INTRODUCED INTO THE FEDERAL PARLIAMENT: A QUICK GUIDE

SOURCE: DEIRDRE MCKEOWN, POLITICS AND PUBLIC ADMINISTRATION SECTION, WWW.APH. GOV.AU/ABOUT PARLIAMENT, 15 FEBRUARY 2018 (EXCERPTS)

The *Plebiscite (Same-Sex) Marriage Bill 2016* (Cth) was introduced by the Prime Minister, Malcolm Turnbull, in the House of Representatives on 14 September 2016. The Bill fulfilled a Liberal party election promise and sought to establish the legislative framework for a compulsory, in-person vote in a national plebiscite that would ask Australians 'should the law be changed to allow same-sex couples to marry?' The Bill passed the lower house on 20 October 2016 but was defeated at the second reading stage in the Senate on 7 November 2016.

Following the defeat of the *Plebiscite (Same-Sex Marriage) Bill 2016* the government announced that the Australian Bureau of Statistics (ABS)would be directed to conduct a voluntary survey of 'all Australians on the electoral role as to their views on whether or not the law in relation to same-sex marriage should be changed to allow same-sex couples to marry'.

The Australian marriage law postal survey did not require legislation. At the time it was estimated to cost $150 million. On 15 November 2017, the ABS announced the results of the voluntary Australian Marriage Law Postal survey. The ABS reported that, of the 79.5% Australians who expressed a view on the question ***'Should the law be changed to allow same-sex couples to marry?'***, the majority (61.6%) indicated that the law should be changed to allow same-sex couples to marry, with 38.4% responding ***'No'***.

On 15 November 2017 Senator Dean Smith (LIB, WA) introduced, on behalf of eight cross-party co-sponsors, a bill to amend the *Marriage Act 1961* (Cth) so as to redefine marriage as 'a union of two people '. This was the fifth marriage equality bill introduced in the current (45th) Parliament. Senator Smith's Bill passed the third reading stage in the Senate on 29 November 2017; for the first time a marriage equality bill was debated by another chamber when the Bill

PRACTICAL APPLICATION CONTINUED...

was introduced into the House Of Representatives on 4 December 2017. The Bill passed a third reading stage in the House on 7 December 2017 and received Royal Assent the following day.

Since the 2004 amendment to the *Marriage Act 1961* (Cth) which inserted the current definition of marriage, 23 bills dealing with marriage equality or the recognition of overseas same-sex marriages have been introduced into the Federal Parliament. Four bills have previously come to a vote: three in the Senate (in 2010, 2012 and 2013), and one in the House of Representatives (in 2012) these bills were all defeated at the second reading stage. The 23 bills were introduced or co-sponsored by members of parliament representing the Australian Democrats, Australian Greens, Australian Labor Party, Derryn Hinch's Justice Party, Liberal Democratic party, Liberal party of Australia, Nick Xenophon Team and by Independents.

RESEARCH

A DEFINITIVE TIMELINE OF LGBT+ RIGHTS IN AUSTRALIA

SOURCE: SBS SEXUALITY, WWW.SBS.COM.AU, DOWNLOADED 10 MAY 2019 (EXCERPTS)

1968 - Homosexual Law Reform Society forms in Canberra

1970 - Campaign Against Moral Persecution (CAMP) is established

1985 - Queensland passes laws banning bars from serving alcohol to homosexuals

1992 - the Keating Labor government removes the ban on same-sex persons serving in the military despite opposition from defence groups, the Liberal party and Keating's own defence Minister.

1994 - the Keating labour government passes the *Human Rights (Sexual Conduct) Act* to override all State and Territory legislation pertaining to sexual conduct for consenting adults above the age of 18

2003 -The United Nations Human Rights Committee finds Australia in breach of the *International Covenant on Civil and Political Rights* for denying a veterans pension to same-sex spouse

2004 - The Howard Liberal government amends the *Marriage Act 1961* (Cth) to explicitly exclude same-sex couples from marriage. Marriage is defined as the **'union of a man and woman to the exclusion of all others, voluntarily entered into for life'.**

2005 - The Australian Defence Force extends equal benefits to same-sex families

2007 - The Howard Liberal government announces plans to ban same-sex adoption nationwide. This never eventuates due to Labor's election victory

1. Review the above timeline, adding any events which you think are important to understand the **road to achieving same-sex marriage law reform.** [A] [E]

2. Conduct your own research and add to the timeline any recent events which have been significant up to and including **the reform of the *Marriage Act 1971*** (Cth) in December 2017 and beyond. [A] [E]

ON REFLECTION

1. Was the Senate right to block the Turnbull government's plebiscite Bill, making it spend an estimated $122 million on a postal survey, or should the Turnbull government have simply allowed a conscience vote in parliament on the issue? [E]

INQUIRY FOCUS

DOES THE LAW OF ABORTION IN QUEENSLAND FAIRLY BALANCE THE HUMAN RIGHT TO LIFE OF UNBORN CHILDREN AND THE LEGITIMATE RECOGNITION OF THE HUMAN RIGHT OF FREEDOM OF CHOICE IN RELATION TO DECISIONS BY A WOMAN ABOUT HER BODY AND PERSONAL CIRCUMSTANCES?

UNDERPINNING FACTS, LAWS AND CONCEPTS OF THE INQUIRY

WHAT DO YOU THINK?

When did your human rights begin? Was it the day you were born or the day you were conceived or a period of time between? In responding to this question, evaluate the extent to which you agree with the following statement by Federal Senator, Amanda Vanstone, in a 2006 Federal Senate debate about whether to legalise embryonic stem cell research, which is also known as therapeutic cloning (the Federal Parliament did, in fact, pass the *Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act* (Cth) at the end of 2006 by a conscience vote in each of the two houses). [S] [E]

A three-day-old, 14-cell embryo is certainly genetic material; it is not, by any stretch of the imagination, a human. It is not possible to compare Somatic Cell Nuclear Transfer, which involves genetic material about the size of the full stop at the end of this sentence.

State laws apply to abortion rather than there being a single, uniform federal law in place. The grounds on which abortion is permitted vary from state to state. In Queensland prior to 2018, s224, 225 and 226 of the *Criminal Code 1899* (Qld) prohibit abortion unless the mother's life is in immediate danger from the continuation of the pregnancy. Queensland District Court Judge Maguire's ruling in *R v Bayliss & Cullen* (1986) declared abortion to be legal if necessary to preserve the mother from a serious danger to her life or health (including mental health, such as evidence of distress or depression caused by the pregnancy) – beyond the normal dangers of pregnancy and childbirth. This decision confirmed the '*Menhennit* ruling' in a landmark 1969 Victorian Supreme Court ruling which established that an abortion is lawful if the accused held an honest belief on reasonable grounds that the abortion was both 'necessary' and 'proportionate'.

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Approximately 80,000 to 100,000 abortions are performed each year in Australia, which is more than one for every three live births. Less than two per cent of these abortions are for foetal abnormality. The remainder of abortions are for other reasons. For the past two decades, in opinion polls, **the majority of Australians have consistently expressed support for pregnant women having access to abortion and the right to choose**, based on the belief that forcing a woman to have an unwanted child is worse than allowing abortion. Prenatal screening for some birth defects is now virtually universal. If a problem that is likely to lead to a serious disability is detected, most Australian women will seek an abortion, and the community overwhelmingly supports such decisions.

CASE STUDY

R v Leach and Brennan (unreported District Court jury trial, October 2010)

Facts: In April 2009, a 19-year-old Cairns woman was charged under s225 in the Queensland *Criminal Code 1889* (Qld), for procuring her own miscarriage. Her partner was charged under s226 for assisting her. The case was heard in the Cairns District Court in October 2010.

Section 225 states:

Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime, and is liable to imprisonment for 7 years.

Section 226 states:

Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.

Police alleged the couple arranged for a relative to send a supply of the drugs misoprostol and mifepristone, used in medical abortions, to Australia from the Ukraine. It is further alleged the woman used the drugs successfully to terminate her pregnancy at 60 days, after the couple decided they were too young to parent. Police claim the couple made no enquiries about the availability of abortion in Cairns.

The court heard a day and a half of evidence from the prosecution, including three doctors from Cairns that the young woman consulted about the pregnancy, an obstetrics and gynaecology specialist from the University of Queensland, police officers present during the search of the couple's home, subsequent interviews with the police, and video footage of those interviews. The court heard that the couple had decided they weren't ready to have a child, and that accounts of surgical abortion had persuaded them they did not want to choose that for themselves. They decided to have a medication abortion, using the same drugs the young man's sister in the Ukraine had used for an abortion some years previously.

Legal issue: Did Tegan Leach unlawfully administer to herself any poison or other noxious thing in order to procure (bring about) her own miscarriage? Judge Everson said if the jurors were not satisfied beyond reasonable doubt that the drugs supplied by Mr Brennan and taken by Ms Leach were "noxious", both defendants should be acquitted. He defined noxious as a substance that was harmful or injurious to the health or physical wellbeing of the person taking it.

Decision: The judge reiterated in his summing up that if the jury had any doubts as to the noxious nature of the drugs in question, they must acquit both defendants (also stating that due to the wording of the charge, the drugs had to be considered noxious to the woman herself, and that the effect on a foetus may not be taken into account). He reminded the jury of the testimony of Professor Fisk, the obstetrics and gynaecology specialist, who had stated that the drugs were not harmful to the person taking them, were taken by thousands of women around the world every year, were recommended medicines for developing countries and that in this particular case there was seemingly no ill-effect on the young woman. The jury was out for less than an hour before returning with not guilty verdicts for both defendants.

1. How was Queensland's anti-abortion law applied to this court case? [A]
2. Who were the stakeholders in this case and how were their legal rights affected? [A]
3. Was the legal outcome a correct application of the Queensland anti-abortion laws? Why or why not? Give clear, relevant and specific examples from the above Case study to prove your legal point of view (position). [E]

SERGIE BRENNAN AND TEGAN LEACH LEAVE CAIRNS COURTHOUSE AFTER A JURY'S NOT GUILTY VERDICT. PICTURE: MARC MCCORMACK SOURCE: CAIRNS POST

EVALUATE LEGAL SITUATIONS

WHAT DO YOU THINK?

To do nothing is also a good remedy. (HIPPOCRATES)

According to the website of Cherish Life Queensland (cherishlife.org.au), a significant legal outcome of the trial of Tegan Leach and Sergie Brennan was '… the Crown's powerful restatement of principle in Queensland law, that it is prohibited for adults to take the life of their unborn baby unless compelled to do so because of serious risk to the life or health of the woman. As the Crown prosecutor, Michael Byrne, reminded the jury, abortion is "illegal unless the pregnancy posed a threat to the woman's life or her physical or mental health" and is not permitted for reasons of "lifestyle". In this comment, he was restating the earlier ruling of Judge McGuire that this exception for "serious risk" to the woman is "a humane doctrine devised for humanitarian purposes, but it cannot be made the excuse for every inconvenient conception." In the Cairns case, the accused couple was found to be not guilty of violating this principle — but the principle remains.'

The mystery of life is not a problem to be solved but reality to be experienced.

(AART VAN DER LEEUW)

1. Why do you think Cherish Life Queensland sees the case of *R v Leach & Brennan* as a win for its position on abortion in Queensland, even though the defendants were ultimately found not guilty of the charges by the jury in the trial? [E]
2. Do you believe this legal position under the Criminal Code in Queensland should be retained in its present form or should be changed (reformed) by the Queensland Parliament? Give reasons to back up your point of view, taking into account the opposing evidence and arguments provided by the following source. [E]

ProChoiceQld
our choice. our voice.

Cherish Life .org.au
Queensland

Pro-choice point of view:

PRO-CHOICE advocates welcomed the acquittal of the Cairns couple charged over a home abortion. Pro-choice campaigner Dr Caroline De Costa said she was delighted with the jury's verdict and called on the Queensland parliament to reform the law so no-one is ever charged with the offence again. "This law was written in 1899, it is no longer relevant to the practice of abortion in 2010 or what the general pubic think."

Pro-life point of view:

Cherish Life Queensland president Teresa Martin said the group would lobby MPs to maintain the current law. She said pregnant women who did not want to keep their child should be aware they had other options such as adoption. "We don't believe that abortion ever helps a situation, it does harm, it harms physically, mentally, spiritually and emotionally," she said.

SOURCE: ELKS, S., 14 OCTOBER, 2010, 'VERDICT PROVES ABORTION LAWS NO LONGER RELEVANT, SAY PRO-CHOICE ADVOCATES', THE AUSTRALIAN

PRACTICAL APPLICATION

The Queensland Government introduced changes to s282 of the *Criminal Code 1889* (Qld) in 2009 after the trial of Sergie Brennan and Tegan Leach. Section 282 of Queensland's Criminal Code does not relate specifically to abortion, but provides a defence for doctors charged with performing a procedure unlawfully. It is the defence on which doctors would rely, were they charged over providing abortion. The old text of s282 is as follows:

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.

The concern of providers was that 'surgical operation' was specified, and that medical abortion could not really be defined as a surgical operation. This grey area existed for many years and was repeatedly raised as a concern by doctors. To resolve this issue, the Government committed to reforming this section of the Code to allow for the provision of medication - which they argued was also applicable to treatments such as chemotherapy. The revised section now reads:

A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill a surgical operation on or medical treatment of:

a) a person or unborn child for the patient's benefit; or

b) a person or unborn child to preserve the mother's life;

if performing the operation or providing the medical treatment is reasonable, having regard to the patient's state at the time and to all circumstances of the case.

There is also an added clause stating that if a person has been lawfully supplied (or believes they have been lawfully supplied) with a substance then it is legal for them to use it—thereby offering a small amount of protection to women seeking medication abortion.The sections pertaining specifically to abortion, s224-226, remain in the Code, and were not examined or altered in any way. They set out penalties for doctors, women and support people.

The parliamentary debate over the Government's amendments to s282 of the Criminal Code was brief - only nine MPs spoke on the bill. The amendments were voted on along party lines, as the bill was not specifically abortion-related and therefore did not require a conscience vote. The Opposition pledged their support to the changes, with members stating several times that their support was based on the fact this would not increase the availability of abortion in Queensland, but would serve only to clarify current practice. The changes were passed on 3rd September 2009, with only Independent Gladstone MP Liz Cunningham voting against

Which of the following stakeholder responses to the above change to Queensland's anti-abortions do you believe provide the most compelling reasons to justify their viewpoints? [E]

"During the debate today honourable members on both sides of this parliament should not cloud this issue. What we are dealing with is something that is extremely narrow in its application... This is a medical debate. A pregnancy termination remains a criminal offence unless the life of the mother is jeopardised. The fundamental principle is not changed, impinged or affected in any way whatsoever by this bill before the parliament today." – LAURENCE SPRINGBORG, THEN DEPUTY OPPOSITION LEADER (2009)

"We cannot stand by and allow existing out-of-date laws to continue for any length of time that have the potential of making, unintentionally, criminals of both health professionals and the public. These people deserve to be protected and we need to provide certainty as far as is possible for both the highly trained health professionals and the public caught up in the current uncertainty that comes from old and/or out-of-date laws." - GRACE GRACE, ALP, BRISBANE CENTRAL

"There are many who have concerns with the current level of abortions in this state and have the view that this highlights a social tragedy." - DAVID GIBSON, LNP, GYMPIE

"I think it is important for me to put on the record that my strong view from what I know of many members of this parliament on both sides, and views that they have publicly expressed, is that a

bill brought before this House to substantially change the existing law on termination of pregnancy would not succeed. I do not see any point in bringing legislation into this parliament when you know it has no real prospect of success." – (FORMER) PREMIER ANNA BLIGH

"We now lose 14,000 babies a year. If we apply the interpretation of case law, they die to preserve the woman from serious danger to her life or her physical or mental health. I am sorry, but I find it very difficult to accept personally that all of these babies die in that specific circumstance." - LIZ CUNNINGHAM, INDEPENDENT, GLADSTONE

"It has been said that abortion is a matter between a woman, her partner and the doctor. With respect, there is also an unborn person." - MICHAEL CHOI, ALP, CAPALABA.

PRACTICAL APPLICATION

FACT CHECK: WILL QUEENSLAND'S PROPOSED ABORTION LAWS ALLOW UNRESTRICTED ACCESS AFTER 22 WEEKS?

SOURCE: ABC NEWS, WWW.ABC.NET.AU, 4 OCTOBER 2018, DOWNLOADED 22 MAY 2019

The claim

Protestors have marched through the streets of Brisbane voicing their opposition to proposed changes to abortion laws in Queensland.

Among them was Nationals senator for Queensland Matt Canavan, a cabinet minister, who addressed the crowd and spoke to reporters at the march.

"[The proposed changes] would be some of the most radical and extreme legislation of abortions in the world, and it would allow, effectively … unrestricted abortions beyond 22 weeks," Senator Canavan said.

The verdict

Senator Canavan's claim is baseless.

Experts told Fact Check that the bill before Parliament contained clear restrictions on abortions after 22 weeks' gestation.

While abortions would be available on request up to 22 weeks, the bill would require two doctors to consider "all the circumstances" before performing an abortion after 22 weeks.

Those circumstances included all relevant medical considerations, a woman's current and future physical, psychological and social circumstances, and take into account all relevant professional standards and guidelines.

Experts also told Fact Check the changes would be unlikely to increase the number of abortions carried out in Queensland, pointing to the experience of Victoria (which revamped its laws in 2008).

The current Queensland legislation

In Australia, abortion is legislated at a state and territory level.

In Queensland, abortion remains in the 1899 criminal code.

Three sections in the code make it a crime for a woman or other person to attempt to procure a miscarriage or to supply "anything whatever" intended to be used to procure a miscarriage.

However, Heather Douglas, a professor of law in the TC Beirne School of Law at the University of Queensland, told Fact Check that another section of the state's criminal code (282) allows for legal abortion in Queensland.

PRACTICAL APPLICATION CONTINUED...

"There is a defence under section 282 of the code that makes abortion legally available in circumstances where the doctor can demonstrate that the abortion was performed in good faith and with reasonable care and skill," Professor Douglas said.

The section further states: "A person is not criminally responsible… if performing the operation or providing the medical treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case."

The bill before Queensland Parliament

Under the proposed changes, abortion would be available on request up to 22 weeks.

After 22 weeks' gestation, an abortion may only take place if the medical practitioner performing the abortion has consulted with a second medical practitioner and both agree that "in all the circumstances" the abortion should be performed.

The bill sets out as "circumstances" to be considered by the medical practitioners, all relevant medical circumstances, the woman's current and future physical, psychological and social circumstances, and the professional standards and guidelines that apply to the medical practitioner in relation to the performance of the termination.

The bill also stipulates that an abortion may be performed after 22 weeks' gestation if it is necessary to save the woman's life or the life of another unborn child.

Do the proposed changes allow for "unrestricted access" to abortions after 22 weeks' gestation?

All experts consulted by Fact Check said the bill would not allow unrestricted access to abortion after 22 weeks.

Professor Douglas told Fact Check there was a clear restriction within the bill.

"Two doctors must consider relevant medical circumstances and the woman's current and future physical, psychological and social circumstances, and the professional standards," Professor Douglas said.

Adrianna Walters, a senior lawyer with the Human Rights Law Centre, agreed that abortions would be restricted after 22 weeks.

"For the rare and distressing situations in which an abortion is required after 22 weeks, two doctors would need to agree that an abortion is appropriate after considering all the woman's circumstances and professional standards and rules," Ms Walters said.

PRACTICAL APPLICATION CONTINUED...

Julie Hamblin, a health law expert and consultant with HWL Ebsworth Lawyers, added that she believed doctors would be very cautious about authorising late-term abortions.

"They always have been, and that is unlikely to change," she said.

How will the proposed legislation affect access to abortions in Queensland?

A June 2018 report by the Queensland Law Reform Commission states that a total of 10,421 terminations were performed in Queensland public hospitals and licensed private health facilities in 2016 and that approximately 99 per cent of terminations are performed before 20 weeks' gestation

Experts told Fact Check they didn't expect the proposed laws to have a substantial effect on the number of abortions carried out in Queensland, but that the changes were important nonetheless.

Senior policy and health promotion officer at Women's Health Victoria, Dr Amy Webster, agreed there was unlikely to be an increase in the number of abortions.

"Decriminalisation is unlikely to substantially increase the number of women who seek an abortion. However, it is possible the number of abortions provided in Queensland will increase as women will no longer have to travel interstate to access essential health services.

The Victorian experience

Experts told Fact Check it was fair to compare the proposed legislation in Queensland to current abortion laws in Victoria, which have been in place since 2008.

A 2017 study - *Intended and unintended consequences of abortion law reform: perspectives of abortion experts in Victoria, Australia* - found that while experts agreed law reform had been positive, "they did not think it had significantly changed practice."

In fact, experts perceived that access to surgical and post 20-week abortion had contracted since the law's reform, though this may have been coincidental.

1. What fact is being checked about Queensland's abortion laws in this article? [C]
2. Describe and explain the current Queensland abortion law legislation. [C] [A]
3. Describe the Bill before the Parliament referred to in the article which proposes changes to Queensland's abortion law. [C]
4. Compare the proposed changes to abortion law to the existing law. Do the proposed changes allow for 'unrestricted access' to abortions after 22 weeks' gestation? [C] [A]
5. Do you consider that the changes to Queensland's abortion law mean that there is a fair balance between the human right to life of unborn children and the legitimate recognition of the human right of freedom of choice in relation to decisions by a woman about her body and personal circumstances? [E] [R]

ON REFLECTION

Do you think it is likely that there will be attempts to reverse the laws on abortion which have recently been passed in Queensland and are also in place in other states in Australia, just as there have been recent attempts to challenge the seminal case in the United States of *Roe v Wade*. This appears to have happened in the United States because President Trump has successfully appointed Judge Brett Kavanaugh, a conservative judge, to the bench of the Full Court of the Supreme Court in the United States.

PRACTICAL APPLICATION

EARLY ABORTION BANS: WHICH STATES HAVE PASSED THEM?

SOURCE: MARA GORDON, ALISON HURT, WWW.NPR.ORG/SECTIONS/HEALTH- SHOTS, 5 JUNE 2019 (EXCERPTS)

This year has brought an unprecedented wave of new state laws that only allow abortions to be performed early in pregnancy-if at all. Most of the new laws-known as early abortion bans-explicitly outlaw abortion when performed after a certain point early in the pregnancy. The laws vary, with some forbidding abortion after six weeks of pregnancy, and some after eight weeks. Alabama's law is the most extreme: it aims to outlaw abortion at any point, except if the woman's health is at serious risk. So far in 2019, nine US states have passed laws of this type, and more states are considering similar legislation.

These new bans are a direct challenge to the precedent set by the 1973 Supreme Court ruling *Roe v Wade*.

8.4 PATTERNS OF CRIMES AND CIVIL OFFENCES: DOMESTIC AND FAMILY VIOLENCE, ALCOHOL FUELLED VIOLENCE, AND MEDICAL NEGLIGENCE

The statistics of crime and civil offences, and the patterns they disclose, are a powerful opportunity for stakeholders in the community (such as governments, community organisations and victims' families) to speak out for reform. Statistics and the patterns they reveal can be powerful drivers of change. Because the only way in which the criminal law changes is through legislation, much of the energy for change is directed through the media to motivate political parties and governments to develop new policies that satisfy public opinion. The difference between a civil offence and a criminal offence can broadly be described as follows:

Under the civil law, the person who has suffered damage (the plaintiff) must bring a private claim against the alleged wrongdoer (the defendant).

Criminal charges are made by the police. Court cases are commenced and argued by a prosecutor on behalf of the victim and the general public (the state) against the accused. Although rare, it is possible for a citizen to bring a private prosecution.

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This important difference between **civil offences** and **criminal offences** should be kept in mind when considering particular examples of law reform. It is probably more appropriate to look at the studies in this chapter as examples of **civil law reform** and **criminal law reform**. One of the most important distinctions is that civil law reform (for example **same-sex marriage legalisation**) involves the police and other enforcement agencies to a much lesser extent. On the other hand, the complexity of law reform in the **domestic and family violence** area, is to a large extent a result of the likely overlap of civil and criminal law in every matter which comes before the court.

DOMESTIC AND FAMILY VIOLENCE

A statistical picture of violence experienced by men and women in Australia can be found in the data released by the **Australian Bureau of Statistics** (ABS) based on a survey which collected information from men and women aged 18 years and over about the nature and extent of violence experienced since the age of 15. The data which will be presented to you below will contain both general information about violence in the community, but will naturally extract statistics about the **specific issues** which arise **in Domestic and Family Violence.**

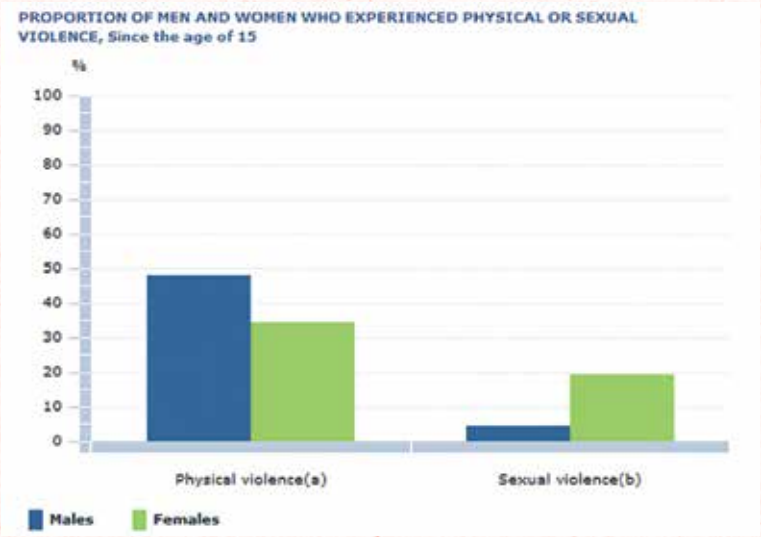
PRACTICAL APPLICATION

4906.0—PERSONAL SAFETY, AUSTRALIA, 2016. LATEST ISSUE RELEASED 8/11/2017.

SOURCE: AUSTRALIAN BUREAU OF STATISTICS, WWW.ABS.GOV.AU/AUSSTATS (EXCERPTS)

EXPERIENCES OF VIOLENCE

Prevalence of violence since the age of 15



Changes in violence prevalence rates over time

For men the proportion experiencing physical violence in the last 12 months has almost halved since 2005, decreasing from 10% in 2005 to 5.4% in 2016. For women, the proportion has fallen from 4.7% in 2005 to 3.5% in 2016.

The proportion of **women experiencing sexual violence** in the last 12 months has remained steady between 2005 and 2016 (1.6% in 2005 compared to 1.8% in 2016). However **since 2012, there has been an increase, from 1.2% in 2012 to 1.8% in 2016.**

Prevalence of violence since the age of 15-Relationship to perpetrator

More than one in three Australians experience violence by a male perpetrator since the age of 15 (36% or 6.7 million), compared to 1 in 10 by a female perpetrator (11% or 2 million).

Approximately **one in four women** (23% or 2.2 million) **experienced violence by an intimate partner**, compared to one in 13 men (7.8% or 703,700).

More than one in four men (27% or 2.5 million) experienced violence by a stranger, compared to one in 11 women (9.4% or 880,800).

PRACTICAL APPLICATION CONTINUED...

Men's and women's most recent incident of physical assault by a male

In the most recent incident of physical assault by a male, women were most likely to be physically assaulted by a male that they knew (92% or 977,600)

The location of the most recent incident was most likely to be in their home (65% or 689,800)

Two thirds of men and women who experienced physical assault by a male did not report the most recent incident to the police (69% or 908,100 men and 69% or 734,500 for women)

Women's most recent incident of sexual assault by males

In the most recent incident of sexual assault by males, women were most likely to experience sexual assault by a male they knew (87% or 553,700).

The location of the most recent incident was most likely to be in the respondents home (40% or 252,400) or in the perpetrators home (17% or 109,400).

The majority of women (9/10) did not contact the police (87% or 553,900)

1. Describe the prevalence of violence in Australia in accordance with the **Personal Safety Survey** conducted by the ABS in 2016. [C]
2. Although the survey was funded by the Department of Social Services under the ***National Plan to Reduce Violence against Women and Their Children 2010-2022***, why do you think the ABS survey was conducted in a gender neutral way? [E] [R]
3. What does the data tell you about trends in, and the status of, violence against women? [C] [A] [E]
4. Do the statistics support government intervention and funding in the area of violence against women and their children? Why? [A] [E]

While statistics may be useful to provide evidence that justifies action by governments and organisations responsible for administering government legislation, it is the horror and devastating consequences felt by families of victims presented in the media which has led public opinion to support the programs that are necessary to deal with what some people describe as an epidemic of violence within the family unit in our society. It is not necessary to illustrate this to you here because you will see this violence and its consequences regularly if you follow the media. However, one example is provided for you to research to see one woman's response to the tragic death of her son at the hands of his father.

RESEARCH

ROSIE BATTY: 'THREE YEARS ON & GRIEF STILL HAUNTS ME'

SOURCE:WHIMM: WWW.WHIMM.COM.AU/PEOPLE/ROSIE BATTY ,22 OCTOBER 2017 (EXCERPTS)

Three years on and Rosie still battles with the loss of her son, Luke

Rosie Batty experienced the loss of her son Luke in 2014 when he was killed by his father in terrible circumstances. As a consequence she started a campaign against family violence, and started the Luke Batty foundation NEVER ALONE (see lukebattyfoundation.org.au/honour-luke). Research her story and write a short 300 word article about her that could be published in your school newspaper. [S] [C] [A] [E] R]

Rosie Batty's story is the tip of the iceberg. The extent of violence in the family, particularly the violence perpetrated against women, has been the subject of many media articles and concern by governments, both state and federal. We have previously referred in *Legal Studies for Queensland Volume 1* (Eighth Edition) 2018 to the report of the Australian Law Reform Commission ALRC(11 November 2010) entitled ***Family Violence – a National legal response*** in the INQUIRY FOCUS into the application of bail laws in Queensland to family (domestic) violence. This inquiry described how the concerns raised in the media about the murder of Teresa Bradford in February 2017 by her husband while he was on bail led to changes in the *Bail Act* making it harder for high-risk offenders to successfully apply for bail when subject to a domestic violence order, or where involved in a dispute about domestic violence. This is an important issue about which you should read again in Chapter 7.2 of Volume 1 of this textbook.

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Even before Teresa Bradford was murdered, the Queensland government had commissioned former Governor-General Dame Quentin Bryce to chair a new domestic violence task force in Queensland.

PRACTICAL APPLICATION CONTINUED...

FORMER GOVERNOR-GENERAL DAME QUENTIN BRYCE TO CHAIR NEW DOMESTIC VIOLENCE TASK FORCE IN QUEENSLAND

SOURCE: ASHLEIGH STEVENSON, SASKIA EDWARDS AND LOUISA REBGETZ, ABC NEWS, WWW.ABC.NET.AU , 10 AUGUST 2014, (EXCERPTS)

Former Governor-General Dame Quentin Bryce has been announced as the chair of a new taskforce aimed at reducing domestic violence incidents in Queensland. The State Government said the unit was designed to address the rapid rise of domestic violence incidents throughout the state. The group is expected to work closely with communities and families to review the current services and facilities available to victims of domestic violence and determine how services can be improved.

PRACTICAL APPLICATION CONTINUED...

Dame Quentin said the figures were alarming. "There are about 175 reports of domestic violence incidents every single day and no one is going to dispute that this is absolutely appalling." she said. "I feel a personal and moral obligation to do anything I can to stem the tide of domestic violence. It's pervasive. It's insidious and it's got to be stopped. Violence against women is one of the gravest human rights challenges of our time. "

The Opposition said it wanted the State Government to bring forward its consideration of a private members bill that dealt with harsher penalties for domestic abuse.

DOMESTIC AND FAMILY VIOLENCE TASKFORCE REPORT

SOURCE: PREMIER OF QUEENSLAND NEWSROOM, WWW.THEPREMIER.QLD.GOV.AU/NEWSROOM/DOMESTIC, (DOWNLOADED 31 MAY 2019) (EXCERPTS)

Premier Anastasia Palaszczuk has received a report outlining recommended actions to tackle domestic and family violence in Queensland. The Honourable Quentin Bryce AD CVO, chair of the Special Taskforce on Domestic and Family Violence delivered 140 recommendations in the report '*Not now, Not ever: Putting an End to Domestic and Family Violence.'*

The Premier said her government has made a commitment to consider all the recommendations made by the Taskforce.

"Domestic and family violence is a violation of basic human rights and there is no excuse for not acting to eliminate it," Ms Palaszczuk said. "From Opposition, Labor introduced a Private Member's Bill which sought to boost the task of tackling domestic violence in Queensland. We will now examine the Taskforce recommendations to determine how improved support can be provided to families and individuals experiencing violence. The number of domestic violence incidents in Queensland is one of our state's great shames."

In 2013-14, more than 66,000 incidents were reported to Queensland police-equating to more than 180 incidents reported every day across the state. In 2012-2013, 17 homicides relating to domestic and family violence occurred in Queensland.

1. Describe and explain the purpose behind the establishment of the Taskforce. [C] [A]
2. Describe the reasons given by the Premier for commissioning the Taskforce report. [C] [A]
3. Describe and explain what '**basic human right' is being infringed** by domestic and family violence. [C] [A]

THE SPECIAL TASKFORCE ON DOMESTIC AND FAMILY VIOLENCE

The report '***Not now, Not ever: Putting an End to Domestic and Family Violence***' handed down on 28 February 2015, is wide-ranging and comprehensive. It can be accessed online at www.qld.gov.au/dfvtaskforce. Included in its recommendations are specific recommendations for legislation and for involvement of the state institutions which provide legal services. For example, it recommends the establishment of a new offence of '**strangulation**', and of **specialist courts** dealing with domestic and family violence. Other recommendations cover the many activities carried out in the domestic and family violence area, such as safe houses for threatened women and children, and professional training for staff in many areas of need, including training for lawyers who practice in the area. The Foreword of the report states:

As we learned more about domestic and family violence in Queensland, it became clear that three broad areas of reform are necessary; changes in our culture and attitudes, reform to the responses to incidents of abuse of its victims, and reform to the response from our justice system.

The Executive Summary of the report contains important statements of principle which help the reader to understand the scope and importance of the report. Two paragraphs taken from the Executive Summary illustrate this.

Domestic and family violence, in all forms, is a violation of basic human rights. Everyone, regardless of their sex, religion, nationality, race, language, relationship, or living arrangements, has a right to feel safe and be safe in public and at home. Domestic and family violence, which is perpetrated in the home or among family members, is as much a matter of public concern as crime in the streets. It must not be accepted or excused.

The majority of people who experience domestic and family violence in Queensland are women. This is not to say that women cannot be the perpetrators of fear and violence upon male victims. Men can be and are victims of violence and coercive control, and are victims of domestic and family violence homicides. Any domestic and family violence, regardless of who the victim and perpetrator are, is unacceptable. The statistics (detailed at some length in this Report) tell us, however, that the most common pattern of domestic and family violence is that it is committed by men against women.

It should be clear to you from the material that has been covered above on this topic that domestic and family violence is a **nationwide concern**, and an ongoing area of law reform. When the Report was handed down in February 2015, the Queensland government at the time indicated it would adopt the recommendations of the Report. In particular, it amended the *Criminal Code 1899* (Qld) by the introduction of the criminal offence of ***Choking, suffocation or strangulation in a domestic setting*** (s315A) in line with the Report's recommendation to introduce a separate offence of strangulation.

PRACTICAL APPLICATION

CRIMINAL CODE 1899 (QLD)

Section 315A Choking, suffocation or strangulation in a domestic setting

(1) A person commits a crime if—

(a) the person unlawfully chokes, suffocates or strangles another person, without the other person's consent: and

(b) either---

(i) the person is in a domestic relationship with the other person; or

(ii) the choking, suffocation or strangulation is associated domestic violence under the Domestic and Family Violence Protection Act 2012.

Penalty—

Maximum penalty—7years imprisonment.

(2) An assault is not an element of an offence against subsection (1).

1. Describe the elements of the offence contained in s315A. [C] [A]
2. Describe and explain s315A(2).
3. What do you think are the reasons for amending the *Criminal Code* to introduce the new offences under s315A? [A] [E]

THE SPECIALIST DOMESTIC AND FAMILY VIOLENCE (DFV) COURT- SOUTHPORT

As indicated above, the Taskforce recommended the establishment of Specialist Magistrates Courts to deal with domestic and family violence. In Queensland, a trial was established on 1 September 2015, and after two years this permanent DFV court continued at Southport, dealing exclusively with all civil and criminal DFV offences. According to the **Queensland Courts** website, specialist domestic and family violence courts were also to be located at Beenleigh, Townsville, Mount Isa and Palm Island. At Beenleigh and Townsville there were to be major refurbishments to both courthouses to house the various activities of the specialist DFV courts. There is also one in Brisbane.

SPECIALIST DFV COURTS OFFER

- a dedicated magistrate with expertise in DFV issues;
- a Department of Justice and Attorney-General court coordinator to oversee court operations, including stakeholder engagement;
- a specialist DFV court registry where specialist court staff offer support and information;
- dedicated prosecutors;
- duty lawyers to provide advice and representation for both parties;
- court support workers for the aggrieved;
- support/liaison workers for the respondents; and
- access to domestic and family violence perpetrator programs.

An evaluation of the Southport trial was conducted in February 2017 by the **Griffith Criminology Institute** of the Griffith University. A summary of some of the findings is set out in the practical application below.

PRACTICAL APPLICATION

EVALUATION OF THE SPECIALIST DOMESTIC AND FAMILY VIOLENCE COURT TRIAL IN SOUTHPORT

SOURCE: CHRISTINE BOND, ROBYN HOLDER, SAMANTHA JEFFRIES, CHRIS FLEMING, GRIFFITH CRIMINOLOGY INSTITUTE (FEBRUARY 2017)

By comparing the specialist court to a conventional court model, the 12-month evaluation found that overall the Southport specialist court has made strong progress on its short and medium term process outcomes. Particular outcomes include:

- the role of the specialist magistrates was vital to facilitating collaborative change process in establishing the specialist court;
- the enhancement of strong collaborative relationships between the court, domestic violence services, police prosecutors and duty lawyers resulted in improved coordination of matters and services;
- ratings of satisfaction and perceived procedural justness of the process reported by victims was higher at the specialist court, compared to the comparison court;

PRACTICAL APPLICATION CONTINUED...

- levels of self-reported understanding of court outcomes for both victims and perpetrators, (although the findings were more mixed for perpetrators) were higher at the specialist court, compared to the comparison court;
- there were indications that perceptions that offenders were being held accountable were higher at the specialist court, compared to the comparison court; and
- the achievements to date suggest that the fairly modest additional cost of the specialist court may be justified.

Finally, the application of a specialist approach to domestic and family violence in other communities was seen as feasible. This may mean a specialist court in some locations, but different strategies in other locations. In other words, the approach needs to be adapted to local needs and circumstances:

- support and assistance is even more crucial to ensure access for diverse populations;
- collaborative consultation with Aborigines and Torres Strait Islander communities is needed to ensure culturally appropriate adaptations; and
- a tiered approach to specialisation, based on rural/remote, regional and urban, would allow for local conditions to be considered in any implementation of a specialist approach.

1. Why do you think the Specialist DFV Southport Court is achieving superior outcomes to a normal Magistrates Court? [C] [A] [E]
2. Prepare a profile to be used to evaluate applications by lawyers to join the duty lawyer staff of the proposed Specialist DFV Palm Island Court. Give reasons for the qualifications you expect your ideal applicant to have. [C] [A] [E]
3. Describe the similarities and differences between the Murri Court and the Specialist DFV Southport Court. Do you think these courts are likely to meet the needs of the persons which come before them? [C] [A] [E]

ALCOHOL-FUELLED VIOLENCE

The issue of alcohol-fuelled violence in the Australian community is common to all jurisdictions. All States and Territories have developed policies over many years in an attempt to limit the effects of violent behaviour in private and public places. The connections between violence and the consumption of alcohol are well-established. The principal stakeholders in the community are the **victims and their families, policymakers** (members of parliament, political parties) and the **economic community** (hotel owners, nightclub owners, entertainment venues etc.) which depend upon the sale of alcohol for a living. Getting the balance right has been a concern since at least 2004, when a much liked and well-known former member of the Australian cricket team was killed outside a bar at St. Kilda in Melbourne.

PRACTICAL APPLICATION

CRICKETER HOOKES DIES AFTER BAR BRAWL

SOURCE: MARK OLIVER, THE GUARDIAN, WWW.THEGUARDIAN.COM/WORLD 20 JANUARY 2004 (EXCERPTS)

Former Australian test cricketer David Hookes has died from head injuries after being involved in a fight outside a hotel bar in Melbourne last night. A hotel bouncer has been arrested on an assault charge following the incident, which happened as the 48-year-old-who played 23 tests between 1977 and 1986-celebrated a victory for the Victoria state side that he coached.

A witness told Australian media that they had seen a scuffle breakout between around six people at the bar moments before Hookes was punched unconscious.

1. What evidence is there in this article that alcohol may have been involved? [C] [A]
2. Describe the violence that preceded the death of David Hookes. [C]
3. How would the death of David Hookes raise issues of policy? What would these be? [C] [A]

The Queensland government and the Queensland police carry out campaigns against alcohol fuelled violence.

PRACTICAL APPLICATION

QUEENSLAND ALCOHOL-RELATED VIOLENCE AND NIGHT TIME ECONOMY MONITORING PROJECT

SOURCE: MILLER ET AL, BMC PUBLIC HEALTH.BIOMEDCENTRAL.COM/ARTICLES, 5 OCTOBER 2017 (EXCERPTS)

Queensland government alcohol policy

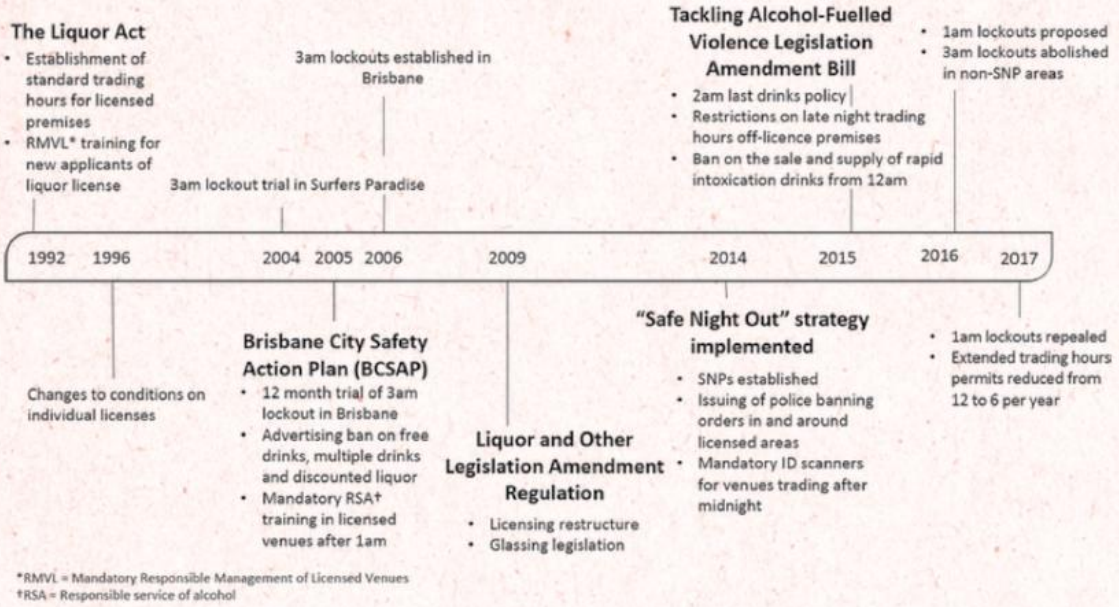
In 2016, the Queensland government responded to the community's concerns around alcohol-fuelled violence and other harm by implementing a broad-based multi-faceted policy. While this is not the first multi-faceted policy concerning alcohol problems that the Queensland government has introduced, this is the first time earlier last-drinks legislation has been implemented at a statewide level, rather than within a few key entertainment districts. (The policy is presented in Figure 1).

Most components of the policy are consistent across the state, with some applicable only to designated Safe Night Precincts (SNPs).There are currently 15 SNPs (key entertainment areas that are managed by local boards) across Queensland. The policy has three broad aims:

1. To achieve cultural change around drinking behaviour which includes more responsible drinking practices (in particular drinking behaviour outside of the home and in designated SNPs in Queensland).
2. A safe night time environment, in particular in entertainment precincts.
3. A regulatory framework that balances the interests of the liquor industry with a reduction in alcohol-fuelled violence.

PRACTICAL APPLICATION CONTINUED...

FIGURE 1 - LEGAL POLICY TIMELINE



A FIGHT OVER NOTHING, CHANGED EVERYTHING

SOURCE: QUEENSLAND POLICE, WWW.POLICE.QLD.GOV.AU/CSCP/PERSONALSAFETY/YOUTH, (DOWNLOADED, 7JUNE 2019) (EXCERPTS)

This campaign is aimed at reducing instances of alcohol fuelled violence among young people and is about starting a conversation with these young people, educating them to not make split-second decisions which can ruin their lives or the lives of others.

Originating on the Gold Coast, research was undertaken over a two-year period to identify those who are most at risk of being either an offender or a victim in alcohol fuelled violence assaults. This research concluded that young tradesmen and university students were at an increased risk.

Through community consultation, police partnered with local Gold Coast creative Kiel Tillman, to produce an artwork depicting the perceived outcomes of alcohol- fuelled violence by the target audience. This resulted in the development of the campaign slogan 'a fight over nothing, changed everything'.

This campaign is being proactively utilised in the Gold Coast District with officers continuing to engage with the target audience in new and innovative ways, including the use of social media.

1. Describe the various responses in Queensland to alcohol-fuelled violence set out in figure 1 above. What is a multi-faceted policy? [C] [A]
2. What is a Safe Night Precinct? How do you think the police would be involved in the regulation of these precincts? Do you think that these are a good idea? Why or why not? [C] [A] [E]
3. Describe and explain the police campaign 'A Fight over Nothing, Changed Everything'. Do you think it is likely to have some success in changing attitudes? Why or why not? [C] [A] [E]

RESEARCH

To fully appreciate the extent of legislated involvement in attempts to reduce alcohol-fuelled violence, it is recommended that you read the article by Miller headed 'Queensland alcohol-related violence and night-time economy monitoring project', from which an extract is presented above in the practical application. [S]

ONE PUNCH CAN KILL

The other aspect of alcohol-fuelled violence is the frequency with which the nature of the violence causes premature death, where establishing **intention to cause unlawful killing** is difficult. This means, for example, that **charging** the bouncer allegedly responsible for striking the blow that caused the death of David Hookes in 2004 **with murder**, was not possible. The number of deaths which occurred as a result of a single punch or blow in the context of alcohol-fuelled violence became impossible to ignore. The relatives of the victims were supported by the media and some politicians. The law was changed creating a special offence with its own punishment in these sorts of circumstances. There is an **INQUIRY FOCUS** in chapter *3.2 Legal Studies for Queensland Volume 1* (Eighth Edition) entitled:

Do Queensland's new 'one punch can kill' laws achieve the purposes for which they were created and fairly balanced the rights and responsibilities of the different parties and other stakeholders affected by them

A recent case illustrates how seriously the Queensland government, the Queensland Courts, and the community regard offences of this type.

CASE STUDY

R v Renato; Ex parte Attorney-General for the State of Queensland [2018] QCA 356

Facts: Mr Renato pleaded guilty to a charge of unlawful striking causing death under s314A of the *Criminal Code 1899* (Qld). The offence carries a maximum penalty of life imprisonment. In addition, upon conviction, the Court must make an order that the person is not released from prison until he or she has served the lesser of either:

1. 80% of the person's sentence for the offence; or
2. 15 years imprisonment.

The Supreme Court took into account Mr Renato's personal circumstances, the circumstances specific to the offending and the time spent by Mr Renato in maximum security whilst on remand. It decided the starting point for Mr Renato's sentence was 8 ½ years and imposed a sentence of seven years imprisonment of which Mr Renato was required to serve 80% before being eligible to make an application for parole. The sentence was appealed by the **Attorney-General** on the basis that the sentence imposed was **manifestly inadequate.**

Legal issue: Should Mr Renato's sentence be changed?

Decision: The Court of Appeal agreed. It decided that a starting point of 11 to 12 years was to be used, took into account a number of factors in mitigation, and substituted a sentence of nine years and six months imprisonment. Essentially, the reasons of the Court of Appeal were the same as the Court of first instance, except that it signalled that, when imposing sentences for this type of offending, the court must have regard to the **increased public consciousness and concern in relation to alcohol-fuelled violence.**

ON REFLECTION

Do you regard the decision of the Court of Appeal as being understandable in the light of the sources, analysis, and evaluation which is considered in the original INQUIRY FOCUS into the topic 'One Punch can Kill'. [R]

MEDICAL NEGLIGENCE

The reforms to the law in Queensland which were contained in the *Civil Liability Act 2003* (Qld) are the last significant statutory reforms in this area of law in Queensland. These reforms and the trend towards an increase in **class actions** are both covered in **Unit 2:Topic 3** of L*egal Studies for Queensland Volume 1* (Eighth Edition).

8.5 LAW REFORM DUE TO TECHNOLOGICAL ADVANCES: ROMANCE, SCAMS, CATFISHING, CYBERSTALKING

INTRODUCTION

The rapidly expanding capabilities of information and communications technologies (ICT) have created new crimes and new ways to commit old crimes.

SOURCE: TONY KRONE, AUSTRALIAN INSTITUTE OF CRIMINOLOGY, 'HIGH TECH CRIME BRIEF', (AIC.GOV.AU) 2015 (EXCERPTS).

Technology has had an immense impact on society and, in turn, the laws that govern our behaviour and oversee the detection and investigation of criminal activity. In Queensland, the *Criminal Code 1899* (Qld), which was written over 100 years ago, contains many of the State's indictable criminal offences. At the time it was written, Sir Samuel Griffith, Chief Justice of Queensland, could not have imagined that computers, mobile phones, social media, the Internet and 3D printing would be part of criminal law– as technology has created new criminal offences and changed the way individuals commit crime. **While technology changes quite rapidly, our law making process can be perceived as being slow in comparison– as often parliaments respond to technological advances after they occur and courts can only respond to cases that come before them.** However, over time, laws have been amended, adapted or interpreted to reflect Australian society's needs, values and technological advances. We will now investigate how effectively our legal system has responded to technological advances by examining a number of emerging legal situations and issues, including online romance scams such as catfishing (which we will examine first), before turning to cyberstalking.

ONLINE ROMANCE SCAMS AND CATFISHING

Catfish: someone who uses false information to cultivate a persona online that does not represent their true identity.

SOURCE: ERIC VANMAN, THE CONVERSATION & ABC NEWS (ABC.NET.AU) 26 JULY 2018 (EXCERPTS).

Technology has had a huge impact on how we meet and connect with people. While many people go online with a genuine intention to form a relationship, some people do not. Sometimes scammers will use the anonymity of the online world to take advantage of people looking for love or friendship. They will develop a fake profile using a fictional name or use another person's identity to lure unsuspecting victims. Over time **perpetrators of this type of crime often build trust with their victims before manipulating them to send money, gifts, intimate images or complete a task.**

INQUIRY FOCUS

HOW HAS THE LAW RESPONDED TO THE GROWTH IN ONLINE ROMANCE SCAMS AND CATFISHING?

Since January 2016, the Australian Competition and Consumer Commission (ACCC) has published data on romance scams – with catfishing being one type of romance scam. Its website provides statistics of reported romance scams in Australia– but it is important to remember that it is impossible to know how widely this offence occurs, as many victims may be too humiliated to make a report. From January to April 2019, over $6 million has been lost by victims of romance scams. However, only 34.3% of incidents involved financial loss. Other impacts of this type of crime include emotional and psychological harm or physical injury. Of the few academic works published on this issue authors Whitty and Buchannan (2012) point out that many victims of romance scams suffer a, 'double hit of victimisation, where the individual must grieve both the loss of the relationship and any financial losses.' The majority of reported victims are female (56.9%) but males are almost equally affected (43%).

PRACTICAL APPLICATION

COST OF ROMANCE FRAUD IS ON THE RISE IN AUSTRALIA

SOURCE: NICK WHIGHAM, THE ADVERTISER (ADELAIDENOW.COM.AU) 3 MAY 2019, (EXCERPTS).

Figures from the consumer watchdog show that victims lost more than $AU24 million in 2018 from cases reported to ScamWatch.

And then there is the more confounding behaviour of catfishing in which someone deliberately deceives a person by carrying on an online relationship with them while pretending to be someone else for their own self-gratification.

The phenomenon has arisen in the age of social media and the culprits rely on stolen or edited photos usually taken from an unwitting third party to form their fake identity. It sounds strange but as people spend more of their daily lives online, there is no shortage of examples - and some end in tragedy.

1. How much did victims of romance fraud lose in 2018? [C]
2. What online environment is contributing to the rise in catfishing? What advantages does this environment offer over email, text messages and telephone? [C] [A]
3. Does the rise of romance fraud demonstrate that the law, or the legal processes associated with its application, needs to be reformed? Why or why not? [A] [E]

WHAT DO YOU THINK?

1. In 2018, 30.8% of reported dating and romance scams included financial loss. What other reasons could be behind 'social catfishing'? How might this impact the legal system's response to this issue? [A] [E]

LEGAL RESPONSES TO ROMANCE SCAMS AND CATFISHING

Online scams and spam are major issues in Australia. The problem is not only a financial one, but also one which ruins the lives of people, and in some tragic cases has resulted in the deaths of their victims.

SOURCE: ADRIAN COOREY, 2018, 'ONLINE SCAMS AND SPAM-LEGAL MEASURES TO STEM THE RISING TIDE', AUSTRALIAN JOURNAL OF COMPETITION AND CONSUMER LAW, VOLUME 26, P. 5 (EXCERPTS).

No law mentions the word romance scam or catfishing. **Instead our legal system has used pre-existing criminal offences against defendants who deceive others under the guise of a romantic relationship. Words within these pre-existing criminal offences can be interpreted and applied to new types of crime or new methods.** These criminal offences can be found in Commonwealth, State and Territory legislation. **Depending on the circumstances of the romance scam, a defendant could be charged with various offences at a Commonwealth level. These are found in the *Crimes Act 1995* (Cth)**. Some criminal offences include: dealing in identification information (s372.1), dealing in identification information that involves using a carriage service (s372.1A), possession of identification information (s372.2), using a carriage service to make a threat (s474.15), using a carriage service to menace, harass or cause offence (s474.17) or money laundering (Part 10.2). **Queensland's *Criminal Code 1899* (Qld) also contains some relevant offences including fraud** (s408C), obtaining and dealing with identification information (s408D), acts done with the intent to defraud (s459), stalking (s359B) or forgery and uttering (s488). If the victim is a child, other offences can apply - an example being grooming (s218B). **But, the criminal offences provided here are not an exhaustive list- romance scams and catfishing can result in physical injury or even death.** To understand how the law operates in practice, we will examine a number of recent cases.

PRACTICAL APPLICATION

Choose and locate one Commonwealth and one Queensland criminal offence related to romance fraud or catfishing from the paragraph above.

1. What are the elements of the criminal offence? [S] [A]
2. What is the maximum penalty of the criminal offence? [C] [S]
3. How does it demonstrate the actions undertaken by a 'catfish'? [E]
4. Do you think the current criminal provision you have chosen provides a sufficient response to a romance scam or catfishing? Why or why not? Consider whether the section you have chosen demonstrates the characteristics of an effective law in the context of this type of crime. [E]

PRACTICAL APPLICATION

MAN POSING AS US SOLDIER ALLEGEDLY SCAMS WOMAN OUT OF ALMOST $400,000

SOURCE: LILY NOTHLING, ABC NEWS ONLINE (NEWS.NET.AU) 11 JANUARY 2019, (EXCERPTS).

A foreign national from Africa accused of posing as a soldier from the United States in order to groom a woman he met online, has been charged with fraud after allegedly scamming her out of almost $400,000.

Police said the 34-year-old woman began an online romantic relationship with Cosmos Emeh, 32, after befriending him on social media in October 2018. It is alleged in the following months, she was groomed into believing Mr Emeh was a US soldier, and sent him more than $200,000 through a money transfer service. Police said he then travelled to the woman's house to collect a further $105,000. She became suspicious and reported the matter to police after confiding in a close friend.

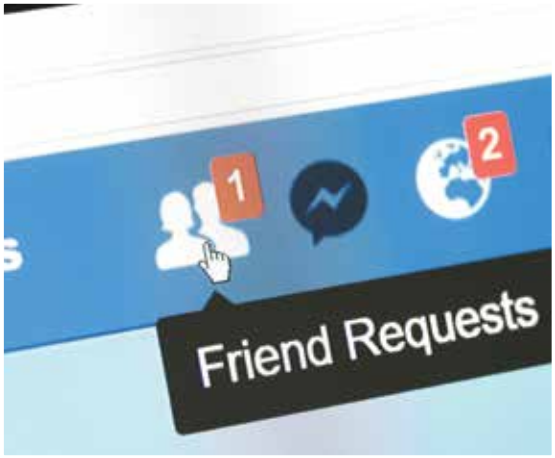
Detectives from the State Crime Command's Financial and Cyber Crime Group arrested Mr Emeh on Thursday while he was trying to persuade the victim to hand over more money.

He has been charged with one count each of fraud and attempted fraud. The court heard Mr Emeh is studying a degree at a Brisbane university and denied having any contact with the alleged victim via the internet.

1. What criminal offence has Emeh been charged with? [C]
2. What process did the defendant use to scam the victim? [C]
3. Who arrested Emeh? What does this show about how seriously the legal system is taking this criminal offence? [C] [A]

CASE STUDY

R v Abdelmalek (Unreported, Magistrates Court of Victoria, 21 May 2019)



Facts: In 2011 the first victim, accepted a Facebook friend request from actor 'Lincoln Lewis', an old childhood friend. Lincoln and the first victim exchanged messages, telephone calls and photographs. As her and Lincoln's interactions became romantic, she believed she was in a romantic relationship. She later found out that the Facebook and telephone number did not belong to the real Lincoln Lewis, they were fake. She confronted the person who told her his name was Michael Jason Smith. She demanded Michael stop contacting her, which he did. However, she and Michael began speaking again – but he soon confessed his 'real' name was Danny Jason MacGreene, a British actor (but he used Michael as a cover to protect his real identity). While they continued their online relationship, she began to receive anonymous menacing messages, which her 'boyfriend' told her he was also receiving. One evening the victim received a message from a man claiming to be a federal police officer stating that her boyfriend had been kidnapped, but this was later discovered to be a lie. The anonymous messages continued and began to threaten her family. The first victim, sought help from the police and mental health professionals, but later killed herself. The second victim also believed she was in a relationship with 'Lincoln Lewis', but like the first victim, discovered the relationship

CASE STUDY CONTINUED...

was fake. She reported the matter to the Queensland police, who, with her help discovered the person behind the romance scam was Lydia Abdelmalek.

Legal issue: Did Abdelmalek's actions constitute the act of 'stalking'? Can this be proven beyond a reasonable doubt?

Decision: Abdelmalek was found guilty of six counts of stalking. She was sentenced to two years and eight months jail, with a non-parole period of one year and nine months. At the time of printing Abdelmalek was planning on appealing her sentence.

1. What criminal offence did Abdelmalek commit? [C]
2. Compare and contrast Abdelmalek's behaviour to that of Emeh. How are they similar and different? [A]
3. What do you think would happen if Abdelmalek was located overseas? Why? [A] [E]

INVESTIGATING AND POLICING ROMANCE SCAMS AND CATFISHING

The investigation of online fraud can involve a number of government authorities – including the Australian Competition and Consumer Commission (ACCC), Australasian Consumer Fraud Taskforce (ACFT), Australian Cybercrime Online Reporting Network (ACORN) and the Queensland and Federal police. Anonymity and the trans-jurisdictional nature of romance scams such as catfishing can make prosecution difficult, even if Commonwealth and State authorities are working together and sharing information. **Like many cybercrimes, if a defendant is located overseas and takes steps to hide their identity, prosecution can be impossible.** Future improvements in detection technology, co-operation between Commonwealth and State police services and regulators, further enforcement and public awareness campaigns may strengthen the law's responses to this criminal offence.

ON REFLECTION

1. Which of the further legal reforms listed above do you think will have the most impact on romance scams and catfishing? Justify your selection by providing several legal reasons to support your choice. [E] [R]
2. Reflection on your learning is an important part of the inquiry approach. You have completed many questions that have asked you to comprehend key legal concepts, analyse the legal issues present in this criminal offence and justify a legal alternative. What tasks or skills do you need more help to develop? How will you go about getting this help? [A] [R]

CYBERSTALKING

Stalking as a criminal concept is a relatively recent one. In the past the persistent pursuit of someone was often seen as a mark of 'true love'. However, this changed in the beginning of the 20th century. In 1993 **Queensland recognised stalking as a specific criminal offence in *Criminal Code 1899* (Qld)** s359B. The introduction of this criminal offence was the result of changes in community perceptions about respectful behaviour in relationships, increased awareness of domestic

violence and the work of women's legal organisations such as the Women's Legal Service. Together these factors influenced legislators to reform the law and create a specific criminal offence to address persistent harassment. Other reasons behind the introduction of this offence can be found by reading the *Criminal Law Amendment Bill 1993* (Qld) Explanatory Notes:

> *…many submissions were received from community and women's interest groups contending that the criminal law of Queensland did not adequately provide protection…Although the Criminal Code contains a small number of sections…the Criminal Code does not generally provide for criminal liability in cases where a person has been subjected to behaviour which might reasonably cause an expectation of potential violence.*

Stalking involves making unwanted and repeated contact with another person that leaves them feeling intimidated or fearful. The key feature of 'criminal' stalking is its repetition. It can include repeatedly following a person, sending a person letters or gifts, loitering around a person's home or workplace or repeatedly calling a person. Like most crimes, the victim and defendant can be known to each other (a current or former partner, friend, family member or work colleague), but it can also involve a stranger. We usually hear or read about stalking on the news when a fan becomes unhealthily obsessed and continuously harasses a celebrity, causing them to feel unsafe or become fearful for their life – for example in 2016 a man was sentenced for sending unwanted gifts and following singer Ariana Grande.

The different types of behaviour associated with the criminal offence of 'unlawful stalking' in Queensland are very wide. This has meant, so far, that the law has not had to be amended to keep pace with social, moral or technological change. **While technological advances have changed the way stalking occurs, the police have been able to use existing criminal offence provisions to charge and prosecute a person who stalks another using digital programs, platforms or devices.** However, the invasive nature of technology means that people can use a wide variety of platforms to harass, abuse and intimidate their victims, which can be difficult to escape and ignore as technology is increasingly an important part of how we communicate and keep in contact with people.

The Office of the E-Safety Commissioner identified the many ways cyberstalking can occur, including:

- making unwanted contact electronically;
- sharing or threatening to share humiliating images or videos;
- posting humiliating, abusive or intimidating comments;
- accessing a person's accounts to read their personal information, emails and messages; or change their passwords;
- impersonating another person's online identity in order to harm their reputation or relationships; and
- monitoring a person's movements.

SOURCE: OFFICE OF THE E-SAFETY COMMISSIONER, 'WHAT IS CYBERSTALKING', (ESAFETY.COM.AU), ACCESSED 18 MAY 2019 (EXCERPTS).

INQUIRY FOCUS

DOES THE LAW ADEQUATELY RESPOND TO CYBERSTALKING?

You now are aware that stalking is a relatively recent crime in Queensland. Cyberstalking is a type of stalking that uses modern technology to instil fear. **Cyberstalking has gained the attention of the media and the public as it forms a new threat that some believe is not being addressed by the legal system and further reform is required.** In a 2000 Australian Institute of Criminology paper on cyberstalking, Dr Emma Ogilvie wrote:

> *Whilst it can be argued that some cyber crimes are no different from real world crimes in as much as they reflect the same range of offensive and dangerous behaviours, it also needs to be acknowledged that the Internet can magnify, distort, and ignore the attributes of the real world in ways we urgently need to address.*

PRACTICAL APPLICATION

CRIMINAL CODE 1899 (QLD)

Section 359B

Unlawful stalking *is conduct—*

(a) intentionally directed at a person (the ***stalked person****); and*

(b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and

(c) consisting of 1 or more acts of the following, or a similar, type –

- *(i) following, loitering near, watching or approaching a person;*
- *(ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;*
- *(iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;*
- *(iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;*
- *(v) giving offensive material to a person, directly or indirectly;*
- *(vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;*
- *(vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and*

(d) that—

- *(i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or*

PRACTICAL APPLICATION CONTINUED...

(ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.

Section 359E

(1) A person who unlawfully stalks another person is guilty of a crime.

(2) A person who commits the crime of unlawful stalking is liable to a maximum penalty of imprisonment for 5 years.

(3) However, a person is liable to a maximum penalty of imprisonment for 7 years if, for any of the acts constituting the unlawful stalking, the person—

(a) uses or intentionally threatens to use, violence against anyone or anyone's property; or

(b) possesses a weapon within the meaning of the Weapons Act 1990 ; or

(c) contravenes or intentionally threatens to contravene an injunction or order imposed or made by a court or tribunal under a law of the Commonwealth or a State.

(4) Also, a person is liable to a maximum penalty of imprisonment for 10 years if any of the acts constituting the unlawful stalking are done when or because the officer is investigating the activities of a criminal organisation.

1. Read *Criminal Code Act 1899* (Qld) s359B(c)(i)-(iv) provided above and answer the following questions:

   a) Can an individual be charged with stalking for a single incident? [C]

   b) What impact must the contact have on the victim? [C] [A]

   c) Are there any technology-related words used in this section? If so, where? [C] [A]

   d) Explain and provide at least four examples of stalking behaviour that can occur online according to the circumstances outlined in the Act. Are there any parts of the Act that cannot be replicated in the online world? [C] [A]

   e) Are there any particular online behaviours that you feel should be specifically included in this section? Why or why not? [A] [E]

2. Read *Criminal Code Act 1899* (Qld) s359E provided above and use it to answer the following questions:

   a) If a defendant followed a victim and loitered around their home on at least three occasions, what is the maximum penalty he or she could receive? [C] [A]

   b) If a defendant sends at least two text messages to their former partner threatening to kill their pet and owned a gun, what is the maximum penalty he or she could receive? [C] [A]

   c) If a defendant emailed a number of violent images to a person and threatened to use violence against them, what is the maximum penalty he or she could receive? [C] [A]

   d) Do you believe using technology to commit stalking should receive a higher penalty? Why or why not? [A] [E]

   e) Do you believe cyberstalking should form a separate category like those found in s359E(3)? Why or why not? [A] [E]

PRACTICAL APPLICATION

3. What are the similarities and differences between the Queensland criminal offence of unlawful stalking (*Criminal Code Act 1899* (Qld) s359B) and the Commonwealth criminal offence of using a carriage service to menace, harass or cause offence (*Criminal Code Act 1995* (Cth) s474.17). Which do you feel is a more suitable legislative response for cyberstalking if, at all? Why? [A] [E]

DEFINING CYBERSTALKING

Defining what amounts to cyberstalking can be very difficult. In the research report 'Stalking: Legislative, Policing and Prosecution Patterns in Australia', published in 2000, Dr Emma Ogilvie acknowledges that there has been great difficulty in defining stalking as a criminal and legal concept as opposed to a social one. We know that in order to be effective, law must be enforceable and clear. We will return to our inquiry and focus on the wording of the legislation to help us decide whether Queensland law is adequately responding to cyberstalking.

Ch 5.3

CASE STUDY

Phillips v Police [2016] SASC 135

Facts: The victim (MH) in this case was a police officer. The appellant sent private Facebook messages and wrote public posts about MH. The messages and posts alleged that MH had an unlawful sexual relationship with two underage girls. The appellant was charged with stalking and found guilty by a magistrate. The appellant challenged the magistrate's interpretation of the words 'apprehension or fear' in the criminal offence.

Legal issue: Were the words 'apprehension or fear' limited to circumstances that involve physical harm only? To what extent should the words 'apprehension or fear' be interpreted?

Decision: Chief Justice Kourakis held that the scope of the words 'apprehension or fear' included an apprehension or fear for a person's reputation, an apprehension or fear of adverse consequences or an apprehension or fear of embarrassment in front of his or her family, friends or employer. It also includes an apprehension or fear of emotional or mental harm, as well as physical harm. However, the court also held that the apprehension or fear must be 'serious' and that this could only be decided by examining the facts of the case.

1. What did the appellant do? [C]
2. What evidence do you think would have be used at trial by the prosecution? [A]
3. What consequences could occur if 'apprehension or fear' only extended to include the apprehension or fear of physical harm? [A]
4. Why is it significant that our understandings of the impact of stalking includes emotional or mental harm? [A] [E]

RESEARCH

Locate *Criminal Law Consolidation Act 1935* (SA) s19AA and re-read *Criminal Code 1899* (Qld) s359B and answer the following questions:

1. How do both jurisdictions respond to technology facilitated harm? [A]
2. Does the Queensland Act's definition of apprehension, fear or detriment include emotional or mental harm? [A]
3. The South Australian Act was last amended in 2001. Should the Queensland Act be further reformed in any way? If so, how? [A] [E]

PRACTICAL APPLICATION

WOMEN ARE STILL BEING TARGETED ONLINE 'AT THEIR WEAKEST POINT'

SOURCE: WENDY TUOHY, BRISBANE TIMES (BRISBANETIMES.COM.AU), 16 MAY 2019 (EXCERPTS).

Eighteen months since the dawn of a movement demanding an end to women being viewed as prey, prominent women's safety advocates say measures to protect Australian women online remain "woeful", and cyberstalking, trolling and harassment remain rampant.

#MeToo may have made men in prominent roles more wary of crossing real world boundaries, but according to advocates Ginger Gorman - author of the 2019 book *Troll Hunting: Inside the world of online hate and its fallout* - cyber-harassment researcher, Dr Emma Jane and **Stop Stalking Australia**'s Rachel Cassidy, women are still being targeted at 'their weakest point'.

Ginger Gorman believes social media companies have been woefully slow to enforce protections for women, and police are also lagging in their response to allegations of online crimes against women, including serious online harassment.

"In terms of policing, it's like domestic violence was 30 years ago – they think it's a private matter. They don't understand the real-life harm it does, the relative [relevant] legislation or how to investigate crimes like this. They don't have the training or resources to deal with it," says Canberra-based writer, Gorman.

Rachel Cassidy, CEO of Stop Stalking Now foundation and author of the new book *Stalked - The Human Target*, says there is still often a lag time between law enforcement and the justice system 'catching up to the current cohort of perpetrators' who use technology to commit cyberstalking.

1. What problems and issues with the current law do Ginger Gorman and Rachel Cassidy identify in the article? How do these impact victims? [C] [A]

ON REFLECTION

What is the most important thing I learned personally about technology and law reform? [R]

8.6 TRANSNATIONAL AND ORGANISED CRIME

In 2017 a report was published by the Australian Criminal Intelligence Commission (ACI) on **organised crime in australia**. The first sentence of that report stated that:

> *Transnational serious organised criminal groups have had a significant impact on crime markets in Australia in the past two years with technology and digital infrastructure presenting as key enablers across multiple crime types*

International criminal activity and organised criminal activity is varied. It involves drug trafficking, the trade in counterfeit goods, the trade in stolen goods, kidnapping and human slavery, cybercrime and smuggling. The ACI identified key enablers for serious and organised crime. One of the most important of those was money laundering.

MONEY LAUNDERING

There are two aspects to money laundering. They are:

- that money laundering is an enabler of profit-motivated crime; and
- that it is in itself, a lucrative criminal enterprise.

The primary goal of money laundering is to give money which has been obtained from illegitimate sources the appearance of having come from legitimate sources. It almost always involves the actual moving of such funds without detection. Such monies are likely to be invested in businesses or schemes that provide the greatest chance of concealing the origins of the money. The fact that such investment doesn't provide a high return and in fact very often provides a negative return, doesn't matter. What matters is that the money obtained from an illegitimate source is **'washed'** to give the appearance of money obtained from legitimate sources. The banking system itself, and money transfer services, are the most common methods used to launder funds. Money laundering enables criminals to further their criminal activity, hide their wealth, evade taxes, and avoid prosecution . The transnational nature of money laundering activities make it extremely difficult to identify money laundering. Sports betting is such an activity. International and organised criminals are owners of online bookmaking services. These services are available for Australians to launder proceeds of crime by allowing them to bet large amounts of money anonymously through offshore bookmakers who base their operations in jurisdictions where there is very little or no regulation or oversight of gambling activities. In Australia it is also very common to see international money laundering syndicates which operate in Australia, often coordinated by people from overseas, where Australians are recruited to launder money and directed on how to deposit and exchange the money through financial institutions.

It is as a result of the above problems that the law in Australia had to change.

The *Australian Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) was passed by the Federal government with the express purpose of preventing money laundering and the financing of terrorism. The Act does that by imposing on the:

- financial sector;
- gambling sector;
- money transferring service organisations, (among others);

Obligations to:

- collect information about customer's identities;
- monitor the behaviour of the customers, including reporting suspicious matters;
- report transactions which exceed the threshold (currently $10,000);
- report international fund transfers and instructions for such transfers; and
- to finally provide an annual report.

The Federal government body which oversees the providing of such information is the Australian Transaction Reports and Analysis Centre (AUSTRAC).

When this Act was introduced into parliament the minister said that the Act was aimed at addressing up to an estimated $11.5 billion of money laundering per year in Australia and the threat to national security caused by the financing of terrorism. AUSTRAC's role is to collect and analyse information provided by reports from the financial sector and then provide that information to the law enforcement agencies of Australia to enable them to prosecute serious criminal activity including **terrorism financing, organised crime, money laundering** itself, and even **tax evasion.** Breaches of the obligations by financial institutions have resulted in extraordinarily large fines.

PRACTICAL APPLICATION

COMMONWEALTH BANK: HOW SMART ATMS AND A CODING ERROR CAUSED A MASSIVE MISTAKE

SOURCE:YASMIN PARRY & WILL OCKENDEN, ABC NEWS ONLINE ABC.NET.AU, 8 AUGUST 2017 (EXCERPTS)

The CBA first rolled out the Intelligent Deposit Machines (IDMs) in May 2012.

You might have seen IDMs around. They're a type of ATM that automatically counts the cash into the CBA customer's account.

It's convenient and saves the bank money, since fewer human tellers are required.

But AUSTRAC alleges that CBA didn't limit the number of transactions a customer could make per day, and that its IDMs allowed up to 200 notes per transaction.

If you've got a lot of Granny Smiths ($100 notes) from your illegal drug empire, you could put 200 into a machine at a time.

That adds up to a $20,000 transaction – well above the mandatory reporting limit.

IDMs also allowed anonymous cash deposits, so it wasn't long before the system was abused by criminals.

For a criminal, that means you could potentially put millions of dollars through a machine in one day anonymously.

Not only that, but because the money appears instantly, a user can immediately transfer the money to another account – say, one that exists offshore.

Since the Commonwealth Bank introduced the IDMs five years ago, their use has grown significantly.

In May and June 2016, more than $1 billion in cash went through CBA's IDMs.

AUSTRAC has made a number of allegations against the Commonwealth Bank in its civil proceedings.

PRACTICAL APPLICATION CONTINUED...

The most significant is that the bank failed to flag more than 53,000 transactions over the $10,000 limit that passed through the smart ATMs over three years.

It is unclear how it happened, but it is possible whoever installed the machines back in 2012 simply didn't realise transactions above $10,000 had to be reported, and never wrote the code.

On the ABC's AM program, CBA chief executive officer Ian Nerev explained the error by saying 53,000 "sounds like a big number", but is actually mostly because of just one flaw in the software.

'One very important piece of context here is that the vast majority related to one software coding error in 2012 that we picked up in 2015, fixed within a month and rectified," he said.

In a statement to the Australian Stock Exchange on Monday, the bank went further, arguing that all 53,000 alleged contraventions of the code could be counted as just one offence.

It is an important distinction, because one infraction alone carries a penalty of $18 million. 53,000 of them…is a rather large fine.

The ABC's business editor Ian Verrender calls that a "brave" and "adventurous" argument but said the law is very clear.

'Imagine if you're caught for speeding again and again and again, and you say, "Well, look, my speedo was broken so I didn't know how fast I was going, so therefore I should only have to pay the fine once, not the 450 times that you've caught me speeding.'

'You reckon that'd fly?'

1. How many transactions which exceeded the threshold did the CBA fail to report ? [C]
2. What is an IDM? [C]
3. From the point of view of AUSTRAC what were the three major problems that arose as a result of the 'software error'. [C]
4. Accepting that this failure to report by the CBA existed for three years and given the figures referred to above for May and June 2016, what is the approximate dollar value of the transactions that were not scrutinised and reported upon by the CBA? [C]
5. Do you think the approximate dollar value is a significant sum in the context of money laundering? [A]
6. In your own words set out what the argument was that was unlikely to "fly"? [A]

The result of the above failure by the Commonwealth Bank is best described in the following practical application:

PRACTICAL APPLICATION

IS THE COMMONWEALTH BANK TO PAY $700M FINE FOR ANTI-MONEY LAUNDERING, TERROR FINANCING LAW BREACHES

SOURCE: MATTHEW DORIAN & MICHAEL JANDA, ABC NEWS ONLINE, 4 JUNE 2018 (EXCERPTS)

The Commonwealth Bank has agreed to pay the biggest fine in Australian corporate history for breaches of anti-money laundering and counter-terrorism financing laws that resulted in millions of dollars flowing through to drug importers.

CBA will pay $700 million plus legal costs after federal financial intelligence agency AUSTRAC last year accused the bank of serious and systemic failures to report suspicious deposits, transfers and accounts.

As part of the settlement, CBA admitted to the late filing of 53,506 reports of transactions of $10,000 or more through its "intelligent deposit machines" (IDMs).

Banks are required to report these large transactions within 10 business days, so that AUSTRAC can monitor them to see if the money might be going to crime gangs or terrorist networks.

The Commonwealth Bank had originally considered challenging the number of breaches, arguing that a single coding error had led to the failure to report the 53,506 transactions.

However, it later decided to admit most of the alleged breaches and try to reach a settlement.

For a period of three years, the bank also failed to properly monitor transactions on 778,370 accounts to check for money-laundering red flags.

It also admitted that 149 suspicious matter reports were filed late, or not filed at all.

In addition, the bank breached its obligations to perform checks on 80 suspicious customers and transaction monitoring did not operate as intended on a number of accounts between October 2012 and October 2015.

AUSTRAC's investigation also exposed 14 occasions where CBA failed to properly assess risks related to its IDMs.

While many of the transactions were for legitimate purposes, the bank has admitted that it failed to report "millions of dollars of suspected money laundering".

"AUSTRAC suspects that there was significant further undetected money laundering through CBA accounts that ought to have been detected and reported," noted the statement of facts agreed between the bank and AUSTRAC.

The money laundered through the CBA accounts included the proceeds of drug and firearms importation and distribution syndicates predominantly involving methamphetamine.

"Criminal syndicates rely upon money laundering syndicates to import and distribute their drugs."

1. How much did the CBA agree to pay for its breaches of the anti-money laundering counter-terrorism financing laws? [C]
2. Apart from a failure to report 53,506 incidents of transactions which exceeded the threshold, what were the other four failures? [C]
3. Name two criminal activities assisted by the money-laundering through the CBA accounts? [C]
4. Was the amount of the fine imposed upon the CBA out of proportion to the failure of the CBA? Give your reasons. [E]

The payment of the above fine by the CBA has been the largest civil penalty ever paid in Australian corporate history. Prior to that payment the largest settlement for money-laundering breaches was a fine of $45m imposed upon TABcorp in March of 2017 when TABcorp failed to alert AUSTRAC to reports of suspicious behaviour on 108 occasions over more than five years where such suspicious activity related to money-laundering and credit card fraud. Prior to this legislation gaming service providers, casinos and even clubs with poker machines had no obligation to disclose details of punters coming into their establishments with large amounts of cash which would be traded for chips or used as credits. This is no longer the case because these institutions now have imposed upon them the same obligations as banks and other financial institutions. They are now required to identify and verify the details of their customers. They are required to report suspicious matters, and they are required to report transactions greater than the threshold figure of $10,000.00, as well as to keep appropriate records of gambling transactions for seven years.

CASE STUDY

Regina v Yi Hua Jiao [2015] NSW CCA 95 (15 May 2015)

Facts: Ms Jiao held a Taiwanese and New Zealand passport. She flew to Sydney and was staying at the Star Casino in Sydney where she had a casino account. She met a man unknown to her at the casino. She identified herself to the unknown man by exchanging with him AU$5.00 bank note with a known serial number (a method of identification which is common practice when cash is passed between criminal syndicates and money-laundering syndicates). She then accompanied the unknown person who identified himself as Mr Nguyen to the casino carpark where she collected a sports bag from him which contained $624,340.00 in Australian currency. She then deposited the money into her casino account but she requested of the casino that $200,000.00 be transferred to a Commonwealth Bank of Australia account in Brisbane in the name of a money remitter. The casino staff declined that request on the basis that they were only entitled to transfer money into accounts held in the name of the customer. But Ms Jiao was informed that she could withdraw cash and make a deposit into a nominated bank account directly. The next day she withdrew $300,000.00 in cash and took it to the Pyrmont branch of the Commonwealth Bank. The casino staff who had become suspicious had notified the Australian Federal Police, who arrested her at the bank. She initially told the police that the cash belonged to a Mr Liu (whom she didn't know and didn't know how to contact), and that she was depositing the cash into her Commonwealth Bank account before transferring it to another Commonwealth Bank account in the name of Anna Yu, that being an account of a money remitter who would release the funds in China once the money had been deposited. She later made a statement to the police that the money exchange had been facilitated by her elder brothers in Hong Kong and that her brothers had arranged for her to receive $625,000.00 from an unknown male at the Star Casino who would identify her through the serial number of a $5.00 note in her possession and that her brothers wanted her to send half of the money to China. She was convicted at trial of money-laundering. She was sentenced to a term of imprisonment for six months. An appeal was lodged by the Crown against this sentence. The Crown submitted that it was manifestly inadequate.

Legal issue: Was the sentence of imprisonment inadequate in the circumstances of the case?

Decision The Court of Criminal Appeal held that the sentence was inadequate and that money-laundering is a serious offence and that the amount of money involved is of paramount consideration. Ms Jiao had played a significant role in the case. She was certainly more than a "bag person". She was sentenced to imprisonment for 16 months.

1. Would you describe Ms Jiao's explanation of how she received the monies as suspicious? Why? [A][E]
2. If you accept that the source of the money was criminal activity in Australia describe the process of money-laundering in your own words. [C][A]
3. The money-laundering was unsuccessful. Would it be likely to have been more successful if a series of smaller withdrawals were taken from the casino account? Why? [A][E]

RESEARCH

HUMAN TRAFFICKING

Background

As was set out at the start of this section kidnapping, human slavery and human trafficking are serious transnational crimes. Human trafficking is different to people smuggling. Human trafficking involves the movement of people across borders through deceptive means, force or coercion. People smuggling on the other hand is an organised illegal movement of people across borders usually on a payment for service basis. The other major distinction is that the human trafficking does not cease when a person is brought into Australia but it is really the start of continuing extortion of that human being in the country. People smuggling usually ceases once people are across the border and inside Australia. The victims are trafficked to be exploited either in some form of slavery (sexual or otherwise), to provide forced labour, to repay debts that may or may not exist, or to be forced into a marriage against their will. The Australian Federal Police state that Australia is primarily a destination country for people trafficked from Asia, particularly Thailand, Korea, Malaysia and the Philippines.

Task

Read the two articles and view the cartoon listed below that apply to trafficking and answer the following questions:

- Study finds half of human traffickers are women and many have been victims
  SOURCE: GABRIELLA MARCHANT, ABC NEWS ONLINE. 12 APRIL 2019 (EXCERPTS)
- This is happening in Australia: Sydney victim of slavery speaks out
  SOURCE: DAISY DUMAS, SYDNEY MORNING HERALD, WWW.SMH.COM,10 APRIL 2016

1. What generally is the background of the offenders convicted for trafficking in Australia between 2004 and 2017? [C]
2. Are you sympathetic towards the perpetrators of sexual trafficking referred to above because of their background? Give your reasons. [A] [E]
3. What were the circumstances in which Susan lived in Australia which entitled her to be seen as a victim of human trafficking? Do you agree with the use of the word 'slavery' to describe the condition in which she lived in Australia? [A] [E]

- Go to the website https://theconversation.com/human-trafficking-and-slavery-still-happen-in-australia-this-comic-explains-how-112294. You will see four real life examples set out in cartoon form, of trafficking in Australia. Select one of those and produce a report for the class of the example of trafficking selected. In that report ensure that you set out:

  a) The circumstances that gave rise to the servitude – slavery – forced marriage. [C] [S]

  b) The form such servitude took. [C] [S]

  c) The resolution of the servitude. [C] [S]

REVIEW

1. Describe the following: [C]

Code of Hammurabi | The 10 Commandments | Social pressures for change | Public opinion

2. Describe and explain:

   (a) The need for a postal survey to determine public opinion about the issue of same-sex marriage. [C] [A]

   (b) The change/s to the law of marriage necessary to legalise same-sex marriage. [C] [A]

   (c) The role of lobby groups influencing change to the same-sex marriage law. [C] [A]

   (d) Why are domestic and family violence and alcohol-fuelled violence such important areas for law reform in Australia? [C] [A]

   (e) Five criteria you consider are essential for the success of a specialist DFV court. [C] [A] [E]

3. Describe how technological advances have facilitated criminal activity. You are encouraged to use examples to demonstrate your understanding. [C] [A]

4. Describe and explain how the law has changed to respond to either cyberstalking or catfishing. [C] [A]

5. Describe and explain money laundering and how it facilitates other forms of organised crime. [C] [A]

TOPIC 2: LAW REFORM WITHIN A DYNAMIC SOCIETY

CHAPTER 9: ROYAL COMMISSIONS

FOCUS SUBJECT MATTER

9.1 ROYAL COMMISSIONS

9.2 ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

9.3 ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

9.4 OTHER SIGNIFICANT ROYAL COMMISSIONS

9.5 ANALYSING ROYAL COMMISSIONS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the role and purpose of a royal commission;
- there have been many royal commissions into significant social, economic and legal problems affecting the Australian community;
- the essential role the community plays in the royal commission process;
- how royal commissions assist to make law and its related processes more equitable, modern, fair and efficient.

9.1 ROYAL COMMISSIONS

Royal commissions: a formal, independent public inquiry appointed by the Governor or Governor-General who are tasked to investigate an issue of public importance for the government. A royal commission has special powers to collect information. They produce a written report making recommendations. In Australia, royal commissions are the highest form of inquiry.

SOURCE: AUSTRALIAN GOVERNMENT, 'ROYAL COMMISSIONS', AUSTRALIA.GOV.AU, ACCESSED 16 JULY 2019 AND GEORGE GILLIGAN, 'ROYAL COMMISSIONS OF INQUIRY', 2002, PG. 289-290 (EXCERPTS).

Royal commissions have been around for some time— with members of English royalty appointing Royal Commissioners to investigate important social, legal and economic problems as far back as the 11th century. **You are aware from an earlier chapter that the legislation that establishes the legal framework for this body is the *Royal Commissions Act 1902* (Cth).** It was one of the first pieces of legislation enacted by our first Commonwealth Parliament

Ch 7.3

PRACTICAL APPLICATION

ROYAL COMMISSIONS ACT 1902 (CTH)

1A POWER TO ISSUE ROYAL COMMISSION

Without in any way prejudicing, limiting, or derogating from the power of the King, or of the Governor-General, to make or authorise any inquiry, or to issue any commission to make any inquiry, it is hereby enacted and declared that the Governor-General may, by Letters Patent in the name of the King, issue such commissions, directed to such person or persons, as he or she thinks fit, requiring or authorising him or her or them or any of them to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth. If some of the above section looks familiar it should—we included a brief extract of it in an earlier chapter.

Ch 7.3

1. Who authorises a royal commission? What arm of government do they represent? Who might they take advice from before announcing a royal commission? [C]
2. This section heavily references the King. Why? [A]
3. What types of matters can a royal commission inquire into? [C]
4. What document restricts the scope of a royal commission? [C]
5. What does a royal commission produce at the end of the inquiry? [C]

INVESTIGATIVE POWERS OF A ROYAL COMMISSION

Royal commissions can only investigate matters provided for in the terms of reference, which are listed in the Letters Patent. This limits the scope of the royal commission.

Royal commissions have extensive powers to gather information that aren't given to traditional law enforcement bodies, such as the police. This is because it is important that royal commissions have the ability to get to the truth of a matter, no matter how embarrassing or uncomfortable that may be for the government, an organisation or an individual. A commissioner has the power to summon witnesses (s2), search and seize evidence (s4) and offer indemnities to people who co-operate. There is no right to protect oneself from self-incrimination (s6A), but evidence can be given in private and witnesses have a right to refuse to disclose information about secret manufacturing processes (s6D). A person who refuses to give evidence can be charged with an offence and be given a penalty of up to two years imprisonment (s6).

The Prime Minister recommends to the Governor-General that a royal commission should be established.

↓

The Governor-General issues Commonwealth Letters Patent appointing Commissioner(s) and the royal commission's terms of reference. The terms of reference outline the scope and specific issues to be addressed. The government provides funding for the royal commission.

↓

Hearings commence of key witnesses. Most hearings are open, but some are closed. Commissioners are assisted by legal counsel to examine witnesses. Hearings can occur in a single location or throughout Australia. People are also able to make written submissions to the royal commission.

↓

Sometimes a discussion paper, issue paper, case study, consultation paper or an interim report is written and released to the public.

↓

A report is prepared and presented to the Governor-General and tabled in Commonwealth Parliament.

↓

Final report released to the public.

THE TYPICAL PROCESS FOLLOWED BY A ROYAL COMMISSION.

RESEARCH

Locate and read *Royal Commissions Act 1902* (Cth), Part 3. Create a table that lists the different offences a person can be charged with under the Act and its associated punishment, as shown below:

Section	Offence	Punishment

To understand in what circumstances a royal commission can be established, how the public make an important contribution to the royal commission process, and what happens after the royal commission hands down a report; we will now examine two completed royal commissions, *Royal Commission into Institutional Responses to Child Sexual Abuse* and *The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*.

9.2 ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

Royal commissions are generally established to achieve one of the following purposes:

- to uncover the truth about something, or
- to provide advice to assist the government to form policy.

Both purposes have a strong connection to the law reform process. To understand how royal commissions contribute to legal change and assist to make laws and processes more equitable, modern, fair and efficient we will now look at the *Royal Commission into Institutional Responses to Child Sexual Abuse*.

But, before we begin to look deeply at this royal commission, we will briefly look at the events preceding its establishment. Since the first priest was imprisoned for the sexual assault of a child in 1978, a small number of priests were convicted of similar crimes around Australia. But, convictions were rare and police investigating the actions of the clergy were facing great challenges uncovering the truth, as those who were accused of crimes against children were being protected. Victorian Police Detective Denis Ryan resigned after being told to stop investigating Monsignor John Day. He would later receive compensation and an apology from the Victorian Police.

In 2006, Newcastle Herald reporter Joanne McCarthy published a series of stories that detailed allegations of members of the clergy committing child sexual abuse and the cover-up by the Catholic Church in the Newcastle-Maitland Diocese. In Victoria, reports published by The Age and ABC concerning victims of child sexual abuse committed by the Catholic Church in Ballarat led to then Premier of Victoria Ted Baillieu commissioning a parliamentary inquiry into religious and other institutional responses to child abuse. In 2012, the Newcastle Herald would launch a campaign—'Shine the Light' that called for a royal commission into institutional responses to child sexual abuse. By the end of that year, then Prime Minister Julia Gillard would announce the royal commission into that very issue.

INQUIRY FOCUS

WHAT CONTRIBUTIONS DID THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE MAKE TO THE PROCESS OF LAW REFORM?

LETTERS PATENT, COMMISSIONERS AND TERMS OF REFERENCE

There have been too many revelations of adults who have averted their eyes from this evil. I believe in these circumstances that it's appropriate for there to be a national response through a royal commission.

PRIME MINISTER JULIA GILLARD, 2012

Since the 1950's concerns about children being abused by religious organisations and government institutions were being raised in courtrooms and government inquires around Australia. On 12 November 2012, then Prime Minister, Julia Gillard, announced the ***Royal Commission into Institutional Responses to Child Sexual Abuse***. The royal commission had bipartisan support.

PRACTICAL APPLICATION

LETTERS PATENT

ELIZABETH THE SECOND, BY THE GRACE OF GOD QUEEN OF AUSTRALIA AND HER OTHER REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH:

TO

The Honourable Justice Peter David McClellan AM,
Mr Robert Atkinson,
The Honourable Justice Jennifer Ann Coate,
Mr Robert William Fitzgerald AM,
Dr Helen Mary Milroy, and
Mr Andrew James Marshall Murray

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the Royal Commissions Act 1902 and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters, and in particular, without limiting the scope of your inquiry, the following matters:

a) what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;

b) what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;

c) what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse;

d) what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims

PRACTICAL APPLICATION CONTINUED...

through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms.

THE LETTERS PATENT, WITNESSED BY QUENTIN BRYCE, GOVERNOR-GENERAL OF THE COMMONWEALTH OF AUSTRALIA, DATED 11 JANUARY 2013, (EXCERPTS).

1. Who are the commissioners? [C]
2. Briefly summarise what the commissioners were tasked to investigate. [C]
3. What evidence can you find to support the view that royal commissions are able to make recommendations critical of the government? How does this demonstrate the concept of accountability? [C] [A]

LEGISLATIVE AMENDMENT

As you can see above, the Letters Patent appointed six commissioners to oversee the royal commission. Given the sensitive nature of the inquiry and the vulnerability of potential witnesses, the government amended the Act to allow commissioners to take evidence in private sessions

In developing the terms of reference for the commission, the government worked with people from all parts of Australia.

One of the key themes that arose in this consultation process was the importance of having hearing processes sensitive to the needs of victims, so that they feel supported in preparing and giving evidence. And this bill will assist the commission to put into place the most appropriate processes to hear the stories of those affected.

The bill will allow the chair of the commission, the Hon. Justice Peter McClellan AM, to authorise a fellow commissioner to hold a private session to receive information from victims and others affected by child sexual abuse. A traditional royal commission hearing setting will not generally serve as the best way to facilitate participation in the royal commission by those people affected by child sexual abuse.

Mr Mark Dreyfus
Attorney-General and Minister for Emergency Management
House of Representatives
Wednesday 13 February 2013, 9:14 am

HEARINGS AND SUBMISSIONS

The royal commission held 57 formal public hearings and 8,013 private sessions. It heard evidence from 1,200 witnesses. The royal commission also received over 25,000 letters and emails in response to an issue the commission identified as being important to the inquiry. Some issues included the:

- working with children check
- redress schemes
- civil litigation
- sexual abuse of children in out-of-home care
- experience of police and prosecution responses
- advocacy and support and therapeutic treatment services

PRACTICAL APPLICATION

CHILD ABUSE ROYAL COMMISSION BEGINS PRIVATE HEARINGS IN NEWCASTLE

SOURCE: ABC NEWS (ABC.NET.AU) 24 FEBRUARY 2015 (EXCERPTS).

The Royal Commission into Institutional Responses to Child Sexual Abuse will this week hear from Hunter region abuse survivors, as it begins four days of private hearings in Newcastle.

32 people will get the chance to tell of their experiences behind closed doors at the hearings, which get underway this morning.

Spokeswoman for the Royal Commission Danielle Redmond says each session will last around an hour, and will see abuse survivors meet with a Commissioner one-on-one.

She says the stories will not be considered formal "evidence", but they will influence the final outcome

"A lot of people who have experienced child sexual abuse in an institution, they told the person about their abuse when they were a child.

"They might have told the institution or people around them, and they weren't believed at the time, because they were children.

"So for a lot of people having a private session they say it's the first time a person in authority has actually believed them."

1. How many people provided evidence in a private hearing in Newcastle? [C]
2. How will their evidence be considered by the royal commission? Why do you think this is the case? [C] [A]
3. What benefits are provided by making provisions to allow people to provide evidence behind closed doors? [A]

ROYAL COMMISSION INTO CHILD ABUSE BEGINS HEARINGS IN ADELAIDE TO EXAMINE SALVATION ARMY HOMES

SOURCE: ANDREW DOWDELL, THE ADVERTISER (ADELAIDENOW.COM.AU) 6 OCTOBER 2015 (EXCERPTS).

Child sex abuse victims at Salvation Army homes were physically beaten or further sexually abused if they reported crimes against them, the Royal Commission into Institutional Child Sexual Abuse has heard.

Opening the 33rd public hearing of the national commission in Adelaide, counsel assisting Sophie David SC, said the hearing would examine abuse at four Salvation Army homes in South Australia, Victoria and Western Australia between 1940 and 1980.

Three former residents of Eden Park Boys' Home in the Adelaide Hills will tell the commission of years of abuse they suffered at the hands of Salvation Army members including Sergeant William John Keith Ellis.

Ms David said Eden Park employees were reported as far back as 1940, when a staff member was jailed for indecent conduct against three boys.

Despite subsequent allegations in the 1950s and 1960s, Eden Park was allowed to continue to house wards of the state, mainly young boys.

Abuse survivor Graham Rundle, who won a civil case against the Salvation Army over abuse he suffered at Eden Park, today told the commission he was first taken to the home as a seven-year old.

1. What institution was the focus of the hearings referred to in the article? [C]
2. What did the witnesses reveal at the hearing? [C]
3. What criminal and civil consequences have been experienced by the victims of abuse? [C]

PRACTICAL APPLICATION CONTINUED...

CHILD ABUSE: DOCUMENTING AUSTRALIA'S SHAME

SOURCE: PHIL MERCER, BBC NEWS SYDNEY (BBC.COM/NEWS) 20 DECEMBER 2016 (EXCERPTS).

The Royal Commission into Institutional Responses to Child Sexual Abuse is an unprecedented investigation into an epidemic of depravity across Australia.

Too ill to travel from the Vatican to Sydney to give evidence, Australia's most prominent churchman, Cardinal George Pell, was questioned via video link by the Royal Commission over what he knew about alleged abuse and cover-ups within the Catholic Church.

For four days earlier this year, the senior Vatican official was quizzed, denying any personal wrongdoing but conceding the organisation had made grave errors.

"I am not here to defend the indefensible," said Cardinal Pell. "The Church has made enormous mistakes, is working to remedy those, but the Church has in many places - certainly in Australia - mucked things up."

When he was 13, John Ellis, a former altar boy, was molested by an Australian monk who was also implicated in a suspected paedophile ring at a former Catholic boarding school in the Scottish Highlands.

"The most important thing for people in being invited to give their own stories and having their stories valued is that somebody cares," Mr Ellis told the BBC news website.

"For many, many years people have been silenced, people have been fearful of what reaction they will get if they were to tell their truth. The overwhelming emotion people have when they have had that opportunity is empowerment."

1. Which institution's actions are being investigated in the article above? [C]
2. Who is Cardinal George Pell? What did he say at the royal commission? [C]
3. What positives came out of the hearings for one of the victims in the article? What does this demonstrate about the importance participating in these hearings has for victims and their families? [C] [A]

CASE STUDIES

The first public hearing of the royal commission was held from 16-19 September 2013. To focus the royal commission hearing, a case study was used. This approach was also used in many other hearings. This case study concerned the responses of organisations, including Scouts Australia, Hunter Aboriginal Services and the then Department of Community Services to the conduct of Mr Steven Larkins. Not only did people provide oral evidence (that is transcribed and made available to the public) but the lawyers for all organisations provided written submissions, an excerpt of which is shown below.

PRACTICAL APPLICATION

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE AT SYDNEY

SUBMISSIONS OF SENIOR COUNSEL ASSISTING THE ROYAL COMMISSION	SUBMISSIONS ON BEHALF OF SCOUTS AUSTRALIA NSW
Available Finding **2. The '*official warning*' against Mr Larkins was not effectively recorded or communicated to members of Scouts Australia NSW.** [18] Mr Currie wrote that he had also removed Mr Larkins from '*face-to-face*' contact with youth members. In evidence, Mr Currie said that Mr Larkins was permitted to attend major Scout activities, and was not required to get permission to go to these events. [19] Mr Currie gave evidence that the action to remove Mr Larkins from face-to-face contact with young Scout members was advised to others through '*word of mouth*' only. Mr Currie said that at the time, he was attending a large number of Scout activities in the Region, and would have known personally if Mr Larkins had breached this condition. He said he did not receive any reports from local Scout groups that Mr Larkins had attended their groups. Mr Currie agreed that it was '*little more than a hope*' that he could communicate his expectations of Mr Larkins to adults at those events. [20] In a letter to Mr Larkins, also on 17 April 1997, Mr Currie confirmed these conditions. Mr Currie wrote that the publicity from the incident at Stockton pool was something the Scout Association could '*well do without*'. He said the Stockton group was in '*damage control*' and that, as Regional Commissioner, one of his responsibilities was improving the public image of Scouts and doing what was '*necessary to keep our good name*'. In evidence, Mr Currie said that in taking the action he did, he would have been '*trying to preserve the good name of Scouts, but we would take the necessary action if required*'.	*Proposed Finding 2* [5] The official warning given to Mr Larkins by Allan Currie, the Regional Commissioner of the Hunter and Coastal Region after the Stockton pool incident (the evidence establishes that neither Scouts nor its staff knew of the allegations of actual sexual abuse involving AA until 2000, when Mr Larkins was promptly suspended, and did not hear of the allegations of actual sexual abuse involving AC until some years after Mr Larkins had resigned from Scouts) was recorded in at least two places. Firstly, it is clear that a copy of the warning was sent to Branch Headquarters (as it was then called), and placed on a file (a type of "personnel file" called a behavioural file) that specifically concerned Mr Larkins. Secondly, a copy of the warning letter was kept by the Area/Region Secretary in the Area/Region Office. [6] For reasons referred to below, at that time it was thought to be at least improper – if not illegal – to disseminate suspicions other than founded on a substantial basis. When a substantial basis was discovered (for example, the allegations made by AA in 2000), Scouts acted promptly. [7] Mr Olah said in his evidence that the behavioural file was available to him in his role as Chief Executive. Mr Olah said that he became aware of the warning letter during his tenure as Chief Executive. [8] Although the allegations dealt with by Mr Currie in 1997 referred to bizarre behaviour, they were not so directly suggestive of actual abuse as to have required immediate action, nor was it suggestive of the likelihood of actual abuse in the future.

1. Which two parties made the submissions above? [C]
2. Why is it important that both parties have the opportunity to make a submission? [A]
3. What issues are in dispute in the submissions above? [C] [A]
4. According to the submission made by the Senior Counsel assisting the royal commission how did Mr Currie and Scouts NSW fail children? [A]

REPORT AND RECOMMENDATIONS

The final part of the process is the releasing of a report to the public. The report contains recommendations. These recommendations generally address the problems and issues identified by the royal commission, but they can also recommend people are charged with criminal offences. The *Royal Commission into Institutional Responses to Child Sexual Abuse* handed down its report on 15 December 2017- five years after it first began. The final report was made up of 17 volumes, was thousands of pages long and contained over 400 recommendations. Some of recommendations concerned:

- working with children checks
- redress and civil litigation
- child safety
- reporting institutional response and reporting
- improving record keeping and information sharing
- support and therapeutic services for survivors
- addressing the issue of children's harmful sexual behaviours
- ensuring child safety in contemporary out of home care, schools, community groups, contemporary detention facilities and religious institutions

ROYAL COMMISSION RECOMMENDATIONS

Introduce new laws: A number of existing professions (such as religious ministers and school counsellors) must, by law, report sexual abuse.

Introduce new criminal offences: New criminal offences for failing to protect children from sexual abuse or failing to report child sexual abuse should be enacted.

Permanently remove religious ministers convicted of sexual abuse

Force religious minister to report information shared during a confession.

Expand school's liability: Schools should be able to be sued for sexual abuse committed by their staff, even in circumstances where the school was not negligent.

Create a national office for child safety

Establish a legal service for victims to access.

As you can see royal commissions provide a detailed plan for how the law and its associated legal processes can be improved to benefit the community. But, the process of law reform can be challenging, particularly if it involves different levels of government and independent organisations. The article below describes the progress the government and institutions have made on implementing some of these legal reforms.

PRACTICAL APPLICATION

ANNUAL PROCESS REPORT ON IMPLEMENTATION OF ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE RECOMMENDATIONS

SOURCE: MEDIA RELEASE, (ATTORNEYGENERAL.GOV.AU), 14 DECEMBER 2018 (EXCERPTS)

Since the release of the Final Report, significant progress has been made. Action is being taken on all recommendations where the Australian Government is responsible, with work continuing in partnership with states and territories to ensure children are safe from abuse in institutional care.

Key achievements as outlined in the Annual Progress Report include:

- establishing the National Office for Child Safety – July 2018
- commencement of the National Redress Scheme – July 2018
- finalising the National Principles for Child Safe Organisations for Council of Australian Government endorsement and developing National Standards for Working with Children Checks with states and territories
- opening the Australian Centre to Counter Child Exploitation – July 2018
- national Apology to Victims and Survivors of Institutional Child Sexual Abuse – October 2018
- implementing the Commonwealth Child Safe Framework across Australian Government entities.

The Prime Minister has also written to all institutions from which the National Redress Scheme has received applications demanding they sign up urgently.

CHILD SEXUAL ABUSE SURVIVOR DIES BEFORE REDRESS APPROVED; OTHER TERMINALLY ILL VICTIMS WAITING

SOURCE: PHILIPPA MCDONALD, ABC NEWS ONLINE (ABC.NET.AU) 7 DECEMBER 2018 (EXCERPTS)

Child sexual abuse survivor Geoff Meyers died before seeing a cent through the National Redress Scheme, as figures reveal only 1 per cent of people have received a payout so far.

While Social Services Minister Paul Fletcher has described the scheme as "up and running" there are major hurdles to thousands of survivors making claim.

"At the moment about 50 per cent of the applications that have been received from survivors relate to institutions that are not yet within the scheme," Mr Fletcher told the ABC.

While the Anglican Church partly signed on today, the Uniting and Catholic churches are yet to participate.

In an interview with the ABC, the chair of the Anglican Representative National Redress Scheme Ltd, Garth Blake SC, said he expected by the middle of next year a majority of entities will have joined the scheme.

Mr Blake accepted the process had taken time but said identifying every church-run institution had been a complex and lengthy process.

PRACTICAL APPLICATION CONTINUED...

1. What new laws were recommended by the royal commission? [C]
2. What recommendations specifically help victims of child abuse? [C]
3. What statutory body did the royal commission recommend be introduced? Has the government acted on this recommendation? [C]
4. Are there any recommendations that the government can't influence through legal reform? What does this demonstrate about some of the shortcomings of the royal commission process? [A]
5. Explain the government and victim's perspective on the implication of one of the key recommendations, to introduce a national redress scheme. Why is it difficult to implement? What consequences may the key stakeholders suffer if the scheme does not achieve its aims? [A]
6. Choose one of the recommendations listed above (or in the infographic). Do you support its introduction? Why should this be introduced? [E]

CRIMINAL PROSECUTION AND PUNISHMENT OF THOSE WHO COMMITTED CHILD SEXUAL ABUSE

The head of the royal commission, Justice Peter McClellan, referred hundreds of allegations of child sexual abuse to law enforcement authorities to investigate. It is difficult to ascertain the number of people who have been convicted of child sexual abuse as a result of *The Royal Commission into Institutional Responses to Child Sexual Abuse*, as there is no specific report that answers this question. In 2017, The Guardian reported that 127 prosecutions had been undertaken to date, whilst the ABC reported 27 prosecutions against Catholic Church officials had begun. We will conclude this section, by examining two decisions that have been made after the royal commission. The first case is said to stem from the royal commission. The other case involves an appeal that examines the real-world application of an offence similar to one raised as a recommendation.

CASE STUDY

R v Mithen [2018] (Unreported judgment, District Court of Western Australia, 15 January 2019)

Facts: Father Allan Mithen committed two acts of indecent assault of an Indigenous girl on two separate occasions in 1965 when he was a superintendent at the Wandering Mission in Western Australia.

One of the assaults occurred after a sexual education class that Mithen had introduced at the mission. After the assault Mithen told the victim she was bad and sent her to confession to admit her sins. At the time he was 26 years old. At sentencing he was 81.

Legal issue: What sentence should Mithen receive?

Decision: Mithen pleaded guilty to the offences. District Court Judge Laurie Levy spoke about the impact Mithen's actions had on the victim, 'Rather than protecting her, those involved in running the mission subjected her to physical, emotional, psychological and sexual abuse… she was being offended against by you in a vile manner, purely for your sexual gratification in circumstances where it was your role to spiritually guide her and protect her…you then sent her to confession to admit the sins that you, as a representative of the Church, had procured her to commit.'

In her victim impact statement, W wrote that she was 'confused and sickened' by the abuse.

His Honour sentenced Mithen to 13 months imprisonment, but suspended the term for 15 months after taking into account his age, significant medical problems, guilty plea and rehabilitation. His Honour also acknowledged that Mithen had made significant contributions to the Catholic and Indigenous community. He will be reported to the sex offenders register.

CASE STUDY

Dr Hannah McGlade, a senior Indigenous Researcher Fellow at Curtin University, said that the case is the first in Western Australia of a non-Indigenous perpetrator being found guilty of the sexual assault of children taken from their parents and placed in care.

1. Where was Mithen working as a priest when he committed these offences? [C]
2. What sentence did Mithen receive? What factors did the judge take into account? [C]
3. Do you believe this sentence is just and fair in the circumstances? Why or why not? [A]
4. Complete some research to see if you can locate information on how the Indigenous community and other supporters of the victim reacted to the sentence. What did they say? Why did they react in this way? [S] [A]

R v Wilson [2018] NSWDC 487 (6 December 2018)

Facts: On 22 May 2018, Philip John Wilson, was convicted in the Local Court by Magistrate Stone for failing to report his knowledge that a Catholic priest, James Fletcher, had sexually abused a child. It was alleged that Peter Creigh, then a 15 year old altar boy, went to Father Wilson and told him that he had been abused.

Wilson was sentenced to twelve months imprisonment with a non-parole period of six months, which Magistrate Stone directed be served by means of a Home Detention. Wilson lodged an appeal against his conviction.

At the time of his conviction, the finding of Magistrate Stone was considered a landmark moment, as *The Royal Commission into Institutional Responses to Child Sexual Abuse* recommended that failing to report child sexual abuse should become a criminal offence in all States and Territories. When he was charged, Wilson was the Archbishop of Adelaide.

Legal issue: Did the Crown prove beyond reasonable doubt that Wilson failed to disclose allegations about a priest (who was later charged and convicted of child sexual offences) to the police?

Decision: The New South Wales District Court Judge Ellis upheld Wilson's appeal. At the beginning of his judgment his Honour Judge Ellis stated:

> *…it is fair to say that the Catholic Church as an institution has a lot to answer for in terms of its historical self-protective approach to children complaining of sexual abuse at the hands of some of its priests. However, Philip Wilson when he appears before this court is simply an individual who has the same legal rights as every other person in our community. It is not for me to punish the Catholic Church for its institutional moral deficits or to punish Philip Wilson for the sins of the now deceased James Fletcher by finding Philip Wilson guilty simply on the basis that he is a catholic priest [at Paragraph 10].*

> *…it is important to appreciate that the media's interest in the prosecution of institutional sexual abuse or its cover up should not be permitted to undermine judicial independence and the rule of law [at Paragraph 15].*

It is important to note that Wilson stated that the victim did not tell him Fletcher had committed sexual assault. If he was told, His Honour believed that it could be argued that Wilson did not form a belief about the guilt of the alleged perpetrator, as 'being suspicious that an allegation may be true…falls well short of actually believing that the allegation is in fact true.' His Honour also found that one of the key witnesses in the case, Mr Creigh, made 12 inconsistent statements about telling Wilson of the abuse. This was raised reasonable doubt as to whether the Crown had proved their case.

Wilson's conviction was quashed and he was discharged.

CASE STUDY

1. What criminal offence is at the center of this case? What sentence did he receive? [C]
2. Why was Wilson's appeal upheld? [C]
3. What is your reaction to the quote included in the case study of New South Wales District Court Judge Ellis? Do you agree or disagree with his view? Why? [E]
4. NSW and Victoria are the only two states that have laws that make failing to report criminal activity a criminal offence. Should Queensland introduce this offence? Why or why not? [E]
5. What problems does this case highlight about the issues of proving this criminal offence? [A]
6. When Wilson was convicted and punished, many felt his successful prosecution meant that matters arising from the work of the Royal Commission might have more success and that others who failed to report abuse might not be beyond the reach of the criminal justice system. What now might be concluded by this decision? [E]

9.3 THE ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

The *Royal Commission* into Misconduct in the Banking, Superannuation and Financial Services Industry, headed by the Honourable Justice Hayne, was established on 14 December 2017. As the name suggests, it was tasked with inquiring into the behaviour of a number of financial industries. As we discussed earlier royal commissions are usually called when a social, legal and economic issue of great importance requires in-depth investigation. This royal commission was influenced by a number of factors, including people speaking out against the unethical and illegal actions of banks and financial institutions, political pressure and investigative reporting, as shown below.

PRACTICAL APPLICATION

BANKING BAD

SOURCE: ADELE FERGUSON, FOUR CORNERS/FAIRFAX, ABC FOUR CORNERS (ABC.NET.AU/4CORNERS) 5 MAY 2014 (EXCERPTS)

This is a story about ordinary Australians taking on Australia's biggest bank. It begins with a dying man who believed the Commonwealth Bank wronged him and who was forced into a David and Goliath legal battle in the last six months of his life.

"It's going to be very hard for me to trust anyone at any bank at any given time because they were just ruthless... They knew he was an easy target and they just went for it," his daughter told Four Corners.

This week in a joint Four Corners/Fairfax investigation, reporter Adele Ferguson examines a sales-driven culture inside the Commonwealth Bank's financial planning division that has been described as profit at all cost - a culture that has been built on commissions.

The program also looks at the wilful practices of another financial planner, whose annual salary was almost half a million dollars. The CBA protected him until a whistleblower and several of his clients fought back.

The planner's customers, mostly retirees, believed the Commonwealth Bank when it said it was 'the people's bank'. But when they saw their life savings disappearing as a result of bad advice, they knew they had to act.

PRACTICAL APPLICATION CONTINUED...

This story reveals how those customers who believed they were wronged took on both the bank and the corporate regulator, ASIC, and won. There are others who didn't fight and may have lost their life savings.

The CBA says it has since cleaned up its act and there is no place for so-called 'rogue' financial planners.

The Federal Government also wants to make changes to the financial advice legislation that would reintroduce some of the commissions and kickbacks that had been banned under the previous government. If the reforms go ahead it will potentially mean financial planners are less, not more, accountable to their clients.

1. Media stories, such as this one, raised concerns about unethical behaviour in the banking industry. According to the program's overview, what did the banking and financial industry do to cause many to call for a royal commission? [C]
2. What criticisms were leveled against the government and ASIC in the program? How might this demonstrate that royal commissions play an important role in holding governments to account? [C] [E]

To view the program visit abc.net.au/4corners/banking-bad/5433156

NICK XENOPHON CALLS FOR JAIL TERMS FOR BANKING BOSSES COMPLICIT IN MONEY LAUNDERING

SOURCE: HENRY BELOT, ABC NEWS ONLINE (ABC.NET.AU), 6 AUGUST 2017 (EXCERPTS)

Scandal renews calls for banking royal commission

Nationals senator John Williams will again call for a royal commission into the banking industry at the Coalition party room next week.

"We seem to go from catastrophe to catastrophe with some of the institutions, and it doesn't help their cause in the public opinion arena and that's why you hear so many people call for it, as I've said, I wished we had it years ago when I first called for it," he told the ABC.

"It's a message to all financial institutions — keep an eye on the money, do the right thing or they may be assisting accidentally in financing terrorist organisations overseas, that is a big worry."

So far, scandals involving the Commonwealth Bank's insurance arm, Comminsure, and banks overcharging clients for services have not prompted a royal commission.

1. According to the article, who will call for a royal commission? What party are they part of? Thinking back to the previous article, does this Member of Parliament support or oppose the government's actions? [C] [A]
2. What reasons are given in the article to support a royal commission? [C]
3. Why do you think calls for a royal commission have been resisted by the government so far? [E]

WHISTLEBLOWER JEFF MORRIS SAYS 'NOTHING WILL CHANGE' WITHOUT A ROYAL COMMISSION INTO BANKS

SOURCE: KARA VICKERY, NEWS.COM.AU (NEWS.COM.AU) 9 JUNE 2016 (EXCERPTS)

THE man who exposed the Commonwealth Bank financial planning scandal has lined up behind Labor calling for a Royal Commission into banks.

Financial planner Jeff Morris — who eight years ago turned whistleblower against his employer prompting a damning Senate inquiry — is set to star in a television and online advertising campaign backing a banking Royal Commission.

PRACTICAL APPLICATION CONTINUED...

Borrowing a line from Labor, who have vowed to hold a Royal Commission into financial sector misconduct, Mr Morris claimed Prime Minister Malcolm Turnbull was "on the side of banks".

The advertisements will start today and are understood to be funded by left-leaning group GetUp!!!!!

Earlier this week Labor jumped on news ASIC had launched legal action against the National Australia Bank over rate rigging, claiming it was further evidence of the need for a Royal Commission.

1. Which political party supports a royal commission? [C]
2. Has the behaviour of the banks been investigated before? If the answer is in the affirmative, explain who was involved. [C]
3. Do you think it is right for the opposition, the media and lobby groups to apply pressure for a royal commission to be established? [E]

PUBLIC HEARINGS AND REPORTS: CONSUMER LENDING PRACTICES

The royal commission conducted seven rounds of public hearings over 68 days, called more than 130 witnesses and reviewed over 10,000 public submissions. To examine this royal commission, its recommendation and what has occurred as a result of its report, we will focus on a specific issue, the paying of commissions to mortgage brokers.

INQUIRY FOCUS

WHAT DID THE ROYAL COMMISSION CONCLUDE ABOUT COMMISSIONS BEING PAID TO MORTGAGE BROKERS AND HAVE THESE FINDINGS CONTRIBUTED TO LAW REFORM?

On 14 December 2017, the Governor-General appointed former High Court Judge, the Honourable Kenneth Hayne to inquire into misconduct in the banking, superannuation and financial service industry. One of the terms of reference in *The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* included investigating:

(h) Whether any further changes to any of the following are necessary to minimise the likelihood of misconduct by financial services entities in future (taking into account any law reforms announced by the Commonwealth Government):

(i) the legal framework;

(ii) practices within financial services entities;

(iii) the financial regulators;

In the early and late stages of the public hearing process (as well as the media reports on the recommendations handed down), home loans and in particular, the use of mortgage brokers, came under the spotlight, as shown below.

WHAT IS A TRAILING COMMISSION?

When a mortgage broker (who is not employed by a lender) helps a person secure a home loan from a lender (such as a bank or building society), the lender pays the mortgage broker a commission. Over the life of the loan the mortgage broker continues to receive a commission from the lender. This is referred to as a trailing commission.

PRACTICAL APPLICATION

'ECONOMICAL WITH THE TRUTH': CBA RAPPED OVER BROKER COMMISSIONS

SOURCE: RUTH WILLIAMS, THE SYDNEY MORNING HERALD (SMH.COM.AU) 15 MARCH 2018 (EXCERPTS)

The head of the banking royal commission has questioned whether the Commonwealth Bank is being "economical with the truth" in failing to tell customers the value of commissions it pays to mortgage brokers in return for selling its products.

The bank had been unsure it could provide accurate information, Mr Huggins said in response to questions from counsel assisting, Rowena Orr QC about why it was not already doing so, but he said "improvements could be made". Mr Huggins acknowledged it was something that the bank "could do".

Commissioner Kenneth Hayne asked whether it was fair to say the bank was being "economical with the truth" in not disclosing the value of the commissions. "That's not our intention in setting it up this way," Mr Huggins said, acknowledging there were ways of providing "more transparency to the customer".

Later in the day, Mr Huggins was probed over evidence of lax monitoring of CBA's network of mortgage brokers, after an internal audit uncovered what Ms Orr dubbed "pretty obvious anomalies" in loan documentation.

The royal commission is focusing on the bank's relationships with its networks of mortgage broker "head groups", including how it rewards brokers for selling its products. Ms Orr's questions have sought to highlight the conflicted nature of payments like upfront and trail commissions, which pay brokers more money based on the size and duration of the loans they sell. Commissioner Hayne has asked questions about flat-fee payments as an alternative to commissions.

1. Who questioned Mr Huggins? [C]
2. What was Mr Huggins being questioned about during the hearing? [C]
3. What alternative approach does Commissioner Hayne raise during the hearing? [C] [A]

THE WEEK THAT WAS: ROYAL COMMISSION HEARS FROM CBA, WESTPAC & ASIC

SOURCE: PETRINA BERRY, CANSTAR (CANSTAR.COM.AU) 23 NOVEMBER 2018 (EXCERPTS)

The corporate regulator's reluctance to pursue the major banks, Commonwealth Bank's sale of dubious insurance policies and Westpac's opposition to a number of potential industry reforms were among the key issues heard during the banking royal commission's latest public hearings.

Westpac CEO Brian Hartzer told the commission that the bank opposed many of the royal commission's suggested reforms, including banning mortgage brokers' commissions, banning trailing commissions for intermediaries and making industry codes legally enforceable.

He said this did not mean that the bank was opposed to change and admitted that the major banks' move into the wealth management business had not resulted in good outcomes for customers.

PRACTICAL APPLICATION CONTINUED ...

1. Which banks were being questioned at the public hearing in the article above? [C]
2. In the article what evidence is there that the government's own organisation was also being investigated? [C]
3. What potential industry reforms were being investigated further? How were the banks responding to these reforms? Why do you think they were reacting in this way? [C] [E]

MORTGAGE BROKERS STRUGGLE TO MAKE CASE FOR TRAILING COMMISSIONS THAT HAYNE WANTS GONE

SOURCE: EMMA ALBERICI, ABC NEWS ONLINE (ABC.NET.AU) 14 FEBRUARY 2019 (EXCERPT)

The royal commission has recommended that the borrower, not the lender, should pay the mortgage broker a fee for arranging a loan, to ensure the broker is working for the customer and not the bank.

Trailing commissions are 'money for nothing'

It's that trailing commission that royal commissioner Kenneth Hayne has dubbed "money for nothing".

Among the 76 recommendations in his final report, Mr Hayne suggested trailing commissions be banned.

On Twitter, Ian Armstrong — who spent 36 years working at a couple of the major banks, for much of that time as a relationship manager helping clients with loans — said he concurred with the royal commission findings.

"I left the industry early under the stress of the unrelenting sales culture. It was unethical and targets unsustainable. Experience meant little. If you could push product, you were a star."

That model extends to mortgage brokers, through the commission system.

Mr Hayne concluded that "the present system of remunerating mortgage brokers is conflicted remuneration". The payment, he said, is one that "could reasonably be expected to influence the choice of financial product recommended to clients".

In that system, loans are sold for commission rather than as part of the daily job of the old-style bank managers, who were paid a salary and were keen to please their loyal customers by looking out for their best interests

1. What key recommendation did the royal commission make regarding mortgages? Why was this recommendation made? [C]
2. What occurred in the past regarding loans? What positives of this approach are provided in the article? [C]
3. What possible implications do you think this recommendation might have on people seeking a loan, banks and mortgage brokers? You may wish to discuss this question with members of your family that have a mortgage. [C] [A]

GOVERNMENT FLIPS ON ROYAL RECOMMENDATION ON MORTGAGE BROKERS

SOURCE: KATHARINE MURPHY, THE GUARDIAN (THEGUARDIAN.COM) 12 MARCH 2019 (EXCERPTS)

The Morrison government, under heavy fire from politically influential mortgage brokers, has backed down on a key recommendation from the Hayne royal commission, and will no longer ban trailing commissions from 2020.

The flip was revealed by the treasurer, Josh Frydenberg, after a cabinet meeting on Tuesday. He told reporters the government had resolved not to prohibit trail commissions on new loans, but rather review their operation in three years.

PRACTICAL APPLICATION CONTINUED ...

Frydenberg said the government changed its position because "we are concerned about the impact on competition in the mortgage-lending market". He said brokers played a "critical role" in the home lending market, and declared the government "stands side by side with mortgage brokers".

On the day the findings were handed down, the government said it would prohibit the payment of trail commissions for new loans from July 2020 – which prompted an immediate warning from the sector that the changes would cripple their business model and decrease competition in the home loan market, hurting consumers.

Labor, in its response to the Hayne report, initially indicated it would implement all the recommendations, then under pressure from the industry, also backflipped, proposing a fixed-rate commission for mortgage brokers rather than accept the banking royal commission recommendation to apply user-pay fees to the service.

Brokers are well organised and politically influential, and have been lobbying intensively since the royal commission findings were handed down.

1. Outline the Government and Opposition's view on the use of fixed-rate commissions paid by lenders. Are they the same or different? [C]
2. How has the position taken by each party changed? Why? [C]
3. Will the laws regarding commissions paid to mortgage broker's change, as recommended by the royal commission? Why or why not? What does this highlight about the benefits or shortcomings of the royal commission process? [C] [E]
4. What has the Government promised to do regarding this recommendation? [C]

In the aftermath of the royal commission, the Australian Securities and Investments Commission (ASIC) shared that they were completing almost 50 investigations into misconduct committed by companies and individuals. One of the first criminal prosecutions involves the National Australia Bank (NAB).

PRACTICAL APPLICATION

ASIC TAKES NAB TO COURT OVER FEE FOR NO SERVICE BREACHES

SOURCE: JOANNA MATHER & JAMES FROST, AUSTRALIAN FINANCIAL REVIEW (AFR.COM) 6 SEPTEMBER 2018 (EXCERPTS)

The Australian Securities and Investments Commission (ASIC) is suing two of NAB's wealth management entities for charging superannuation clients fees for services that were not provided.

NAB's chief legal counsel Sharon Cook confirmed the action had been launched and the bank was reviewing its options.

The regulator alleges wrongdoing in relation to $100 million in fees deducted from the accounts of hundreds of thousands of members.

ASIC has sought at least 50 declarations involving communications with members it says were false and misleading in breach of 12DA of the *ASIC Act* and which can attract a penalty of between $1.1 million and $1.7 million per breach.

NAB is the first bank to be taken to court over the industry-wide fee for no service scandal, the extent of which could exceed $1 billion, ASIC has estimated.

The civil action is the first to be launched under ASIC chairman James Shipton.

1. Who is prosecuting NAB? [C]
2. What did the NAB allegedly do? What is the legislative basis for the criminal offence? [C]
3. What penalty might NAB receive? [C]

RESEARCH

One of the first individuals to face criminal prosecution is Financial Director Terry McMaster (Dover Financial). Conduct some research into this case, developing a case note that includes an overview of the facts (including the legislative basis of the criminal offence(s) he is charged with), the legal issue(s) and any outcome (if decided). [S] [C] [A]

If an outcome is known, do you think it was just? If not, what penalty do you think he should receive? [E]

9.4 OTHER SIGNIFICANT ROYAL COMMISSIONS

The royal commissions into the banking and finance industry and institutional responses to child sexual abuse are just two examples. In this textbook we have also briefly examined the ***Royal Commission into the Protection and Detention of Children in the Northern Territory*** and Queensland's ***Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry)***. Over Australia's history, there have been over 130 royal commissions that have investigated significant social, economic and legal issues or events. To understand the scope of the issues royal commissions investigate, we will now briefly cover some other significant inquires below.

Ch 7.3

ROYAL COMMISSION INTO TELEVISION (1953-1954)

On 16 September 1956 the first regular television transmission began with the statement, 'Good evening and welcome to television.' Three years earlier, then Prime Minister Sir Robert Menzies established a royal commission to investigate many issues including the cost of television, its perceived impact, how many commercial television stations could be established, who should be awarded television licences and television program standards. Many organisations and individuals made written submissions, both supporting and arguing against the introduction of commercial television in Australia. The royal commission would play an integral role in providing the government with guidance to establish a television policy.

ROYAL COMMISSION INTO THE CHAMBERLAIN CONVICTIONS (1986-1987)

The death of two-year old Azaria Chamberlain at Uluru gripped Australia. Azaria's parents, Michael and Lindy Chamberlain, were found guilty of her death and being an accessory after the fact, despite their claim that their daughter had been taken by a dingo and killed. Doubts about some of the evidence used in the case led to the Commonwealth and Northern Territory Governments appointing a joint royal commission. The royal commission found that there were, 'serious doubts and questions' about their convictions. The Northern Territory Court of Appeal would later overturned their convictions. However, it took until a 2012 coronial inquiry (the fourth inquest into this case) to conclude a dingo was responsible for Azaria Chamberlain's death.

ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY (1987-1991)

The *Royal Commission into Aboriginal Deaths in Custody* studied and reported on the underlying social, cultural and legal issues behind the deaths in custody of 99 Aboriginal and Torres Strait Islanders. The final report concluded that the deaths were not due to police violence, but that, 'glaring deficiencies existed in the standard of care afforded to many of the deceased.' It found that the rate at which Aboriginal people were taken into custody was overwhelmingly different to non-Aboriginal people. The royal commission made over 300 recommendations, including that imprisonment should be used as a sanction of last resort, that people should be arrested only when no other way of dealing with the problem existed, a formal process of reconciliation should be initiated and medical attention should be sought immediately if any doubt arises about a person's condition. Sadly, Indigenous people continue to die in custody. The National Deaths in Custody Monitoring and Research Program at the Australian Institute of Criminology (one of the outcomes of the royal commission) reported that in 2016-17, 16 Indigenous people died in prison custody.

9.5 ANALYSING ROYAL COMMISSIONS

Royal commissions can play an important role in holding the government to account, as they can make findings or recommendations critical of the government. Although they are not a judicial body and their recommendations are not legally binding they can have a profound impact on society by encouraging momentum for law reform. The royal commission process also allows members of the public to tell their stories.

But, royal commissions haven't escaped criticism. In 2009 the Australian Law Reform Commission (ALRC) handed down a report that investigated the operation of the *Royal Commissions Act 1902* (Cth). **The report found that they are costly and can take some time to complete (although they are generally given a due date)**. Another concern is the fact that governments aren't obligated to change the law or legal processes- we saw an example of this regarding the recommendation to remove trailing commissions given to mortgage brokers in the royal commission into financial institutions misconduct. In an article published on *The Conversation*, Scott Prasser, Executive Director of the Public Policy Institute noted that '…concerns about the powers of royal commissions, [and] the lack of review of their processes…' continue to exist. Legal academic Dr George Gilligan pointed out that royal commissions have become a 'crisis management' strategy - a way for governments to give the appearance of doing something when faced with a controversial problem.

PRACTICAL APPLICATION

ROYAL COMMISSION A WITCH-HUNT: UNIONS

SOURCE: ADAM BENNETT, AAP AND HERALD SUN (HERALDSUN.COM.AU) 9 FEBRUARY 2014 (EXCERPTS).

LABOR leader Bill Shorten says any royal commission into the unions should also focus on dodgy employers, but corruption claims should be investigated by police.

Prime Minister Tony Abbott will reportedly announce a royal commission into unions this week, with the terms of reference to investigate bribes, secret commissions, corruption and slush funds.

PRACTICAL APPLICATION

Former High Court justice John Dyson Heydon will head the 12-month inquiry, which will have the power to compel union leaders to give evidence, News Corp Australia reports.

Mr Abbott said it was necessary at times to "shine a great big spotlight" into the workings of public organisations.

Mr Shorten called for a joint police taskforce into allegations officials had been involved in bribery, extortion and kickbacks, and linked to organised crime on major projects such as Sydney's Barangaroo development.

The royal commission was a political stunt that would cost more than $100 million, he said.

ACTU president Ged Kearney dubbed the commission an expensive "witch-hunt", and said it was police who should probe union corruption.

1. What will the royal commission announced by then Prime Minister Tony Abbott investigate? [C]
2. Undertake some research into this royal commission, answering the following questions:
    a. What was it called?
    b. On what date was it established and when did it hand down its final report?
    c. How many hearing days did this royal commission have?
    d. Approximately, how much did this royal commission cost?
    e. Briefly describe some of the key findings of this royal commission. [C] [S]
3. In the article, who is rumoured to be the commissioner? What benefits and limitations might appointing a judicial officer have on an inquiry? [C] [A]
4. How do the various stakeholders noted in the article view the inquiry? Why might their viewpoints differ? [A]
5. One concern raised about royal commissions is that they can be politically motivated. If this concern is justified, how may the integrity of a royal commission be affected? [E]

RESEARCH

In the chapter entitled, 'Australian Royal Commissions and Public Inquiries: Their Use and Abuse and Proposals for Reform' author Scott Prasser (pg. 248) stated:

Nevertheless, public inquiries of the inquisitional royal commission type still remain the "institution of last resort" for governments when all other bodies are deemed unsuitable for handling issues of high political salience and sensitivity.

Why do you think royal commissions are viewed by the author as an option of last resort? [E]

REVIEW

1. Describe the following key terms in your own words:
   a. consultations
   b. royal commission
   c. submissions
   d. terms of reference [C]
2. Explain the role and purpose of a royal commission. [C]
3. Outline the process followed by a royal commission. [C]
4. What benefits and shortcomings does the royal commission process possess? [A]
5. Explain the role royal commissions play in influencing legal change and law reform. How do they contribute to the creation of just, fair and efficient laws and legal processes? What criticisms are levelled at royal commissions? [C] [A]
6. Describe the cause and effect of one royal commission of your choice. [C] [A]

TOPIC 2: LAW REFORM WITHIN A DYNAMIC SOCIETY

CHAPTER 10: CORONIAL INQUIRIES AND SPECIALIST TASKFORCES

FOCUS SUBJECT MATTER

10.1 CORONIAL INQUIRIES

10.2 SPECIALIST TASKFORCES

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the circumstances in which coronial inquiries are conducted by coroners;
- the role of the coroner;
- the importance of recommendations made by the coroner in reforms to the law;
- the purpose of specialist taskforces in Queensland; and
- the importance of the recommendations of specialist taskforces in the reform of the law.

10.1 CORONIAL INQUIRIES

In Queensland coronial inquiries are conducted by coroners who are magistrates in Queensland. The most senior coroner in Queensland is the State Coroner who is appointed by the government. A Deputy State Coroner is appointed as well.

It is the coroner's duty to investigate some deaths in Queensland. Coroners do not investigate all deaths. A coroner has a duty to investigate '**reportable deaths**'. Reportable deaths are defined in s7 of the *Coroners Act 2003* (Qld), and are those where:

a. It is not known who the person is; or

b. The death was a violent or otherwise unnatural death; or

c. The death happened in suspicious circumstances; or

d. The death was a healthcare related death; or

e. A cause of death certificate has not been issued and is not likely to be issued, for the person; or

f. The death was a death in care; or

g. The death was a death in custody; or

h. The death happened in the course of or as a result of police operations.

Once the coroner has been notified of a reportable death the coroner conducts an inquiry into the circumstances of the death to establish:

- the identity of the person who has died;
- how the person died;
- when the person died;
- where the person died; and
- what caused the person to die?

The coroner coordinates each step of the inquiry. Police officers help the coroner gather evidence. An initial report is prepared. After considering the initial report the coroner then may ask the police to investigate further. This may include getting more medical records and other statements from witnesses. In most cases the coroner orders an **autopsy** to assist in answering the questions he or she needs to. **The coroner then decides whether an inquest is required. The inquest is a court hearing conducted by the coroner.**

Not all reportable deaths result in an inquest, in fact, very few coronial inquiries proceed to an inquest. However, an inquest must be held if any of the following occur - *Coroners Act (Qld)* s27:

- the death occurred in custody;
- the death occurred while a person was in care and there are issues about the care;
- the death occurred as a result of police operations (unless the coroner considers an inquest is not needed); and
- the Attorney-General of Queensland, the State Coroner or the District Court directs that an inquest be held.

One of the considerations of the coroner in deciding whether to hold an inquest is the public interest. There might be some serious doubt about the cause and circumstances of death or more commonly a coroner may believe an inquest is needed so that future deaths of the type that have occurred may be avoided by the conduct and recommendations arising from an inquest.

If the coroner decides not to conduct an inquest into a death, a person may apply to the coroner investigating a person's death to hold an inquest into the death (*Coroner's Act 2003* (Qld) s30).

An inquest is not a typical court case. Its purpose is not to determine guilt or civil liability. It is therefore conducted in a different manner to the usual court cases in Queensland.

The coroner identifies the issues to be investigated and the means of investigation, which is usually a police investigation. A coroner determines who will be given leave to appear at the inquest and what witnesses will give evidence. It is his/her role to instruct police in what inquiries should be made, to require witnesses to answer questions and to obtain reports from experts. A coroner may order that a post-mortem be performed (autopsy). The inquest is not bound by the rules of evidence. Interested parties are commonly represented by lawyers at the inquest.

After the inquest is completed the coroner brings down his/her findings. As a matter of law the coroner must not include in his/her findings any statement that a person is or may be guilty of an offence or civilly liable for some action (s45(5)). Apart from making the usual findings about how and when and where the person died, and what caused the person to die, the coroner is entitled to make further comments under s46. The coroner can comment on anything connected with the death investigated at an inquest, that relates to:

a. Public health or safety; or

b. The administration of justice; or

c. Ways to prevent deaths from happening in similar circumstances in the future.

A coroner quite often makes recommendations about these matters after the inquest.

CASE STUDY

Coroner's Court of Queensland

Findings of Inquest

Citation:	Inquest into the disappearance and death of Daniel James Morcombe
Title of Court:	Coroner's court
Jurisdiction:	BRISBANE
File No:	2009/1210
Delivered on:	5 April 2019

Facts: The facts in the police investigation have been set out more fully in *Topic 2 Criminal Investigation Process in Legal Studies for Queensland, Volume 1 – Eighth Edition.* In brief, Daniel disappeared on 7 December 2003. He had planned to walk to a bus stop to catch a bus to the Sunshine Plaza Shopping Centre. More than seven years after his disappearance skeletal remains belonging to Daniel were recovered at a location around 40 kilometres from where he had been waiting for the bus. Daniel was killed within one hour of his abduction. Brett Cowan was arrested and convicted of Daniel's murder. The inquest commenced in 2010 and the final findings were brought down on 5 April 2019 by Mr Terry Ryan, the State Coroner.

Findings: The findings were that Daniel Morcombe died on 7 December 2003, that the place of death was 510 Kings Road, Glasshouse Mountains; that the date of death was 7 December 2003 and that he had been killed by Mr Cowan; and the cause of death was asphyxiation as a consequence of neck compression.

Recommendations

1. The State Coroner made recommendations about the need for future police procedures to review investigations in long and complex cases. He pointed

CASE STUDY CONTINUED...

out that the reviews completed throughout the investigation of Daniel's disappearance, particularly the review completed in March 2011 by Detective Senior Constable Linwood, demonstrated the value a fresh set of eyes can play in a lengthy and complex investigation. He found that reviews mitigate against the risk of investigative bias and can prevent 'tunnel vision'. As to the additional burden of such reviews on police, the coroner had regard to the fact that over 80% of murders in Queensland are cleared within twelve months by the police. Having regard to that fact any mandatory review requirement that he would be recommending after twelve months, would affect fewer than five investigations each year and a relatively small number of unresolved high risk missing persons investigations. He therefore made the following recommendation:

- 'I recommend that the Queensland Police Services Operational Procedures Manual be amended to mandate an independent review in circumstances of a homicide or suspicious high risk missing person investigation remaining unsolved for a period of twelve months after the commencement of the investigation.'

2. The coroner also concluded that the Morcombe family were understandably distressed that although Daniel's remains were located in 2011, they were not released by the State Coroner until November 2012. This occurred only after the committal hearing had commenced and Mr Cowan had instructed his lawyers that he no longer required the remains for testing. A submission was made by the Morcombe family that the prosecution and defence should be given three months only to carry out testing after which the remains should be returned to the family for burial. The submission to the coroner made by the Commissioner of Police noted that as long as Mr Cowan contested that the skeletal remains belonged to the deceased (Daniel) it was necessary for the remains to be retained in the event that they had to be released for testing. The coroner agreed that it is unsatisfactory that families should be required to wait until criminal proceedings are finalised before being able to bury their loved one and that this was particularly so when DNA evidence can establish the identity of a deceased person with a high degree of certainty. Furthermore, he pointed that there is a provision in the *Criminal Code 1899* (Qld) (s590AS) which the defence can use to seek a direction from a court that they be able to view any original evidence (including bodily remains) upon request. As a result the coroner made the following recommendation:

   - 'I recommend that the Queensland Government amend the *Criminal Code* to ensure a time limit is imposed on the testing of human remains in circumstances where the prosecution and defence fail to reach agreement on the identity of the deceased.'

3. The Morcombe family also submitted that consideration be made for an open frank debate on the adoption of a publicly accessible sex offenders website. The coroner concluded that such a proposal could only be properly implemented after considering a wide range of community and expert views and how such a website would influence matters such as recidivism, vigilantism and rehabilitation of offenders.

   - No recommendation made

4. The Morcombe family also submitted that consideration should be given to the forfeiture of a defendant's right to appeal where the defendant declines to give evidence at his or her trial. The coroner concluded that such a policy would require detailed consideration and broad public debate as it represented a fundamental departure from the presumption that an accused person cannot be compelled to give evidence at his/her own trial.

   - No recommendation made.

5. It was submitted also by the Morcombe family that part of the criminal justice system include a provision that where there is no body and a person has been convicted of unlawful killing then there should be no parole allowed to the convicted killer. The coroner said that there was no need for him to make any recommendations with respect to that submission because there had been an amendment to the *Corrective Services Act 2006* (Qld) by the insertion of a new section (s193A) in 2017. If a prisoner is serving a period of imprisonment for a homicide offence and:

   a. The bodily remains of the victim of the offence have not been located; or

   b. Because of an act or omission of the prisoner or another person part of the bodily remains of the victim has not been located;

then the parole board must refuse to grant parole unless the board is satisfied the prisoner has cooperated satisfactorily in the investigation of the offence to identify the victim's location.

   - No recommendation made.

CASE STUDY CONTINUED...

Questions:

1. A recommendation to review investigations by the police in long and complicated complex cases was made by the State Coroner. In your own words set out the reasons why the Coroner made such a recommendation. [C] [A]
2. A submission was made by the Morcombe family that there should be a sex offenders website which would be able to be accessed by the public. The Coroner did not make that recommendation. Set out firstly the three matters that would be influenced by the existence of such a website. Do you think that these three matters justify the non-existence of a publicly accessible sex offenders website? Why? [C] [E]
3. Why wasn't a recommendation adopted by the coroner in response to the Morcombe family submission that the criminal justice system include a provision that where no body is found, the person convicted of the unlawful killing of that person, should not be allowed parole. Give your reasons. [C] [A]

You can see from the above case study that the value of inquests are that they may result in recommendations being made to the Queensland Government to reform the law or to reform procedures to bring current laws into greater effect. In that sense they are similar to royal commissions.

You may also be interested in how the change in the law – **no body no parole** came about. Look at the following Practical Application.

PRACTICAL APPLICATION

'NO BODY, NO PAROLE' LAWS PASSED, QUEENSLAND MP BROUGHT TO TEARS

SOURCE: ALLYSON HORN AND ASHLEIGH STEVENSON (ABC.NET.AU) 10 AUG 2017 (EXCERPTS)

Prisoners convicted of manslaughter or murder will have to reveal the location of their victim's body if they want parole, under new laws passed unanimously in Queensland Parliament.

Under amendments proposed during debate on Thursday, Government and Opposition MPs also agreed to include striking causing death, interfering with a corpse and accessory after the fact to manslaughter in the legislation.

The issue touched a nerve with several politicians, including LNP police spokesman Tim Mander, who choked back tears while recounting the murder of Timothy Pullen in 2012.

Mr Pullen's body has never been found.

His parents, Gary and Leanne Pullen, watched in the parliamentary gallery as the legislation was debated on Wednesday night.

"Hopefully this legislation will stop people having to suffer the way [all our families] have had to suffer not knowing, because it's the wondering," Ms Pullen said.

Corrective Services Minister Mark Ryan said now was the time for the incarcerated to show goodwill by coming forward with the location of their victim.

"You do not have to wait until the time for your parole application to be made. Give the information now. It will be taken into account when your application is considered for parole," he said.

The bill was sparked by the killing of 81-year-old grandmother Elizabeth Kippin in her Townsville home in July 2016, allegedly by a man who was released on parole hours earlier.

PRACTICAL APPLICATION CONTINUED...

While Ms Kippin's family could not make it to Brisbane for the debate, other affected families did.

Fiona Splitt's husband Bruce Schuler disappeared more than five years ago north-west of Cairns.

Two people were convicted of his murder but his body has never been found.

"Hopefully this will change my situation and the two people who took my husband away from me will tell me where he is," Ms Splitt said.

"It's not very nice at all because I still expect him to walk through the door. I don't know where he is. We need to bring him home."

The legislation is one of 91 recommendations from a report into Queensland's parole system conducted by former solicitor-general Walter Sofronoff QC.

Member for Townsville Scott Stewart earlier said he hoped the laws would help to bring some closure to families who had suffered.

"I have no doubt that anyone living in Townsville will ever forget the fateful day of Wednesday the 27th of June last year when Townsville police discovered the tragedy that was the murder of beloved mother, grandmother and Aunty Beth Kippin," he said.

"Beth was murdered by a man who'd only just been released from Stuart prison that same day.

"While we'll never console the Kippin family for their loss of their matriarch it is, however, a change to the parole system.

1. What sparked the passing of this 'No body, no parole' law? [C]
2. Do you think that the possibility of parole would be a sufficient incentive for prisoners to reveal where the body of the unlawfully killed person is? Why? Why not? [A]
3. Do you think this is a good law? Before you fully answer this question you should look at s193A of the *Corrective Services Act 2006* (Qld) and in particular at s193A(8)(a) to look at the definition of the offences caught by this provision. [E]

CASE STUDY

Citation:	Inquest into the disappearance and death of Matthew Stephen Barclay
Title of Court:	Coroner's court
Jurisdiction:	BRISBANE
Delivered on:	15 January 2016

Facts: Matthew Barclay was a 14 year old boy who was competing in the second round of the Under 15 board race at the Australian Surf Lifesaving Championships at Kurrawa beach on the Gold Coast. While he was attempting to negotiate the waves on the outer bank his board flew into the air and was submerged within seconds and was lost in the surf break. Matthew was observed to be in difficulty by fellow competitors and several rescue water craft operators. His body was not located until after 9.00 a.m. the following morning approximately 2.5 kilometres from his last observed position. At the time of his death Matthew was in Year 10 and was regarded as one of the best open water swimmers in Queensland for his age group, and was one of the best competitors in the competition from the Maroochydore Surf Club. A report was obtained from the Office of Fair & Safe Work Queensland (OFSWQ) which

CASE STUDY

identified that the *Work & Health Safety Act 2011* (Qld) imposes duties on organisations such as Surf Lifesaving Australia (SLSA) to ensure the health and safety of its contestants, in particular, to eliminate risks to health and safety as far as reasonably practicable, and where it is not practicable, SLSA is required to minimise those risks as far as reasonably practicable by implementing risk control measures. Risk control measures were implemented. There were a series of assessments of risk throughout that day, and, in particular there were at least four risk assessments of the state of the surf during the day. The evidence of witnesses was taken by the police. There were differing opinions also from witnesses as to the safety of the surf, at the time of the event.

Issue: Whether the policies of SLSA relating to postponement or abandonment of competition for the safety of competitors were adequate.

Held: That the SLSA was aware of its obligations under the WHS Act and that the policies and plans adopted by SLSA were sufficiently detailed. The coroner also found that the policies relating to the postponement or abandonment of competition were applied appropriately. The coroner went on then to make recommendations, which included:

a. That SLSA mandate the use of helmets and level 25 life jackets for all surf craft events from the competitors of 17 years and under.

b. That SLSA mandate that surf events are not to start unless there is a viable means of rescuing an unconscious person from the water (that is a crewed rescue boat or crewed jetski on the water in the competition area).

c. That in the event of a future death at a surf lifesaving event an investigation be carried out by the regulator under the *Work Health & Safety Act 2011*, in consultation with the Queensland Police Service.

1. Why do you think the inquest was held? [A]
2. What is the duty imposed upon the SLSA to ensure the health and safety of its contestants? [C]
3. What do you think the effect is of the acceptance of the recommendation that if there is such death occurring again that the police refer that to the Workplace, Health & Safety Queensland. Do you think that recommendation is appropriate in the circumstances? Why? [A] [E]

The last recommendation referred to above was adopted and implemented by the Queensland Government. The Queensland Government responds to recommendations directed to its agencies at inquests by always advising the community if a recommendation is to be adopted or the reason why such a recommendation is not adopted. The last recommendation referred to above was implemented by the Queensland Government. The Queensland Police Service made a change to its *Operational Procedures Manual*. (This is a manual that police refer to constantly that gives them direction as to what they should do in certain circumstances). The change made was the insertion of a separate heading called 'Drowning death at a surf lifesaving event' in Chapter 8 of the Manual. This change provided that police officers responding to a drowning death or missing competitor who is suspected to have drowned at an official surf lifesaving event are to notify the Office of Industrial Relations through the Duty Officer at the Police Communication Centre Brisbane. Thereafter the investigation of such a death is to be conducted in conjunction with inspectors from Workplace Health & Safety Queensland.

10.2 SPECIALIST TASKFORCES

SUBCONTRACTORS - QLD BULDING INDUSTRY

Another way of identifying problems in our society and identifying ways in which those problems may be solved is by way of specialist taskforces. Specialist taskforces in Queensland are established by the State Government of Queensland. They are principally designed to investigate into a particular failure in the adequacy of our legal system and then to identify ways in which such problems can be solved. There have been many specialist taskforces established. An example of a recent specialist taskforce was one established on 28 February 2019 by the Queensland Government to investigate complaints and allegations of fraudulent behaviour, in the main by construction companies, that have led to the non-payment of subcontractors in Queensland's building industry. The problem that has developed in Queensland (and in other states) is that major Queensland construction companies go into liquidation and as a result of that subcontractors who are owed millions of dollars are simply not paid. That failure to pay has caused great hardship to some Queenslanders.

In the media statement issued by the Premier and Minister for Trade on 28 February 2018 in setting up this taskforce, the description of the taskforce was:

Special joint taskforce to hunt dodgy builders

In the body of the media release the Premier Ms Palaszczuk said:

The subbies who have been left out of pocket are mums and dads and small business people are left to the whims and mercies of bigger operators who too often leave their subbies in the lurch.

The Housing Minister in that release Mr de Brenni said:

I've met first-hand with hundreds of builders and subcontractors whose lives have been torn apart by a broken system.

The obvious current failure in our legal system is that the 'bigger operators' are failing to pay with impunity.

The taskforce is headed up by a retired Supreme Court Judge, The Honorable Justice John Byrne who has the assistance of other lawyers and the Queensland Police Service.

Terms of reference are established for every taskforce appointed by the Queensland government. These terms of reference set out the composition of the taskforce and the type of the investigations to be undertaken by the taskforce. In the case of the taskforce referred to above the scope of the taskforce is to:

a. Invite and investigate matters and complaints provided through confidential submissions (in person and/or in writing) in relation to allegations of fraudulent behaviour relating to building subcontractor non-payment.

b. Where the material discloses evidence of possible breaches of legislation, refer that material to the relevant prosecuting authority.

c. Consider if there are sufficient and appropriate investigative and supervisory powers to deal with the conduct disclosed in the matters reviewed.

d. Provide recommendations to the government by 30 June 2019.

As this text goes to print the recommendations have not yet been received.

Ch 8

DOMESTIC AND FAMILY VIOLENCE

In Chapter 8 of this text you have seen the background and details of Domestic and Family Violence Taskforce set up by the Queensland Government.

Its report was entitled '*Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*' and was provided to the Queensland government on 28 February 2015. The report made 140 recommendations and established a vision and a direction for strategies to end domestic and family violence in Queensland and to ensure that those affected by family violence have access to safety and support. Many of these recommendations have now been implemented, but not all. This taskforce was set up in response to a failure, despite decades of effort, to reduce domestic and family violence and, to prevent something which was 'prevalent, and a horrific blight on our community'. To give you some idea of reported occurrences of domestic violence in Queensland the following statistics were set out in Chapter 1 of the report:

a. In 2010-2011 there were 52,889 occurrences of domestic and family violence – a 7% increase on the previous year.

b. In 2011-2012 there were 57,963 occurrences of domestic and family violence – a 9.6% increase on the previous year.

c. In 2012-2013 there were 64,258 occurrences of domestic and family violence – a 10.8% increase on the previous year.

d. In 2013-2014 there were 66,016 occurrences of domestic and family violence – a 2.7% increase on the previous year.

Those figures meant on average that there were 181 incidents of domestic and family violence reported to the police every day in Queensland in the 2013-2014 year. Furthermore, 17 domestic and family violence related homicides occurred in Queensland in the 2012-2013 year out of a total of 49 homicides in the State in the same period. The taskforce was set up in response to those statistics at the same time acknowledging that the data doesn't come close to representing the true extent of the problem because many such incidents go unreported.

Given the extent of such domestic violence the recommendations by the taskforce were extensive. You have seen the recommendation with respect to Specialist Domestic Violence courts. As to the success of the recommendations made in the 'Not Now, Not Ever' report this will be ascertained over the next few years.

We now turn to look more fully at a recently completed anti-cyber bullying taskforce in Queensland.

ANTI-CYBER BULLYING TASKFORCE

The Queensland Anti-Cyber Bullying Taskforce was appointed by the Premier of Queensland in February 2018. The taskforce was asked to develop a proposed framework to address cyber bullying of children and young people in Queensland and to recommend community and government action that was required. The terms of reference of the taskforce did not extend to workplace cyber bullying of young people. This taskforce held 59 consultation events across Queensland with approximately 650 attendees and received a total of 364 written submissions.

One of those written submissions that we now refer to was made by the Australian Psychological Society. This society represents more than 24,000 members and is the premier professional association for psychologists in Australia.

PRACTICAL APPLICATION

SUBMISSION TO THE QUEENSLAND ANTI-CYBER BULLYING TASKFORCE BY AUSTRALIAN PSYCHOLOGICAL SOCIETY

JUNE 2018 (EXCERPTS ONLY)

Cyberbullying can take place via all methods of online communication, and can take a variety of forms including (but not limited to) harassment and threatening messages, critical remarks and teasing, denigration, trolling, sending nasty SMS (including homophobic, sexist or racist comments), masquerading, impersonation, outing and trickery (sharing private personal information, messages, pictures with others), social exclusion (intentionally excluding others from an online group), and sexting (sharing explicit material by mobile phone). There is some evidence that individuals who cyberbully tend to bully others in face-to-face settings as well, and may also be victims of cyberbullying (Kowalski et al 2014).

With the widespread use of mobile devices by young people, cyberbullying can occur 24 hours a day, and leaves a permanent online record which can be very difficult to remove, and is sometimes impossible to escape. It often involves no authority (adults are less aware of cyberbullying as it is nearly always carried out secretly).

According to cyberpsychologist Mary Aiken (2016), who specialises in the impacts of technology on human behaviour, online anonymity fuels online disinhibition, which can result in people behaving more cruelly online than they would in person. The online environment and rapid sharing through large networks thus means that the effects are amplified. Cyberbullying can be shared with hundreds, even thousands of people.

Rapid technological changes, the anonymity of the perpetrator, and the potentially large audience make cyberbullying more complicated to prevent than traditional bullying. Therefore, policy makers, educators, parents, and adolescents themselves should be aware of its potentially harmful effects. Further research is needed on whether anti-bullying policies, materials, interventions, and mobile telephone and internet user guidelines are effective for reducing cyberbullying.

Cyberbullying is associated with a wide range of psychological and psychosomatic problems, including fear for one's safety; impaired social and emotional adjustment; poor academic achievement, anxiety, depression and suicidality; poorer physical health; higher absenteeism; and increased loneliness and low self-esteem (Hamm, Newton & Chisholm, 2015). A 3-year Australian study on the consequences of cyberbullying found that mental health problems, including anxiety and depression, were more prevalent for children who reported that they had been cyberbullied compared to those who had been bullied offline (Joint Select Committee on Cyber-Safety, 2011) Cyberbullying has been strongly related to suicidal ideation, more so than traditional bullying (Van Geel, Vedder, & Tanilon, 2014).

The number of children going online, together with the increased mobile phone ownership in younger children, means that the incidence of children and young people at risk of cyberbullying is increasing all the time. For the 'digital native' generation, it is likely that their technical skills exceed their social and emotional maturity. The age of children who are subjected to cyberbullying is thus an important consideration in understanding the psychological and social impacts.

A US study on children's online use found that one-quarter of the children in the study reported using Facebook even though it is a social network meant for teenagers and adults (Blackwell, Lauricella, Conway, & Wartella 2014). In an EU study, one-quarter of the 9-10-year-olds and one-half of the 11-to-12-year-olds were using Facebook; four out of 10 gave a false age (Livingstone et al., 2014). (In 2018 such usage is likely to have expanded to newer platforms such as Snapchat and Instagram).

Blackwell et al. (2014) point out that underage social media users (8-10-year-olds) are at risk because they are engaging in online social interactions prior to necessary cognitive and emotional development that occurs throughout middle childhood. They warn that this could lead to negative encounters or poor decision-making. At this age, children can also be hypersensitive to criticism and cutting remarks. For example, Aiken (2016) points out that not many children have the social skills to deal with a thousand social network 'friends' turning on you, or just passively watching you being cyberbullied.

Teenagers between 12 and 18 are also particularly vulnerable because of the developmental stage of identity formation that they are undergoing (e.g. Shapiro, spices & Margolin, 2014). During this period, teenagers are experimenting with

PRACTICAL APPLICATION CONTINUED...

different identities, trying on new styles, new clothes, new interests. They are building up a sense of themselves that is stable and knowable. This identity relies a great deal on the feedback of others.

Teenagers face a more complicated process of identity formation in the age of the internet, not just because of the sheer volume of feedback they can now receive from their social contacts, but also because they can have a number of different identities of 'selves' online depending on how they represent themselves. Also, because of this critical stage of identity formation, and the time and effort that teenagers put into their cyber-selves, being attacked online has the potential to be catastrophic for teenagers (Aiken, 2016).

Young people are not a homogenous group, and some researchers and practitioners have highlighted the particular vulnerability faced by young people who already face discrimination and/or marginalisation, such as young people with a disability, LGBTQI+ and CALD young people, and young Aboriginal and Torres Strait Islanders.

The Youth Affairs Council of Victoria (2009) cites UK research highlighting that

- approximately 80% of students with an intellectual disability are bullied, and
- cyberbullying of people with a disability often happens under guise of humour, making it harder to detect.

1. What forms can cyber bullying take? [A]
2. What does online anonymity mean? [A]
3. How does online anonymity result in people behaving more cruelly online than they would in person? [A]
4. What type of psychological problems is cyber bullying associated with? [A]
5. Why is cyber bullying even more hurtful than bullying offline? [C] [A]
6. What is the evidence that demonstrates that there is an increased risk of cyber bullying for young people? Do you agree that this is the case? [A] [C]
7. In your own words describe why it is that teenagers are especially vulnerable because of the stage of his or her identity formation that they are undergoing. [A]
8. Are you surprised by the statistic from the Youth Affairs Counsel of Victoria that approximately 80% of students with an intellectual disability are bullied? Why or why not? [A] [E]

There were 29 recommendations made by the taskforce when it delivered its final report on 14 September 2018. You will be able to access these recommendations on the internet. There were no specific recommendations with respect to changes to the law. Recommendation 26 was that the Queensland Government investigate, collect and report on the amount of bullying and cyber bullying related charges, prosecutions and outcomes under the relevant offences in the *Criminal Code* and further under Recommendation 27 that the Queensland Police Service review its *Operational Procedures Manual* to ensure reports of cyber bullying incidents are appropriately and consistently investigated. One of the responses of the Queensland Government was to establish an implementation advisory committee to continue to advise the government about the implementation of the recommendations in the taskforce report. It may well be that future legislative changes will arise out of the work of that committee.

RESEARCH

Recommendation 29 of the report was:

> 'The Taskforce recommends that the Queensland Government advocate that the Commonwealth Government introduce 'right to be forgotten' or 'right to erasure' legislation in Australia. Go to the report itself (page 78 in particular) and find out what the expression 'right to be forgotten' or 'right to erasure' is referring to. In groups of three or four prepare a submission to the Commonwealth Government as to what legislative steps the Commonwealth Government should take to put into effect this recommendation.' [S] [A] [E]

REVIEW

1. Explain each of the following: [C] [A]
   a. What reportable deaths are pursuant to the *Coroners Act 2003* Qld?
   b. What events require an inquest to be held under the *Coroners Act 2003* Qld?
   c. The recommendations that were made by the Coroner in the inquest into the disappearance and death of Daniel James Morcombe.
   d. The 'No body, no parole' laws passed in Queensland.
2. Describe three specialist taskforces established in Queensland. [C] [A]
3. What were the reasons behind the establishment of the three specialist taskforces referred to in question 2 above? [C] [A]
4. What is online anonymity and what result does it have on people going online? [C] [A]
5. What forms can cyber bullying take? [C]

TOPIC 2: LAW REFORM WITHIN A DYNAMIC SOCIETY

CHAPTER 11: CURRENT ISSUES IN LAW REFORM

FOCUS SUBJECT MATTER

11.1 WHERE NEXT FOR LAW REFORM?

11.2 AUTOMATED FACIAL RECOGNITION SYSTEMS

11.3 PRESS FREEDOM

11.4 INDIGENOUS VOICE TO PARLIAMENT

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the law changes to meet current and emerging legal issues;
- potential legal change can involve the balancing of competing interests;
- there can be many possible legal alternatives raised to resolve a legal issue; and
- law reform can face many challenges.

11.1 WHERE NEXT FOR LAW REFORM?

INTRODUCTION

We have spent some time exploring how Australian society's changing values, needs, morality and ethics, advances in technology or significant events have acted as an impetus for legal change and reform in a range of areas. To summarise we have examined how:

- technological advances have created new ways to facilitate criminal activity;
- globalisation has increased the reach of transnational and organised crime;
- changes in patterns of crime have developed new focus areas; and
- well-organised lobby and advocacy groups have changed public opinion and opened dialogue on a particular legal or social issue.

So what legal issues are emerging as we enter the next decade? This is a difficult question to answer, as the world around us constantly changes and we don't know what challenges we will face in the future. In 2019, the **Australian Law Reform Commission (ALRC) identified seven areas that might be subject to future reform** (some of which you will recognise from earlier chapters), including:

- the *Australian Constitution*, specifically the recognition of human rights and Indigenous recognition;
- banking, taxation, superannuation and financial services;
- faunal extinction;
- anti-corruption measures such as capping political advertising, strengthening disclosure regimes and making lobbying more transparent;
- immigration; and
- defamation.

PRACTICAL APPLICATION

WHERE NEXT FOR LAW REFORM?

SOURCE: AUSTRALIAN LAW REFORM COMMISSION, (ALRC.GOV.AU) 9 MAY 2019 (EXCERPTS)

Where next for law reform?

The ALRC has initiated a national conversation about what should be the priorities for law reform over the next three to five years (Priorities for Law Reform). This conversation is about giving Australians a say in what areas of law should be the focus of a law reform inquiry by the ALRC.

Through an online survey, individuals and organisations will have the opportunity to provide comments on potential law reform topics and make their own suggestions about areas of law they believe are in need of reform. The ALRC will also hold consultations with key stakeholders and conduct public seminars.

1. How are the ALRC finding out the viewpoints of individuals and organisations? [C]
2. What is the ALRC going to do with the comments it receives from individuals and organisations? [C]
3. If you could nominate an area or an issue for the ALRC to examine, what would it be? Why do you think this area or issue requires reform? [E]

In the following sections we will examine three current and emerging issues - freedom of the press, an Indigenous voice to parliament and the use of biometric data to detect and prevent crime.

11.2 AUTOMATED FACIAL RECOGNITION SYSTEMS

AUTOMATED FACIAL RECOGNITION TECHNOLOGY

Technology and, more specifically, the use of biometric data, can help police prevent criminal behaviour, investigate a criminal offence or capture defendants. But sometimes, the use of technology as a crime-fighting tool can raise conflicting ethical and moral arguments.

Following the terrorist attacks that occurred in the United States of America (US) on 11 September 2001, governments around the world have developed laws to allow law enforcement authorities to gather much more comprehensive information on its citizens. For example, amendments made to the *Telecommunications (Interception and Access) Act 1979* (Cth) allow law enforcement and intelligence agencies to now track our metadata (such as phone calls, text messages, emails and internet activity). In 2005 Australia began to use biometric passports, with the *Australian Passport Act 2005* (Cth) allowing the Department of Foreign Affairs and Trade to collect, use and disclose applicants' personal information. **Automated facial recognition technology** is a relatively new law enforcement tool that is being debated in Australia. **It involves the automatic extraction, digitisation and comparison of the facial features of an individual using an algorithm.** This algorithm then compares the image of an individual's face to one stored in a database. A brief summary of the process followed by automated facial recognition technology programs is illustrated below.

A FACE IS LOCATED IN AN IMAGE OR VIDEO.

↓

A NUMERIC REPRESENTATION OF THE FACE IS DEVELOPED. EACH FACE HAS 'DATA FLOWS', ENABLING A CONNECTION TO BE FORMED WITH OTHER SETS OF DATA.

↓

THE DATA IS COMPARED TO DATABASE IMAGES, FOR EXAMPLE, A DRIVER'S LICENSE DATABASE.

A SIMPLE OUTLINE OF THE PROCESS FOLLOWED BY AUTOMATED FACIAL RECOGNITION TECHNOLOGY PROGRAMS.

The facial recognition genie, so to speak, is just emerging from the bottle. A government … could follow anyone anywhere, or for that matter, everyone everywhere. It could do this at any time or even all the time. This use of facial recognition technology could unleash mass surveillance on an unprecedented scale.

MICROSOFT PRESIDENT BRAD SMITH, DECEMBER 2018.

Automated facial recognition technology has been integrated with other types of technology, such as closed-circuit television in the United Kingdom and the US, with varying levels of success. In a 2017 journal article, law academics Monique Mann and Marcus Smith point to studies conducted in the US that show that the effectiveness of this type of technology remains contentious. In 2019 San Francisco became one of the first US States to ban the use of automated facial recognition technology, due, in part, to civil liberty concerns. In Australia it has been used in the Northern Territory, Victoria and New South Wales. Private industry in Queensland has also begun quietly using facial recognition systems.

WHAT DO YOU THINK?

What is your initial reaction to Facial Recognition Technology – do you support or disagree with its use? Why? [E]

PRACTICAL APPLICATION

FACIAL RECOGNITION QUIETLY SWITCHED ON A QUEENSLAND STADIUMS, SPARKING PRIVACY CONCERNS

SOURCE: JOSH BAVAS, ABC NEWS ONLINE (ABC.NET.AU) 6 JUNE 2019 (EXCERPTS).

Stadiums Queensland has admitted to trialling facial recognition software on sports fans and concertgoers, prompting questions by the state's Privacy Commissioner about its quiet implementation.

The move means patrons are being monitored in real time, with their biometric data potentially being stored and shared with other agencies such as state and federal police.

While Stadiums Queensland (SQ) venues display privacy warnings about the use of CCTV, there is no signage suggesting facial recognition technology is in operation.

Queensland Privacy Commissioner Phil Green said the public deserved to be aware their images and data were being captured and encouraged SQ and other similar agencies to conduct a privacy impact assessment.

Mr Green said when facial recognition is used by matching a particular image in a database to someone in a crowd - otherwise known as the "one to many" approach - bias could evolve in the use of the technology.

1. What did Stadiums Queensland admit to doing? [C]
2. Who could Stadiums Queensland potentially share this information with? [C]
3. What concerns does Queensland's Privacy Commissioner share in the article? [C]
4. What is the 'one to many' approach? [A]
5. Do you believe the privacy warnings are adequate? Why or why not? [E]
6. How does the situation reflect the statement said by Microsoft President Brad Scott above? How is facial recognition a 'genie'? [A] [E]

INQUIRY FOCUS

SHOULD AUSTRALIA CONTINUE TO LEGISLATE FOR THE USE OF AUTOMATED FACIAL RECOGNITION TECHNOLOGY OR SHOULD IT BE BANNED?

Any legal development in this area will have to effectively manage the tension that exists between an individual's right to privacy and the potential protection of society from harm. We will now conduct an inquiry into some of the legal issues automated facial recognition technology has.

2005 – The Council of Australian Governments (COAG) entered into the Intergovernmental Agreement to a National Identity Security Strategy (NISS). The strategy was about enhancing a nationally consistent process for verifying a person's identity

2009 – The Document Verification Service was established by the NISS to verify identity documents against the records of the issuing agency.

2012 – A National Biometrics Interoperability Framework was developed to assist agencies to exchange and compare facial biometrics.

2015 – COAG agreed to implement a recommendation from the *Martin Place Siege: Joint Commonwealth and New South Wales Review* that recommended agencies should strengthen their name-based identity checking processes and explore greater use of biometrics.

2017 – At the Special Meeting of COAG on Counter-Terrorism the Intergovernmental Agreement on Identity Matching Services (IGA) was established. The agreement allows Commonwealth, State and Territory governments to share and match identity information (such as driver license or passport images)

2018 – The Queensland government introduced and passed the *Police and Other Legislation (Identity and Biometric Capability) Amendment Act 2018* (Qld).

A TIMELINE OF KEY EVENTS THAT HAVE UNDERPINNED THE LEGISLATIVE FRAMEWORK FOR THE SHARING OF IDENTITY INFORMATION BETWEEN DIFFERENT LEVELS OF GOVERNMENT.

PRACTICAL APPLICATION

POLICE AND OTHER LEGISLATION (IDENTITY AND BIOMETRIC CAPABILITY) AMENDMENT ACT 2018 (QLD)

28EO Collection, use and disclosure by host agency

The host agency may, for a purpose related to the operation of an identity matching service –

(a) collect or use identity information disclosed to it under this division; or

(b) disclose the identity information to the chief executive or a participating entity for the service.

28EP Disclosure, use or collection must be for permitted purpose

(1) Despite sections 28EM, 28EN and 28EO, identity information may be disclosed, collected or used under this division only for a ***permitted purpose.***

PRACTICAL APPLICATION CONTINUED...

(2) Each of the following purposes is a permitted purpose –

(a) preventing, detecting, investigating or prosecuting crimes involving fabricated, manipulated, stolen or otherwise assumed identities;

(b) preventing, detecting, investigating or prosecuting other offences against Commonwealth or State laws;

(c) conducting investigations or gathering intelligence for purposes related to national security within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cwlth);

(d) promoting the security of the assets, facilities or personnel of a participating entity that is a government entity;

Examples

- *protecting and managing legally assumed identities*
  - *security or background checking*

(e) identifying individuals who are at risk of, or have experienced, physical harm;

Examples

- *investigating individuals reported missing*
  - *identifying individuals reported as dead, or unidentified human remains*
  - *identifying individuals when addressing significant risks to public health or safety*
  - *identifying individuals in relation to disaster events or major events*

(f) improving road safety, including the detection of unlicensed and disqualified drivers and individuals who hold multiple licences;

(g) verifying an individual's identity with the individual's consent or as authorised or required by law.

1. Who has the legal authority to collect, use and disclose information? [C]
2. What can the information be lawfully used for? [C]
3. The list of 'permitted purposes' is very broad. Why do you think this is the case? What could be the implications of this wording? [A] [E]

COMMONWEALTH PROGRESS ON AUTOMATED FACIAL RECOGNITION TECHNOLOGY LEGISLATIVE REFORM

In 2018, then Minister for Home Affairs and Minister for Immigration and Border Protection, Peter Dutton, introduced the *Identity-matching Services Bill 2018* (Cth). The Bill provides:

…for the exchange of identity information (in this case, Driver license images) between the Commonwealth, State and Territory governments by enabling the Department of Home Affairs to collect, use and disclose identification information in order to operate the technical systems that will facilitate the identity-matching services envisaged by the IGA.

(EXPLANATORY MEMORANDUM, 2018, [1])

Ch 5.1

The Bill reached the second reading stage and was referred to the Parliamentary Joint Committee on Intelligence and Security, but the inquiry lapsed when Parliament was dissolved for an election in May 2019. With parliament returning in July 2019, the debate surrounding automated facial recognition technology as a resource for investigating or preventing crime will return to lawmakers. Let's take a moment examine a number of articles that discuss the legal issues surrounding the use of this type of technology.

PRACTICAL APPLICATION

WHY REGULATING FACIAL RECOGNITION TECHNOLOGY IS SO PROBLEMATIC – AND NECESSARY

SOURCE: LIZ CAMPBELL, THE CONVERSATION (THECONVERSATION.COM.AU), 26 NOVEMBER 2018 (EXCERPT).

The use of automated facial recognition technology (FRT) is becoming more commonplace globally, in particular in China, the UK and now Australia.

FRT has numerous private and public-sector applications when identity verification is needed. These include accessing a secure area, unlocking a mobile device or boarding a plane. It's also able to recognise people's moods, reactions and, apparently, sexuality.

And it's more valuable for policing than ordinary CCTV cameras as it can identify individuals in real time and link them to stored images. This is of immense value to the state in criminal investigations, counter-terrorism operations and border control.

This technology has major implications for people's privacy rights, and its use can worsen existing biases and discrimination in policing practices.

1. Which countries are currently using FRT? [C]
2. Which concerns you more, FRT use by the private or public sector? Why? [A] [E]
3. What key concerns are raised in the article? [C]

FACIAL RECOGNITION IS ABOUT TO END YOUR PRIVACY. HOW DO YOU FEEL ABOUT THAT?

SOURCE: MARK WHITE, FINANCIAL REVIEW (AFR.COM) 8 FEBRUARY 2019 (EXCERPTS)

Australia's own mass surveillance program could soon be a reality. The *Identity-Matching Services Bill* 2018 (IMSB) will create a giant searchable hub called the Capability by pooling federal and state photo databases such as passports and drivers' licences, which could be used for more than law enforcement. Near real-time tracking could be conducted for reasons as nebulous as "community safety".

Angus Murray, junior vice-president of the Queensland Council of Civil Liberties (QCCL), says, with feeling, "The question for society is whether this is technology we can or should be using. It's a slippery slope to a place that's probably irretrievable if we end up with technology like this around all the cities of Australia. We may decide this isn't the way we want to go – the concept of privacy and freedom of association disappears fairly rapidly."

PRACTICAL APPLICATION CONTINUED...

Human Rights Commissioner Edward Santow says the two bills under review are "unprecedented" in their impact on Australians' privacy, calling for caution and stronger legal safeguards.

1. What criticism is made about the reasons provided by the Bill to justify law enforcement agencies accessing 'the Capability'? [C] [A]
2. Angus Murray raises the 'slippery slope' argument. What does this mean? Do you think we can reverse the use of this type of technology or is it too late? [A] [E]
3. What reforms are being called for by the Human Rights Commissioner Edward Santow? [C]

11.3 PRESS FREEDOM

Previously, we have spoken about the role the media has played in contributing to good governance.

In June 2019 the Australian Federal Police (AFP) executed two raids, one on the home of News Corporation Australia journalist Annika Smethurst, and the other on the offices of the Australian Broadcasting Corporation (ABC). Radio Presenter Ben Fordham also revealed that he had been notified that he was under investigation for a story he reported on involving intercepted boat arrivals. The raids concerned stories that allegedly compromised Australia's national security and intelligence operations. Annika Smethurst had published a story concerning a government agency being given powers to covertly monitor Australian citizens, which also included images of a 'top secret' memo. The story published by ABC journalists Dan Oakes and Sam Clark concerned allegations of misconduct by Australian special forces in Afghanistan based on a defence leak known as 'The Afghan Files' (abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642). The source for the ABC story was known at the time, a former Australian Defence Force officer and lawyer turned whistleblower David McBride. **The raids were condemned both in Australia and around the world, triggering a public debate about press freedom and saw journalists from competing organisations join together to advocate for reform.**

PRACTICAL APPLICATION

WORLD MEDIA CONDEMNS AUSTRALIAN FEDERAL POLICE RAIDS TARGETING JOURNALISTS

SOURCE: ROSEMARY BOLGER, SBS NEWS (SBS.COM.AU) 6 JUNE 2019 (EXCERPTS)

The UK public broadcaster BBC led international condemnation.

In a statement, the BBC said: "This police raid against our partners at ABC is an attack on press freedom which we at the BBC find deeply troubling. "At a time when the media is becoming less free across the world, it is highly worrying if a public broadcaster is being targeted for doing its job of reporting in the public interest."

The police action made headlines around the world with the New York Times noting that "no other developed democracy holds as tight to its secrets".

The power of the police to search through thousands of emails of journalists in search of sources shocked CNN's chief media reporter Brian Stelter. "We almost never see this in a democratic country like Australia," he said.

1. Which three international organisations spoke out against the raids? What were their main concerns? [C]
2. The New York Times noted that Australia holds on 'tight to its secrets.' What does this mean? How is Australia potentially being viewed by other countries? [C] [A]

We will now examine one of the laws that journalists believe requires reform to protect press freedom.

INQUIRY FOCUS

SHOULD AUSTRALIA REFORM ITS SECRECY LAWS TO PROTECT PRESS FREEDOM?

As you will learn in the next unit you will study, Human Rights, the *Australian Constitution* does not contain many explicit human rights. Instead, many of our human rights are implied in legislation and case law (both of which can be easily changed). **Currently, there is no law that guarantees the 'freedom of the press'. Journalists are required to follow many different laws and ensure their reports don't breach those laws before publication.** Sometimes the restrictions are justifiable - to protect the identity of a child victim of sexual abuse, but other restrictions (such as defamation law or suppression orders) is argued to have a chilling effect on the media.

In June 2018, the Government introduced a number of new counter-espionage laws designed to prevent foreign interference in elections and political decision-making. *The National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) also created new treason-like and secrecy offences. While it initially opposed the Bill, Labor supported its passage when concerns about the penalties that could be handed down to journalists reporting on national security issues were allayed. To understand how these provisions might negatively impact press freedom, we will now view an excerpt of the relevant law below.

PRACTICAL APPLICATION

CRIMINAL CODE ACT 1995 (CTH)

PART 5.6 - SECRECY OF INFORMATION

121.1 Definitions (excerpts) inherently harmful information means information that is any of the following:

(a) security classified information;

(c) information that was obtained by, or made by or on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency's functions;

(e) information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency.
***security classified information** means information that has a security classification.*

Division 122 - Secrecy of information

122.1 Communication and other dealings with inherently harmful information by current and former Commonwealth officers etc.

Communication of inherently harmful information

(1) A person commits an offence if:

(a) the person communicates information; and

(b) the information is inherently harmful information; and

(c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

Penalty: Imprisonment for 7 years.

Other dealings with inherently harmful information

(2) A person commits an offence if:

(a) the person deals with information (other than by communicating it); and

(b) the information is inherently harmful information; and

(c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

Penalty: Imprisonment for 3 years.

PRACTICAL APPLICATION CONTINUED...

Information removed from, or held outside, proper place of custody

(3) A person commits an offence if:

(a) the person:

(i) removes information from a proper place of custody for the information; or

(ii) holds information outside a proper place of custody for the information; and

(b) the information is inherently harmful information; and

(c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

Penalty: Imprisonment for 3 years.

Failure to comply with direction regarding information

(4) A person commits an offence if:

(a) the person is given a direction; and

(b) the direction is a lawful direction regarding the retention, use or disposal of information; and

(c) the person fails to comply with the direction; and

(ca) the failure to comply with the direction results in a risk to the security of the information; and

(d) the information is inherently harmful information; and

(e) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

Penalty: Imprisonment for 3 years.

1. What are the four criminal offences that are identified above? [C]
2. What is the penalty for communicating inherently harmful information? [C]
3. Is it possible for a receptionist to be charged with a criminal offence under this Act for receiving and passing on information to a journalist? [C] [A]
4. How does information become 'security classified information'? Provide an example of a type of information that you believe many would consider to be classified and a situation when the law could be abused by a government. What issue does this demonstrate about the drafting of a law? [C] [A] [E]
5. Why might some believe these laws attack freedom of the press? What could be a counter-argument? [A] [E]
6. Some believe the definition of 'inherently harmful information' is too broad. Suggest an amendment that might balance the needs of the government and the media. [E]

After the raids occurred, the Law Council of Australia issued a Media Release that targeted both concepts central to this inquiry, the free press and secrecy laws.

PRACTICAL APPLICATION

OPINION PIECE: FREE PRESS IS KEY TO OUR DEMOCRACY

SOURCE: ARTHUR MOSES SC, LAW COUNCIL OF AUSTRALIA (LAWCOUNCIL.ASN.AU/MEDIA) 6 JUNE 2019 (EXCERPTS); SPEECH ALSO PUBLISHED IN THE AUSTRALIAN.

Official secrecy must be tempered by the public's right to accountable government.

It is a fundamental role of government to protect our community, our rights and our freedoms.

Reports of law enforcement activity during the past 48 hours, including a warrant executed on the home of an award-winning press gallery journalist, raise fresh concerns as to whether Australia's unauthorised disclosure and secrecy laws appropriately balance the need to protect sensitive information with freedom of the press and protections for those making disclosures in the public interest.

For this reason, the media must be able to lawfully report on matters of public interest without fear or favour.

At issue is an area of law that has undergone significant change. Before December 29 last year, section 79 of the *Crimes Act 1914* included several offences that dealt with unauthorised disclosures and the use of official secrets, defence or security information. These provisions were not used often and were difficult to prosecute.

The *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* created new provisions and defences, including a public interest defence that came into force in the Criminal Code from December 29 last year.

There is no doubt that the work of our national security agencies is vital. But the government should not classify information as confidential simply because its disclosure would be a political embarrassment or expose misconduct.

1. What role does the press play in our democracy according to Arthur Moses SC in the article? [C]
2. When did the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) come into force? [C]
3. Arthur Moses SC of this article presents both sides of the debate regarding secrecy laws. What do both sides of the debate believe and what conflict exists between the key stakeholders? [C] [A]

RESEARCH

As mentioned by Arthur Moses SC the law also includes a 'public interest' defence. Locating a range of primary and secondary sources answer the following questions:

1. What is the legal definition of 'public interest'? [C] [S]
2. What benefits and criticisms are raised against the defence of 'public interest'? [S] [A]
3. What does 'public interest' mean to you? [C]
4. Using both definitions, do you think the stories written by the journalists at the centre of the raids were in the 'public interest'? Why or why not? [A] [E]

In the aftermath of the AFP police raids, there were talks of the Morrison Government announcing a parliamentary inquiry into press freedom, but at the time of writing this had not occurred. All media organisations are pushing for law reform that supports freedom of the press, but wider public outcry is key to any legal change.

11.4 INDIGENOUS VOICE TO PARLIAMENT

Uluru Statement from the Heart

From 23 to 26 May 2017, over 250 Aboriginal and Torres Strait Islander leaders met to discuss and agree on an approach to constitutional reform to recognise First Nations Peoples. This convention was convened by the bipartisan-appointed Referendum Council. It was the culmination of 13 Regional Dialogues held around Australia.

The majority of the Aboriginal and Torres Strait Islander leaders resolved, in the *Uluru Statement from the Heart* to call for:

- the **establishment of a 'First Nations Voice'** in the *Australian Constitution*; and a
- Makarrata Commission' to supervise a process of **'agreement-making' and 'truth-telling' between governments and Aboriginal and Torres Strait Islander peoples**, which could be set up by legislation.

The *Uluru Statement from the Heart* also affirmed the long and continuing connection of Aboriginal and Torres Strait Islander peoples with the land, comments on the social difficulties faced by Aboriginal and Torres Strait Islander peoples and the structural impediments to the real empowerment of First Nations Peoples.

ULURU STATEMENT FROM THE HEART (EXCERPT)

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

WHAT DO YOU THINK?

The Referendum Council (referendumcouncil.org.au/discussion-topics/indigenous-voice) published a number of questions for Australians to discuss. Try answering them for yourself!

WHAT DO YOU THINK? CONTINUED...

1. Do you think that Indigenous people should have a say when the Australian Parliament and government make laws and policies about Indigenous affairs?
2. Should a new Indigenous group be set up under the Constitution to give advice and make sure Indigenous people have a voice in political decisions that affect them?
3. Is it worth creating the new group if it can only give advice and does not have the power to block new laws?
4. Do you have any ideas about what the new group would look like?

You are welcome to conduct some research to inform or support your responses.

INQUIRY FOCUS

WHAT CHALLENGES MAY HINDER THE ESTABLISHMENT OF AN INDIGENOUS VOICE TO PARLIAMENT?

Changing a law or creating a new one is not always an easy process. **The process can be challenging and there can be many obstacles and barriers that need to be overcome before a law can be reformed.** These can include:

- divisions between social groups and conflict between stakeholders or affected parties;
- public indifference;
- political pressure within parties as different factions oppose change due to conflicting ideologies;
- the media;
- government budgetary constraints;
- the difficult process of changing the *Constitution* evidenced by the few successful referendums that have been passed; and
- the parliamentary structure, which can 'block' government bills for political and practical reasons.

Ch 2.6

One of the biggest challenges establishing an Indigenous voice to parliament faces is the long and complex process that must be followed to change the *Australian Constitution*. We know from Chapter 2 that s128 states that any alteration to our founding document must pass both Houses of Parliament, receive royal assent and be supported by the majority of Australians and the majority of States. But, this is not the only challenge this amendment faces. The collection of media reports below gives you an idea about the challenges this potential legal reform faces.

PRACTICAL APPLICATION

INDIGENOUS VOICE TO PARLIAMENT SHOULD BE RECONSIDERED, BIPARTISAN COMMITTEE FINDS

SOURCE: ISABELLA HIGGINS, ABC NEWS ONLINE (ABC.COM.AU) 29 NOVEMBER 2018 (EXCERPTS)

For years, there has been debate about how to recognise Indigenous Australians in the nation's founding document.

Last year, the Turnbull government rejected the recommendation of its own Referendum Council to establish a constitutionally enshrined Indigenous advisory body - known as a voice to parliament.

But the idea was also rejected by the Morrison Government…

Labor MP and committee member Linda Burney said the bipartisan view of the committee was that Indigenous Australians should have greater say in the issues affecting their lives.

"The resounding message is that the people want a voice to the parliament," she said.

The recommendations in this report do not clearly outline the voice must be constitutionally enshrined and could instead be legislated, which concerns some Indigenous leaders.

Ms Langton said she was confident a referendum would be successful.

But both members of the parliamentary committee questioned the level of public support.

Ms Leeser also had concerns about the level of support or the public's understanding of the issue.

"What we know is changing it (the constitution) is very hard," he said.

"It's never succeeded without bipartisan support - and without strong bipartisan support - so I think we do need to build some more support."

1. What idea did the Turnbull government reject? [C]
2. Why was it rejected? Do you agree with this reason? Why or why not? [C] [E]
3. What does the word 'bipartisan' mean? Why may it be important that a law or legal change has bipartisan support? [C]
4. Some Indigenous leaders prefer enshrining the voice in the Constitution over enacting legislation. What is your preferred method of recognition? Examine the implications of your recommendation. [A] [E]

PAT DODSON URGES COALITION TO 'DEAL WITH' INDIGENOUS VOICE TO PARLIAMENT AND REFERENDUM

SOURCE: LORENA ALLAM, THE GUARDIAN ONLINE (THEGUARDIAN.COM.AU) 5 JUNE 2019 (EXCERPTS)

There is no reason the Morrison government cannot move to create a voice to parliament and hold a referendum for constitutional reform in its first term, Labor senator Pat Dodson has said.

"It seems to me the focus we've got to take as a parliament is to not keep kicking that can down the road, to face up to it and deal with it," Dodson said.

Dodson said Labor's defeat was "a sad blow, there's no doubt about that".

"To watch the election results come in, and to know we wouldn't be in charge of the agenda going forward, particularly in terms of Indigenous affairs, that was the most difficult part of it for me."

PRACTICAL APPLICATION CONTINUED...

1. What does Labor Senator Pat Dodson believe the Morrison government should do? [C]
2. What challenge is Labor Senator Pat Dodson alluding to in this article? [A]
3. Why do you think Labor Senator Pat Dodson holds this view? [A]

REVIEW

1. Automated facial recognition technology, freedom of the press and an Indigenous voice to parliament are three current and emerging issues facing Queensland and Australia. Choosing one of these issues, select information from the text or from your own research that assists you to:
   a. Identify and explain the relevant law. [C] [A]
   b. Analyse and evaluate a key legal issue within this legal area. [A] [E]
   c. Propose a recommendation to improve outcomes for those affected by the law or legal issue. [E]
2. There are many challenges that legislators must overcome to reform the law. With each source below:
   a. Identify the challenge raised in the article that may be impeding law reform. [C]
   b. Identify any other challenges not raised in the article that are having an impact on law reform in that area. [A]
   c. Analyse how it is making law reform difficult. Could this challenge lead to stronger laws being made? Why, or why not? [A]
   d. Justify how this challenge could be overcome. [E]

SOURCE 1: EUTHANASIA

QUEENSLANDERS ASKED FOR EUTHANASIA VIEWS

SOURCE: AAP, SBS NEWS (SBS.COM.AU) 14 FEBRUARY 2019 (EXCERPTS)

For some people voluntary euthanasia is the answer to dying with dignity and preventing lonely suicides. Others believe it's a slippery slope.

"There will be very passionate and divergent views held on both sides of the debate," says Labor MP Aaron Harper, chair of the committee tasked with examining medically assisted deaths.

David Muir, chairman of the Clem Jones Trust, which has been campaigning for voluntary euthanasia to be legalised, says people slipping into death are going to extreme lengths to end their lives.

But Teeshan Johnson, executive director of Cherish Life Queensland, is against voluntary euthanasia because it opens the vulnerable to abuse. "No safeguards are effective when it comes to assisted killing," she said.

SOURCE 2: ENERGY POLICY

RBA GOVERNOR TELLS POLITICIANS TO GET THEIR ACT TOGETHER ON ENERGY

SOURCE: ERYK BAGSHAW, SYDNEY MORNING HERALD (SMH.COM.AU) 17 AUGUST 2018 (EXCERPTS)

Reserve Bank governor Philip Lowe has called for Parliament and the states to get their act together on energy policy, warning it is up to them to reduce power prices, business costs and encourage investment.

The Coalition has been beset by public infighting over its National Energy Guarantee (NEG), with up to four MPs reserving their right to cross the floor.

Electricity prices jumped by six times the rate of the average pay rise last year, partly on the back of business investment uncertainty caused by a decade of energy policy paralysis.

SOURCE 3: PILL TESTING

DRUG DEATHS AT MUSIC FESTIVALS REIGNITES DEBATE ON PILL TESTING

SOURCE: GREG STOLZ, THE COURIER MAIL (COURIERMAIL.COM.AU) 5 JANUARY 2019 (EXCERPTS)

To test or not to test?

That is the question state governments around the country are again grappling with following five drug-related deaths at music festivals in NSW and Victoria since September.

The deaths, including that of 22-year-old Brisbane man Joshua Tam after the Lost Paradise festival on the NSW Central Coast last weekend, have reignited debate about the merits of pill testing.

Supporters say the measure, used widely at festivals and rave parties in Europe and trialled in Australia for the first time at the Groovin' the Moo festival in Canberra last April, has the potential to save lives. Opponents argue that on-site testing is an inexact science, condones illicit drug use and could actually do more harm than good.

UNIT 4

HUMAN RIGHTS IN LEGAL CONTEXTS

In Unit 4, students consider legal concepts, principles and contemporary issues studied in previous units to consider fundamental human rights concepts and analyse Australia's participation within the global community. They recognise how human rights create challenges in national and international contexts, and for minority groups, and examine the impact of international law on the Australian legal system and those who are subject to it.

This unit features contemporary contexts involving human rights matters in Australia and where Australia has an interest internationally. Examples of issues include:

- Australian Aboriginal peoples' and the Torres Strait Islander peoples' access to health and other community services;
- parents' and children's human rights in surrogacy and artificial conception agreements;
- the right to marry and create a family;
- people smuggling and the treatment of asylum seekers;
- War and peace issues, for example, the *Geneva conventions* and peacekeeping forces; and
- environmental issues, for example, climate change and the rights of future generations.

TOPIC 1: HUMAN RIGHTS

In Topic 1, students explore the global context for human rights and how international laws and institutions affect Australia.

TOPIC 2: THE EFFECTIVENESS OF INTERNATIONAL LAW

In Topic 2, students examine the effectiveness of international law and legal institutions in upholding human rights globally. Students focus on legal issues and international situations in which Australia has a legal interest.

TOPIC 3: HUMAN RIGHTS IN AUSTRALIAN CONTEXTS

In Topic 3, students continue to focus on human rights and also explore how this area of law is addressed in Australia and Queensland. They explore the role of different groups in both protecting rights and influencing just and equitable outcomes.

QUEENSLAND LEGAL STUDIES 2019 GENERAL SENIOR SYLLABUS, PP 41-44 (EXCERPTS)

TOPIC 1: HUMAN RIGHTS

CHAPTER 12: THE MAIN FEATURES OF INTERNATIONAL HUMAN RIGHTS

FOCUS SUBJECT MATTER

12.1 WHAT ARE HUMAN RIGHTS?

12.2 THE ORIGIN OF HUMAN RIGHTS

12.3 THE UNITED NATIONS CHARTER

12.4 INTERNATIONALLY RECOGNISED HUMAN RIGHTS (*THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (1948))

12.5 CURRENT HUMAN RIGHTS ISSUES

12.6 HUMAN RIGHTS, LEGAL RIGHTS AND LEGAL DUTIES

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the nature of modern human rights and their origins;
- the desire after World War II to promote peace and human rights;
- the role of the United Nations in the international recognition of human rights;
- there are many events and activities which raise human rights issues in Australia and the world; and
- human rights are not necessarily all protected in a nation's domestic law by legal rights.

12.1 WHAT ARE HUMAN RIGHTS?

The basis of modern human rights is the United Nations *Universal Declaration of Human Rights* (1948). It is always referred to as the single most influential document when stating your rights as a human being. This does not mean that prior to 1948 there were no recognised human rights. There are other documents which contain statements of what we would regard as human rights at different points in the history of the world, and in particular, in our historical background in Australia. For example, whenever the **right to a fair trial** is discussed, almost inevitably there is reference to the Magna Carta, which contained a statement of the rights of the English to trial by jury. We will introduce you to this historical framework and look at some of the significant signposts along the way, before the *Universal Declaration of Human Rights* was signed in 1948.

It has gradually become established that it is possible to give a general definition of the bundle of rights which are set out in the *Universal Declaration of Human Rights* (1948), and that there have been various attempts to give these an inclusive definition. For example:

A human right is:

> *that which is ethically good and proper and in conformity with the moral law as it pertains to people*
>
> SOURCE: MACQUARIE DICTIONARY

A definition which perhaps makes more sense in the context of what you are about study is found on a website belonging to Amnesty International Australia:

Human rights are the basic freedoms and protections that belong to every single one of us. All human beings are born with equal and inalienable rights and fundamental freedoms. Human rights are based on dignity, equality and mutual respect–regardless of your nationality, your religion or your beliefs.

Your rights are about being treated fairly and treating others fairly, and having the ability to make choices about your own life. These basic human rights are:

- ***Universal:*** *they belong to all of us–everybody in the world*
- ***Inalienable:*** *they cannot be taken away from us*
- ***Indivisible and interdependent:*** *governments should not be able to pick and choose which are respected*

SOURCE: AMNESTY INTERNATIONAL AUSTRALIA, WWW.AMNESTY.ORG.AU, DOWNLOADED 26 JUNE 2019

RESEARCH

(a) Conduct a search of the Internet for definitions of human rights. Select a number of them which are different. [S]

(b) Describe the common features of the above definitions and those you have found. What are the key terms that are common? [C]

(c) Describe differences, if any. [A]

(d) Investigate and describe some examples of some human activities caught by your definitions. [E] [R]

(e) Discuss your findings in groups of three or four in the class and then compare your conclusions as a group as to which definition you prefer. You may find it useful to refer to the *Universal Declaration of Human Rights.* [E]

INDIVIDUAL V COLLECTIVE HUMAN RIGHTS

You have been frequently asked in your legal studies class to date to determine how to balance different points of view about a legal issue. For example, the media in Australia has the right to publish any story. Sometimes there are restrictions on the grounds of national security or for other reasons, such as defamation. This raises the issue as to how and by whom the grounds for non-publication are determined.

Ch 11.3

Many religious groups involved in the national debate about granting same-sex couples the right to marry, were opposed to that reform. Nevertheless, because there was such amajority of people who supported the change, new laws were passed in the *Marriage Act* 1961 (Cth) making the change.

Ch 8.3

WHAT DO YOU THINK?

A number of statements follow which have all been quoted from various **United Nations** documents. Each of them purports to make a declaration as to the rights of individuals or the rights of a group (**collective rights**). No attempt has been made to categorise or identify these rights for you.

A. Every indigenous individual has the right to a nationality.

B. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

C. Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country.

D. Everyone has the right to life, liberty and security of person.

E. Everyone has the right to freedom of thought, conscience and religion.

F. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and where possible, with the option of return.

G. No one shall be subject to arbitrary arrest, detention or exile.

H. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations, which shall be appropriately reflected in education and public information.

1. Decide which of each statement is a declaration about an individual right, and which is about a collective right. [C] [A]
2. Select a statement from each category which you think can be rewritten so that it can be identified in the opposite category. Rewrite each of them to do this. [C] [A]
3. From the category of individual rights, identify any rights which you think could not be group rights. Give your reasons for being able to do this, or your reasons for not being able to answer the question. [C] [A] [E]
4. Many of the human rights described in the statements are said to refer to Indigenous peoples. Aborigines are Indigenous peoples. Are there any of the rights set out in any of the statements rights which could or could not be identified as the rights of Aborigines when Australia was first colonized? Would the answer be different if you are considering the rights of Aborigines today? Give your reasons. [C] [A] [E]
5. Should your individual human rights be the same as someone living in a different part of Queensland or Australia? Should Queenslanders as a group enjoy any human rights which are different from those enjoyed by Victorians or Tasmanians as a group? Do Aborigines as a group who live in Queensland enjoy the same rights as other Queenslanders? [C] [A] [E]

LHS 'OUTBACK ACCOMMODATION' RHS- CITY ACCOMMODATION'

So far as your study of human rights is concerned, it is probably fair to say that the issues raised by academic writers about whether or not there are such rights as collective human rights, are not of great importance. That is because individual human rights and collective human rights are both capable of being described and identified, and do co-exist because it is almost universally agreed that the individuals of a group certainly possess the same human rights as other persons, although the group to which they belong may not possess the same rights as other groups. In Australia, the land rights, voting rights, and citizenship rights of the original inhabitants, the Aboriginal and Torres Strait Islander (ATSI) peoples took a long time to be recognised. On the other hand, in New Zealand, the original inhabitants, the Maoris, had many of their rights as a group recognised much earlier in the *Treaty of Waitangi*. We will later consider the progress (or lack of it) which has been made by the ATSI peoples towards constitutional recognition acceptable to them.

A taste of the two points of view is in the following quotation:

Can a right borne by a group be a human right? For some analysts, the answer is obviously," No". They argue that human rights are the rights of human beings and, self-evidently, each human being is an individual being. Groups may have rights of some sort, but whatever those rights might be, they cannot be human rights. Human rights must be borne by human individuals.

Other analysts, unimpressed by that simple logic, insisted human rights can take collective as well as individual forms. They argue that much of what is fundamentally important to human beings relates to "goods" and "bads" that people experience collectively rather than individually. If we insisted human rights must be rights that people can hold only as independent individuals, our conception of human rights will not match the social reality of the human condition.

SOURCE: RAKESH CHANDRA, COLLECTIVE RIGHTS VS INDIVIDUAL RIGHTS, INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY RESEARCH AND DEVELOPMENT, VOLUME 4, ISSUE 7, JULY 2017

FURTHER READING

The diversity of views about collective and individual human rights is set out in Mr Chandra's article. Explore the different points of view in his article and any other source materials which are properly listed in the article as references. As a result of your research, which point of view do you favour? Give your reasons. [S] [C] [A] [E] [R]

12.2 THE ORIGIN OF HUMAN RIGHTS

For the most part, modern human rights as stated in the United Nations *Universal Declaration of Human Rights* (1948), have been developed in western countries. Ideas and philosophies about human rights have developed because of the work of individuals, because of events related to political and social progress, and on some occasions because of the need to understand and make sense of war and conflict, and other events of a similar kind. What follows is not a comprehensive outline, but a collection of statements and views that can be set out to give you an understanding of what was going to be possible when the United Nations was established in 1945.

EVENTS AND IDEAS LEADING TO THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS* 1948

Magna Carta of King John 1213: We have also granted to all free men of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

Habeas Corpus Act 1679: This law protected and extended the right of the detained person to go before a judge to determine whether the detention was legal. A crucial step towards ***the right to a fair trial.***

English Bill Of Rights 1689: Included the freedom to petition the monarch (a step towards political protest rights), and freedom from cruel and unusual punishments (the forerunner to the ***ban on torture*** *in the* ***Human Rights Act 1998*** *(UK)).*

American Declaration of Independence 1776: We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness…. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,--- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness.

Declaration of the Rights of Man and Citizen 1789 (French): Article 1: Men are born free and equal in dignity and rights.

HG Wells, *A Declaration of the Rights of Man 1940*: HG Wells, author and social commentator, prepared a charter in 1940, when he published a book entitled *The Rights of Man* which contained many ideas set out in the *United Nations Charter.* Its first paragraph states:

1.The Right to Live
Everyman is a joint inheritor of all the natural resources and of the powers, inventions and possibilities accumulated by our forerunners. It is entitled, within the measure of these resources and without distinction of race, colour or professed beliefs or opinions, to the nourishment, covering and medical care needed to realise his full possibilities of physical and mental development from birth to death. Notwithstanding the various unequal qualities of individuals, all men shall be deemed absolutely equal in the eyes of the law, equally important in social life, equally entitled to the respect of fellowmen.

RESEARCH

Conduct research into the individual human rights which Australians enjoyed or did not enjoy prior to World War II. For example, the right to Australian citizenship, the right to vote, the right to freedom of movement, the right to ownership of property, the right to asylum, and the right to marry. In particular, investigate the history of involvement of Aboriginal and Torres Strait Islander Peoples as active participants in World War II. Did those who participated in the armed forces receive the same benefits as white Australian soldiers after the war? Report your findings to the class. [S] [C] [A] [E] [R]

WHAT DO YOU THINK?

What do you consider to be the five most important individual human rights which emerge from a study of the development of human rights ideas prior to World War II? [A] [E]

12.3 THE UNITED NATIONS CHARTER

Modern human rights is generally regarded as being the result of the establishment of the United Nations in 1945. The impact of World War II on the nations of the world, particularly those described as the Great Powers (USA, Great Britain, France, China and Russia) led to the recognition of the need to establish an international body which would promote world peace and international law. Australia, as one of the significant contributors to the Allied forces in World War II, sent a delegation to the meeting that founded the United Nations in San Francisco in 1945. The leader of this Australian delegation was Dr Herbert Vere Evatt (1894-1965). Dr Evatt is a famous Australian, who was highly respected overseas and enhanced Australia's reputation with his work in the international sphere. Dr Evatt's performance at the San Francisco conference has been described as:

...of virtuoso quality: for sheer brilliance in an international forum there is nothing in Australia's diplomatic annals to surpass it. For the public, he was one of the outstanding personalities (newspaper representatives voted Harold Stassen of the United States and Evatt as the most impressive delegates). Abroad he was loaded with praise… The reputation Evatt won for himself as the voice of Australia long endures in the United Nations. It brought great credit to his country. More than any other national leader, Evatt made Australia known universally and made it known as a country of courage, responsibility and liberalism.

SOURCE: EVATT FOUNDATION, EVATT.ORG.AU/ABOUT- US, DOWNLOADED 21 JUNE 2019

It took three months of diplomatic struggle for the ***Charter of the United Nations*** to be adopted. It was finally signed by Evatt on 26 June 1945, and adopted unanimously on 24 October 1945. In 1948 Dr Evatt was elected President of the General Assembly of the United Nations, the only Australian to have ever held the position.

'EVATT SIGNING THE CHARTER OF THE UNITED NATIONS AT THE SAN FRANCISCO CONFERENCE, 26 JUNE 1945'

An overview of the United Nations is set out on its website as follows:

The mission and work of the United Nations are guided by the purposes and principles contained in its founding Charter. Due to the powers vested in its Charter and its unique international character, the United Nations can take action on the issues confronting humanity in the 21st century, such as peace and security, climate change, sustainable development, human rights, disarmament, terrorism, humanitarian and health emergencies, gender equality, governance, food production, and more.

The UN also provides a forum for its members to express their views in the General Assembly, the Security Council, the economic and social Council, and other bodies and committees. By enabling dialogue between its members, and by hosting negotiations, the organization has become a mechanism for governments to define areas of agreement and solve problems together.

SOURCE: OVERVIEW, UNITED NATIONS, WWW.UN.ORG.AU/EN/SECTIONS/, DOWNLOADED 3 JULY 2019

As a signatory of the *United Nations Charter*, and one of the founding nations to establish the United Nations, Australia is committed to its *Purposes, Principles,* and *Processes*. Our international relationships and our role in the international community have seen Australia involved in armed conflict and in military peacekeeping obligations in countries outside Australia. It has seen Australia participating in court cases in the International Court in the Hague. It has seen us experience the struggle of dealing with the human rights of our Aboriginal and Torres Strait Islander Peoples and the refugees that come to our shores seeking asylum. Generally, the fact that we are a signatory to the *United Nations Charter* does require us to meet certain international obligations. The extent of these obligations and what they mean for Australia and individual Australians will become clearer as we proceed.

PREAMBLE

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- *to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and*
- *to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and*

- *to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and*
- *to promote social progress and better standards of life in larger freedom,*

AND FOR THESE ENDS

- *to practice tolerance and live together in peace with one another as good neighbours, and*
- *to unite our strength to maintain international peace and security, and*
- *to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and*
- *to employ international machinery for the promotion of the economic and social advancement of all peoples,*

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER 1: PURPOSES AND PRINCIPLES

ARTICLE 1

The Purposes of the United Nations are:

1. *To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;*
2. *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;*
3. *To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and*
4. *To be a centre for harmonizing the actions of nations in the attainment of these common ends.*

ARTICLE 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. *The Organization is based on the principle of the sovereign equality of all its Members.*
2. *All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.*
3. *All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*

4. *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

5. *All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.*

6. *The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.*

7. *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.*

ARTICLE 4

1. *Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.*

2. *The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.*

ARTICLE 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

ARTICLE 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

ARTICLE 7

1. *There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat.*

2. *Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.*

SOURCE: CHARTER OF THE UNITED NATIONS, WWW.UN.ORG/EN/SECTIONS, DOWNLOADED 3 JULY 2019 (EXCERPTS)

PRACTICAL APPLICATION

Refer to the above excerpts from the *United Nations Charter*

1. Identify and describe the paragraph in the *Preamble* which refers to individual Human Rights. Does it give any indication that the United Nations would eventually make a declaration about the rights of Indigenous peoples? [C] [A] [E]

2. Do the *Purposes* and *Principles* extend to making a declaration about the rights of Indigenous peoples? Give your reasons. [A] [E]

12.4 INTERNATIONALLY RECOGNISED HUMAN RIGHTS (THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS* (1948))

The atrocities perpetrated against millions of innocent people during World War II led to the global recognition of human rights in the United Nations ***Universal Declaration of Human Rights (*1948)** (the *Universal Declaration*). In the Preamble, the General Assembly of the United Nations proclaims the *Universal Declaration* as:

… a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance …

As an original member of the United Nations, the Australian Government has formally committed itself to passing laws to uphold the letter and the spirit of the *Universal Declaration.* Although not part of Australian law, the *Universal Declaration* is an international benchmark by which Australia's laws can be evaluated in terms of their fairness to specific individuals and groups within our society.

Examples of rights/ freedoms recognised in the *Universal Declaration of Human Rights* (1948)

It is our duty to ensure that these rights are a living reality – that they are known, understood and enjoyed by everyone, everywhere.

UN SECRETARY GENERAL BAN KI-MOON, 2007

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

Everyone has the right to life, liberty and security of person. (Article 3)

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. (Article 4)

All are equal before the law and are entitled without any discrimination to equal protection of the law. (Article 7 - excerpt)

No one shall be subject to arbitrary arrest, detention or exile. (Article 9)

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 10)

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. (Article 12 - excerpt)

Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country. (Article 13(1)(2))

Everyone has the right to seek and enjoy in other countries asylum from persecution. (Article 14(1))

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (Article 16 - excerpts)

Everyone has the right to own property alone as well as in association with others. (Article 17 – excerpt)

Everyone has the right to freedom of thought, conscience and religion … (Article 18 - excerpt)

Everyone has the right to freedom of opinion and expression ... (Article 19 - excerpt)

Everyone has the right to freedom of peaceful assembly and association (for example, unions, churches). No one may be compelled to belong to an association. (Article 20(1)(2))

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives … The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. (Article 21 - excerpts)

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone has the right to form and to join trade unions for the protection of his interests. (Article 23(1)(2))

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. (Article 24)

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. (Article 25(1)(2))

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (Article 26(1))

PRACTICAL APPLICATION

1. Obtain a copy of the full text of the *Universal Declaration*. In your class divide into small groups (six or less) and, using the *Universal Declaration* as a basis, brainstorm the rights which you think should be represented in the legal systems of the world. Make a list. Use the words 'Right to…' before each of the rights you identify. For example, 'Right to a fair trial'. Choose those which you think are the most important. Justify your choice [S] [C] [A] [E]
2. Are any of the rights you have chosen not represented in the *Universal Declaration*? Why is this so? [A] [E]
3. Which provisions of the *Universal Declaration* might be very difficult for poor nations to implement? [C] [A] [E]
4. One criticism of the *Universal Declaration* is that it is designed for Western democracies and does not account for countries with different political, cultural and religious systems, or for countries in which improving the living standards of the community is the main priority, not individual freedoms. Nations in Africa, the Middle East, and parts of Asia promote this view. Do you think that this is a fair assessment? Give your reasons. [A] [E]

THE *UNIVERSAL DECLARATION*

The *Universal Declaration* does not create law, nor is it an agreement creating legal obligations between nations, but is a **statement of principles to which nations should aspire and adopt,** when and where possible, into their national law. We will examine in the next chapter (**International Law and Human Rights**) the nature and scope of international law and how human rights can be incorporated into the law of a nation. When the *United Nations Charter* and the *Universal Declaration* were signed by those nations which became members of the United Nations in 1945, we have seen above that these nations in the Preamble to the Charter determined to

> *reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.*

The basic principle is that states have exclusive jurisdiction over what happens within their borders, known as the concept of **state sovereignty**. This is because the nations of the world have different priorities, values, traditions, religions and practices that ought to be respected. However, there was broad agreement that international rights should be pursued by the United Nations to ensure that all peoples of the world are treated fairly and with respect. As a result, international law has tried to develop a comprehensive code of human rights for all nations to follow.

12.5 CURRENT HUMAN RIGHTS ISSUES

Have you ever complained to a parent, teacher or perhaps another student, 'How unfair is that!'? You might have heard someone else exclaim this when punished for something they claim not to have done or where they may believe the punishment is unjust. When you think something is unfair, usually you do so because it infringes some right you believe you have, for example, if you are given a detention for something you did not do.

The word 'rights', comes to mind when we believe the law is not just, especially when it is applied to a person or a group of people. The following scenarios give rise to a wide range of human rights world issues affecting the parties and others in the community.

PRACTICAL APPLICATION

We have set out some examples of current issues in the following 'snapshots'. **Each week check the newspapers or online for an issue which you think could be included with these 'snapshots' we have selected.** For each one respond to the following question. What issues affecting human rights, if any, are raised in the context of each example given? Describe each of the rights you identify using the expression 'the right to…' [S] [C] [A]

LOSS OF LANGUAGE

Loss of Aboriginal languages

Before invasion more than 250 Aboriginal languages existed in Australia. Only 60 of them are still considered healthy. Why are so many lost?

Many Aboriginal languages are lost because up until the 1970s government policies banned and discouraged Aboriginal people from speaking their languages. Members of the Stolen Generations are one such group. In many cases, children were barred from speaking their mother tongue at school or in Christian missions. "Our people were not allowed to follow any aspect of their traditional culture. This included being forbidden to speak their languages. This affected both my mother and father and as a result, us kids missed out on being taught our traditional tongues," concedes singer/songwriter Phill Moncrieff.

What happens if the language is lost?

Languages carry cultural knowledge, so the loss of a language means the loss of culture, of Aboriginal people's connection to their ancestors. This in turn has the potential to impact on Aboriginal people's health and well-being. Research shows that strong culture and identity helps develop resilience.

Prof Ghil'ad Zuckerman, a linguist from Adelaide University, agrees: "Without a language, you do not have cultural autonomy, you do not have intellectual sovereignty, you do not have culture, you do not have heritage," he says. The loss of languages is also associated with economic and social costs.

SOURCE: CREATIVE SPIRITS,WWW.CREATIVESPIRITS.INFO/ABORIGINALCULTURE/LANGUAGE, DOWNLOADED 4 JULY 2019 (EXERPTS)

RISING SEA LEVELS-PACIFIC ISLANDS DROWNING

Sea Levels-Pacific Islands

Since the start of the 1990s the Australian Bureau of Meteorology (BOM) has run the South Pacific Sea-level and Climate Monitoring Project. Every month the tidal centre publishes an update on their work. (There are 12 island sites, from PNG to the Cook Islands).BOM estimates the rate of rise to be in the range of 3.4to 11.6 mm per year.

SOURCE:THE IMPACT OF CLIMATE CHANGE, WWW.CLIMATEDATA.INFO/IMPACTS/SEA-LEVELS, DOWNLOADED 12 JUNE 2019 (EXCERPTS)

RISING SEA LEVELS INUNDATE THE HOUMATALA BURIAL GROUND AT LOTOFOA, HAAP'AI, TONGA.

[When Haveahikule'o, Helu I, died, he was given a burial ground called Houmatala at the Northern end of Lotofoa Island. Mafi's brother, Hanipale, was buried here in Houmatala. Unfortunately the waves washed away part of this land over some years. In late 2016, his remains were moved by his son, Fatai Helu, and his grandson, Soloni, to the Langi of Tu'ipelehake Lekaumoana in Monotapu, Foa.

(Mrs Weir gave permission for the use of her family's story to illustrate the personal loss experienced when a rising sea level inundated and washed away the Houmatala burial ground)

SOURCE:'ILISAPESI ELIZABETH WEIR, TALES FROM THE KINGDOM OF TONGA . UNPUBLISHED MANUSCRIPT 2019

PRACTICAL APPLICATION

SOLOMON ISLANDS: RISING SEA LEVELS BLAMED FOR THE DISAPPEARANCE OF FIVE REEF ISLANDS

At least five reef islands in the remote Solomon Islands have been lost completely to sea level rise and coastal erosion, and a further six islands have been severely eroded. Sea level rise, erosion and coastal flooding are some of the greatest challenges facing humanity from climate change. The islands lost to the sea range in size from 1 to 5 hectares and supported dense tropical vegetation that was at least 300 years old.

Nuatambu Island-home to 25 families-has lost more than half of its habitable area, with 11 houses washed into the sea since 2011.

SOURCE: ABC NEWS, THE CONVERSATION, WWW.ABC.NET.AU/NEWS/2016-05-07, DOWNLOADED 20 JUNE 2019 (EXCERPTS)

CHILDREN IN WAR ZONES

Who bears responsibility for the Children of Isis?

There are 70 Australian minors affiliated with Isis in Syria. Yet there is no policy or direction on repatriation. The death of UK teenager Shamima Begum's newborn son and the recent video of an Australian woman in Syria calling to be returned home with her sick daughter has brought the issue of Isis minors and the role of the home government in safeguarding these citizens to the forefront.

By stripping Begum of her UK citizenship and not immediately repatriating her newborn child, UK Home Secretary Sajid Javid has been accused of moral cowardice, of being callous and inhumane, and of being swayed by populism, by religious leaders, opposition politicians, and members of his own party. He is now facing increasing calls for the restoration of Shamima Begum's citizenship. In return, Javid has stated during questions in the House of Commons that:

The death of any British child, even those born to a foreign terrorist fighter,is of course is a tragedy. But the only person responsible for the death of that child is the foreign terrorist fighter.

SOURCE: JENNIFER PERCIVAL, RODGER SHANAHAN, WWW.LOWYINSTITUTE.ORG/THE INTERPRETER, PUBLISHED 21 MARCH 2019, DOWNLOADED 20 JUNE 2019 (EXCERPTS)

GENOCIDE IN MYANMAR

RINJ Prods UNSC on War Rape

Raped Rohingya Women may be as many as 100,000 across three countries where Rohingyas are displaced.

> ***If the UN Security Council (UNSC) does not*** *call to account the perpetrators of rape crime in Myanmar under UN Resolution 1820, the Security Council should fold its tents for if the rape and forced pregnancy of tens of thousands of Rohingyas matters nought, so does the UNSC.*
>
> *By Sharon Santiago Feminine Perspective Staff*

The Bangladesh health ministry reports that 81,000 pregnant girls and women who are about to give birth in Bangladesh refugee camps are displaced Rohingyas from Myanmar. **According to the women's accounts, they were raped** in Myanmar by soldiers who were killing their people and burning their villages in an ethnic cleansing rampage that has driven an estimated 700,000 people from Rakhine State, Myanmar.

SOURCE: RINJ.ORG.INTERACTIVE/PENALTY- FOR-RAPE, DOWNLOADED 1 JULY 2019 (EXCERPTS)

12.6 HUMAN RIGHTS, LEGAL RIGHTS AND LEGAL DUTIES

As you continue to study human rights and the law in this Unit, it is important to understand that a human right that you recognise, or which is contained in the *Universal Declaration*, may not be protected or promoted by any law in Australia.

Like the word 'law', the word 'right' has many meanings. Rights are usually accompanied by a duty. A **legal right** is protected by the legal system, while a **human right** may not be, unless the two coincide. Normally, a breach of a human right accepted by a community can also be condemned by the community, even though the right may not be able to be enforced by law. For example, you have a legal right to own a home and this is accompanied by a **legal duty** imposed on the State to protect your right. It means that anyone who comes into your home without your permission could be charged with an offence or may have to give you compensation if the law allows it. Some parents may feel they have a duty to provide accommodation for healthy and financially independent adult children. Some children may believe that they have a right to expect parents to do this. However, there is no such legal right which adult children can enforce or which the State will enforce. There is however a **human right** for all to be provided with adequate shelter or housing. Article 25 of the *Universal Declaration* states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including … housing.

A State that recognises this as a human right can pass laws to provide housing and shelter of some kind for its citizens, depending on its means. No one should be homeless. In addition, in Australia there is a legal right against discrimination, so if you are denied accommodation because of your race, gender, sexual orientation or age, the State has a duty to provide a forum, such as an Anti-Discrimination Commission, or a Court, where the matter can be decided. You have a **legal right** to take such a matter to the Commission, and the parties are bound by its decision.

We will explore in the remaining chapters of this Unit how the law in Australia gives expression to human rights.

The next chapter introduces you to the international law and the processes by which its deliberations about human rights have influenced the domestic law of Australia.

REVIEW

1. Describe the meaning of: [C]

   Individual human rights | collective human rights

2. Describe the origin of modern human rights. Which of these are still significant today? [C] [A]

3. Describe and explain the circumstances in which the United Nations was formed. Describe the contents of the Preamble of the *United Nations Charter*. Describe and explain any features of the *United Nations Charter* (signed in June 1945) which indicate or foreshadow the publication and signing of the *Universal Declaration* in 1948. [C] [A]

4. With respect to the three source documents below, answer the following:

   (a) Describe the human right raised by each of them. [C]

   (b) Explain how you identified the human right in each source from its text. [C] [A]

(c) Identify the legal issue or issues which are raised by each source. Are changes to the law proposed by any of the sources? [C] [A]

(d) In each case, what further information might you need to make a decision to support or oppose any change to the law you have identified? [A] [E]

SOURCE 1: SAME-SEX MARRIAGE

Up to 800 gay couples could marry in a mass Canberra wedding in early December. Plans for the mass ceremony were revealed as the Federal Government yesterday failed to speed up its High Court quest to tear up the ACT's new same-sex marriage laws. Commonwealth Solicitor-General Justin Gleeson, SC (Senior Counsel), told the High Court he was ready for hearings to begin in November – before the first gay couple could walk down the aisle, likely on December 7. "We will say that the central purpose of the Federal (Marriage) Act [noting that the *Marriage Act 1961* (Cth) defines marriage as '… *the union of a man and a woman to the exclusion of all others, voluntarily entered into for life*'] (is) … there shall not be other and different forms of marriage," he told Chief Justice Robert French in a hearing to set down dates for the landmark case.

SOURCE: EXTRACT FROM 'HUNDREDS PLAN MASS GAY NUPTIAL', THE COURIER MAIL, 26 OCTOBER, 2013.

SOURCE 2: MOTORCYCLE GANGS

In October, 2013, the Queensland Government responded to a brawl that spilled out of a Broadbeach café onto the street in front of horrified diners between 15 members of the outlawed Bandidos motorcycle club, wearing their full club colours, and two men linked to the Finks, by rushing the country's toughest anti-bikie laws through parliament, including the following offences punishable with jail terms:

- Riding on motorcycles in groups of three or more if members of designated 'criminal organisations'.
- Wearing club colours to a hotel.
- Mandatory 15-year sentences for bikies convicted of drug possession, trafficking, dangerous driving and assault, plus an extra 10 years imprisonment for an office-bearer, unless the gang member becomes an informant.
- A participant in a criminal organisation (for example, Hells Angels) should be refused bail while awaiting charges on alleged criminal activity, unless the defendant can show cause as to why their detention in custody is not justified.

SOURCE 3: MUSLIMS

The NSW Government is set to pass a law which will allow police to order someone to remove a face covering. Police will be given powers to force people to remove facial coverings if they are suspected of committing a crime, the Premier, Barry O'Farrell, has said.

Mr O'Farrell announced late yesterday that cabinet had approved laws allowing police to direct people to remove coverings, including veils and motorcycle helmets, if they had reasonable grounds for suspecting breaches of security may occur, or breaches of the law had occurred.

SOURCE: 'POLICE GIVEN BROAD POWERS TO REMOVE FACIAL COVERINGS',THE SYDNEY MORNING HERALD, 5 JULY, 2011, BY AMY CORDEROY WITH SAFFRON HOWDEN.

TOPIC 1: HUMAN RIGHTS

CHAPTER 13: INTERNATIONAL LAW AND HUMAN RIGHTS

FOCUS SUBJECT MATTER

13.1 WHAT IS INTERNATIONAL LAW?

13.2 INTERNATIONAL CONVENTIONS

13.3 THE RIGHTS OF STATES

13.4 THE INTERNATIONAL COURT OF JUSTICE (ICJ)

13.5 THE INTERNATIONAL CRIMINAL COURT (ICC)

13.6 CONCLUSION

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the nature of international law;
- how human rights have developed in the context of international law;
- there is an agreed process whereby international conventions become binding as between nations;
- international conventions do not of themselves make law binding on Australian citizens;
- States have the right to ratify and accede to international conventions in order to make laws for their own citizens; and
- the ICJ does not have jurisdiction to hear claims and actions by private individuals about human rights.

13.1 WHAT IS INTERNATIONAL LAW?

International law is the system of rules, principles and practices that govern relationships:

- **between nations;** and
- **between nations and other international bodies.**

For example, Australia's relationship with the United Nations (the UN) is part of the system of international law. The rules of international law cover most inter-state activities, including the rules of international communications, carriage of goods and trade between nations. So when you post a letter overseas, travel on a plane to another country or purchase an item from eBay, international law applies. Even though international law exists to regulate relationships between nation states, the effects of international law extend to individuals in all countries. When a country signs an international treaty it is under an obligation to ensure its national (also called 'domestic') law conforms to the terms of the treaty. In this way international law can impact directly on citizens living within the borders of the signatory country.

However, until the convention (covenant or treaty) is ratified or acceded to by the domestic law of a nation, it does not become part of that nation's law.

International law also deals with spaces not owned by individual nations. These include seas, oceans, airspace, outer space and Antarctica. It makes international law a very important aspect of environmental protection.

THE NEED FOR INTERNATIONAL LAW

Clearly the **relationship between nation states needs stability and consistency**. This can be seen from the activities that bind them together, such as communications and trade. However, despite this, and a history of nation states entering into quite complex agreements to regulate their relationships, there is a corresponding history of armed conflict to which the nations of the world resorted to resolve their disagreements. Concerns about the prevalence and horrors of war have continued through the centuries. A series of international conferences was held during the 19th century to decide collectively on **what rules should apply during wartime**, especially in regard to the treatment of civilians, wounded soldiers, and soldiers who surrendered or were captured by the opposing side. One of the first of these was the ***Geneva Convention*** which met in 1863 and established, amongst other things, the **International Red Cross**. This convention was signed by just 16 nations. Since then, there have been three more *Geneva Conventions* and numerous *Protocol*s, which expanded the international laws of war.

In 1899, the *Hague Conference*, established the **Permanent Court of Arbitration** as a venue for the peaceful resolution of international disputes. While this remains a venue for the peaceful resolution of international disputes, especially for commercial disputes, it did not stop the **World War I (1914-1918) or World War II (1939-1945)** from occurring. These events made the desire for the civilised nations of the world to set up a world body to preserve and maintain international peace more pressing. As we have seen, it led to the establishment of the UN in 1945. It also led to a new court being established- the **International Court of Justice** (ICJ) and to the expansion of international law to go beyond nation states to include **individuals, through protection of human rights, and forums and laws for crimes against humanity and genocide.**

Today, **the need for international law is even greater than in previous decades and centuries.** Wars are still occurring and with the presence of nuclear weapons and technologies such as the 'smart bomb' and 'drones' the potential for destruction is only increasing. It is realised that international coordination and cooperation is vital to every nation state in many other ways. Technological innovation and economic globalisation accelerated the need for rapid and extensive interconnection between the

nations of the world, as well as for individuals living in those countries. Regulating this interaction requires international as well as national laws. This extends to protection of the environment, transport, regulation of trade between states, monetary stability, aerospace, communications across the globe including mediums such as the Internet, health, resources and nuclear power and energy.

SOME FEATURES OF INTERNATIONAL LAW

The most distinctive feature of international law is that it is not made by any national legal system, but by entities representing the nation states of the world. This gives rise to certain consequences:

- **international law cannot be enforced in the same way as national laws.** If you break a national law there are direct legal consequences that will flow from the breach. However, with international law there are **no international police, prisons, or courts with jurisdiction over all nations and all people.** A nation state can ignore or break many international laws without fear of repercussions, other than diplomatic disapproval or economic sanctions.
- **National law is relatively easy to find.** Although the world is made up of legal systems that function in quite different ways, one can find the law in most countries by going to laws passed by Parliament, or in some cases a monarch or a dictator. Depending on the system of law, these laws are supplemented with the judgments of courts. In all these systems and in most Nation States, there is a hierarchy of the source law, as you have learned about when studying the Australian legal system in Volume 1 of *Legal Studies for Queensland* (Eighth Edition).

With international law **there is no national legislature or parliament.** Neither the United Nations General Assembly, nor any other body, fulfils the role of an international legislature. Nor is there any formal hierarchy of international courts. Tribunals and bodies such as the International Court of Justice (ICJ) and the International Criminal Court (ICC), hear a relatively small number of cases. This leads to **greater uncertainty on legal issues that arise in nation states.**

Topic 2: The effectiveness of international law, deals with many of these issues, especially as they relate to human rights. The question arises as to how the *Purposes, Principles and Processes,* set out in the *Preamble* of the *United Nations Charter* can be achieved.

So far we have established that being a signatory to the *United Nations Charter*, and the *Universal Declaration*, does not mean that a nation state has entered into binding legal obligations to enforce human rights principles within its borders and as between itself and the other member states of the UN. The **Conventions** which take place under the auspices of the UN, which create agreements in writing between the member states are **a primary source of international law**.

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13.2 INTERNATIONAL CONVENTIONS

These are the most important sources of international law. Even before the establishment of the UN the countries of the world were meeting and entering into agreements to conduct their affairs. Under the term **convention**, comes a range of agreements between two or more nation states, including **treaties, covenants, statutes, protocols, charters and agreements.**

FEATURES OF CONVENTIONS

Although there are different types of conventions that are described differently (e.g. **covenants,**

treaties, statutes, protocols) they have many similar features:

- their terms are set out clearly like written contracts;
- there are formalities which must be observed for a convention to be binding:
- it must state the parties to the agreement intend it to be binding according to international law;
- it must state the parties entered into the agreement voluntarily; and
- It must be signed by an authorized representative of the nation which wishes to rely on it.

However, unlike a contract, conventions do not require consideration. It is also possible when negotiating for a nation to indicate it will sign the convention (covenant, treaty) but at the same time make some **reservation about its obligations under the conventions. (eg. protocols amendments or supplements to an earlier treaty or agreement).**

EXAMPLES OF INTERNATIONAL CONVENTIONS (AGREEMENTS)

The term convention is found in agreements such as:

the *Convention on Biological Diversity of 1992;*

the *Convention on the Law of the Sea of 1982.*

The term 'covenant' is found in agreements such as the *International Covenant on the Elimination of All Forms of Racial Discrimination* (1966).

The term 'statute' is in the *Rome Statute on the International Criminal Court 2002.*

The term 'treaty' is found in the *Timor Sea Treaty of 2003.*

An example of a 'protocol' is the *Kyoto Protocol* which is an amendment to the *United Nations Framework Convention on Climate Change* (1997).

Like all agreements, all international conventions, to be effective law internationally and domestically, need to be binding:

- as between nations;
- by complying with the agreed arrangements of the United Nations; and
- to have been passed into the law of the relevant nation state.

RESEARCH

Treaties usually consist of a title, a preamble, recitals, a series of numbered articles and a conclusion, which is immediately followed by the signatures of the parties listed above

- look at Treaty of your choice and find out where it was signed and by which nations; and
- set out the main aims and objectives.

Treaties signed by Australia can be found on a Commonwealth government Treaty database.
See www.austlii.edu.au/other/treaties/.

All treaties can be found on the United Nations treaty series www.untreaty.un.org.

ACCESSION, RATIFICATION, AND RESERVATIONS

Again, the best way to approach this topic, is to initially think in terms of the way in which contract law is applied after an initial contract has already been agreed between the parties to it.

Where **an additional party** seeks to join an existing contract, all of the parties to the existing contract must agree.

Where one of the parties to a contract seeks to **change the terms of an existing contract**, if the parties all agree to the change, a new contract can be entered into by the parties. Contract law requires these **various processes to ensure the parties are legally bound**. In the same way, the documents produced at meetings of member nations of the United Nations, needed to have a **system of arrangements that nations could follow**, as they decided to firstly, agree to their terms, and secondly, to make them part of their domestic law. This process is recorded in a United Nations Convention.

PRACTICAL APPLICATION

VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

Article 12 (2) (b): Signature ad Referendum

A representative may sign a treaty 'ad referendum' , i.e., under the condition that the signature is confirmed by the State. In this case, the signature becomes definitive once it is confirmed by the responsible organ.

Articles 10 and 18: Signature Subject to Ratification, Acceptance or Approval

Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses a willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and purpose of the Treaty.

Articles 2 (1) (b), 14 (1) and 16: Ratification

Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accompanied by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depository to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.

Articles 2 (1) (b) and 15: Accession

'Accession' is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty is entered into force. The Secretary-General of the United Nations, in his function as depository, has also accepted accessions to some conventions before their entry into force.The conditions under which accession may occur and the procedure involved depend on the provisions of the Treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur if the negotiating states were agreed or subsequently all agreed on it in the case of the state in question.

Articles 2 (1) (d) and 19-23: Reservation

A reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the Treaty in their application to that state. A reservation enables a state to accept a multilateral treaty as a whole by giving it a possibility not to apply certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to. Reservations must not be incompatible with the object and purpose of the Treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made.

PRACTICAL APPLICATION CONTINUED...

1. Each of the main terms described and explained in the separate paragraphs above is captured in a 'topic' sentence. In each case write down the sentence exactly as it is expressed. Does the sentence you have selected accurately describe the meaning of the term? If not, why not? [C] [A] [E]
2. In Article 12 (2) (b), ***Signature ad Referendum***, what do the words '*confirmed by the responsible organ*' mean? [A]
3. Suppose that in an Australian contract, under common law, there is an express clause which says '**Where this contract has been signed by all parties, it shall not be binding until the physical or electronic version of the contract has been countersigned by an authorized representative of each party and delivered to all parties electronically, by facsimile, or physically.**' Do you think this is what is intended by the '**Signature Subject to Ratification**' article? Why do you think there are further obligations created by the last sentence of the article? [C] [A] [E]
4. Compare the explanation about the possible process in a contract in the previous question to the explanation in the '**Ratification**' article about the processes by which a nation member of the United Nations can become bound by ratification. Explain any similarities and differences? [C] [A]
5. How does '**Accession**' differ from '**Ratification**' ? Describe and explain the process by which a state can enter into a treaty after a number of other nations have already negotiated the terms, and where that state is not included as a possible party in the provisions of the treaty. Why do you think these arrangements have been agreed by the members of the United Nations who initially drafted the *Vienna Convention on the Law of Treaties 1969*? [C] [A] [E]
6. What is the purpose of a state making a '**Reservation**'? In what circumstances are reservations allowed to be made? [C] [A]

Australia is a signatory to many of the Conventions (**Covenants, Treaties, and Protocols**) of the United Nations. Many of these are studied throughout Unit 4. We will indicate to you the status of each convention referred to when it has, or has not become part of our domestic law and consequently part of the Australian legal system. A simplified diagram follows which illustrates the status, in Australia, of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966)

International Covenant on the Elimination of All Forms of Racial Discrimination (1966)
(One of the first human rights treaties to be adopted by the United Nations. Australia becomes a signatory in 1969)

↓

Racial Discrimination Act 1975 (Cth)

↓

Section 7 - Ratification of Convention
Approval is given to ratification by Australia of the Convention.

↓

(Australia ratified this Convention on 30 September 1975, subject to certain reservations)

13.3 THE RIGHTS OF STATES

Statehood is clearly necessary for a country to qualify as a member of the UN, and to be able to enter into legal relationships with other states and with the Organisation.

MEMBERSHIP OF THE UN

- Membership of the UN is open to all peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations.
- The admission of any such state to membership of the UN will be affected by decisions of the General Assembly upon the recommendation of the Security Council.

Some of the criteria to determine statehood set out in the *Montevideo Convention on the Rights and Duties of States* (1934) include:

> *Article 1: the state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.*

WHAT DO YOU THINK?

Taiwan, as the Republic of China, has applied 14 times for membership of the UN, and been refused. Taiwan argues that the nation meets the criteria of the *Montevideo Convention*. Apply the four criteria set out in Article 1 of the Convention to make a determination as to whether it does, or does not, meet the criteria. Should Taiwan, as the Republic of China, be admitted to membership of the UN? Why do you think it has not been accepted as a state by the UN? [C] [A] [E]

TERRITORIAL DISPUTES

All sovereign nations have borders. These will either be land or maritime (sea) borders. The area within these borders is said by the relevant state to be its territory. In the short history of the United Nations there have been many territorial disputes.

> *A territorial dispute is a disagreement over the possession/control of land (or sea) between two or more territorial entities or over possession or control of land (or sea) usually between a new state and the occupying power.*

SOURCE: TERRITORIAL DISPUTE, EN.WIKIPEDIA.ORG, 18 JULY 2019

RESEARCH

At the time of writing, there is a territorial dispute in the South China Sea, a maritime area of significance to Australia and a number of Asian countries, notably the People's Republic of China (China), the Philippines, Malaysia, Indonesia, and Vietnam. Investigate the territorial dispute between China and Vietnam about their maritime borders. There have been many newspaper articles/online articles about the topic.

1. Describe where each of China and Vietnam claim their borders to be. [C] [A]
2. Describe and explain the significance to each country of the position of the territory to which it lays claim. [C] [A]
3. Have China and Vietnam been involved in armed conflict about a territorial dispute in the past? Is either country prepared for such conflict again over this dispute? [C]
4. Is the UN (one of its organisations) involved in the dispute? What is its role and what is the current status of the dispute? [S] [C] [A]

SOVEREIGNTY

This concept is used in the *United Nations Charter*, without being defined .The importance of this concept is that within international law, the extent to which legal relationships are binding **as between one state and another,** and the extent to which the **United Nations can involve itself in the domestic law of a nation,** is determined by the *Principles* set out in the *United Nations Charter*. We have set these out in Chapter 12. Some of these are repeated below.

Ch 12.3

PRACTICAL APPLICATION

CHARTER OF THE UNITED NATIONS

Chapter 1-Purposes and Principles

Article 2 (1)-(5)

The Organisation and its Members, in the pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organisation is based on the principle of the sovereign equality of all its Members.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.

1. Look up the meaning of the word 'sovereign' in your dictionary. What do you think *Principle 1* should mean to a Member? [C] [A]
2. Describe and explain in your own words *Principle 4.* What main Purpose set out in the *United Nations Charter* does it support? [C] [A]
3. When does *Principle 7* permit United Nations to intervene in the affairs of a member? When might such an issue arise? [C] [A]

FURTHER COMMENTS ABOUT SOVEREIGNTY

According to Prof James Crawford, who was elected in 2014 as Australia's second only ever judge on the *International Court of Justice*, sovereignty is a:

> *Flexible legal concept that is adapting to globalization, consistent with a variety of complex internal forms of government and with the evolution of international institutions.*

He says it is a '*description of statehood*' and identifies a number of legal characteristics including that:

- states have the ability on the international stage to perform acts, and agree to conventions (covenants, treaties etc);
- states have exclusive competence in their internal affairs;
- states are not subject to compulsory international processes, jurisdiction or settlement without the consent, given either generally or in the specific case; and
- states are regarded as 'equal' (although this may be formal rather than substantive)

SOURCE: JAMES CRAWFORD, SOVEREIGNTY AND LAW, POCKETBOOKS OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 2013

The point is that **entering** into specific and legal arrangements with other states, and **withdrawing** from those arrangements is **an attribute of sovereignty.** This is reflected in the process necessary to legally bind a member to Conventions (covenants, treaties) as set out above in the section on the *Vienna Convention on the Law of Treaties* (1969). Merely signing a convention is not enough, there must be ratification or accession before it is binding, and even then a member state may withdraw from the agreement.

SCENARIO

Facts: Countries A and B are both signatories to the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) (CERD) and pass domestic laws establishing various rights against discrimination in an Act of Parliament which also ratifies the Convention. Both countries A and B have Indigenous peoples who were killed and displaced from their homes by European colonisation. Country A does not allow the native language of its Indigenous peoples to be taught in the schools which their children attend. This has led to widespread loss of language skills over succeeding generations which is continuing. On the other hand, Country B has taken steps to promote the native languages of its Indigenous peoples.

Country B decides it wants to take legal action at an international level in the *International Court of Justice* to compel Country A to introduce a policy that leads to its Indigenous children being taught their native language as well as English.

There is no clause in the CERD which says that the parties to this convention **can not take legal action** against any other party to the convention to enforce its terms.

Legal issue: Should Country B be able to take legal action against Country A to stop it from discriminating against its Indigenous children? If so, would Country B the likely to be successful?

Answer: Give your answer to the above legal issue. Provide your reasons. [A]

We will now look at the *International Court of Justice* to see if it has any role in promoting human rights or **determining disputes about human rights** in its decisions.

13.4 THE INTERNATIONAL COURT OF JUSTICE (ICJ)

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

Article 34

1. Only states may be parties to matters before the court.

Article 38

1.The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it , shall apply:

a. International conventions, whether general or particular establishing rules expressly recognized by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognized by civilized nations;

d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

JURISDICTION- *ARTICLE 34*

The ICJ does not have jurisdiction to make orders which bind any nation other than the nation parties appearing before it in a dispute which arises under international law. This does not mean that one nation is not able to allege that another nation is in **breach of a right if, which observed, would ensure the human rights of that nation's peoples**. The *Nuclear Test* cases involving France and New Zealand were such cases. Decisions of the ICJ are only binding on the parties that bring the dispute before the court. **The ICJ does not set any precedents which are binding on all nations.**

As states freely submit cases to the ICJ there is a reasonably good record of countries complying with the ICJ's decisions but there are quite a few cases of non-compliance where the decision is ignored. In some cases, a country will withdraw itself from the ICJ jurisdiction, as occurred in the cases set out below.

CASE STUDY

Nuclear Test Cases (Australia v France, New Zealand v France) 1974 *ICJ Rep 253*

Facts: In 1966, France began atmospheric nuclear testing in the Pacific Ocean at its colony of French Polynesia. This was because four years earlier, France's African colony Algeria, which France had used as its nuclear test site, gained its independence and refused to allow nuclear testing to continue. Australia and New Zealand were concerned about the risk to their countries from the high level of radioactive fallout from the recurring above ground nuclear tests.

In 1973, Australia and New Zealand brought their case to the ICJ. Their main ground was that the testing was a breach of the customary international law rule that injury should not be caused to another nation. They requested an order that the French Government not carry out any further such tests.

Legal issue: Were the atmospheric nuclear tests unlawful under international law?

Decision of ICJ: The majority decided they would not determine whether atmospheric testing was lawful or not in the South Pacific. They found it was no longer an issue on which the ICJ had to rule. This was because the French President, Foreign Minister, and the Ambassador to New Zealand, had made a series of public statements to the

CASE STUDY CONTINUED...

effect that France now had sufficient data on atmospheric testing, and would soon switch to underground tests. The majority held that France was now bound by those statements and was under a legal obligation to stop atmospheric testing. The majority added that if France did not stop atmospheric testing Australia could re-open the case in the ICJ.

The minority, five judges including Australia's ad hoc (appointed) judge for the case, Sir Garfield Barwick, gave a strong dissent. They argued that the ICJ should hear the case on its merits and determine the issue of whether atmosphere nuclear testing by France was lawful in the South Pacific.

[Commentators felt political considerations were important as both France and China were conducting atmospheric tests at the time and both would have ignored any ICJ ruling of illegality of above ground nuclear testing. France withdrew its acceptance of the jurisdiction of the ICJ in 1973 just prior to the case being heard.]

Between 1966 and 1974 France conducted 41 atmospheric tests in the Pacific and 138 underground tests up to 1992. It stopped testing in 1992 due to obligations arising under the *Nuclear Non Proliferation Treaty of 1968* which France had just signed.

CASE STUDY

Nuclear Test Case (New Zealand v France) 1995 *ICJ Rep 288 – Australia joined this action.*

Facts: A decade later, Australia and the international community were incensed when French President Jacques Chirac announced in June 1995 that France would lift the moratorium and resume underground nuclear tests in the South Pacific. France proceeded to conduct eight tests between September 1995 and May 1996. New Zealand and Australia were concerned that the testing cracked the atoll where the tests were being carried out, and allowed seepage of radioactive material in the ocean. This would harm marine life and could be spread by currents and storms across the Pacific towards New Zealand and Australia. The argument was that the nuclear testing posed increased risks to humans as well as to the environment.

Legal issue: Given the extent of harm being done to the marine environment, could the ICJ re-open the 1974 case to give a ruling of illegality against French tests in the Pacific? Or could it hear a new case on the issue of underground testing? New Zealand also requested the ICJ conduct an independent environmental impact assessment as part of the decision making process.

Decision: The majority held that the 1974 case could not be reopened. The 1974 decision allowing it to be reopened was referring only to atmospheric testing. New Zealand's argument that it should be read more broadly to cover French Pacific testing generally as both forms create radioactive contamination in the marine environment, was rejected by the ICJ. They also ruled that the fact France had removed itself from ICJ jurisdiction prevented a new case being brought to the ICJ.

The minority argued that there is in international law a 'basic principle, that no nation is entitled by its own activities to cause damage to the environment of any other nation' and that the legality of the testing should be determined by the court.

However, whilst this case was being brought to the ICJ, anti-nuclear protests occurred around the world. In Vancouver, nine protesters chained themselves to the French consulate. Protesters in New Zealand dumped manure outside the French ambassador's residence. French Polynesians burned a French flag at a rally in Sydney, and protesters held a candlelight vigil in Fiji. Riots and protests occurred in Tahiti, the capital of French Polynesia. Marchers wore T-shirts and banners demanding independence in light of the nuclear testing. Economic boycotts symbolised international discontent with France's actions. Trade boycotts with France were frequent in New Zealand, Australia, and Japan with many people refusing to buy French products including French cheese, wines, cosmetics and cars.

The end result was that France bowed to the negative reaction of the international community and in May 1996 stopped all testing and signed the *Comprehensive Test Ban Treaty of 1996*.

The ICJ cannot hear cases when one party is an individual, a company or NGO. This means that a potential claim for an alleged breach of human rights by such a plaintiff will not be heard by the ICJ. On the other hand, it will hear disputes between nations which arise pursuant to an international convention which is about human rights, if the parties consent, or are both parties to the relevant convention because they have ratified or acceded to it. An example of this is found in a case commenced by Georgia against the Russian Federation:

CASE STUDY

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), proceedings instituted 12 August 2008

Claim: The Russian Federation, through its state organs, state agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaza separatist forces and other agents acting on the instructions of, and under the direction and control of the Russian Federation, is responsible for serious violations of its fundamental obligations under CERD, including articles 2,3,4,5 and 6.

Legal issue: Would the ICJ hear and determine Georgia's claim?

Decision: Following several preliminary hearings, the Court requested each party to provide submissions in relation to whether or not it should proceed to hear the claim on the merits. Following submissions, the court concluded that none of the documents or statements provided any basis for a finding that there had been a dispute about racial discrimination. It followed from the general finding of the court and the specific findings made with regard to each document and statement that Georgia had not, in the court's opinion, provided support for its contention that the dispute with Russia over ethnic cleansing was long-standing and legitimate.

Although the ICJ took the matter through various preliminary stages, on the basis that the parties were both signatories and had ratified the CERD, it did not consider that there was evidence for it to conclude that Russia had breached its obligations under the Convention. The claim was dismissed.

SOURCE: THE INTERNATIONAL COURT OF JUSTICE, WWW.ICJ-CIJ.ORG/EN/CASE/140, DOWNLOADED 11 JULY 2019 CHAPTER XIV: THE INTERNATIONAL COURT OF JUSTICE

The ICJ's second role is to give **legal advice, known as advisory opinions,** when requested by the UN and its 16 specialised agencies. Individual governments and other bodies such as NGOs cannot request such an opinion. In the last 60 years the court has given 25 advisory opinions, including advice on the legal consequences of the construction of a wall in the occupied Palestinian Territory, admission to UN membership, and reparation (compensation) for injuries suffered in the service of the UN.

The ICJ cannot investigate disputes of its own motion. If a party is dissatisfied with the ICJ decision it has no avenue of appeal, but can challenge the scope or meaning of the decision and can apply for a review of the decision. The ICJ is not a criminal court and has no jurisdiction to prosecute any state or individual for criminal acts. Nor does it have power to hear appeals from other international courts or from national courts. It is not a court of last resort like the High Court of Australia.

Because states freely submit cases to the ICJ there is a reasonably good record of countries complying with the ICJ's decisions but there are quite a few cases of non-compliance where a decision is ignored. In some cases, a country will withdraw itself from the ICJ jurisdiction, as occurred in the nuclear cases set out above.

THE APPLICABLE LAW-*ARTICLE 38*

The ICJ applies the law it sources from the matters set out in *Article 38* when two or more states submit a claim which is disputed. We will deal with these briefly in turn, as the ICJ has historically not been involved in hearing disputes between states about human rights to any significant extent.

a. **International conventions:** We have seen already that individuals are not able to take their claims to the ICJ. When nations ratify or acccede to a covenant or treaty which involves human rights and are in dispute about a matter relevant to such a treaty they can bring a claim for the ICJ to hear it. We have already looked at how this can work above. We will look at this again in **Topic 2** when assessing the effectiveness of international law in this area.

b. **International customary law:** These are rules that evolved from the customs of national states. To be a custom it must have been **reasonably consistent over many years,** applied fairly **uniformly** and the nations of the world must **accept that it is binding on them.** An example of international customary law is that each nation now has jurisdiction and control extending up to 12 (nautical) miles from the shoreline, known as territorial waters. There are sometimes claims made about the position of this boundary limit. Australia claims a 200 mile territorial sea limit extending from its territory in Antarctica as a protected whaling sanctuary. **Another example is the principle that refugees should not be forcibly returned to a country where they face persecution or genocide.**

c. **Law recognized by civilized nations:** these general principles have not been passed by governments but are seen as the basic concepts, processes and procedures that are possessed by fair, functioning, legal systems. Not surprisingly, there is much debate as to these general principles with the o**bligation to act in good faith** and to abide by the **principles of natural law** frequently cited as examples of general principles.

d. **Judicial decisions and the teaching of the most highly qualified publicists of the various nations:** subsidiary or secondary sources include published judicial decisions which are the **decisions made by judges and courts law, both national and also international.** There is no system of stare decisis (precedent) in international law. *Article 59* of the ICJ statute specifies '*a decision of the court has no binding force except between the parties and in respect of that particular case*'. Prior cases may be considered when courts (International or National) try to determine the scope of the rules sourced in treaties, customs and general principles (the first three sources). Also included as secondary sources are the writings of publicists, mainly eminent legal academics such as professors in international law who have written books, treatises and papers on various international law issues

RESEARCH

Go to the website of the ICJ, Icj-cij.org/homepage.

There is a list of contentious cases on the site. Select one, preferably one which involves a convention on human rights, and write a case summary under the headings:

Facts.

Legal issue(s)

Decision. [S] [C] [A]

13.5 THE INTERNATIONAL CRIMINAL COURT (ICC)

The ICC is a permanent court situated in The Hague. It has the responsibility of prosecuting individuals for offences which arise under international criminal law. These are crimes so heinous that they cannot be left to one nation to prosecute. These crimes include genocide, crimes against humanity and war crimes. This new form of law was recognised after the World War II when the atrocities committed by members of Germany's Nazi regime against European Jews, and the annihilation of millions of civilian victims in concentration camps, warranted special trials and punishment.

- **Genocide:** the deliberate and systematic destruction of an ethnic, religious or national group.
- **Crimes against humanity:** a repeated practice of atrocities tolerated or condoned by a government or a de facto authority. Murder, execution, torture, rape, and forms of persecution will only reach the threshold of crimes against humanity if they are a part of a widespread or systematic practice. An isolated incident is not enough and would need to be tried under national laws.
- **War crimes:** crimes that violate the laws of war, such as the killing of men who surrender or the torturing of captured enemy soldiers.
- **Aggression:** *The Rome Conference of 1998* that established a court and its rules, could not agree on the legal definition of aggression, so that jurisdiction remains dormant for now and there will be no prosecutions brought until this issue is settled. *The Rome Statute* which established the ICC became a binding treaty in April 2002, with 60 nations ratifying it. The ICC can only prosecute crimes committed after that date.

It is clearly a breach of the human rights of individuals living in the country where they are part of a group oppressed and persecuted by the de facto rulers, or even the legitimate rulers of that country. It seems fairly clear that this is what is happening at present to the Rohingya citizens of Myanmar. We will examine cases that have been heard in the ICC in **Topic 2** when considering the effectiveness of international law. The first trial held by the ICC concluded in October 2012 with the accused Lubanga of the Congo found guilty.

CASE STUDY

The Prosecutor v Thomas Lubanga Dyilo of the Congo

Facts: Lubanga was a military commander in the Congo. He led an ethnic revolt under the banner of the Union of Congolese Patriots (UCP) to demand that Ituri become an autonomous province of the Congo. He used child soldiers in his militia with evidence of 800 children under 15 years of age recruited or forced to join. He attacked civilians on the basis of their ethnicity and destroyed villages. In 2004, the Congolese government authorised the ICC to commence investigations.

In 2006, Lubanga became the first person ever arrested under an ICC arrest warrant and charged with a war crime. He was flown to The Hague where he was kept in the ICC detention centre. His trial opened on 26 January 2009.

Legal issue: Had he committed the crime of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities?

Decision: Lubanga was convicted of the offence in 2012. The Court found that as he was Commander-in-Chief of UCP. Lubanga exercised an overall coordinating role of their activities and he had actively supported recruitment initiatives, for instance, by giving speeches to the local population and to the young recruits. He also personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UCP/FPLC staff members who were below the age of 15. This evidence established beyond reasonable doubt that he had committed the offence.

13.6 CONCLUSION

Australia is a signatory to many international covenants and treaties. Some of these are purely commercial in character, but many of them codify the system of human rights at an international level. The extent to which these international human rights have become part of the domestic law of Australia requires us to look at

- the human rights contained in the covenant or treaty under consideration;
- whether or not the particular convention had been ratified or acceded to after it had been signed;
- whether or not the *Australian Constitution*, and the Australian legal and political systems, have allowed the human rights principles in question to be translated into Australian domestic law without reservation; and
- finally, examining the domestic legislation which has been passed in Australia which made particular human rights enforceable at law.

Two very important examples which you have already studied come to mind. **The Tasmanian Dam Case,** where Commonwealth legislation overrode state legislation to prevent the Tasmanian government from constructing a dam on the Gordon River, and the use of the *Racial Discrimination Act 1975* (Cth) to support Aboriginal and Torres Straight Islander land rights claims in the ***Mabo case*.**

Chapter 14 will look at:

- *International Covenant on Civil and Political Rights* (1966) (ICCPR);
- *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR);

Chapter 15 will look at:

- *Sources of human rights law in Australia.*

Chapter 16 will look at:

- *Covenant Relating to the Status of Refugees* (1951) and the *Protocol Relating to the Status of Refugees* (1967)*; and*
- *Convention on the Rights of the Child* (1990).

Chapter 17 will look at:

- *International Convention on the Elimination of All Forms of Racial Discrimination* (1966)*:*
- *Racial Discrimination Act 1975* (Cth)*;*
- *Sex Discrimination Act 1984* (Cth)*;*
- *Disability Discrimination Act 1992* (Cth).

REVIEW

1. Define the following: [C]

international law | conventions | ratification | accession

2. Describe and explain the 'rights of states'. [C] [A]

3. Describe and explain the circumstances in which a treaty can be enforced. [C] [A]

4. Describe and explain the jurisdiction of the *International Court of Justice*. [C] [A]

5. A claim is filed in the *International Court of Justice*. Where can the court go to determine the law applicable to the circumstances of the case? [C] [A]

6. Describe and explain the difference between the process of ratification and process of accession. What further steps must be taken by Nation States to make an international treaty domestic law? [C] [A]

7. Describe and explain the role of the *International Criminal Court*. [C] [A]

TOPIC 1: HUMAN RIGHTS

CHAPTER 14: PRINCIPAL COVENANTS

FOCUS SUBJECT MATTER

14.1 WHAT IS A COVENANT?

14.2 *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1966) (ICCPR)

14.3 *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (1966) (ICESCR)

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- conventions are an important source of international law;
- two principal conventions are the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- signatories are kept accountable by the requirement to report to United Nations bodies.

14.1 WHAT IS A COVENANT?

Ch 13.2

In Chapter 13 you were introduced to the term 'covenant'. **Covenants are described as agreements between two or more nation states. They are a type of treaty.**

Treaties are necessary because there are certain areas (many of which we raised before such as civil aviation, the environment and defence) that countries need to address together. **After they are developed, covenants are first adopted by a resolution by the General Assembly before they are opened to other nation states to sign and ratify. A nation state that ratifies a covenant voluntarily agrees to be bound by its terms.**

Ch 4.1

According to the Department of Foreign Affairs and Trade (DFAT), '…the power to enter into treaties is an executive power,' which means that **the final decision about whether to sign and ratify a treaty is made by the Federal Executive Council**, which is made up of the Governor-General and Cabinet. Executive power is conferred by the *Commonwealth of Australia Constitution Act 1901* (Cth) s61. To give legal effect to a treaty the Commonwealth relies on the external affairs power in s51 (xxix). We saw this in action during the *Tasmanian Dams Case* we examined in an earlier chapter.

Ch 2.5

AUSTRALIA'S TREATY TABLING ARRANGEMENTS

1. Treaty
2. Cabinet or Ministerial Agreement
3. Federal Executive Council Approval
4. Signature
5. Consultations continue on final treaty action, including any necessary legislation or changes to practice, with State and Territory Governments, peak industry bodies and NGOs.
6. Cabinet or Ministerial Agreement
7. National Interest Analysis (NIA) prepared. States and Territories consulted in the development of NIAs in which they have a major interest and views reflected.
8. Relevant number of copies of a treaty text and NIA submitted to Treaties Secretariat for tabling in Parliament.
9. Table treaty in Parliament at least 15 sitting days prior to Australia taking binding action. Joint Parliamentary Committee on Treaties may consider treaty.
10. Final treaty action through exchange of notes, ratification, accession etc. following Federal Executive Council Approval where appropriate.

SOURCE: STATE LIBRARY OF NEW SOUTH WALES, 'CHAPTER 4B: TREATY MAKING PROCESS IN AUSTRALIA' (LEGALANSWERS.SL.NSW.GOV.AU/HOT-TOPICS-85-HUMAN-RIGHTS) ACCESSED 22 JULY 2019.

WHAT DO YOU THINK?

Should the decision about whether to sign a treaty be made by Parliament instead of the Executive? Why or why not? [E]

Australia has signed and ratified seven principal international human rights treaties. These include the:

- *International Covenant on Civil and Political Rights* (1966) (ICCPR);
- *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR);
- *Convention on the Rights of the Child* (1990) (CRC);
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* (1985) (CAT);
- *Convention on the Elimination of All Forms of Racial Discrimination* (1966) (CERD);
- *Convention on the Elimination of All Forms of Discrimination against Women* (1976) (CEDAW); and
- *Convention on the Rights of Persons with Disabilities* (2006) (CRPD).

Once an in-principle decision has been taken to agree to a treaty, the Commonwealth Government considers whether:

a specific implementing action is required;

b if so, whether existing legislation (Federal or State) is adequate; and

c if not, whether the treaty should be implemented by legislation at the Federal, State or Territory level.

SOURCE: DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, 'TREATY MAKING PROCESS' (DFAT.GOV.AU/INTERNATIONAL-RELATIONS/TREATIES) ACCESSED 22 JULY 2019.

These treaties can be used as an evaluative tool to help you decide whether a current or proposed law meets our international human rights obligations.

Over the next three chapters, we will refer to most of these covenants and conventions.

RESEARCH

How many treaties (that remain in force) has Australia ratified to date? [S]

14.2 *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1966) (ICCPR)

When the international community was developing a set of human rights to be enjoyed by all human beings around the world they began with the overarching idea to form an '*International Bill of Human Rights*'. **The *International Bill of Human Rights* has two parts, the *Universal Declaration of Human Rights* (1948) (which remember is not a legally binding document, but purely aspirational), and two covenants that would contain binding commitments.** These covenants were the ***International Covenant on Civil and Political Rights* (1966)** (ICCPR) (which will be the focus of this section) and the ***International Covenant on Economic, Social and Cultural Rights* (1966)** (ICESCR), which we will cover in the next section.

Civil rights are broadly defined as those rights that deal with the rights and liberties of all peoples, whereas political rights are concerned with the rights relating to citizenship. However, some rights, such as the right to non-discrimination and equality apply to both civil and political contexts.

RESEARCH

Civil and political rights are often referred to as 'first generation' or 'negative rights'. Economic, social and cultural rights are often referred to as 'second generation' or 'positive rights'.

Using secondary sources to guide you, what does this distinction mean? [C] [S]

The ICCPR, which is a multilateral treaty, was adopted by the United Nations General Assembly in 1966. As it is a treaty, it is binding on States that ratify or accede to it. **Australia became a signatory to this treaty in 1980, although it has reserved certain rights in relation to some of the provisions.** For example, it does not agree with the provision that all juvenile offenders must not be held in custody in adult prisons.

According to the Office of the High Commissioner as of June 2019, 173 states were party to the ICCPR. Countries such as Bhutan, United Arab Emirates, Solomon Islands, Singapore, Saudi Arabia, Myanmar and Malaysia have taken 'no action' to date on the ICCPR.

KEY FEATURES OF THE ICCPR

The ICCPR is divided into six parts, along with a preamble and conclusion:

Part	Article(s)	Summary
1	1	States that all peoples have the right to self-determination.
2	2-5	Creates an obligation that parties need to legislate to give effect to the provisions within the ICCPR. It also recognises that everyone should be treated equally.
3	6-27	The most important provisions of the ICCPR are contained in Articles 6 to 27 inclusive. These provisions, which are summarised below, are sometimes described as the substantive or core provisions of the ICCPR: ▸ Articles 6-8 cover the right to life, and prohibit torture and slavery. ▸ Articles 9-10 prohibit arbitrary arrest and detention, and cover the rights of persons arrested or detained. ▸ Articles 14-16 address the need for procedural fairness so that the rights of accused are protected and there is a right to a fair trial. ▸ Articles 12-13, and 17-27 address the freedoms of movement, religion, thought, speech, assembly and association.
4	28-45	Establishes the Human Rights Committee (which monitors the ICCPR).
5	46-47	States the ICCPR shall not be interpreted as interfering with the operation of the United Nations.
6	48-53	Concerns issues such as ratification, when the ICCPR is in force and the amendment process.

PRACTICAL APPLICATION

This activity can be done individually, in small groups, or as a class.
Draw up a chart with three columns (shown below):

Right	Australian example	Overseas example

Locate a copy of the ICCPR and answer the questions below regarding five civil and political rights of your choice:

a. What rights are contained in the ICCPR? (Column 1) [C]

b. Can you find an example of this right in action in Australia or a country overseas? If so, include a brief summary in the second and/or third column. [S] [C]

c. Is this right protected by law? If so, identify the relevant statute or case law in the second and/or third column. [A]

d. Using a simple points system to allocate positive points for promoting a human right and negative points for infringing or opposing a human right- are the rights contained in the ICCPR better protected in Australia or another country. [E]

OPTIONAL PROTOCOLS

The ICCPR has two optional protocols, outlined below.

Optional Protocol to the International Covenant on Civil and Political Rights (1966)

This protocol allows the United Nations Human Rights Committee to hear complaints from Australians who allege the Government has violated their civil and political rights. But, the findings of the Human Rights Committee are not enforceable. We will see how this works in practice by using the *Toonen* case below:

CASE STUDY

Toonen v Australia (1992)

Facts: Nicholas Toonen, a homosexual man, was the General Manager of the Tasmanian AIDS Council (Inc). He lost his job after the Government threatened to withdraw funding from the organisation unless Toonen was fired. At the time, in Tasmania consensual sex between adult males was against the *Criminal Code Act 1924* (Tas) s122(a)(c);s123. Toonen made a complaint to the Human Rights Committee.

Legal issue: Did Tasmanian law violate Toonen's right to privacy (Article 17)? Did the law discriminate against people on the basis of their sexual orientation (Article 26)?

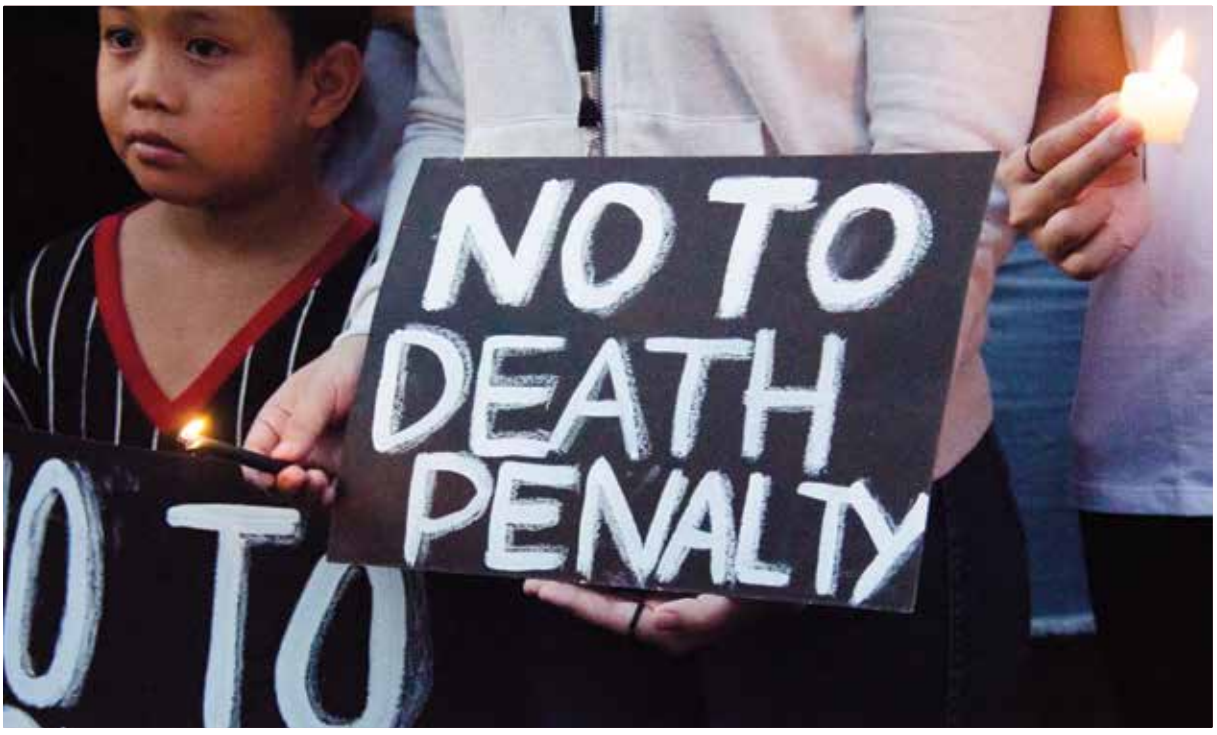
Decision: The Human Rights Committee found that consensual sexual activity between adult men in private was covered by the concept of 'privacy' and the law continuously and directly interfered with this right. The Committee also found that sexual orientation can be considered within the meaning of 'other status' or 'sex' within Article 26. For these reasons, Australia was in breach of its obligations. The Committee agreed with Toonen's remedy that the law should be repealed.

1. What law did Toonen make a complaint about to the Human Rights Committee? [C]
2. What were the grounds of the complaint? How does this relate to the rule of law? [C] [A]
3. Complete some research to see how the Tasmanian and Federal Government responded to the Committee's decision? What does this demonstrate about this protocol? [S] [A]
4. How is this decision viewed by others in more recent times? [E]

Second Optional Protocol to the International Covenant on Civil and Political Rights (1990)

The purpose of this protocol is to eliminate the death penalty, which, in reality was completely abolished in Australia by 1985. Queensland was the first State to abolish this form of publishment in 1922, with New South Wales being the last.

Australia agreed to be bound by this protocol on 2 October 1990.



PRACTICAL APPLICATION

DEATH PENALTY DEAD AND BURIED

SOURCE: THE AGE (THEAGE.COM.AU) 11 MARCH 2010 (EXCERPTS)

A Liberal senator has used the permanent abolition of the death penalty in Australia to call for Indonesia to spare the lives of members of the Bali Nine, saying the use of capital punishment is not reflective of a civilised society.

The federal parliament on Thursday passed laws that ensure the death penalty can never be reintroduced by any state or territory in Australia.

Both sides of politics supported the move, which is seen as largely symbolic.

Senator Humphries said the abolition of the death penalty was a "hallmark of a civilised society".

1. What law was passed by the Commonwealth Parliament according to this article? [C]
2. What reason was provided by Senator Humphries in support of the law? [C]
3. The article refers to the 'Bali Nine'. Who were they and were their lives spared? [S] [C]
4. Why was the new law seen as 'largely symbolic'? [A]
5. Do you agree or disagree with this law? Support your position with several reasons. [E]

ICCPR IN AUSTRALIAN LAW

You will examine how effectively our rights as Australian citizens are protected in law in more detail in later chapters. **But, in broad terms some civil and political rights are protected in our domestic legislation. The *Commonwealth of Australia Constitution Act 1901* (Cth) does contain some civil and political rights**, such as protecting citizens right to vote (s7, s24) and trial by jury for indictable offences (s80). **Victoria, Queensland and Australian Capital Territory have enacted human rights legislation, which includes some of the civil and political rights** listed in the ICCPR. For example, the H*uman Rights Act 2019* (Qld) includes the right to life (s16), freedom of movement (s19) and freedom of expression (s21). The ICCPR is also mentioned in A*ustralian Human Rights Commission Act 1986* (Cth) Sch. 2 and is a document the Aboriginal and Torres Strait Islander Social Justice Commissioner (s46C(4)(a)) and National Children's Commissioner (s46MB(6)(b)(iii)) must give regard to as part of their role.

Ch 21.6

Ch 21.3

While it is clear that some civil and political rights are included across a number of different laws, **the ICCPR is not expressly included in Australia's domestic law as a single piece of legislation**. This is despite that fact that under international law Australia has been under an obligation to, 'take the necessary steps, in accordance with its constitutional processes…to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant' (Article 2).

The UN Human Rights Committee has commented on this failure to implement the ICCPR. In 2009 the Committee recommended Australia should enact domestic law that incorporates all the ICCPR provisions stating:

> *The Committee notes that the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level.*

In most other countries, civil and political rights are located in a 'Bill of Rights'. As raised above we will examine how effectively Australia protects some fundamental civil and political rights, and whether Australia should enact a Bill of Rights in later chapters.

HUMAN RIGHTS COMMITTEE

According to their website (ohchr.org) the Human Rights Committee is a:

…body of [18] independent experts that monitors implementation of the International Covenant on Civil and Political Rights by State parties.

The Committee holds approximately three sessions per year in either Geneva, Switzerland or New York. Its current Chair is Mr Ahmed Amin Fathalla.

All parties to the treaty are obligated to submit regular reports to the Committee on how effectively their citizen's civil and political rights are being protected and whether domestic law has been implemented to give legal effect to the ICCPR (Article 40). The Committee also publishes comments on particular human rights issues, and hears complaints made by individuals (such as the Toonen case in the previous section) and States.

RESEARCH

Locate a copy of the last report Australia filed with the Human Rights Committee and the Committee's concluding observations on this report. Answer the following questions:

1. On what date was the report due? Did Australia complete the report in time? [C] [S]
2. According to the introduction of the report how does Australia implement its international obligations? [C] [S]
3. What is the role of the Australian Human Rights Commissioner? [C] [S]
4. Choose a particular case from the list that involves an Australian court considering a civil or political right. What civil or political right did it relate to? Why was it a significant case? [S] [A] [E]
5. What aspects contained in the report did the Committee view positively? [C] [S]
6. What were the Committee's first principle matter of concern? Evaluate the recommendation the Committee identifies in response to this concern- how will implementing this recommendation benefit individuals? [C] [S] [E]

WHAT DO YOU THINK?

Many human rights organisations value the use of committees, such as the Human Rights Committee, as it is:

…a significant mechanism for holding nations accountable for abuses and violations of their legal obligations..

SOURCE: NICK CUMMING-BRUCE, 'BUDGET CUTS MAY UNDERCUT THE UN'S HUMAN RIGHTS COMMITTEES, NEW YORK TIMES (NYTIMES.COM) 24 MAY 2019.

Do you think making countries report on how they have implemented the ICCPR regularly is important? Why or why not? [E]

14.3 *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (ICESCR) (1966)

The origin of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) is exactly the same as the ICCPR— it was part of the *International Bill of Rights* . The Human Rights Law Resource Centre Ltd. wrote that:

Together, the ICESCR and the ICCPR are considered to be complementary twin pillars, containing the civil, political, economic, social and cultural rights that are indivisible and necessary to ensure respect for human rights and human dignity.

The **ICESCR sets out basic economic, social and cultural rights** including the right to:

- work;
- fair and just conditions of work;
- social security;
- an adequate standard of living, including adequate food, clothing and housing
- health; and
- education.

Australia ratified the ICESCR in 1975, but is yet to fully implement its provisions into domestic legislation. No declarations or reservations were made upon ratification. In later chapters we will examine how well Australia's approach of relying on existing legislation or creating legislation in response to a specific issue protects Australian's economic, social and cultural rights. In 2017 the Committee on Economic, Social and Cultural Rights (which we will learn more about later) stated:

The Committee remains concerned that in spite of its previous concluding observations, the Covenant provisions are still not fully incorporated into the State party's domestic legal order and therefore not justifiable in domestic courts.

According to the Office of the High Commissioner as of June 2019, 170 states were party to the ICESCR. Twenty-three countries such as Bhutan, Botswana, Malaysia, Nauru, Oman, Samoa and Singapore have taken 'no action' to date on the ICESCR. The United States of America is a signatory, meaning that it has preliminarily endorsed the instrument and will consider ratifying it in the future.

WHAT DO YOU THINK?

Why do you think less countries have ratified the ICESCR, when compared to the ICCPR? [E]

KEY FEATURES OF THE ICESCR

The ICESCR follows a similar structure to other foundational human rights instruments. It has a preamble and 31 articles divided into five parts:

Part	Article(s)	Summary
1	1	States that all peoples have the right to self-determination.
2	2-5	Establishes that these rights should be recognised without discrimination and that States take steps to progressively achieve the rights listed in the Covenant.
3	6-15	Lists the economic, social and cultural rights.
4	16-25	Governs the reporting and monitoring of the Covenant.
5	26-31	Concerns issues such as ratification, when the ICESCR is in force and the amendment process.

PRACTICAL APPLICATION

Locate a copy of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Ensure you reference the ICESCR if an answer requires you to quote a part of the treaty.

1. Under what circumstances can the economic, social and cultural rights of individuals be limited? [C]
2. How are the limitations of developing countries acknowledged in this treaty? Why do you think this was included in an article? [C] [E]
3. Reading Articles 6-15, categorise the rights listed into the following categories shown in the table below [A]:

Economic rights	Social rights	Cultural rights

4. What category of rights is primarily protected in the ICESCR? Which right do you think is the most difficult to protect by law? Why? [A] [E]
5. Explain how our progress is monitored. [C]

OPTIONAL PROTOCOL

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)

The *Optional Protocol* does not grant any additional rights but **allows the Committee on Economic, Social and Cultural Rights to consider complaints from individuals or groups who claim their rights under the ICESCR have been violated.** It also provides a procedure for inter-state complaints to be investigated and an inquiry procedure. **Australia is yet to accept this *Optional Protocol*.**

RESEARCH

In July 2009 the Human Rights Law Resource Centre Ltd. published a submission entitled '*Australia's Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.' Locate a copy of this submission.

1. What arguments were given in favour and against ratifying the *Optional Protocol*? [A]
2. Do you agree or disagree with Recommendation 1? Justify your position. [E]

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ECOSOC)

As a signatory Australia is required to submit a progress report to the Secretary-General of the United Nations (Article 16). These reports are transmitted by the Secretary-General to the Committee on Economic, Social and Cultural Rights (ECOSOC), which was established in 1985. Similar to the Human Rights Committee we discussed earlier, this Committee consists of 18 independent experts, nominated by state parties, who are elected for a four year term. Its purpose is to:

- monitor the implementation of the Covenant by State parties, thereby assisting governments to fulfil their obligations by making specific legislative and policy recommendations; and
- interpret articles.

Australia submitted its fourth report in January 2008. In its concluding observations the Committee welcomed the apology to the stolen generation, but expressed concern about the disparity in education, health and welfare outcomes between Indigenous and non-Indigenous Australians. The Committee also advocated for additional support services for victims of domestic violence and mental illness; and recommended that mitigating action be taken against the consequences of climate change on Indigenous peoples' food, land and water. Australia's most recent report was submitted in 2016. In its concluding observations the Committee welcomed a number of legislative and policy measures introduced by the Australian Government including the *National Plan to Reduce Violence against Women and their Children, National Disability Strategy* and the *Remote School Attendance Strategy*. But, it remains concerned about Australia's climate change policy, the system of offshore processing of asylum claims and the inadequacy of meaningful consultation with Indigenous peoples in programmes and policies that affect them.

These issues are ones that we have examined previously and will continue to examine in future chapters.

REVIEW

1. Define the following [C]:
   a. Covenant
   b. Multilateral
2. Describe the main features of the [C]:
   a. *International Covenant on Civil and Political Rights* (1966) (ICCPR)
   b. *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR)
3. Explain the process by which treaty obligations translate into domestic law. [C]
4. Explain how Australian's adherence to the ICCPR and ICESCR are monitored. [C]
5. The Committees responsible for monitoring how effectively Australia has implemented the provisions of the ICCPR and ICESCR in domestic legislation share the same concern. What is this concern and what are the implications of our actions? [A]

TOPIC 1: HUMAN RIGHTS

CHAPTER 15: SOURCES OF HUMAN RIGHTS LAW IN AUSTRALIA

FOCUS SUBJECT MATTER

15.1 INTRODUCTION

15.2 INTERNATIONAL CONVENTIONS AND AGREEMENTS

15.3 THE COMMON LAW

15.4 THE CONSTITUTION OF AUSTRALIA

15.5 FEDERAL AND STATE LEGISLATION

15.6 CUSTOMARY LAW

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the various sources of human rights law in Australia;
- international Conventions and Agreements as a source of human rights law in Australia and the role of the *Human Rights (Parliamentary Scrutiny Act 2011* (Cth));
- the human rights that have arisen from common law in Australia;
- what human rights the *Australian Constitution* expressly protects and impliedly protects;
- the Federal and State Legislation as a source of human rights; and
- the role of customary law in establishing human rights in Australia.

15.1 INTRODUCTION

There is not a single source of human rights law in Australia. Australia does not have a bill of rights to which citizens could look as the primary source of human rights law in Australia. The source of human rights law in Australia is haphazard. In this chapter we will set out those sources under the following headings:

- International conventions and agreements
- Common law of Australia
- The Constitution of Australia
- Federal and state legislation
- Customary law

15.2 INTERNATIONAL CONVENTIONS AND AGREEMENTS

As you are aware the Commonwealth Government has become a signatory to a whole range of international conventions on human rights (also called treaties, agreements, covenants, charters and declarations). **The fact that these human rights conventions are entered into by the Commonwealth Government does not mean that they automatically form part of the domestic law of Australia. They need to be incorporated into Australian domestic law by way of Commonwealth legislation and/or State and Territory legislation. Only then can they be directly enforced in Australian courts and tribunals.**

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A principal difficulty for the Commonwealth Government is the need to continually refer to these international covenants to ensure that the legislative program of the Commonwealth Government includes these human rights that Australia has agreed to uphold in the international sphere. That had not been happening.

With this difficulty in mind and to mark the 60th Anniversary of the *Universal Declaration of Human Rights* the Commonwealth Government launched a Human Rights Consultation on that date. On the 8th October 2009 the Attorney-General of Australia released a National Human Rights Consultation Committees *Report on the National Human Rights Consultation.*

The Attorney-General of Australia announced **in April 2010 Australia's Human Rights Framework** (the Framework), which was the government's response to recommendations contained in the consultation. Not all recommendations of the Consultation Committee's Report were put into effect. One of the recommendations that was put into effect and became one of the key features of the Framework was the passing of an Act of Parliament namely the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (the Scrutiny Act). It commenced operation on 4 January 2012. **Its whole purpose was to ensure as far as possible that future Commonwealth laws would be consistent with Australia's human rights obligations contained in certain of the International Conventions.**

The Act contained two main aspects. The first of these was that the Act requires that when a member of Parliament proposes to introduce a Bill for an Act into a House of Parliament that person must cause a **Statement of Compatibility** (SOC) to be prepared in respect of that Bill. This Statement of Compatibility must include an **assessment of whether the Bill is compatible with Human Rights**. (A similar obligation is imposed on the makers of rules under delegated legislation). These Statements of

Compatibility are required to be precise and should identify whether the proposed legislation affects human rights by either promoting them or by limiting them and, if such a right is limited, the reasons for any limitation of such rights. The Act does not provide a list of domestic human rights against which the Bills are to be assessed nor does it ensure that all the Bills are assessed against all international covenants entered into by the Commonwealth Government. The human rights referred to in the Act are the rights and freedoms recognised or declared in one of **seven international instruments** listed in the Act. These are:

- *The International Covenant on Civil and Political Rights* (1966) (ICCPR)
- *The International Covenant on Economic Social and Cultural Rights* (1966) (ICESCR)
- *The International Convention on the Elimination of All Forms of Racial Discrimination* (1966) (ICERD)
- *The Convention on the Elimination of All Forms of Discrimination against Women* (1976) (CEDAW)
- *The Convention against torture and other cruel inhuman or degrading treatment or punishment* (1985) (UNCAT)
- *The convention on the rights of the child* (1990) (CRC)
- *The convention on the rights of persons with disabilities* (2004) (CRPD)

Any other rights dealt with in any other international conventions are not the subject of scrutiny under this Act.

The second important aspect of the Scrutiny Act is the establishment of a **Parliamentary Joint Committee on Human Rights** (PJCHR). The PJCHR is a ten person committee made up of five members from each House of Parliament, with its main function being to examine Bills coming before the Parliament for compatibility with human rights and to examine current Acts for compatibility with human rights. It also has a further obligation to enquire into any matter relating to human rights that is referred to it by the Attorney-General. Given the purpose of the committee, it is clear that the **Statement of Compatibility** is to assist the committee in making its considerations. The committee issues reports, the purpose of which is to inform Parliamentary deliberations. However, there are occasions when the committee has not been able to table its final report prior to the passage of the legislation. Such a failure **does not** in any way invalidate the legislation. A failure also to prepare a Statement of Compatibility will not affect the validity or operation or enforcement of the Act when it has been passed. The system established therefore under the Parliamentary Scrutiny Act is one of a dialogue between the committee and the Parliament so that the Parliament can be kept aware of how closely or otherwise the Commonwealth Government of Australia is adhering to its international obligations adopted by it when it has signed treaties.

The work of the committee is extensive and demanding. In its report for the period 1 January 2018 to 31 December 2018 it assessed over 2,000 Bills and Acts and other legislative instruments. Most of those had no human rights concerns contained in them. However the committee sought responses in relation to 76 of those instruments and, after receiving a reply (from usually the Minister), sought further responses to 15 of them. To allow you to appreciate the complexity of this work, we set out the following:

PRACTICAL APPLICATION

INFORMATION SHARING, ASSISTANCE AND EXTRADITION TO FOREIGN COUNTRIES

SOURCE:WWW.APH.GOV.AU/PARLIAMENTARYBUSINESS/COMMITTEES/JOINTHUMANRIGHTS (EXCERPTS)

3.33 In the reporting period the committee examined a number of bills and delegated legislation concerning information sharing, assistance and extradition to foreign countries, which may put individuals at risk of human rights violations, for example:

- the Intelligence Services Amendment (Establishment of the *Australian Signals Directorate*) Bill 2018;
- the Extradition (El Salvador) Regulations 2017 [F2017L01581];
- the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018; and
- the Office of National Intelligence Bill 2018.

3.34 Measures examined in these bills and instruments include:

- sharing information overseas including with foreign entities and foreign intelligence agencies;
- amending the Mutual Assistance in *Criminal Matters Act 1987* to provide assistance to foreign countries in relation to data held in computers; and
- extending the definition of 'extradition country' to include El Salvador and removing India from the list of extradition countries in the Extradition (Commonwealth countries) Regulations, as it was now governed by the Extradition (India) Regulations 2010.

3.35 Human rights engaged by these measures include the right to privacy, the prohibition on torture, cruel, inhuman or degrading treatment or punishment, the presumption of innocence, the right to life, the right to a fair hearing and fair trial, and the right to equality and non-discrimination.

3.36 The committee raised concerns that some of the information sharing and extradition measures may mean that Australian agencies cooperate with foreign countries in which the death penalty applies. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty, like Australia, from exposing a person to the death penalty in another state. As clarified by the United Nations Human Rights Committee, this prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. The committee also raised concerns that information sharing overseas in some circumstances could result in a person being subject to torture, cruel, inhuman or degrading treatment or punishment. The committee noted that these issues were not addressed in the statement of compatibility for a number of these measures, which is of particular concern as there is no specific requirement under Australian law to decline to disclose information where it may result in a person being tortured or prosecuted for an offence carrying the death penalty.

3.37 The committee emphasised the need for adequate and effective safeguards to ensure that cooperation or information sharing does not occur where it may lead to the imposition of the death penalty or a person being subject to torture, cruel, inhuman or degrading treatment or punishment, and raised concerns that the safeguards that do exist may be insufficient.

1. What were the three Bills and one set of regulations assessed by the committee? [C] [A]
2. What were the human rights engaged by these Bills and regulations that needed consideration by the committee? [C] [A]
3. What was the main concern raised by the committee with respect to human rights after scrutiny of the Bills and regulations? [C] [A]
4. What is the ICCPR? [C] [A]
5. What did the committee consider the problem was with information sharing with other countries to which the death penalty applies? [C] [A]

PRACTICAL APPLICATION

HUMAN RIGHTS COMMITTEE SHOULD BE ABOLISHED, LIBERAL MPS SAY

SOURCE: RACHEL BAXENDALE, THE AUSTRALIAN, WWW.THEAUSTRALIAN.COM.AU, 7 AUGUST 2019 (EXCERPTS)

Three Liberal members of the parliamentary joint committee on human rights are calling for its abolition, arguing it "elevates the rights of deadbeat dads and child sex offenders" while failing to consider the safety of the community, and is a bureaucratic waste of time.

A fourth Liberal member, chair and West Australian MP Ian Goodenough, stopped short of calling for its abolition, but backed concerns that the committee was unable to give proper consideration to genuine human rights issues because it was required to give cursory scrutiny to every piece of legislation before parliament.

NSW MP Julian Leeser led the charge for abolishing the committee, warning last month that Australia's human rights institutions had been "hijacked" by political and legal activists.

Victorian Liberal MP Russell Broadbent, known for his opposition to hardline asylum-seeker policy and often viewed by his colleagues as a dissident moderate, has backed Mr Leeser's call, as has Victorian Liberal senator James Paterson. The remaining Liberal member of the committee is former independent Lucy Gichuhi.

The committee was established by Kevin Rudd in 2011, as an alternative to a federal bill of rights. It is required to scrutinise all legislation for compatibility with international human rights treaties.

"Most Australians will be unaware of the existence of these treaties and fewer Australians will know about their content, but today they are the yardstick against which every federal bill or regulation is measured," Mr Leeser said. He cited the committee's opposition to the cashless welfare card trial, and to legislation preventing registered child sex offenders from travelling overseas, as evidence that its judgments "do not pass the pub test".

"According to the committee's report, the cashless welfare card trial 'limits the rights of social security, the right of privacy and family and the right to equality and non-discrimination'," Mr Leeser said. "What nonsense! There's no mention of the right of a woman or child not to be bashed by a drunken husband, nor the right of children, rather than the pokies, to be fed. I don't want to be part of a committee that elevates the rights of deadbeat dads and child-sex offenders and fails to consider the safety of the community."

Mr Broadbent said the requirement to scrutinise all legislation wasted time and resources. "Its judgments conform to the international rights regime, but not to community standards," he said.

Labor deputy chair of the committee, Graham Perrett, said he was disappointed by the Liberal calls for its abolition.

"I would suggest that if the Liberal Party is going to reject any notion of championing human rights, they should change their name to the non-liberal Party," Mr Perrett said.

Mr Goodenough said the committee should not be "completely abolished", but agreed reform was needed. "The way we focus our resources should be targeted better, rather than rubberstamping a mass of legislation," he said.

Senator Paterson said Mr Leeser had "belled the cat on the parliament's most dysfunctional and counter-productive committee".

"I have been shocked at the lip service it pays to fundamental human rights like freedom of speech, and its obsession with so-called rights like the right to welfare," Senator Paterson said.

"For the sake of actual human rights and the efficient functioning of the parliament, the sooner it is abolished the better."

PRACTICAL APPLICATION CONTINUED...

1. Who is calling for the abolition of the PJCHR? [C]
2. Do you agree with the proposition 'Most Australians will be unaware of the existence of these treaties'? Why or why not? [C] [A]
3. What is another expression for not passing the 'pub test'? [C] [A]
4. What is the nature of the objection of Mr Leeser to the committee's report that a cashless welfare card trial amounted to a breach of human rights? [C] [A]
5. Do you agree with the proposition from Mr Broadbent that judgments of the committee in scrutinising legislation might conform to the international rights regime but not to community standards? Why or why not? [C] [A] [E]

Apart from the use of the *Scrutiny Act* to ensure that Commonwealth legislation takes into account human rights obligations in international conventions, there has been a **judicial attempt** to make international conventions relevant in government decision making. The question as to what extent international law should be taken into account in decision making generally in Australia, even if such international conventions have not been incorporated into Australian law, came under consideration in the following case.

CASE STUDY

Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh [1995 HCA 20]

Facts: Mr Teoh was a Malaysian citizen who came to Australia in May 1988. He was granted a Temporary Entry Permit. On 9 July 1988 he married an Australian citizen who had been a de facto spouse of his deceased brother. At the time of the marriage Mrs Teoh had four children, three of which were children from her de facto relationship with Mr Teoh's brother. Mr Teoh and his wife then had three children. Mr Teoh applied for and was granted a further Temporary Entry Permit which allowed him to remain in Australia until February 1989. Before that time he applied for permanent residency. While this application was still pending in late 1990 he was convicted of six counts relating to the importation of heroin and three counts of being in possession of heroin. He was sentenced to six years imprisonment with a non-parole period of two years and eight months. In January 1991 he received a letter informing him that an officer authorised under the *Migration Act* had refused his application for the grant of residency on the grounds that to be granted residency he needed to be of good character and in fact he had a criminal record. Mr Teoh applied for a review of the decision primarily on the grounds that he was the only person who could keep the family together. The Immigration review panel rejected the review in July 1991 and the Immigration Minister accepted that decision and an order was made that Mr Teoh be deported. Mr Teoh sought a review of that decision in the Federal Court of Australia. At first instance the Judge dismissed the application. On appeal to the Full Court of the Federal Court, it was found that the decision makers power had been improperly exercised because he (the Minister) had failed to make appropriate investigations into the hardship to Teoh's wife and her children if he was refused residency. An appeal was made to the High Court of Australia.

Legal issue: Did the failure to take into account the best interests of Mr Teoh's children, when making the decision to deport him result in a decision which had been improperly exercised?

Decision: The High Court agreed there had been a breach of natural justice in that the Immigration department had not invited Teoh to make a submission on whether the deportation order should be made contrary to the *Convention on the Rights of the Child* 1990 (CROC) which provides that in any administrative decision concerning a child that the best interests of the child must be a primary consideration. The High Court of Australia considered the effect (if any) of Australia's ratification of CROC on the decision to refuse Mr Teoh's application for residency. One of the major principles of the CROC is that the best interests of children should be always treated as a

CASE STUDY CONTINUED...

primary consideration. It was held by the majority that the ratification of a convention was a positive statement by the executive that it and its agencies would "act in accordance with the convention". In this case that would ensure that there was a **legitimate expectation** that decision makers would act in accordance with the convention even though that **legitimate expectation** did not compel a decision maker to act in a particular way. It meant that that decision maker was required as a matter of procedural fairness to give to Mr Teoh the opportunity to present a case not adopting the proposed course based on what he said was in the best interests of his children. The decision maker was required to do that because Mr Teoh had a legitimate expectation that acting in accordance with the convention the decision maker should have regard to the best interests of the children in making the decision to deport Mr Teoh. It meant that the decision maker was required as a matter of procedural fairness to inform the subject of the decision, in this case Mr Teoh, if the decision maker intended to act in a manner inconsistent with his expectation that the decision maker would act in accordance with the international convention. The decision maker had not even referred to the possible effect of his decision on the best interests of Mr Teoh's children, which was the major requirement of the CRC.

1. Why wasn't Mr Teoh regarded as being of good character when the decision maker made the decision not to grant him residency? [C] [A]
2. What aspect of the CRC was relevant in this case? [C] [A]
3. What gave rise to a legitimate expectation in the mind of Mr Teoh? [C] [A]
4. What had the decision maker done which enabled the High Court to conclude that his decision should be set aside? [A][C]
5. Do you agree with this decision? Why or why not? [A] [E]

This decision was much criticised by the Commonwealth Government. The High Court has **not dealt again** with the precise question of whether a treaty ratified by Australia but not incorporated into domestic law can result in such **a legitimate expectation for administrative law purposes** as set out in the case. In **Obiter** in two further decisions, the High Court of Australia seems to have indicated that Teoh's case could be overturned if it came before the High Court again.

The Australian Government through the Minister for Foreign Affairs and the Attorney-General took immediate action.

PRACTICAL APPLICATION

The High Court reaffirmed in **Teoh** that provisions of treaties do not form part of Australian law unless they have been incorporated by legislation. At the same time, however, the Court developed a new way in which treaties could affect some administrative decisions. The High Court held merely entering into a treaty could give rise to a legitimate expectation that government decision-makers would make decisions consistently with Australian's obligations under the treaty. It was not necessary for any legislation governing the decision to refer to the treaty. Indeed, the provisions of the treaty could apply even where the person affected by the decision did not raise – or even know about – the treaty in question. This was the case in **Teoh** itself, where the Court decided that there was a legitimate expectation that the decision-maker under the *Migration Act* would take the relevant article of the *Convention on the Rights of the Child* into account in coming to a decision not to give residence status.

It may be only a small number of the approximately 920 treaties to which Australia is currently a party could provide a source for an expectation of the kind found by the High Court to arise in **Teoh**… and because of the wide range and large number of decisions potentially affected by the decision, a great deal of uncertainty has been introduced into government activity. It is not in anybody's interest to allow such uncertainty to continue. For that reason the government is taking action to restore the position to what it was understood to be prior to the **Teoh** case.

PRACTICAL APPLICATION CONTINUED...

1. What did the Minister say the High Court held? [C]
2. How many treaties approximately has Australia entered into? [C]
3. Why did Teoh's case introduce a great deal of uncertainty into government activity? [C][A]
4. Do you agree that given the number of treaties that it would not be feasible for government decision-makers to take all treaties into account when making administrative decisions? Why or why not? [A][E]

A Bill was introduced to reinforce that decision into parliament. Despite a number of attempts, the Bill has never been passed.

This leaves the state of law as determined in **Teoh's** case as uncertain.

15.3 THE COMMON LAW

In the Australian legal system, much of the law is found in the **decisions of judges**. These decisions form the basis of the common law. Over the years, the **common law** has been changed by various acts of Parliament (statute law), but is still extremely important, and the basis for much of our law. This system of law had its origins in England. Many of our individual rights are only found in the common law.

The English legal system developed over hundreds of years from its origins in customary law, through the writings of learned authors, and in the decisions of courts. Eventually the courts became centralised, and administered the same law and the same legal procedures for all of England. Sir William Blackstone published his work entitled *Commentaries on the Law of England*, in the 18th century, which set out in a readable form what he regarded as the individual rights of persons in England at the time. Other writers took up his ideas and **the common law system**, as it became known, was adopted in many of the former colonies of the British Empire, particularly in the United States of America, Australia, Canada, South Africa, and India. A comprehensive discussion of the **common law** can be found in Chapter 2.6 Vol 1 8th Edition.

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COMMON LAW RIGHTS

Common law rights in Australia include:

- the right to a court hearing;
- the right to compensation for property resumed by the government;
- the right to refuse access to information given to a lawyer in confidence as a client;
- the right to refuse to give evidence which incriminates oneself;
- the right to challenge a penalty or sentence imposed by a court outside what is allowed by statute;
- the right to sue governments and government authorities;
- the right to sue for interference with your property rights;

- the right to religious worship without interference;
- the right to legal representation when accused of a serious crime;
- the right not to be detained or imprisoned unlawfully; and
- the right to a fair hearing when accused of a public offence; and the right to freedom of speech and movement.

SOURCE: ABRIDGED FROM THE ADDRESS TO THE ANGLO AUSTRALASIAN LAWYERS SOCIETY BY CHIEF JUSTICE RS FRENCH. 4 SEPTEMBER 2009, SYDNEY. THE COMMON LAW AND THE PROTECTION OF HUMAN RIGHTS.

If you believe that the above list is haphazard and not comprehensive, you are right. You should remember that the system of development of rights through the common law really only occurs when cases come before a court.

THE COMMON LAW AND THE PROTECTION OF HUMAN RIGHTS

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Once the rights exist at common law, then obviously they can be enforced by the courts. This is why the **doctrine of precedent** is important. The principles or rules of law are worked out on a case-by-case basis. Nowhere is this more apparent than in *Mabo v Queensland (Mabo No.2)* (1992) 107 ALR 1; 175 CLR 1 where the High Court reversed earlier decisions of lower courts to find that the doctrine of terra nullius did not apply and that Aborigines did have native title to their traditional lands. Before 1992, other courts in Australia made decisions on the basis that the **doctrine of *terra nullius* did not apply** and did not recognise that Aboriginal people had any title to their traditional lands.

Once the High Court decided, after nearly 200 years had passed since Australia was first settled by the British, **that native title had not been extinguished,** the Australian Government moved quickly to pass the *Native Title Act 1993* (Cth) so that there was unambiguous statutory law governing the issue of native title rights.

COMMON LAW RIGHTS AND FREEDOMS AND THE INTERPRETATION OF STATUTES

The common law has another role, namely, the protection of human rights through the interpretation of statutes. A principle has been developed by the courts that, unless the words of the statute which take away an individual right are so clear, that there is really no doubt that the Parliament intended to take away the right, then the courts will not assume that the Parliament intended to do so.

The courts in Australia can prevent Parliament from taking away our common law rights. This is done by applying principles of statutory interpretation which have evolved as the courts have been asked to make decisions about the extent to which various Acts of Parliament have limited or taken away common law rights. Here are two of the cases where the High Court has protected certain common law rights.

CASE STUDY

1. The right to sue a government or government authority

Bropho v State of Western Australia (1990) 171 CLR 1

Facts: Mr Bropho brought a court action to stop the construction of the Swan Bay brewery on a sacred site. The defendant was the authority approving the development (the State of Western Australia). In the lower courts an action brought by the State of Western Australia to dismiss Mr Bropho's claim was successful. Mr Bropho appealed to the High Court.

Legal issue: Could Mr Bropho successfully argue he could sue the authority?

CASE STUDY CONTINUED...

Decision: The High Court reversed these decisions and found for Mr Bropho on appeal. It said he was entitled to bring the action and that the State of Western Australia could not stop it from doing so by claiming immunity. During its analysis of the relevant law, it restated its support for the principle in Potter's case. It said that when deciding the meaning of the statute there was a presumption "against the modification or abolition of fundamental rights or principles".

2. The right to sue for interference with property rights

Coco v the Queen (1994) 179 CLR 427

Facts: Coco was convicted on the basis of evidence which was obtained by the use of a listening device which required a judge to authorise its use. The judge also needed to authorise the police to enter Coco's property to install the device. Coco appealed on the basis that the evidence obtained was inadmissible. His appeal was rejected by the Queensland Court of Appeal and the matter went on appeal to the High Court.

Legal issue: Did the legislation entitle the judge to approve the listening device?

Decision: The High Court examined the relevant legislation. The High Court set aside the order of the Court of Appeal of Queensland and, in its place, ordered that the appeal to the High Court be allowed, Mr Coco's conviction be quashed and a new trial be held. The High Court, in the course of its judgment, noted that Bropho's case had relied on the principle in Potter's case. The High Court said:

1. Any person in possession of premises is entitled to exclude others from those premises because it is a fundamental right.
2. The police officer who enters those premises without the permission of the person in possession commits a trespass unless that entry is authorised by law.
3. The Judge had not authorised the use of the listening device and thus the police officer had committed a trespass.
4. In the absence of express words to the contrary, the Parliament could not have intended to authorise any conduct of this police officer which would otherwise have been in breach of the right of the citizen in possession of property to exclude others.

Clearly Parliament can, with unambiguous, precise language, encroach on the common law rights of Australians. The courts simply ensure that our rights and freedoms are protected to the extent that the legal system allows it.

Whether or not we need a Commonwealth Human Rights Act or Bill of Rights to enlarge or enhance that protection is a question which is dealt with later.

15.4 THE CONSTITUTION OF AUSTRALIA

A Constitution is "**the system of fundamental principles according to which a nation, state or body politic is governed**"(refer Macquarie Dictionary). We can add that it is a written document that has been created with the approval of the nation by some accepted process and embodies the principles which were acceptable to that nation at the time it came into being. This is certainly the case with the *Australian Constitution*, which was approved by a series of referenda by the people of the Australian colonies. The approved draft was enacted as part of the ***Commonwealth of Australia Constitution Act 1900 (Imperial-United Kingdom).*** Some delegates to the original 1898 Constitutional Convention

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were in favour of including a Bill of Rights in the *Australian Constitution* similar to the rights found in the Constitution of the United States of America. The majority of delegates felt that the traditional rights and freedoms of British subjects under the Parliamentary system with an independent judiciary to be created under the Constitution would be sufficient. This view prevailed. As a result of this, the fundamental purpose of our Constitution was to establish a Commonwealth Government of Australia, and to detail what powers that Commonwealth Government was to have. It did not in any way attempt to deal with the comprehensive rights of the citizens of Australia.

WHAT RIGHTS DOES THE AUSTRALIAN CONSTITUTION EXPRESSLY PROTECT?

There are a limited number of rights expressly protected by the Constitution. Some provisions of the Constitution do protect key human rights and the High Court has drawn some significant implications from the Constitution which also protect human rights. These are as follows:

THE RIGHT TO JUST COMPENSATION

*Section 51(xxxi): **the acquisition of property** on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.*

In effect this means that a Commonwealth law with respect to the acquisition of property must provide 'just terms for the acquisition' even though this is a power granted to the Commonwealth under the Constitution, this grant has been interpreted by the High Court as limiting the ability of the Commonwealth to acquire property other than on just terms.

THE RIGHT TO TRIAL BY JURY

*Section 80: **the trial on indictment of any offence** against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.*

You should be aware that s80 only applies to trials on indictment. It is up to the Commonwealth Parliament to decide whether a crime is triable on indictment or not. It is only when it does decide that a crime is triable on indictment that s80 operates to require a jury. If the Commonwealth Parliament decides that a particular crime is triable summarily then s80 does not apply and no jury is required.

However when s80 does apply the jury's verdict must be unanimous. Majority verdicts are not allowed.

CASE STUDY

Cheatle v R [1993] HCA44

Facts: Mr and Mrs Cheatle were charged in the District Criminal Court of South Australia with conspiracy to defraud the Commonwealth. This charge was brought under s86A of the *Crimes Act 1914* (Cth). The offence was an indictable offence under the Commonwealth legislation. Both Mr and Mrs Cheatle were convicted by a majority verdict by a jury of twelve persons. The jury's majority verdict was returned pursuant to s57 of the *Juries Act 1927* (SA) which applies generally to criminal trials by juries in South Australian courts. Appeals against the conviction were lodged by Mr and Mrs Cheatle but were dismissed by the South Australian Court of Appeal. Mr and Mrs Cheatle then appealed to the High Court of Australia on the grounds that the conviction of each of them by majority verdict of the jury in South Australia was a nullity by reason of s80 of the Constitution.

Legal issue: Do the words of s80 of the Constitution require that any conviction in a trial for an offence against the law of the Commonwealth must be unanimous and cannot be by way of majority.

Held: That the guarantee provided by s80 of a trial by jury carries with it immunity from conviction except by the unanimous verdict of the jurors. The Appeal was upheld.

CASE STUDY CONTINUED...

1. In cases under s80 of the Constitution is the unanimous verdict of the jury essential? [C]
2. Some states of Australia allow for majority verdicts in criminal trials whereas unanimous verdicts of the jury are essential in criminal trials for offences under Commonwealth laws. Do you think that this is an anomaly in the criminal justice system in Australia? Why or why not? [A] [E]

THE RIGHT TO FREE TRADE BETWEEN THE STATES

Section 92: *the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*

THE RIGHT TO FREEDOM OF RELIGION

Section 116: *the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

In a recent case *Williams v The Commonwealth* (2012) 86 ALJR 713 the High Court considered a challenge to the funding of the National School Chaplaincy Program on several bases, one of which was s116 of the Constitution. The Plaintiff in that case challenged the funding by the Commonwealth Government of the National School Chaplaincy Program. The Plaintiff's children attended the Darling Heights State Primary School in Queensland. At that time there was an agreement for funding in respect to that school under the Chaplaincy Program between the Commonwealth and Scripture Union Queensland (SUQ) whereby SUQ was to provide chaplaincy services to the school. One of the grounds argued by the Plaintiff was that the school chaplain is an 'office under the Commonwealth' and because the definition of the school chaplain imposes a religious test for that office then the payments to SUQ by the Commonwealth government under the School Chaplaincy Program was prohibited by s116. The challenge failed because it was held that the chaplains engaged by SUQ held no office under the Commonwealth. The chaplain at the Darling Heights State Primary School was engaged by SUQ to provide services under the control and direction of the school principal. There was no contractual or other arrangement between the chaplain and the Commonwealth.

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THE RIGHT AGAINST DISCRIMINATION ON THE BASIS OF OUT-OF-STATE RESIDENCE

Section 117: *a subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.*

WHAT DO YOU THINK?

Do you think it was necessary to include all of the above rights in the Constitution? Are there any rights which you think were important enough to be included which were left out? Give your reasons. [A] [E]

WHAT RIGHTS DOES THE AUSTRALIAN CONSTITUTION IMPLIEDLY PROTECT?

- Freedom of political communication

Apart from the rights expressly set out in the Constitution, the High Court of Australia has concluded that there are hidden within the Constitution some implied rights. One of these is the implied freedom of political communication.

In *Lange v Australian Broadcasting Corporation ("Political Free Speech case")* (1997) 189 CLR 520, the High Court revisited certain views that were expressed by some of the judges in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and stated:

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively…ss7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.

In Lange's case this implied freedom of political communication arising out of the Constitution was confirmed by the majority of judges.

There have been several High Court cases on this implied right to freedom of political communication.

CASE STUDY

Hogan v Hinch (2011) 243 CLR 506

Facts: Derryn Hinch, a radio broadcaster, was charged in the Magistrates Court of Victoria in September 2008 with five counts of contravening suppression orders made under s42 of the *Serious Sex Offenders Monitoring Act 2005* (VIC). The suppression orders prohibited publication of any information that might enable people to identify persons convicted of sex offences who are the subject of post/custodial extended supervision orders under the Act. Mr Hinch named the persons on his website and at a public rally in Melbourne. He was subsequently charged. One of the defences raised by Mr Hinch was the implied right which he had under the Constitution to the freedom of political communication. It was argued that the prohibition of the publication of the information prevented people from communicating a view about the operation of the legislation with respect to its effectiveness in rehabilitating specific offenders, or, a discussion of the circumstances under which specific offenders may have re-offended or breached supervision orders.

Legal issue: Was s42 invalid because the section offended against the implied freedom of communication contained in the Constitution.

Decision: No it did not, the law was valid. The High Court pointed out that whether the law offends against the implied freedom of communication involves two questions. These are:

1. Does the law effectively burden freedom of communication about government or political matters?
2. If it does burden that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

In this case the High Court held that the law most likely did burden freedom of communication about government or political matters. However it was held that despite that the law was reasonably appropriate and adapted to serve a legitimate end. The object of the law was the protection of the community in the rehabilitation of serious sex offenders who are at risk of re-offending after they have completed their sentences.

1. What Act of parliament did Mr Hinch breach? [C]

2. Do you think that s42 served a legitimate end in our society and thus was valid? Why or why not? [A] [E]

The High Court has considered this implied right very recently in the following case study:

CASE STUDY

Clubb v Edwards; Preston v Avery [2019] HCA 11 (10 April 2019)

Facts: Both Victoria and Tasmania had passed Acts of parliament in order to protect people when accessing premises at which abortions are provided in those states. s185D of the *Public Health and Wellbeing Act 2008* (Victoria) prohibited a person from communicating in relation to abortions in a manner able to be seen or heard by persons accessing or attempting to access premises at which abortions are provided, if the communication is reasonably likely to cause distress or anxiety. In Tasmania s9(2) of the *Reproductive Health (Access to Terminations) Act* 2013 (Tas) prohibited protests in relation to abortions that are able to be seen or heard by a person accessing premises at which abortions are provided. Both of these Acts prohibited such activities within a radius of 100 metres from premises in which abortions were lawfully provided.

Mrs Clubb attempted to hand a pamphlet to a couple outside the East Melbourne Fertility Control Clinic. She was charged and convicted under s185D. Mr Preston outside the Specialist Gynaecology Centre located in a building in Victoria Street, Hobart held up placards containing words and images showing his opposition to abortion. He gave evidence that he sought to inform and to challenge the conscience of women entering the centre. He was charged and convicted under s9(2). Both Mrs Clubb and Mr Preston appealed challenging the validity of these laws on the basis that they unlawfully infringed the freedom of communication right implied in the Australian Constitution.

Legal issue: Did s185D and s9(2) contravene the implied freedom of political communication in the Constitution and thus were invalid?

Decision: The High Court unanimously dismissed both appeals. The Judges applied the following test:

1. Does the law effectively burden the implied freedom of political communication?
2. If yes to question 1, is the purpose of the law legitimate in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If yes to question 2, is the law reasonably appropriate and adapted to advance the legitimate object of the legislation.

The Court easily held that the prohibitions on the freedom of political communication were justified because by reference to the legitimate purposes of the legislation including the protection of the safety, wellbeing, privacy and dignity of persons accessing lawful medical services (for abortion services). Some doubt also was expressed in relation to Mrs Clubb that her conduct was not really conduct involving political communication. However, the Court went on to consider the broader question of whether the Victorian law was valid.

INQUIRY FOCUS

1. From the above case both of the Acts of parliament referred to in the case related to activities being conducted within safe access zones. Safe access zones have been enacted in every State and Territory around Australia except for South Australia and Western Australia. In each jurisdiction the zone is 150 metres (except the ACT where it is 50 metres). If these laws applied without reference to any access zone, that is, to any place, do you think such a law would offend the freedom of political communication? [A] [E]
2. Do you think that a discussion between two people with opposing views as to the morality of abortion amounts to political communication and therefore attracting the implied right of freedom of political communication? Why or why not? [A] [E]

THE RIGHT TO VOTE

Sections 7 and 24 of the Constitution both set out that the Senate and the House of Representatives shall be *directly chosen by the people*. This right to vote, which resides in the people of Australia, is to be jealously protected and any changes to the *Commonwealth Electoral Act 1918* (Cth) need to be carefully considered if such changes have the effect of derogating from this right to vote even if the changes contemplated by amendments to the *Electoral Act* result in a smoother and more efficient electoral system.

In *Roach v Electoral Commissioner* (2007) 233 CLR 162 amendments to the Commonwealth *Electoral Act* had the effect of disqualifying from voting all persons who are serving sentences of imprisonment, whatever the length of such sentence. The High Court of Australia held that restrictions on the 'right to vote' had to be for a legitimate end and had to be proportionate to achieving that legitimate end. It was held by the High Court in that case that the amendment to the *Electoral Act* in 2006 whereby all prisoners serving a sentence of fulltime detention are not entitled to vote was invalid. This left the earlier provisions of the *Electoral Act* valid whereby prisoners serving a sentence of three years or longer are not entitled to enrol and vote.

Similarly in *Rowe v Electoral Commissioner* [2010] HCA 46 the Commonwealth government had made an amendment to the Commonwealth Electoral law that prevented new enrolments from 8.00 p.m. on the day of the writ for the election rather than from 8.00 p.m. on seven days after the date of the writ. That had the effect of preventing the enrolment of many citizens during that week period so that they could not vote. In fact approximately 100,000 people were prevented from enrolling. The High Court looked at the legislation and agreed that the legitimate end to the legislation was to have fair elections without fraud but it's immediate practical effect was to disenfranchise many Australian citizens. The change to the electoral laws was held to be invalid.

15.5 FEDERAL AND STATE LEGISLATION

LEGISLATION AND COMMON LAW RIGHTS

Each State Parliament, as well as the Federal Parliament, can pass laws in accordance with its powers. Unambiguous and precise words in statutes will override your common law rights. The nature of a statute and how it is brought into being is set out in Chapter 3. An excellent example of an Act which **restricted and removed individual rights** is the *Weapons Amendment Act 1996* (Qld), which is used as an example in Chapter 3.5 Vol 1 7th Edition. Although the Commonwealth Government did not have the power to legislate to restrict the possession and use of firearms, following the massacre in Port Arthur in April 1996, the then Prime Minister Mr Howard was able to galvanise State support for this legislation and the Commonwealth assisted by financing the buyback of weapons which were prohibited.

EXPANDING THE COMMON LAW

Legislation has been passed by both State and Commonwealth Governments expanding common law rights. Examples of such legislation are:

1. THE RIGHTS OF THE CHILD

The United Nations *Convention on the Rights of the Child* 1990 (CRC) was ratified by Australia in 1990. One of the key principles of the CRC is that the laws and actions of any country should put the best interests of children first and benefit them in the best possible way. Although the CRC is not Australian law, it is a well accepted principle in statutory law in Australia that the b**est interests of the child is the paramount consideration** when making decisions about the welfare of children. Since its first inception, the *Family Law Act 1975* (Cth) has stated this principle. Currently s60CA of the *Family Law Act* states

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

2. THE RIGHT TO A HEALTHY ENVIRONMENT

Australia has entered into many treaty obligations and conventions at the international level in relation to the Environment. As a consequence many Federal and State laws have been passed to protect our environmental rights. In 1972, Australia was a signatory to the United Nations *Convention Concerning the Protection of the World Cultural and Natural Heritage*, which led to the Commonwealth passing the *World Heritage Properties Conservation Act 1983* (Cth). It was this Act which successfully allowed the Federal Government to override the Tasmanian Government and prevent the Franklin Dam from being built. What is meant by a healthy environment is well-established in Australian law. It is the principle set out in the *National Strategy for Ecologically Sustainable Development* (Commonwealth Of Australia) 1992:

Using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.

The sources and principles of environmental law in Australia are set out in *Legal Studies for Australia*, Volume 2, Sixth Edition, at Chapter 8. In Chapter 4 of this section there is an inquiry into the right to protect the Great Barrier Reef from harm.

3. THE RIGHT NOT TO BE DISCRIMINATED AGAINST

All Federal and State Governments have passed laws that prohibit discrimination. At the Federal level, these laws are found in the following Acts of Parliament:

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

Australian Human Rights Commission Act 1986 (Cth)

Disability Discrimination Act 1992 (Cth)

Age Discrimination Act 2004 (Cth)

Workplace Gender Equality Act 2012 (Cth)

One of the key components of Australia's Human Rights Framework referred to earlier is the Commonwealth government's wish to consolidate all existing Commonwealth Anti-Discrimination Law into a single act. This has not yet occurred and is still under consideration. However, recent amendments have been made to the *Sex Discrimination Act* via the passage of *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). That Act inserts new protections from discrimination on the basis of sexual orientation, gender identity and intersex status.

Each State and Territory has also passed anti-discrimination legislation. For example, the *Anti-Discrimination Act 1977* (NSW), and the *Anti-Discrimination Act 1991* (Qld). In Queensland, the Act establishes the **Queensland Human Rights Commission** (previously the Anti-Discrimination Commission of Queensland), which hears complaints about discrimination in Queensland.

At the Federal level, the **Australian Human Rights Commission** (AHRC) has responsibility for assessing complaints about a breach of human rights.

Anti-Discrimination laws in Australia are an extremely significant area of human rights law in our

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community. They have widespread acceptance and have been included extensively in other legislation, such as the *Fair Work Act 2009* (Cth). The scope and relevance of these laws is dealt with further in Chapter 17 and in Chapter 21.

15.6 CUSTOMARY LAW

Most of the law in England was a form of local customary law before the Norman Conquest in 1066. This developed into what we know as the common law system, whereby the decisions of judges are followed by other judges to enable them to decide cases with similar facts in a like manner.

In recent years, the most obvious example of the common law finding in favour of, and enforcing, the human rights of any person, was the decision in *Mabo v Queensland (Mabo No.2)* (1992) 175 CLR 1 (*Mabo's case*). This was the celebrated case in which the common law overturned years of decision-making to hold that the **doctrine of *terra nullius* could not apply** and that Aborigines did have native title in their traditional lands. It said that native title continued to exist where Aboriginal groups acknowledged the laws, observed the customs, and maintained their traditional connection with the land. Apart from the *Mabo* case, customary law is seen to be relevant when sentencing Indigenous Australians convicted of an offence. This however, is not contrary to the general law, because the circumstances of any person who commits an offence are relevant considerations for the judge when determining that person's sentence. This does not mean that there have not been attempts to ask lawmakers (governments) to use customary law as a source to make laws governing Indigenous Australians more relevant.

Why should Aboriginal customary law be integrated into the Australian legal system?

In a national Indigenous legal conference held in Sydney in September 2006, Mr Tom Calma, an Aboriginal and Torres Strait Islander Social Justice Commissioner, gave a speech entitled ***The Integration of Customary Law into the Australian Legal System***. He argued that:

> *a community is most likely to have a healthy sense of order when control comes from agreed norms within. Over time, there is nothing more debilitating to the community than a lack of control, and an ongoing perception of a lack of ability on the part of the people of that community to look after themselves. Aboriginal people are competent, capable people. We regularly achieved extraordinary things. Recognising Aboriginal customary law is about recognising our competence– and recognising the strength that comes from our culture: the core of our identity.*

RESEARCH

Obtain a copy of Mr Calma's speech. In your own words, summarise what he says is the nature of Aboriginal customary law. Set out the arguments he has in favour of integrating Aboriginal customary law into mainstream Australian law. Set out what you consider are the issues that this would raise for your local community. You have been asked to go to a local community meeting and to present the arguments in favour of, or against, Mr Calma's point of view. Prepare a 5 to 10 minute speech to this effect. [C] [A] [R]

REVIEW

1. List five other names sometimes used to describe International Conventions. [C]
2. Describe the purpose of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). [C]
3. What is a Statement of Compatibility and what is its purpose? [C] [A]
4. What is the PJCHR? [C]
5. What international convention should the decision maker in Teoh's case have taken into account in deciding whether to deport Mr Teoh or not? [C]
6. What are the legal principles set out in the decisions of judges called? [C]
7. List what you consider to be the five most important common law rights. Give your reasons. [C] [A]
8. What common law rights are protected by the High Court in *Bropho's* case and Coco's case? [C] [A]
9. What rights are expressly protected in the *Australian Constitution?* [C]
10. What right did the High Court say was impliedly protected by the *Australian Constitution?* Explain your answer. [C] [A]
11. Give two examples of legislation in which common law rights have been restricted. [C] [A]
12. Give two examples of laws passed in Australia which have enhanced human rights. [C] [A]
13. How is *Mabo's* case an example of customary law becoming part of Australian law? [C] [A]
14. Why does Mr Tom Calma argue that Aboriginal customary law should be integrated into Australian law to allow indigenous communities to rely on internal governance systems? [A]

TOPIC 1: HUMAN RIGHTS

CHAPTER 16: HUMAN RIGHTS LAW RELATED TO REFUGEES AND CHILDREN

FOCUS SUBJECT MATTER

16.1 THE SCOPE OF THE GLOBAL REFUGEE CRISIS

16.2 *CONVENTION RELATING TO THE STATUS OF REFUGEES* (1951) AND *PROTOCOL RELATING TO THE STATUS OF REFUGEES* (1967)

16.3 THE *1951 CONVENTION* AND *1967 PROTOCOL* IN AUSTRALIAN LAW

16.4 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

16.5 *CONVENTION ON THE RIGHTS OF THE CHILD* (1990)

FOCUS OBJECTIVES

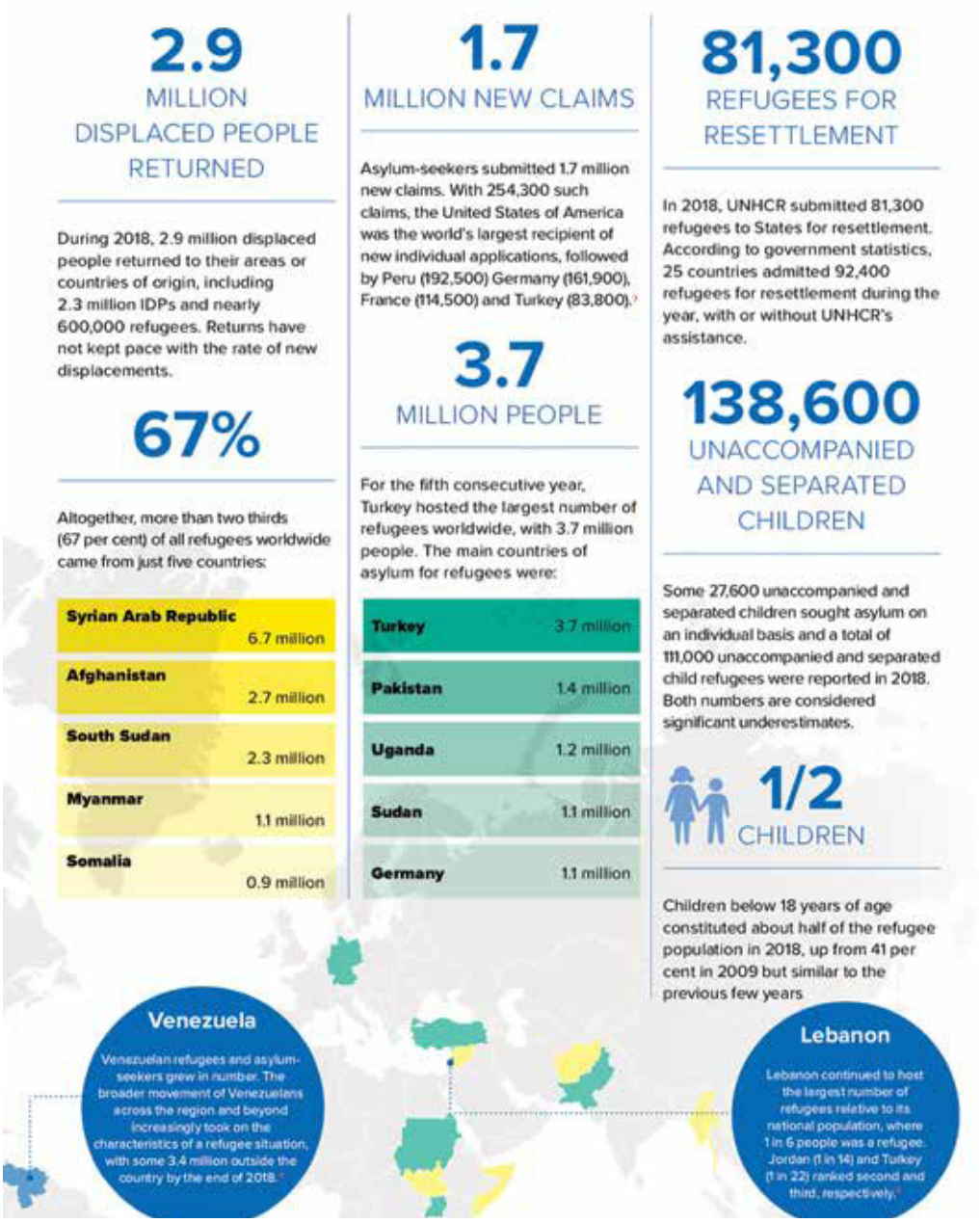
TO UNDERSTAND AND APPRECIATE:

- human rights law can focus on vulnerable groups, such as refugees and children;
- there are a number of treaties, conventions and protocols that give refugees and children rights and responsibilities, whilst also placing obligations on States who are signatories;
- to provide legal rights to refugees and children, our international agreements must be included in domestic legislation; and
- the United Nations has a number of agencies and organisations that report on countries adherence to their treaty obligations.

16.1 THE SCOPE OF THE GLOBAL REFUGEE CRISIS

In 2015 news reports shared an image that would become symbolic of the refugee crisis– a dead Syrian child on a Turkish beach who had drowned attempting to cross the Mediterranean Sea. This child was one of many who seek another place to live and the protection of another country when their own becomes unsafe. The United Nations High Commissioner for Refugees (UNHCR) (an organisation we will discuss in more detail a little later) reported that at the end of 2018 **70.8 million people were forcibly displaced worldwide as a result of persecution, conflict or violence.** In 2018, the number of newly displaced persons totalled 13.6 million, which was equivalent to 37,000 people every day.

PRACTICAL APPLICATION



SOURCE: UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), 2018, *GLOBAL TRENDS: FORCED DISPLACEMENT IN 2018*, (UNHCR.ORG) ACCESSED 8 JULY 2019, (EXCERPT)

PRACTICAL APPLICATION CONTINUED...

AUSTRALIA AMONG COUNTRIES IN 'CRISIS OF SOLIDARITY', AS REFUGEE NUMBERS PASS 70 MILLION: UN

SOURCE: STEPHANIE NEBEHAY, THE SYDNEY MORNING HERALD (SMH.COM.AU) 19 JUNE 2019 (EXCERPTS)

Geneva: Developing countries, not rich Western nations, are bearing the brunt of the world's refugee crisis and are hosting most of the record 70.8 million displaced people who have fled war and persecution, the United Nations said on Wednesday.

Grandi had a message for US President Donald Trump and other world leaders, calling it "damaging" to depict migrants and refugees as threats to jobs and security in host countries. Often, they are fleeing insecurity and danger themselves, he said.

The report also puts a statistical skeleton onto often-poignant individual stories of people struggling to survive by crossing rivers, deserts, seas, fences and other barriers, natural and man-made, to escape government oppression, gang killings, sexual abuse, militia murders and other such violence at home.

Asked whether Trump's policies had made the work of UNHCR more difficult, he said: "It's not just in the United States, in Europe as well, and Australia.

"The global trends, once again unfortunately, go in what I would say is the wrong direction," Grandi told reporters in Geneva. "There are new conflicts, new situations, producing refugees, adding themselves to the old ones. The old ones never get resolved."

In Europe, the issue has been heavily politicised, leaving some governments "terrified" to commit to take in people rescued at sea after fleeing Libya or other conflict zones, he said.

1. In 2018 how many refugees were children? [C]
2. How many displaced people were able to return to their countries of origin in 2018? [C]
3. Which country hosted the largest numbers of refugees in 2018? Does this surprise you? Why or why not? What comments does Grandi make on this trend. [C] [A]
4. What reasons are given in the article as to why people are fleeing their homeland? [C]
5. What impact has Australia's actions had on the global refugee crisis according to Grandi? What has been the flow-on effect of our position? [A]
6. What is the impact of, '…depicting migrants and refugees as threats…'? [A]

16.2 *CONVENTION RELATING TO THE STATUS OF REFUGEES* (1951) AND *PROTOCOL RELATING TO THE STATUS OF REFUGEES* (1967)

Refugees are among the most vulnerable people in the world. The 1951 Refugee Convention and its 1967 Protocol help protect them.

ANTÓNIO GUTERRES, 2011 UN HIGH COMMISSIONER FOR REFUGEES (2005-2015)

REFUGEES AND HUMAN RIGHTS: AN OVERVIEW

Ch 12.4

Refugees have rights and protections under international law. In Chapter 12 you learnt that the *Universal Declaration of Human Rights* (1948) is the foundation document for establishing human rights. Article 14 of the Declaration states that:

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Declarations set standards or aspirations, but are not legally binding documents. Article 14 (above) identifies that everyone has the right to seek asylum in particular circumstances, but lacks detail about how this article operates in practice. **The detail is found in other agreements, such as the *Convention Relating to the Status of Refugees* (1951) and the *Protocol Relating to the Status of Refugees* (1967).**

WHAT DO YOU THINK?

Why do you think the United Nations decided to use a convention to respond to the refugee situation, as opposed to making another declaration? [E]

THE *CONVENTION RELATING TO THE STATUS OF REFUGEES* (1951)

Throughout the 20th century the international community has been developing legal protections for refugees. The rise in displaced people increased dramatically after the conclusion of World War II, with millions of people fleeing their homelands. In response to the growth of refugees, the *Convention Relating to the Status of Refugees* (1951) was approved at a special United Nations conference, held at Geneva from 2 to 25 July 1951. **The *1951 Convention* entered into force on 22 April 1954— with Australia acceding to the convention in that same year** (remember accession has the same legal effect as ratification). States who became a party to the *1951 Convention* according to author Dr Paul Weis (1967), '…constitute general multilateral treaties in the accepted sentence of the term…' and are therefore binding upon signatory States at international law.

According to UNHCR the *1951 Convention*, '…provides the most comprehensive codification of the rights of refugees at the international level.' **It lays down the basic minimum standards for the treatment of refugees.**

RESEARCH

1. Over 140 counties have agreed to the *1951 Convention* since it became legally binding in 1954. In the Asia-Pacific region identify which countries have agreed to the obligations and those which have not. Comment on the overall trend that exists in our region. [S] [A]
2. Australia initially formally declared a reservation to Articles 17, 18, 19, 26, 32 and 28 (paragraph 1). These were later withdrawn. What did this articles concern? Why do you think Australia declared a reservation on these articles? [C] [S] [A]

INQUIRY FOCUS

WHAT ARE THE MAIN FEATURES OF THE CONVENTION RELATING TO THE STATUS OF REFUGEES (1951)?

The *Universal Declaration* provided the right of asylum. But, it is the ***1951 Convention*** **that defines who a refugee is, refugees' rights and responsibilities, and the legal obligations of States relating to the treatment and protection of refugees.**

This group of people are given special rights because they have lost the protection of their own country. In return, refugees must abide by the law of the country that grants them protection (Article 2).

The ***1951 Convention*** **is both a status and rights-based instrument.** This means it makes refugees a special category of persons that need assistance and it gives those persons identified specific rights. One of the most important principles of the *1951 Convention* is the principle of *non-refoulement*. This places a requirement on countries to not send refugees back to a place where they will be at risk of persecution.

We will now briefly examine some of these key features in a little more detail.

PRACTICAL APPLICATION

THE CONVENTION RELATING TO THE STATUS OF REFUGEES (1951) (EXCERPTS)

GENERAL PROVISIONS

Article 1 – Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it…

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

...

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

PRACTICAL APPLICATION CONTINUED...

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

1. For what reasons might a person be persecuted? Are there any circumstances that you think should be included as part of Article 1 but are not? [C] [E]
2. When does the *1951 Convention* cease to protect a person? [C]
3. What persons does the *1951 Convention* not apply to? Do you think this is fair? Why or why not? [C] [E]

RESEARCH

Locate the definition of the term 'refugee' under Australian law. If it does not exist how does Australia define a person seeking asylum? Compare and contrast this definition with the one in the *1951 Convention*. Why do you think these differences or similarities exist? [S] [A] [E]

PRACTICAL APPLICATION

SOURCE 1: SUMMARY OF SOME RIGHTS AND RESPONSIBILITIES CONTAINED WITHIN THE 1951 CONVENTION

States shall:	States shall not:	Refugees shall be treated at least like nationals or non-nationals in the areas of:
▸ respect a refugee's personal status and their associated rights (Article 12) ▸ provide free access to courts (Article 16) ▸ provide administrative assistance (Article 25) ▸ provide identity papers (Article 27) ▸ provide travel documents (Article 28) ▸ allow refugees to transfer their assets (Article 30) ▸ provide the possibility of assimilation and naturalization (Article 34) ▸ cooperate with the UNHCR (Article 35)	▸ discriminate against refugees (Article 3) ▸ expect refugees to pay taxes and fiscal charges that are different (Article 29) ▸ impose penalties on refugees who entered illegally in search of asylum if they present themselves without delay (Article 31) ▸ expel refugees (Article 32) ▸ forcibly return refugees (Article 33)	▸ freedom to practice their religion (Article 4) ▸ the respect and protection of artistic rights and industrial property (Article 14) ▸ rationing (Article 20) ▸ elementary education (Article 22) ▸ public relief and assistance (Article 23) ▸ labour legislation and social security (Article 24) ▸ right to work (Article 17) ▸ right to housing (Article 21)

SOURCE: WIKIPEDIA, (WIKIPEDIA.ORG) ACCESSED 9 JULY 2019, (EXCERPTS).

PRACTICAL APPLICATION CONTINUED...

SOURCE 2: NEWS ARTICLE

The convention gives a range of rights to refugees according to their connection to the receiving country. For example, refugees who are simply in the 'jurisdiction' of a country but not within its territory, such as refugees on the high seas whose boat may be boarded by Australian authorities, have the right not be returned to persecution.

Refugees receive greater rights as they become more attached to a nation. For example, refugees who are in the territory of a country cannot be punished because of the way they travelled. Once the status of refugees within a country becomes regularised, for example, through the grant of a visa, they gain additional rights including the right not to be expelled from the country except in cases where they are a threat to the national security or public order of the country.

SOURCE: AZADEH DASTYARI, THE CONVERSATION (THECONVERSATION.COM) 18 JULY 2013 (EXCERPTS).

SOURCE 3: THE *CONVENTION RELATING TO THE STATUS OF REFUGEES* (1951)

Article 2 - General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

1. Create an infographic (to see an example look at section 15.1) that explains to a refugee family some of the rights and obligations granted to them by the *1951 Convention*. Do the same for a member of the Australian government to explain what obligations they have to refugees. [C]

PROTOCOL RELATING TO THE STATUS OF REFUGEES (1967)

The *1951 Convention* restricted refugee status to those who had become displaced, '…as a result of events occurring before 1 January 1951.' It has had one amendment, in the form of the *1967 Protocol*. **The *1967 Protocol*, which was acceded by Australia in 1973, removed reference to time and location.** This means that the *1951 Convention* now provides universal coverage.

PRACTICAL APPLICATION

PROTOCOL RELATING TO THE STATUS OF REFUGEES (1967) (EXCERPTS)

Entry into force 4 October 1967, in accordance with article VIII

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before I January 1951,

PRACTICAL APPLICATION CONTINUED...

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline I January 1951,

Have agreed as follows:

Article 1 - General provision

1. *The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.*
2. *For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.*

1. Why was the *1967 Protocol* needed? [C]
2. Looking back to the *1951 Convention*, re-write the definition of refugee, applying the *1967 Protocol*, Article 1 (2). [A]

16.3 THE *1951 CONVENTION* AND *1967 PROTOCOL* IN AUSTRALIAN LAW

AUSTRALIA'S MIGRANT AND REFUGEE INTAKE

Australia has a long history of accepting migrants and refugees for resettlement. **Since 1945 over 800,000 refugees and displaced persons have settled in Australia.** People seeking to settle in Australia permanently apply to one of two broad programs. These are:

1. The Migration Program for skilled and family migrants.
2. The Humanitarian Program for refugees.

The Humanitarian Program has two components:

- Offshore resettlement application (application occurs before arriving in Australia)
- Onshore protection application (application process occurs when a person is held in detention either in Australia or off-shore. We will talk about this a little later).

To see how many people access each program and understand the scope of this social and legal issue, you will now analyse some statistics below.

PRACTICAL APPLICATION

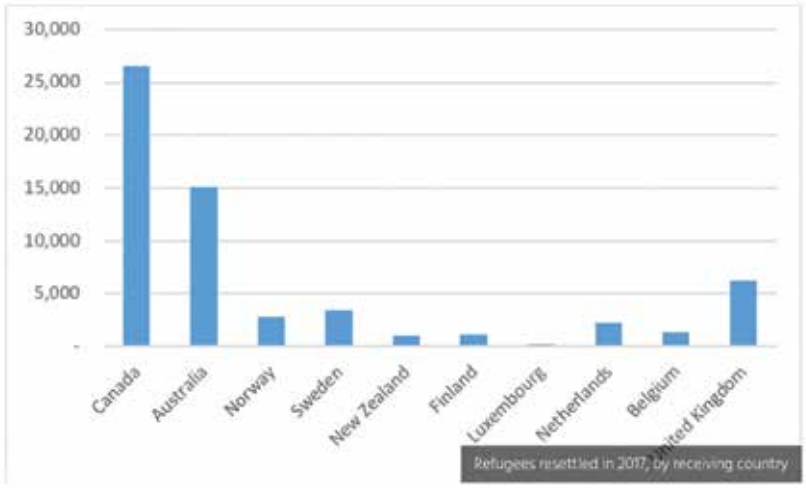
SOURCE 1: REFUGEE AND HUMANITARIAN ENTRANTS BY CATEGORY 2011-2016

Year	Refugee (offshore)	Special Humanitarian (offshore)	Protection Visas (onshore)	Total	Government planning figures
2011–12	5988	714	7043	13 745	13 750
2012–13	11 985	503	7510	19 998	20 000
2013–14	6499	4507	2753	13 759	13 750
2014–15	6002	5007	2747	13 756	13 750
2015–16	8284	7268	2003	17 555	13 750

SOURCE 2: MIGRATION AND HUMANITARIAN PROGRAM VISA GRANTS 2011-16

Year	Migration Program	Humanitarian Program	Humanitarian as percentage of total migration and humanitarian intake
2011–12	184 998	13 745	6.9
2012–13	190 000	19 998	9.5
2013–14	190 000	13759	6.8
2014–15	189 097	13 756	6.8
2015–16	189 770	17 555	8.5

SOURCE 3: REFUGEES RESETTLED IN 2017, BY RECEIVING COUNTRY



SOURCE 1 & 2: JANET PHILLIPS, PARLIAMENTARY LIBRARY RESEARCH PAPER 2016-19, (APH.GOV.AU) 17 JANUARY 2017 (EXCERPTS) AND SOURCE 3: REFUGEE COUNCIL, STATISTICS (REFUGEECOUNCIL.ORG.AU) 21 JUNE 2018 (EXCERPTS)

PRACTICAL APPLICATION CONTINUED...

1. According to Source 2, are more visas granted to those who apply to Australia's Migration Program or the Humanitarian Program? Which program do you think we should grant more visas to? Why? [C] [E]
2. How many places did the government set aside for refugees and humanitarian entrants in 2015-16? Did we exceed or not reach the planning figures? [C]
3. In what year did we grant the most visas? [C]
4. How does Australia compare to other countries regarding the number of refugees resettled in 2017? [C]

WHAT DO YOU THINK?

In the 2019 election campaign the Coalition Government promised to maintain the intake of refugees at 18, 750 refugees per year for the next three years– 30% less than the Labor Party policy. This policy came after concerns about population growth in Australia were raised during the election. How do you feel about our refugee intake? Should we increase, decrease or maintain our intake? Why? [E]

MIGRATION ACT 1958 (CTH)

International agreements, such as conventions and protocols, impose binding obligations on States that are parties to it. When Australia become a signatory to both these international instruments it meant that Australia made a commitment to comply with the provisions in good faith and, in the long term, incorporate them into domestic law (*Vienna Convention on the Law of Treaties*, Article 26).

The principal Act that applies to refugees is the *Migration Act 1958* (Cth). It is here that you will find some reference to provisions of the *1951 Convention* included, although many specific references to the *1951 Convention* were removed by the *Migration and Maritime Powers Legislation Amendment Act 2014* (Cth).

Incorporating international instruments into domestic law allows people to access those rights. It also allows the courts to assist people to enforce those rights if necessary. In contrast, failing to incorporate international agreements into Australian law does not create rights in domestic law and makes it difficult for the courts to decide that Australia is in breach of its international obligations if an Act is valid or overrule a decision made by another court.

However, even when international instruments have not been directly incorporated into domestic law, courts can still refer to international obligations when making a decision to see if a government's actions are consistent with our international commitments. In the case *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) the High Court of Australia confirmed that the legislation central to this case should be interpreted in a way that ensures, as far as possible, in a way that is consistent with Australia's international obligations as 'Parliament, prima facie, intends to give effect to Australia's obligations under international law'. However, it must be stated that this statement does not apply to the circumstances and legal issues beyond those raised in this case and there has been movement away from this decision in more recent times. A full summary of the case can be found in Chapter 15.

CASE STUDY

FTZK v Minister for Immigration and Border Protection [2014] HCA 26

Facts: A Chinese national was refused a protection visa because he had allegedly been involved in a kidnapping and murder incident in China in 1996. The Refugee Review Tribunal found that the appellant was a person to whom Australia had protection obligations under the 1951 Convention. The Minister decided the appellant should be excluded from protection because there were 'serious reasons' that meant his application should be rejected. He appealed to the Administrative Decisions Tribunal (AAT) which upheld the Minister's decision; before unsuccessfully appealing to the Full Federal Court.

Legal issue: How should the meaning of 'serious reasons' be interpreted?

Decision: The High Court decided the 'serious reasons' clause should be interpreted in accordance with the *1951 Convention*, because the *Migration Act 1958* (Cth) s36 makes it a condition that a protection visa should be given to someone to whom Australia has protection obligations. It allowed the appeal and ordered the AAT to review its decision.

1. Explain the original Refugee Review Tribunal's decision? [C]
2. Locate *Migration Act 1958* (Cth). Does it contain a definition of 'serious reasons'? Is there a reference to our international obligations in s36? [C] [S]
3. Explain how the High Court was able to apply the *1951 Convention* in this case. [A]

INQUIRY FOCUS

DO AUSTRALIA'S MANDATORY DETENTION AND OFF-SHORE PROCESSING SYSTEMS BREACH OUR HUMAN RIGHTS OBLIGATIONS?

Since 1992 Australia has had a system of mandatory detention. This means that asylum seekers and refugees are kept in detention until their claim is investigated and processed. According to the *Migration Act 1958* (Cth) s178 a non-citizen must be kept in immigration detention unless they leave Australia or are granted a visa. This system had bipartisan support and was the Keating Government's temporary response to Indochinese unauthorised boat arrivals:

The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community ... this legislation is only intended to be an interim measure.

MINISTER FOR IMMIGRATION, THE HON. GERRY HAND, 1992

The rationale for the system of mandatory detention provided by the Hon. Gerry Hand above has generally been used by successive governments. In 2001, a policy called the 'Pacific Solution' was introduced. This policy was introduced in response to 433 asylum seekers that were rescued from their sinking vessel by Norwegian freighter, the *MV Tampa*.

WHAT WAS THE 'TAMPA CRISIS'?

In 2001 a small Indonesian fishing boat with 433 asylum seekers (mostly from Afghanistan) began to sink in international waters. The asylum seekers were rescued by the Norwegian ship, the *MV Tampa*. The Australian Government refused to allow the ship to land on Christmas Island. When the ship crossed into Australian waters the Government sent 45 SAS troops to board the ship and prevent it landing. After a Bill to provide the Government with the power to remove any foreign ship in Australian waters failed, the Navy took the asylum seekers to Nauru.

This event become a catalyst for Australian's new border protection policy (the 'Pacific Solution)' that remains to this day. It was an important issue in the 2001 federal election, in which then Prime Minister John Howard declared, '**..we will decide who comes to this country and the circumstances in which they come.'**

The Liberal/National coalition was returned to power as many believed Howard was a strong leader after his actions during and after Tampa crisis and the 9/11 terrorist attacks.

The Pacific Solution established Offshore Processing Centres on Nauru and Manus Islands, which were closed and later reopened pursuant to s189AB. Offshore processing has been the subject of many cases, such as the one below.

CASE STUDY

Plaintiff S156/2013 v Minister for Immigration and Border Protection & Anor [2014] HCA 22

Facts: The plaintiff, a citizen of the Islamic Republic of Iran, entered Australia's migration zone by sea at Christmas Island. His method of entry into Australia qualified him as an 'unauthorised maritime arrival' (UMA) under *Migration Act* 1958 (Cth) s55A. The plaintiff challenged s198AB (that provides that the Minister may designate a country as a regional processing country), s198AB (that designation of Papua New Guinea (PNG) as a regional processing country) and s198AD(5) (that UMAs were taken to PNG).

Legal issue: Were s198AB and s198AD constitutional? Was the decision of the Minister to designate PNG as a regional processing country valid?

Decision: In an unanimous decision the High Court held that s198AB and s198AD are valid under the aliens powers conferred by s51(xix) of the *Constitution*. **The court also upheld the decision to designate PNG as a regional processing centre, although it acknowledged, 'there may be some doubt whether the provisions…can be said to respond to Australia's obligations under the Refugee Convention [at 44].'** This confirmed that, despite concerns people may have about offshore processing, the High Court cannot overrule law that is constitutionally valid (regardless of whether or not it is in breach of international treaties). Unless the *1951 Convention* and the *Universal Declaration of Human Rights* are incorporated into domestic law, the courts can do little. This is one reason why some people in Australia are calling for a 'Bill of Rights' .

1. What is the principal *Act* that applies to refugees? [C]
2. What classification was given to the plaintiff in this case? How did this classification impact him? [C]
3. Is our use of regional processing facilities constitutionally valid? How? [C]
4. What did the High Court say about whether or not Australia's approach meets its international obligations? [C]
5. How might the outcome of this case have been different if Australia had incorporated the *1951 Convention* into domestic law? [A]

HOW DOES EUROPE PROCESS ASYLUM SEEKERS AND REFUGEES?

The European Union (EU) *Dublin Regulation* states that refugees are required to claim asylum in the Member State in which they first arrive. The European Commission's Migration and Home Affairs Office states, 'EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards…' However, this hasn't been happening. Some EU countries such as Greece, Italy and Croatia, are allowing people to pass through to travel to other countries such as Germany. The right to asylum is protected in the German Constitution.

This has caused tension in the EU as some countries are criticising others for not accepting refugees. At the same time, political parties who are advocating to limit refugees settling in a particular country are gaining support.

HUMAN RIGHTS AND THE USE OF DETENTION CENTRES

As Australia acceded to the *1951 Convention* and the *1967 Protocol* our country has human rights obligations to asylum seekers and refugees. The Human Rights Commission states, '…the conditions for people in immigration detention, and the manner in which they are treated while in detention, should comply with these human rights obligations.' **Our refugee policies, laws and processes remain a contentious issue in Australia as some believe we are breaching our international human rights obligations.**

PRACTICAL APPLICATION

UN HUMAN RIGHTS CHIEF CALLS ON THE MORRISON GOVERNMENT FOR 'MORE HUMANE POLICIES' FOR REFUGEES

SOURCE: HUMAN RIGHTS LAW CENTRE, NEWS, (HRLC.ORG.AU/NEWS) 7 MARCH 2019 (EXCERPTS)

The United Nations High Commissioner for Human Rights, Michelle Bachelet, used her address to the 40th session of the UN Human Rights Council to highlight some of the world's worst human rights abuses and called out the Australian Government's treatment of refugees and people seeking asylum.

Ms Bachelet raised ongoing concerns about the Australian Government's plans to transfer refugees and people seeking asylum to new detention centres, saying "Those people have been suffering for more than six years; more humane policies could, and should, be implemented."

Katie Robertson, Director of Legal Advocacy at the Human Rights Law Centre, said that Bachelet's comments reflected the continued international shock at the Government's sustained cruelty to refugees.

"For the past six years the UN has raised serious concerns about the Australian Government's blatant abuse of refugees and people seeking asylum in Australia's care, in particular those held in cruel, inhumane and degrading conditions on Nauru and Manus Island. These concerns continue to fall on deaf ears.

1. Who is Michelle Bachelet and what did say about Australia's treatment of refugees? [C]
2. What particular type of abuse does Katie Robertson state the Australian Government has overseen? [C]
3. Locate a copy of the *1951 Convention*. What articles relate to refugees' living conditions? [C] [S]
4. Do you think we are breaching our international obligations? What implications could this have on our international reputation? Complete some further research to locate evidence from an authoritative source to support your opinion. [S] [A] [E]

READING

In 2013 the Australian Human Rights Commission released the 'Human rights standards for immigration detention'. The publication set out benchmarks for the humane treatment of people held in immigration detention.

You can read the standards here: humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-standards-immigration-detention

16.4 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

No single body monitors compliance to ***1951 Convention*** **and the** ***1967 Protocol*****. The main United Nations organisation that protects and supervises refugees is the United Nations High Commissioner for Refugees (UNHCR).** UNHCR is a 'guardian' of the *1951 Convention* and its *1967 Protocol*. The UNHCR was established in 1950. Prior to this, the United Nations established and disbanded two organisations, the International Refugee Organisation (IRO) and the United Nations Relief and Rehabilitation Administration. Its mandate is to:

…provide, on a non-political and humanitarian basis, international protection to refuges and to seek permanent solutions for them.

The functions of the UNHCR is set out in its *Statute of 1950*. As well as supervising the application of the *1951 Convention* and the *1967 Protocol*, the UNCHR promotes the protection of refugees.

DEALING WITH NON-COMPLIANCE

If a country violates the *1951 Convention* or the *1967 Protocol* there are not any real legal consequences. Generally, the only consequence a government may face is bad publicity generated by a media report or the UN/UNHCR handing down a verbal or written condemnation, like the media releases below.

PRACTICAL APPLICATION

UNHCR APPEALS TO AUSTRALIA TO ACT AND SAVE LIVES AT IMMEDIATE RISK

SOURCE: UNHCR, MEDIA RELEASE (UNHCR.ORG/NEWS/PRESS) 23 OCTOBER 2018 (EXCERPTS)

UNHCR, the UN Refugee Agency, appeals to the Government of Australia to take urgent action for all refugees and asylum-seekers in Papua New Guinea and Nauru today. UNHCR appreciates the efforts of doctors, independent experts, lawyers and elected representatives from all sides of politics to highlight the human cost of "offshore processing" and its consequences in recent weeks. This reflects growing recognition that lives are at immediate and critical risk, as well as increased community concern. Despite this, decisive action is still to be taken.

PRACTICAL APPLICATION CONTINUED...

The immediate evacuation of refugees and asylum-seekers from Papua New Guinea and Nauru to Australia does not require legislative change. Further, constraints upon freedom of movement and any differentiated treatment of refugees are both unnecessary and contrary to fundamental principles of refugee protection.

"While children are an obvious priority, there are many other acutely vulnerable men and women in both Papua New Guinea and Nauru who must not be forgotten," urged UNHCR Regional Representative Thomas Albrecht. "Australia has both the ability and responsibility to take action and save lives today."

1. What issue is the UNHCR concerned about? What are the implications of Australia's policy decisions? [C]
2. What action does the UNHCR want Australia to take? [C]
3. What principles is Australia breaching? [C]
4. Should we be concerned that the UNHCR is criticising our actions on a global scale? Why or why not? [E]

16.5 *CONVENTION ON THE RIGHTS OF THE CHILD* (1990)

The Convention marks a distinct moment in history that dramatically changed the way children were treated and viewed. Instead of seeing children as passive and in need of protection, the Convention articulated a view of childhood in which children were empowered and independent. This had the effect of re-conceptualising the traditional dichotomy between adults and children, so that children were no longer simply subject to adult control.

MEGAN MITCHELL, CHILDREN'S COMMISSIONER, SPEECH, 21 JUNE 2019

The idea that children are entitled to special care and assistance has been around since the *Declaration* in 1948— it is contained in Article 25:

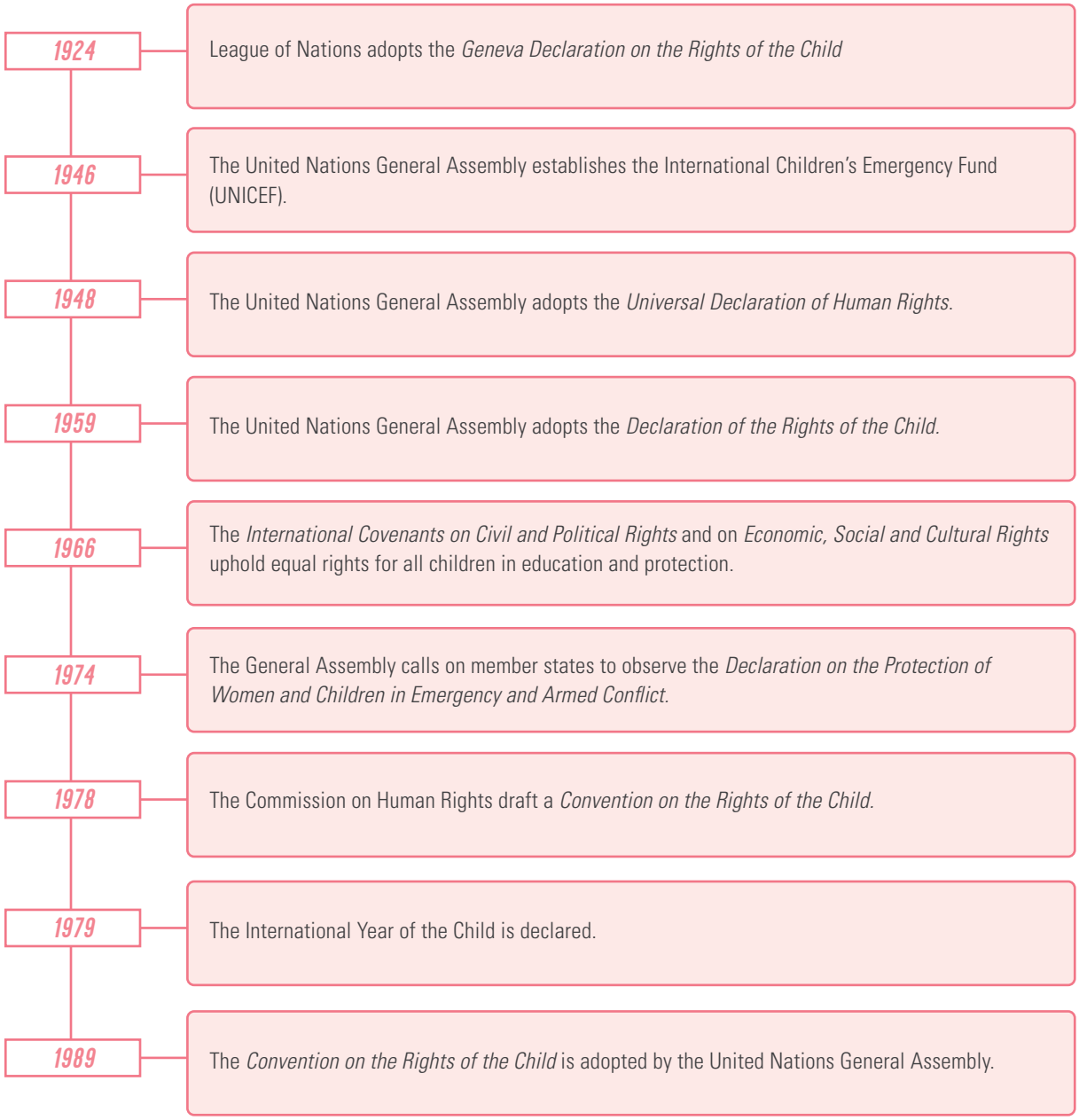
Ch 12.4

1. *Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services…*

2. *Motherhood and childhood are entitled to special care and assistance…*

The *Convention on the Rights of Child* (1990) is an international treaty that recognises the specific human rights of children. Like the *1951 Convention* we just discussed, this convention builds on the ideal that was first highlighted within the milestone document, the *Declaration*. The *1990 Convention* came into force on 2 September 1990, with Australia ratifying it in the same year. It was the result of negotiation between governments, non-governmental organisations, human rights advocates, lawyers, health specialists, social workers, educators, child development experts and religious leaders. **The *1990 Convention* is the most widely ratified human rights treaty in history**, but it is just one event in a long history of recognising the rights of children in international law.

TIMELINE OF KEY EVENTS CONCERNING CHILD RIGHTS



SOURCE: UNICEF (UNICEF.ORG) ACCESSED 13 JULY 2019.

A child is defined in Article 1 as being, '…every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

The *1990 Convention* covers the specific needs of children within civil, political, economic, social, health and cultural spheres. Children have special rights because of their vulnerability. The *1990 Convention* contains 54 articles, with most setting out a specific right a child has. These basic standards set minimum entitlements and freedoms that should be guaranteed by governments. The remaining articles (Articles 43-54) focus on the extra responsibilities adults and governments have to make sure that all children can access their rights.

PRACTICAL APPLICATION

CONVENTION ON THE RIGHTS OF THE CHILD

PART I

Article 2

1. *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

2. *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*

Article 3

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

Article 6

1. *States Parties recognize that every child has the inherent right to life.*

2. *States Parties shall ensure to the maximum extent possible the survival and development of the child.*

Article 12

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

1. The articles above have been chosen as they provide the guiding principles of the *1990 Convention*. Read each article and summarise the principles. [C]

2. The Australian Human Rights Commission wrote a submission to the Committee on the Rights of the Child regarding how well Australia is meeting its international obligations. Locate a copy of this submission. How well is Australia meeting its obligations to the guiding principles you identified above? Where can Australia improve? [S] [A] [E]

RESEARCH

Locate a copy of *The Convention on the Rights of the Child* (1990).

1. In a group identify and categorise the first 43 articles into the following categories shown in the table below. Leave out those which cannot be categorised. [C] [S] [A]

2. Two optional protocols were adopted in 2000. The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (OPAC) and the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*. Which category would the two optional protocols sit in? Why? [A]

Survival rights	Development rights	Protection rights	Participation rights

INQUIRY FOCUS

IN YOUR OPINION WHAT ARE THE THREE MOST IMPORTANT RIGHTS CHILDREN ARE GIVEN IN THE 1990 CONVENTION? WHY? [E]

THE *1990 CONVENTION* IN AUSTRALIAN LAW

Think back to the list of rights you categorised in the previous activity. Do some of them seem familiar? Have you seen them recognised in Australian law? You are now aware about the importance of incorporating international agreements into domestic legislation- it gives people legally enforceable rights. This is because domestic law must be passed to ensure international obligations become part of Australia's legal system. **There is no single Act that lists all the rights children should have according to the *1990 Convention* in a single statute. Instead, Australia argues that the rights listed in the *1990 Convention* are included in a number of domestic legislative instruments in both State and Commonwealth legislation,** although this has been questioned by some legal commentators. Professor Charlesworth, from the University of Adelaide, stated in 1995 to the Senate Standing Committee on Legal and Constitutional Affairs:

We have been a party to the Convention on the Rights of the Child for a number of years now and I have not seen any sign at all that the Federal Government is moving or trying to get support for legislation. Similarly, with the implementation of our rights under the International Covenant on Civil and Political Rights, we are showing no signs at all of moving to implement those fully. We have HREOC and there seems to be absolutely no sign of a more serious implementation of those rights. So I do think there is some room to question the good faith. I think the Australian Government is having its cake and eating it too. It is getting the international applause for signing the treaties and incurring no domestic wrath for doing so.

We will now investigate one of these rights in a little more detail.

INQUIRY FOCUS

DO WE RESPECT THE VIEWS OF CHILDREN IN FAMILY LAW MATTERS?

In 2012 many amendments were made to the *Family Law Act 1975* (Cth). Some of these amendments focused on improving how parenting arrangements were decided, including involving children in the court process and providing better protection for children at risk of violence and abuse. At the time these amendments were said to give life to the *1990 Convention* by including the articles contained within the international instruction into domestic legislation, the final step of the ratification process.

PRACTICAL APPLICATION

SOURCE 1: *THE CONVENTION ON THE RIGHTS OF THE CHILD* (1990)

Article 12

…the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

SOURCE 2: *FAMILY LAW ACT 1975* (CTH)

SECTION 60CA

Child's best interests paramount consideration in making a parenting order

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

SECTION 60CC

How the views of a child are expressed

(1) Paragraph 60CC(3)(a) requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. This section deals with how the court informs itself of views expressed by a child.

(2) The court may inform itself of views expressed by a child:

(a) by having regard to anything contained in a report given to the court under subsection 62G(2); or

(b) by making an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or

(c) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

PRACTICAL APPLICATION

SOURCE 3: AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

3.2 Best interests of the child

[76] Provisions to consider the best interests of the child are commonly included in Australian legislation relating to children.

[77]. For example, it is a key principle in child protection legislation in all jurisdictions across Australia. Amendments to the *Family Law Act 1975* (Cth) (Family Law Act) in 2012 included an acknowledgement of Australia's obligations under the CRC. Section 60B(4) of the Family Law Act now provides that an object of Part VII of the Act is to give effect to the CRC.

[78] While all jurisdictions recognise the importance of the best interests principle and have policies to guide its implementation, its application varies significantly.

...

3.4 Respect for the views of the child

Recommendation 16: The Australian Government amends the *Family Law Act 1975* (Cth) to require that children are provided with an opportunity to express their views in all matters that affect their rights or interests. A child should not be compelled to express a view, but should be provided with the opportunity to do so in a manner appropriate to their age and maturity.

SOURCE: AUSTRALIAN HUMAN RIGHTS COMMISSION, SUBMISSION TO THE COMMITTEE ON THE RIGHTS OF THE CHILD, (HTTPS://WWW.HUMANRIGHTS.GOV.AU), 2018 (EXCERPTS).

SOURCE 4: ACADEMIC JOURNAL

…section 60B(4) is unlikely to have great impact on the courts' decision-making and that children will not be able to rely on the new subsection for statutory protection of a right to participate. This argument has three bases. First, despite the inclusion of section 60B(4), the *UNCRC* is not part of Australian domestic law and its actual influence on decision-makers is minimal. Second, while some specific rights of children contained in the *UNCRC* have been implemented in the Act, the right of children to express their views and participate in decision-making has not. Third, as section 60B is an 'objects and principles' section, its impact on the adjudication of individual decisions is limited.

SOURCE: MICHELLE FERNANDO, NEW SOUTH WALES LAW JOURNAL, (2013) 36(1) P. 88.

1. What right is being discussed in this inquiry? [C]
2. How has this right been incorporated into domestic legislation? [A]
3. How have the Australian Human Rights Commission and academic Michelle Fernando viewed the Australian government's actions? What are the implications of the government's approach (good and bad)? [A]
4. Do you think this right is important? Why or why not? [E]

COMPLIANCE

Compliance is monitored by the United Nations Committee on the Rights of the Child, as well as the United Nations Human Rights Committee. Countries that have ratified the *1990 Convention* are required to report to and appear before this committee. Australia does this every five years.

PRACTICAL APPLICATION

UN COMMITTEE ON THE RIGHTS OF THE CHILD RELEASES DAMNING REPORT ON AUSTRALIA

SOURCE: HUMAN RIGHTS LAW CENTRE, (HRLC.ORG.AU/NEWS/) 20 JUNE 2012 (EXCERPTS)

The UN Committee on the Rights of the Child has handed down a damning report on Australia following its periodic review which took place on 4 and 5 June. The Committee's "Concluding Observations" are a comprehensive set of recommendations to Australia on steps it should take to ensure better compliance with its international legal obligations under the Convention on the Rights of the Child (CRC). The Committee's report card on children's rights in Australia indicates that despite some positive developments over the last few years, such as the recent move to establish a National Children's Commissioner, the situation for many children in Australia continues to be a serious concern and one of international significance. The Committee expressed particular frustration at the ongoing failure of Australia to implement key general measures of the CRC, including:

- the absence of comprehensive legislation enshrining children's rights in Australia's domestic law;
- the lack of adequate coordination between government departments and federal and state governments; and
- the absence of a National Plan of Action to implement the CRC in Australia.

1. What criticisms did the UN Committee on the Rights of the Child make about Australia as part of its 'Concluding Observations'? [C]
2. What positive actions did the UN Committee on the Rights of the Child observe? [C]
3. What specific frustrations did the UN Committee on the Rights of the Child raise? How do these actions impact an Australian child's ability to enforce his or her human rights? [C] [A]

FUTURE ISSUES OF CONCERN

In 2016 the Australian Child Rights Taskforce raised concerns about how well Australia is developing legislative and policy responses that give certain groups of children that face barriers the opportunity to enjoy their rights and reach their full potential. These groups include Aboriginal and Torres Strait Islander children, children who are seeking asylum or are refugees, children with a disability and children who are Lesbian, Gay, Bisexual, Transgender or Intersex (LGBTI). In addition, mental health, homelessness, child abuse, juveniles' treatment in the criminal justice system and child protection are just some issues that need further research, funding and resources to address. You may like to research one of these issues or groups further in your own time.

REVIEW

1. Describe the main features of the
   a. *Convention Relating to the Status of Refugees* (1951)
   b. *Convention on the Rights of the Child* (1990). [C]
2. Explain the role of the United Nations High Commissioner for Refugees. How effectively does it monitor nation States compliance? [C] [E]
3. Describe and explain how the *Commonwealth of Australia Constitution Act 1901* (Cth) s51 has been used by the Commonwealth Government in refugee cases. [C]
4. Examine the legal implication of becoming a signatory to *Protocol Relating to the Status of Refugees* (1967). [A]
5. Using the sources below analyse and evaluate how effectively the *Convention Relating to the Status of Refugees* (1951) protects children in detention centres in Australia. [A] [E]

SOURCE 1: UNHCR MEDIA RELEASE
UNHCR APPEALS TO AUSTRALIA TO ACT AND SAVE LIVES AT IMMEDIATE RISK.

SOURCE: UNHCR (UNHCR.ORG) 23 OCTOBER 2019, (EXCERPT)

UNHCR, the UN Refugee Agency, appeals to the Government of Australia to take urgent action for all refugees and asylum-seekers in Papua New Guinea and Nauru today. UNHCR appreciates the efforts of doctors, independent experts, lawyers and elected representatives from all sides of politics to highlight the human cost of "offshore processing" and its consequences in recent weeks.

Concerted action, founded upon a clear humanitarian imperative, is needed to prevent further deaths and harm to innocent men, women and children alike.

SOURCE 2: RANZCP PRESS RELEASE

SOURCE: RANZCP (RANZCP.ORG) MAY 2003 (EXCERPT).

The mandatory detention of refugees is detrimental to the mental health of children and adults with an alarming rate of mental disorder developing, according to figures to be released today at the 38th International Congress of the Australian and New Zealand College of Psychiatrists (RANZCP). RANZCP delegate, Zachary Steel, who has researched the mental health of children and adults in remote detention centres across Australia will present for the first time, the results of his study. 'Twenty children and 14 adults were assessed for their psychological well-being and it was found that there was a 10-fold increase and a three-fold increase in the number of psychological disorders respectively, over a two year period', Mr Steel said.

SOURCE 3: NEWS ARTICLE
UN: 'HEALTH CRISIS' DEMANDS CLOSURE OF AUSTRALIA'S OFFSHORE DETENTION CENTRES

SOURCE: NAAMAN ZHOU (THEGUARDIAN.COM) 13 OCTOBER 2018 (EXCERPTS)

The United Nations has called on Australia to immediately evacuate its offshore detention centres to prevent an unfolding health crisis.

Catherine Stubberfield, a spokeswoman for the UNHCR in Canberra, said healthcare was "collapsing" at the centres. She said a pre-teenage girl doused herself with petrol in a suicide attempt last month, and remained on Nauru despite a doctor's advice to have her evacuated.

Speaking on Friday, Stubberfield said Australia had to face the responsibility of its offshore detention camps because it had designed, paid for and set up the system. "UNHCR does not agree with the government of Australia's assertion that such cases are solely 'matters for Papua New Guinea and Nauru'," she said. "Australia [has] simultaneously designed, financed and managed the system."

SOURCE 4: UNHCR PUBLICATION
PUBLIC RELIEF AND SOCIAL SECURITY

SOURCE: UNHCR (UNHCR.ORG) NO DATE (EXCERPT)

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

1951 CONVENTION, ARTICLE 23, PUBLIC RELIEF

This mandatory provision seeks to ensure that recognized refugees are entitled to benefit from the national social assistance and welfare schemes enjoyed by nationals, even if they do not meet any of the conditions of local residence or affiliation which may be required of nationals.

The discussions of the Ad Hoc Committee responsible for drafting the 1951 Convention, confirm that this article must be given a broad interpretation, and includes, inter alia, relief and assistance to persons in need due to illness, age, physical or mental impairment, or other circumstances, as well as medical care. Thus, refugees without sufficient resources are equally entitled on the same conditions as nationals to social and medical assistance

TOPIC 1: HUMAN RIGHTS

CHAPTER 17: HUMAN RIGHTS

PROTECTIONS AGAINST DISCRIMINATION

FOCUS SUBJECT MATTER

17.1 WHAT IS DISCRIMINATION?

17.2 *INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (1966) (ICERD)

17.3 *RACIAL DISCRIMINATION ACT 1975* (CTH)

17.4 *CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (1979) (CEDAW)

17.5 *SEX DISCRIMINATION ACT 1984* (CTH)

17.6 *CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES* (2006) (CRPD)

17.7 *DISABILITY DISCRIMINATION ACT 1992* (CTH)

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- protection against discrimination is important to ensure all people are treated equally;
- there are a number of conventions that protect members of our community against discrimination;
- Australia has introduced domestic law that provides some legal effect to conventions against discrimination; and
- the United Nations has a number of agencies and organisations that report on countries adherence to their treaty obligations.

17.1 WHAT IS DISCRIMINATION?

DEFINING DISCRIMINATION

The *Universal Declaration of Human Rights* (1948) declares in Article 1 that:

> *All human beings are born free and equal in dignity and rights.*

Discrimination denies individuals this right—according to the Human Rights Commission **discrimination occurs when an individual or group, '…is treated less favourably than another person or group because of their background or certain personal characteristics.'**

Discrimination can be against the law if it is based on a following personal characteristics:

- sex;
- relationship status;
- pregnancy;
- parental status;
- breastfeeding;
- age;
- race;
- impairment;
- religious belief or religious activity;
- political belief or activity;
- trade union activity;
- lawful sexual activity;
- gender identity; or
- family responsibilities.

ANTI-DISCRIMINATION LEGAL FRAMEWORKS AND MONITORING PROCESSES: AN OVERVIEW

Throughout this chapter you will learn that there are **international human rights instruments and domestic laws that support an individual's right not to be discriminated against.** The laws and treaties we will examine in this chapter include:

- *Convention on the Elimination of All Forms of Racial Discrimination* (1966) (CERD)
- *Racial Discrimination Act 1975* (Cth)
- *Convention on the Elimination of All Forms of Discrimination against Women* (1975) (CEDAW)
- *Sex Discrimination Act 1984* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Anti-Discrimination Act 1991* (Qld)
- *Disability Discrimination Act 1992* (Cth)
- *Convention on the Rights of Persons with Disabilities* (2006) (CRPD)

We will also examine the **bodies responsible for monitoring our compliance** with our international obligations; as well as Australian bodies, such as the Australian Human Rights Commission (AHRC), that deal with the issue of discrimination on a domestic level. We won't examine these Australian institutional frameworks in this chapter, instead we will deal with this group in more detail in Chapter 23. However, you will learn that, **despite these legal protections, discrimination occurs in Australia** (although sometimes discrimination is allowed by law due to an exception or exemption being given). Discrimination remains a prominent legal and social issues facing Australia, as evidenced by the collection of media excerpts below.

New research looking at multicultural youth in Australia has found that a quarter of survey respondents had suffered racial discrimination, but they still believe they belong in Australia.

SOURCE: MAANI TRUU, SBS NEWS (SBS.COM.AU) 31 JANUARY 2019 (EXCERPTS).

Discrimination against someone because of their weight is now considered one of the last remaining socially acceptable stigmas in the country – and it's a problem that doesn't look like it's going away any time soon.

SOURCE: SARAH WHYTE, PM (ABC.NET.AU) 15 JULY 2019 (EXCERPTS).

Google is facing yet another accusation about its toxic culture – this time surrounding pregnancy discrimination and retaliation. Last week, an employee memo titled "I'm Not Returning to Google After Maternity Leave, and Here is Why", had gone viral at the company.

SOURCE: NURHUDA SYED, HUMAN RESOURCES DIRECTOR (HCAMAY.COM/AU) 1 AUGUST 2019 (EXCERPT).

Retired Sydney Swans footballer Adam Goodes was a lightning rod for the racist booing that marred the end of his sporting career because he was powerful and Australians "wanted to cut him down", veteran ABC sports commentator Charlie King says.

SOURCE: KATE ASHTON, ABC NEWS (ABC.NET.AU) 22 JULY 2019 (EXCERPTS).

WHAT DO YOU THINK?

What personal characteristic do you think is the biggest cause of discrimination in Australia? Why do you think this? [E]

17.2 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1966) (CERD)

BACKGROUND

By now you should recognise that the atrocities that occurred during World War Two influenced the international community to create the current system of international law. The extreme anti-Semitism that existed during this global conflict continued to exist in many parts of the world— something that was recognised by the international community. A United Nations General Assembly Resolution 1510 (XV) made in December 1960 condemned, 'all manifestations and practices of racial, religious and national hatred.' It called on the governments of all countries to, 'take all necessary measures to prevent all manifestations of racial, religious and national hatred.' It was the idea behind this resolution that would influence the creation of a legally binding international human rights instrument, the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD).

Before we begin to examine CERD in detail, we will now take a moment to examine the nature and scope of racism in Australia.

PRACTICAL APPLICATION

RACISM AND RACIAL DISCRIMINATION IN AUSTRALIA

SOURCE: AUSTRALIAN NGO COALITION; 'AUSTRALIA'S COMPLIANCE WITH THE INTERNATIONAL *CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION*', OCTOBER 2017, PAGE 6, (EXCERPTS).

5.1 Racism is a growing problem in Australia

Australia's culture is rich and diverse. Australia is home to the oldest continuing culture in the world and our Aboriginal and Torres Strait Islander population is growing. One in four Australians were born overseas and around half of the population has at least one parent born overseas.

Most Australians are proud of this cultural diversity, believe multiculturalism has been good for Australia and support action to combat racism. However, past racist laws and policies have also played an instrumental role in the shaping of Australia, including laws that enabled the oppression and dispossession of Aboriginal and Torres Strait Islander peoples and the White Australia Policy.

There is evidence of a 'disturbing reality of everyday racist abuse.' The latest Scanlon Foundation Social Cohesion Survey, a major longitudinal survey on social cohesion, revealed that:

- 20 per cent of respondents reported experiences of discrimination based on skin colour, ethnicity or religion, an increase in such reports from previous years;
- 27 per cent of people of a non-English speaking background reported experiences of discrimination; and
- 55 per cent of all those who reported experiences of discrimination were verbally abused and 18 per cent either had property damaged or were physically attacked.

It is well documented that racism has serious health, social and economic consequences for affected individuals and their families. These impacts can be compounded by intersectional discrimination on the basis of other factors such as gender, sexual orientation, disability and socio-economic status.

1. Australia is described as a 'multicultural' country. What does this mean? [C]
2. How many Australians were born overseas? [C]
3. How have our past laws contributed to racism? [C]
4. What evidence is provided by the authors of this report to justify the statement that there is a 'disturbing reality of everyday racist abuse'? Do you agree or disagree with the author's contention? Why do you think this? [C] [E]
5. What are the consequences of racism? [C]

MAIN FEATURES OF CERD

The *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) was adopted and opened for signature by the United Nations General Assembly in 1965 and entered into force in 1966. It was one of the earliest and most widely ratified United Nations human rights treaties. More than 180 countries have ratified CERD. **Australia ratified the *Convention* in 1975.**

CERD is made up of 25 Articles across three parts. It is headed by a preamble that begins by affirming the core aspirations of equality:

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations, which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

This principle, as well as the principle of non-discrimination on the basis of race is one of the foundations of the *United Nations Charter (1945),* Article 1(3) and *Universal Declaration of Human Rights* (1948), Article 2.

A summary of some of CERD's main provisions are found below:

- **Article 1** defines racial discrimination as being,

  …any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

- **Article 2** condemns racial discrimination, obliges parties to pursue a policy that eliminates racial discrimination and promote understanding among all races.
- **Article 3** condemns apartheid and racial segregation and asks State Parties to '…undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'.
- **Article 4** prohibits incitement of racial hatred (Australia made a reservation against this article),
- **Article 5** concerns equality before the law. The article describes a number of specific political, civil, social, economic and cultural rights.
- **Article 6** obliges parties to provide effective protection and remedies for any act of racial discrimination
- **Article 7** asks parties to adopt measures that encourage understanding and tolerance.
- **Article 11-13** establishes dispute resolution mechanisms between parties.

- **Article 14** establishes an individual complaints mechanism.
- **Article 22** allows disputes over the interpretation or application of CERD to be referred to the International Court of Justice.

RESEARCH

Locate a copy of CERD and answer the following questions below:

1. What offences needed to be created to fulfil our legal obligations to Article 4? [S] [C]
2. What specific political, civil, social, economic and cultural rights are noted in CERD? [S] [C]
3. What is an individual complaint called? [S] [C]
4. A number of countries submitted a reservation against Article 22 (not including Australia). Why do you think this is? [S] [E]

The Australian Human Rights Commission (2019) states that when Australia ratified CERD it undertook a promise to:

- not engage in any act or practice of racial discrimination;
- not to sponsor, defend or support racial discrimination;
- review government, national and local policies that create or perpetuate racial discrimination;
- amend or repeal laws that create or perpetuate racial discrimination;
- provide protection and remedies for victims of racial discrimination;
- make special measures to ensure disadvantaged groups have full and equal access to human rights; and
- prohibit propaganda that promotes racial superiority, racial hatred, racial violence or racial discrimination.

Over the remainder of this section think about whether Australia has achieved these promises.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION COMMITTEE (CERD COMMITTEE)

The Convention on the Elimination of All Forms of Racial Discrimination Committee (CERD Committee) was established to monitor Australia (and other member states) compliance with CERD.

The CERD Committee is made up of 18 independent experts from many countries. These experts do not represent their country and take an oath of impartiality upon taking office. The CERD Committee usually meets twice a year in Geneva. **Every country that has ratified CERD must submit a report at regular intervals. This report outlines the legislative, judicial, executive measures that have been taken by a State Party to support CERD.** The CERD Committee examines each report and publishes concluding observations that makes recommendations on what improvements a State Party can make. Being subject to reviews (and in effect potentially being openly criticised) by an international

organisation is important, as it makes Australia and other State Parties accountable for the decisions they make surrounding the implementation of CERD. Not unlike other committees the CERD Committee also publishes general recommendations on the content of human rights provisions, publishes concerns about the actions of State Parties and contacts State Parties about a specific issue if required (as seen in the example below).

PRACTICAL APPLICATION

UN WRITES TO AUSTRALIA WITH CONCERNS ABOUT HUMAN RIGHTS BREACHES IN ADANI PROJECT NEGOTIATIONS

SOURCE: AUSTRALIAN LAWYERS FOR HUMAN RIGHTS (ALHR.ORG.AU), 31 JANUARY 2019 (EXCERPTS)

The United Nations' Committee on the Elimination of Racial Discrimination (CERD) has weighed in on the ongoing controversy regarding the Indigenous Land Use Agreement (ILUA) for Adani's Carmichael Coal and Rail Project.

In a December letter to the Australian Government, CERD expressed its concern regarding allegations that the Adani Project does not enjoy the free, prior and informed consent of the W&J native title applicants and that negotiations with them were not in good faith. CERD was also concerned the ILUA could have the effect of extinguishing native title. CERD said that, if these allegations are true, the project would infringe the human rights of the W&J people, as protected under the *International Convention on the Elimination of All Forms of Racial Discrimination*.

1. What is the issue the CERD Committee is making a statement on? [C]
2. What concerns does the CERD Committee have? [C]
3. Conducting research, find out what CERD article is relevant to this issue? How may this project infringe the human rights of W&J native title applicants? [C] [S] [A]

RECENT AREAS OF CONCERN IDENTIFIED BY CERD COMMITTEE

In 2010, in response to Australia's report, the CERD Committee published 21 actions for the government to complete. These included the recognition of Aboriginal and Torres Strait Islanders as First Nations Peoples and addressing the disproportionate outcomes suffered by Indigenous peoples in the criminal justice system, providing greater support for the Australian Human Rights Commission (AHRC) to increase its effectiveness, appointing a Race Discrimination Commissioner and reviewing its mandatory detention regime.

In 2017, the CERD Committee expressed concerns about; an increase in expressions of racism, racial discrimination and xenophobia in the pubic sphere; the low number of racial discrimination cases brought before the courts (with cost and the burden of proof attributing to this number); offshore processing continuing to exist and; the number of unresolved claims to land of Indigenous peoples.

ON REFLECTION

In its Concluding Observations, the CERD Committee 'is concerned by reports that the mainstream education system and school curricula inadequately reflect indigenous history and the impact of colonisation.' What have you learnt at school about Indigenous history and the impact of colonisation? [R]

17.3 *RACIAL DISCRIMINATION ACT 1975* (CTH)

KEY HUMAN RIGHTS PROMOTED BY THE *RACIAL DISCRIMINATION ACT 1975* (CTH)

The *Racial Discrimination Act 1975* (Cth) incorporates Australia's treaty obligations into domestic legislation - the final step in ratification of an international agreement that hasn't been done in the other treaties we have examined so far.

The main aims of the Act are to:

- promote equality before the law for all persons, regardless of their race, colour or national or ethnic origin;
- make discrimination on the basis of race, colour, descent or national or ethnic origin, unlawful; and
- provide protection against racial hatred.

The Act makes it unlawful to insult, humiliate, offend or intimidate a person on the basis of their race, colour, descent, national or ethnic origin (s9, s18C). The Act prohibits discrimination on the basis of race in the following areas:

- access to places and facilities (s11);
- land, housing and other accommodation (s12);
- provision of goods and services (s13);
- trade union membership (s14);
- employment (s15); and
- advertisement (s16).

INQUIRY FOCUS

DO COMPLAINANTS ALLEGING RACIAL DISCRIMINATION HAVE ACCESS TO JUSTICE?

NUMBER OF RACIAL DISCRIMINATION COMPLAINTS

In Australia complaints concerning racial discrimination are made to the Australian Human Rights Commission. According to the Commission's complaint statistics in 2017-18:

- 14% of 2046 complaints were lodged under the *Racial Discrimination Act 1975* (Cth);
- the complaints received concerning the *Racial Discrimination Act 1975* (Cth) are 380 (2013-14), 561 (2014-15), 429 (2015-16), 4019 (2016-17) and 290 (2017-18);
- the highest ground of complaint was race (40%), followed by ethnic origin (18%) and racial hatred (14%);
- the most complaints received by area concerned employment (29%) and provision of goods and services (28.5%); and
- out of 364 complaints 137 were conciliated, the remainder being terminated, discontinued, withdrawn or closed.

But, an individual can also apply to a federal court to have their allegations heard and determined. This embodies Article 6 of CERD, which asserts that everyone has the opportunity to access effective protection from discrimination and seek adequate reparation or satisfaction from tribunals for any damage suffered.

A significant legal issue facing this area of law is the difficulty for complainants to successfully bring about cases of racial discrimination.

CASE STUDY

Sharma v Legal Aid Queensland [2001] FCA 1699

Facts: Mr Sharma, a person with Indian ethnicity, was employed with Legal Aid Queensland, initially in a casual position. He applied for two other positions in the organisation, but was not offered either position. With regard to the first position, it was advertised twice. Mr Sharma was encouraged to re-apply when the position was re-advertised, but withdrew his application when he became aware the person acting in the position had applied. The successful applicant had deficiency in the area of family law. In the second position the successful applicant was scored 57.33 and Mr Sharma scored 53.16. Mr Sharma had acted in the position during the appointment process.

Legal issue: Was Mr Sharma discriminated against on the account of his race?

Decision: The court held that Mr Sharma was not discriminated against. The successful applicants for both positions were judged to have meet the selection criteria better than Mr Sharma. Kiefel J accepted that statistical evidence 'may be able to convey something about the likelihood of people not being advanced because of factors such as race or gender,' but noted that ultimately it is 'a question of fact in each case'.

1. What did Mr Sharma allege occurred? [C]
2. Based on the facts provided, why was Mr Sharma not the successful applicant for both positions? [C]
3. Associate Professor Beth Gaze wrote in a draft paper that, 'Courts have insisted that the complainant must prove the racial motivation, which is virtually impossible.' Can you provide an example of direct evidence that would prove someone has been discriminated against? Do you think it would be hard for a person to get this type of evidence? [A] [E]

PRACTICAL APPLICATION

SKIN-DEEP: PROOF AND INFERENCES OF RACIAL DISCRIMINATION IN EMPLOYMENT

SOURCE: JONATHON HUNYOR, SYDNEY LAW REVIEW, [2003] 25 (4)

If we know that racism exists, why is it so hard to prove? In the first three years of complaints under the Racial Discrimination Act 1975 (Cth) being heard by the Federal Court and the Federal Magistrates Court, 15 cases were substantively litigated and only three were successful. All three involved claims of racial vilification. While it is difficult to make much of such a small sample and there may be a number of possible explanations for the results, the figures serve as a reminder of the well-recognised difficulties faced by complainants seeking to prove racial discrimination…

The burden of proof in all discrimination cases lies with the complainant, other than where a defence or exemption is relied upon by a respondent. The standard of proof is the civil standard — the balance of probabilities, for which a decision-maker must reach 'reasonable satisfaction' that the case has been proved. The difficulty faced by complainants in producing direct evidence to support their case makes inferences to be drawn from the surrounding circumstances all the more important for a complainant. Australian courts and tribunals have, however, been reluctant to draw inferences of racism or racial discrimination, despite acknowledging its often systemic nature.

PRACTICAL APPLICATION CONTINUED...

1. In the first three years of racial discrimination cases being heard by the Federal courts, how successful were litigants? [C]
2. Who has the burden of proof in these types of cases? [C]
3. What difficulties do complainants face according to the author? What could be a counter-argument to explain the lack of successful cases? [C] [A]

PRACTICAL APPLICATION

CONCLUDING OBSERVATIONS ON THE EIGHTEENTH TO TWENTIETH PERIODIC REPORTS OF AUSTRALIA

SOURCE: COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, 2017

Complaints of racial discrimination

15. The Committee is concerned about the limited number of racial discrimination cases brought before the courts, which is reportedly attributed to the costs of court proceedings and burden of proof requirements. Such a situation seems to be further exacerbated by the State party's reservation on article 4 (a) of the Convention (arts. 2 and 6).

16. Recalling its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee calls on the State party to:

a) Remove persistent barriers to access to justice by victims of racial discrimination, including by reversing the burden of proof in civil proceedings involving racial discrimination;

1. What is the CERD Committee concerned about? What reasons are causing this issue to occur? [C]
2. With regard to the first recommendation (16a), what benefits and limitations could adopting this recommendation have? [A]

ON REFLECTION

What have you learnt about racial discrimination in the workplace from the extracts above? What will you do if faced with a situation where you see someone being racially abused? [R]

17.4 *CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (1979) (CEDAW)

BACKGROUND

The United Nations Commission on the Status of Women was established in 1946 to monitor and promote women's rights. The Commission's work in uncovering areas in which women were treated unequally to men was instrumental in developing the *Convention on the Elimination of All Forms of*

Discrimination against Women (1979) (CEDAW). **This international treaty reaffirms the key ideals at the centre of all international human rights instruments that form the International Bill of Rights — that all people should be treated equally and without discrimination.** CEDAW's essential purpose it to set out steps considered crucial to eliminate discrimination against women. The United Nations Entity for Gender Equality and the Empowerment of Women describes CEDAW as, '…an international bill of rights for women.'

CEDAW was adopted by the United Nations General Assembly in 1979 and entered into force in 1981. **Australia signed CEDAW on 17 August 1983.** At the time the Hon Robert Ellicott and the Hon Andrew Peacock (the then Minister for Foreign Affairs) said that the signing evidenced:

Australia's policy of equality for women and the elimination of discrimination.

However, at the time Australia signed CEDAW, it made two reservations. The reservations concerned maternity leave, specifically access to paid parental leave and women's access to combat duty roles in the Defence Force (a reservation Australia later partially withdrew). Despite all women having access to a minimum 18 weeks paid maternity leave at minimum wage due to the *Paid Parental Leave Act 2010* (Cth) being passed, this reservation remains.

WHAT DO YOU THINK?

Women in combat roles has been a contentious issue in the past. In 2016 the Australian Defence Force (ADF) lifted restrictions on all employment categories, including combat roles. Do you agree with Australia's initial reservation, or should women be given equal opportunity to men to serve in combat roles? [E]

KEY FEATURES OF CEDAW

The structure of CEDAW is similar to other treaties we have discussed previously. **It is made up of a preamble proclaiming that, 'all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex', six parts and 30 articles,** which you will now investigate.

PRACTICAL APPLICATION

Part	Articles	Summary
1	1-6	Sets out the scope of the treaty, including key terms, condemnation of discrimination and the commitments undertaken by States.
2	7-9	
3	10-14	
4	15-16	
5	17-22	Establishes the Committee on the Elimination of Discrimination against Women and reporting procedures.
6	23-30	Describes CEDAW's effect on other treaties.

PRACTICAL APPLICATION CONTINUED...

1. Locate a copy of CEDAW. In the table above, complete the boxes left intentionally blank by broadly identifying the category of rights each part concerns (i.e. political, economic social, cultural or legal rights) and summarise the rights found within each part. [C] [S]
2. How does the CEDAW define discrimination? Why does such a broad definition exist? What may be the implications of this definition? [C] [S] [A]
3. What committee monitors compliance? [C]

THE *OPTIONAL PROTOCOL* TO THE *CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (1999)

The *Optional Protocol* to the *Convention on the Elimination of All Forms of Discrimination against Women* was accepted by the UN General Assembly in 1999 before being opened for ratification by those who were already a party to CEDAW.

The overarching purpose behind the *Optional Protocol* is to strengthen the enforcement mechanisms available for women who have their human rights breached. It allows individuals to complain to a committee (which we will identify soon) about a situation where they believe their rights have been violated. It also gives the Committee the power to investigate claims by conducting an inquiry.

Australia took some time to accede to the *Option Protocol*, which entered into force in Australia in 2009. According to the Australian Treaty National Interest Analysis Summary (2008), some of the reasons why Australian signed the *Optional Protocol* were:

- *'it demonstrated the Government's strong commitment to promoting the elimination of discrimination against women and the standards enshrined in the CEDAW;*
- *acceding to the Optional Protocol will provide people in Australia with the opportunity to make a complaint to a UN committee about discrimination in women's access to, and equal opportunities in, among other things, political and public life, education, marriage, social security, health and employment, once they have exhausted all domestic legal avenues;*
- *Australia is party to three other treaties that provide for similar individual complaints mechanisms; and*
- *there has been strong support for Australia to become party to the Optional Protocol from non-government organisations (NGOs) and members of the public, as well as States and Territories.'*

Similar to other supporting treaties, before an individual can file a complaint with the Committee, they must show that they have exhausted all avenues of complaint at a domestic level.

THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

The implementation of CEDAW is monitored by the Committee on the Elimination of Discrimination against Women, which was established in Article 17. This article also establishes the rules, purpose and procedures relevant to the Committee. The Committee has 23 independent elected members, who are elected by the countries who have signed the treaty. According to Australian lawyers Maria Nawaz and Tess Deegan, the key functions of the Committee include:

- 'examining state parties' implementation of rights under the convention;
- making recommendations detailing how state parties can improve compliance with the convention; and
- accepting individual complaints about violations of rights under the convention.'

PRACTICAL APPLICATION

UN SET TO REVIEW AUSTRALIA'S RECORD ON WOMEN'S RIGHTS – AND MAY FIND IT WANTING

SOURCE: MARIA NAWAZ & ANNA CODY, THE CONVERSATION (THECONVERSATION.COM) 28 JUNE 2018 (EXCERPTS).

Australia's record on women's rights is being reviewed by the United Nations Committee on the Elimination of Discrimination against Women in Geneva on July 2-3. The committee will review Australia's compliance with our obligations under the women's rights treaty - the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).

Every state party to CEDAW is required to submit a report every four years on how it is complying with its obligations under the convention. Australia was due to lodge its report in 2014, but only lodged it in December 2016, delaying the reporting cycle. The committee reviews these reports, then reports on the issues to which the government must respond.

Australia has a seat on the UN Human Rights Council. It was elected on a bid built on five pillars, including gender equality and Indigenous people's rights.

However, we're seeing little improvement on women's rights and a concerning deterioration in some areas.

1. How often does a state party submit a report? [C]
2. To whom does Australia submit a report? [C]
3. Where does the Committee meet? [C]
4. What does the author believe is happening in the area of women's rights? [C] [A]

8TH CEDAW COMMITTEE REPORT

The Australian Government provided its 8th report to the Committee in 2016. In its concluding remarks the Committee welcomed amendments to the:

- *Marriage Act 1961* (Cth) to guarantee the right to marry all couples, regardless of gender;
- *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* to give police additional powers to respond to gender-based violence;
- *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) criminalising forced marriage;
- *Paid Parental Leave and Other Legislation Amendment Act 2012* (Cth);
- *Family Law Act 1975* (Cth) that addresses family violence; and
- *Workplace Gender Equality Act 2012* (Cth).

The Committee also welcomed the '*Towards 2025*' strategy and *National Action Plans* to combat human trafficking, slavery, peace, security and violence. However, the Committee noted several areas of concern, making over 90 recommendations for improvement. Some included:

- the absence of a charter of human rights;
- denouncing funding cuts to the Australian Human Rights Commission;
- the lack of harmonization of anti-discrimination legislation;
- the prevalence of sexual harassment;
- the endemic nature of violence against women; and
- gaps in the effectiveness of the *Sex Discrimination Act 1984* (Cth).

The Committee's four priority recommendations focussed on Aboriginal and Torres Strait Islander women, funding for women's services, reproductive rights and ending offshore processing of refugees. Australia will be required to explain to the Committee what actions it has undertaken to address these priority areas within two years.

RESEARCH

The Committee also welcomed amendment to the Sex Discrimination Act 1984 (Cth) in 2011 and 2013. What were the nature of these amendments? [C] [S]

17.5 *SEX DISCRIMINATION ACT 1984* (CTH)

KEY HUMAN RIGHTS PROMOTED BY THE *SEX DISCRIMINATION ACT 1984* (CTH)

When Australia signed CEDAW we became legally obligated to put the convention's articles into action. Australia committed to:

- incorporate the principle of equality in the legal system, abolish discriminatory laws and establish new laws prohibiting discrimination;
- establish formal processes to protect women against discrimination; and
- eliminate discrimination by individuals and organisations.

The *Sex Discrimination Act 1984* (Cth) is a key piece of federal domestic legislation that makes discrimination against individuals on the basis of sex unlawful. But, all states and territories also have anti-discrimination legislation. **The *Sex Discrimination Act 1984* (Cth) gives partial effect to Australia's obligations under CEDAW**. The Act's connection to CEDAW is best demonstrated by reading s3 of the Act:

The objects of this Act are:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments

CEDAW is also found as a Schedule in the Act. According to the Australian Human Rights Commission the objectives of the Act are to:

- promote equality between men and women;
- eliminate discrimination; and
- eliminate sexual harassment at work

This Act prohibits sex discrimination on a number of grounds, including sexual orientation (s5A), gender identity (s5B), intersex status (s5C), marital or relationship status (s6), pregnancy or potential pregnancy (s7), breastfeeding (s7AA) and family responsibilities (s7A) in a number of areas. These areas include:

- employment (s14);
- education (s21);
- goods, services and facilities (s22);
- accommodation (s23);
- land (s24);
- clubs (s25);
- administration of Commonwealth laws and programs (s26); or
- requests for information (s27).

The Act also prohibits sexual harassment, which has become a prominent issue after the #metoo movement gained the attention of the media.

EXEMPTIONS

It is important to note that the Act contains a wide range of exemptions (s30), for example, religious institutions can discriminate on the basis of sex in areas involving the ordination or appointment of priests or ministers of religion (s37).

17.6 *CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES* (2006) (CRPD)

What the Convention endeavors to do is to elaborate in detail the rights of persons with disabilities and set out a code of implementation.

DON MACKAY, CHAIRMAN, CPRD WORKING GROUP

BACKGROUND

The Convention on the *Rights of Persons with Disabilities* (2006) (CRPD) was adopted on 13 December 2006. The CRPD also included an *Optional Protocol* to *the Convention on the Rights of Persons with Disabilities* (which we will examine in more detail later). The CPRD was the first

binding international human rights instrument to specifically focus on disability. It was also the **first comprehensive human rights treaty of the 21st century, although calls had been made for the UN to develop a treaty focussing on the rights of persons with a disability since the 1980s.** When the CRPD was opened for signature in 2007 it had the highest number of signatories for a UN Convention on its opening day in history.

Australia ratified the CRPD in July 2008 and the *Optional Protocol* in 2009. The Australian Federation of Disability Organisations and the CPRD Ratification Task Force recommended Australia sign the CRPD, with the latter outlining that the CRPD had the following benefits:

- ratification would have significant positive economic, environmental, social and cultural impacts;
- there are no disadvantages or negative impacts;
- there is no significant barrier to Australia ratifying the CRPD arising from any fundamental inconsistency between Australian laws, policies and programs; and
- there was overwhelming support from the disability sector for ratification of CRPD.

At the time it signed the CRPD the Australian Government made interpretive declarations on Articles 12, 17 and 18, but these have not changed the legal effect of the CRPD.

PRACTICAL APPLICATION

GRAPH DEPICTING RATIFICATION AND NON-RATIFICATION OF CRPD 2007-16

SOURCE: DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS DISABILITY (UN.ORG/DISABILITIES) 10 OCTOBER 2016 (EXCERPTS)

1. What percentage of member states have ratified the CRPD by the end of 2016? [C]
2. What geographical area has the highest number of member states that are yet to ratify the CRPD by the end of 2016? [C]
3. In 2007 how many member states had ratified the CRPD? What year had the highest number of ratifications? [C]
4. What trends do you observe about the ratification of the CRPD over time? [A]
5. What observations can you make about the ratification of the *Optional Protocol*? [A]

INQUIRY FOCUS

WHAT ARE THE KEY FEATURES OF THE CRPD?

Michael Small, Senior Policy Officer (HREOC) states that CRPD is an, '…international human rights convention which sets out the fundamental human rights of people with disability.' The CRPD does not create any new human rights. Instead, it consolidates and clarifies how existing international human rights obligations apply to people with disabilities.

The Department of Economic and Social Affairs, Disability describes the CRPD as being:

…a human rights instrument with an explicit, social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.

KEY FEATURES OF CRPD

The CRPD has a preamble and 50 articles. Articles 3 to 9 set out a number of general obligations and principles that member states have to abide by. Articles 10 to 30 identify a number of specific rights and freedoms. These include civil, political, economic, social and cultural rights and freedoms in a variety of contexts such as employment, education, health, transport and access to justice. The remaining articles concern implementation, monitoring and reporting processes. The CRPD moves away from treating persons with a disability as a welfare or charity issue— instead it uses an approach that all persons should have full and equal rights and be empowered to make decisions for themselves.

PRACTICAL APPLICATION

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2006)

ARTICLE 1 – PURPOSE

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

ARTICLE 3 – GENERAL PRINCIPLES

PRACTICAL APPLICATION CONTINUED...

The principles of the present Convention shall be:

a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.

b. Non-discrimination.

c. Full and effective participation and inclusion in society.

d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.

e. Equality of opportunity.

f. Accessibility.

g. Equality between men and women.

h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

1. What is the key purpose of the CRPD? [C]
2. How is disability defined? [C]
3. If you could summarise the core ideal of Article 3 in one or two words, what would you choose? Why did you make this choice? [E]
4. How is gender dealt with in Article 3? [C]

PRACTICAL APPLICATION

UN: RIGHTS OF PERSONS WITH DISABILITIES IN FORCE

SOURCE: UN, SCOOP (SCOOP.CO.NZ) 3 MAY 2008 (EXCERPTS)

The United Nations *Convention on the Rights of Persons with Disabilities* entered into force today, one month after the required twentieth country ratified the landmark treaty which guarantees the rights of some 650 million people worldwide.

The Convention – which Secretary-General Ban Ki-moon has called "a powerful tool to eradicate the obstacles faced by persons with disabilities" – was adopted by the General Assembly on 13 December 2006, and was opened for signature and ratification on 30 March 2007.

The Convention does not create any new rights, but aims to ensure that the benefits of existing rights are fully extended and guaranteed.

"It had been argued that persons with disabilities were covered by existing human rights treaties, but the reality was very different," says Akiko Ito, the UN Focal Point on Disability. "Persons with disabilities have routinely suffered discrimination in the job market, in schools and in receiving public services. This Convention will make sure that these people will no longer be ignored."

1. How many persons worldwide are estimated to have a disability? [C]
2. When was the CRPD opened for signature and ratification? [C]
3. What is the CRPD's purpose according to Ban Ki-moon and Akilo Ito? [C]

RESEARCH

Locate a copy of the CRPD, a primary source of legal information.

1. List the human rights contained within it. [C]
2. Categorise these human rights in a way that makes sense to you. [A]
3. Are there any human rights or freedoms you believe are missing which should be included? [E]

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The ***Optional Protocol to the Convention on the Rights of Persons with Disabilities*** **allows individuals or groups of individuals to file a complaint to the Committee on the Rights of Persons with Disabilities.** The articles within the *Optional Protocol* set out the rules of evidence and process when a complaint is filed. We will soon examine how the *Optional Protocol* operates in practice.

COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

The Committee on the Rights of Persons with Disabilities monitors the implementation of CRPD by member states, who are required to submit regular reports to the Committee on how effectively the rights are being implemented. Australia received feedback on its last submitted report in 2013. In its concluding observations the Committee provided positive feedback on a number of actions, including the:

- adoption of the National Disability Strategy;
- introduction of a self-directed disability support scheme;
- use of the Australian Law Reform Commission (ALRC) to inquire into the barriers faced by persons with disabilities to have equal recognition before the law; and
- cooperation of Australia in international programmes supporting disability inclusive development.

However, the Committee made a number of recommendations advising Australia how to better implement specific articles within CRPD, including:

- that compulsory modules on working with persons with disabilities be incorporated into training programmes for law enforcement, corrections and legal professionals (Article 13);
- the end of the unwarranted use of prisons for management of unconvicted persons with disabilities (Article 14);
- the adoption of uniform national legislation prohibiting the sterilisation of persons with disabilities in the absence of their prior, fully informed and free consent (Article 17);
- providing the resources necessary for support services to enable persons with disabilities to live in their communities (Article 19);

- to set targets to increase participation and completion rates by students with disabilities (Article 24); and
- restoring the presumption of capacity of persons with disability to vote (Article 29).

As well as monitoring how the rights enshrined in the CRPD are being implemented by member states, the Committee also:

- examines individual complaints (like the case study below) and
- undertakes inquiries in cases of reliable evidence of grave and systemic violations of the CRPD.

CASE STUDY

Fiona Given v Australia (2018)

Facts: Fiona Given has cerebral palsy. On 7 September 2013 Given wanted to vote by secret ballot in a Federal election. However, due to her limited muscle control and dexterity she was unable to mark a ballot paper, fold it and place it in the ballot box without assistance. An Electoral Commission officer was 'too busy' to assist Given to vote and directed her to ask her carer to assist her — an option Given did not want to undertake as she didn't wish her carer to know whom she was voting for. Electronic voting systems were available, but were only able to be used by persons with a visual impairment.

Legal issue: Did the *Commonwealth Electoral Act 1918* (Cth) and the Australian Electoral Commission actions violate Article 29(a)(i),(ii) and (iii) alone and in conjunction with Article 4(1)(a),(b),(d),(e) and (g), Article 5(2)(3) and Article 9.

Decision: The Committee found that Australia had failed to fulfil its obligations. The Committee stated that Australia should provide Given with compensation for her legal costs and ensure Given was given access to voting procedures and facilities that assist her to be able to cast a secret ballot. As a general measure to prevent similar violations the Committee recommended that the Commonwealth Government amend the Electoral Act 1918 (Cth).

1. What was the nature of Fiona Given's complaint to the Committee? [C]
2. Locate a copy of the CRPD. Explain which articles Given argued Australia violated. [C] [S]
3. How does this case study demonstrate the *Optional Protocol* in action? [A]
4. Do you agree or disagree with the Committee findings? Provide reasons to support your opinion. [E]
5. Has Australia amended the law, as recommended by the Committee? What does this demonstrate about the power the Committee has? [S] [A] [E]

17.7 *DISABILITY DISCRIMINATION ACT 1992* (CTH)

KEY HUMAN RIGHTS PROMOTED BY THE *DISABILITY DISCRIMINATION ACT 1992* (CTH)

The human rights identified in the CRPD have been incorporated into domestic law at both Commonwealth and State levels of government. The *Disability Discrimination Act 1992* (Cth) predates the CRPD. It provides protection for everyone in Australia against direct and indirect discrimination on the basis of disability.

Similar to the CRPD, the Act's definition of 'disability' is wide-ranging, as shown below:

DISABILITY DISCRIMINATION ACT 1992 (CTH)

SECTION 4 - INTERPRETATION

*"**disability**", in relation to a person, means:*

(a) total or partial loss of the person's bodily or mental functions; or

(b) total or partial loss of a part of the body; or

(c) the presence in the body of organisms causing disease or illness; or

(d) the presence in the body of organisms capable of causing disease or illness; or

(e) the malfunction, malformation or disfigurement of a part of the person's body; or

(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or

(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
and includes a disability that:

(h) presently exists; or

(i) previously existed but no longer exists; or

(j) may exist in the future (including because of a genetic predisposition to that disability); or

(k) is imputed to a person.

*To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*

The Act makes it unlawful to discriminate against someone for having a disability in the following areas:

- employment (s15-21B);
- education (s22);
- access to infrastructure such as government buildings, hospitals, shops and libraries (s23);
- provision of goods, services and facilities (s24);
- accommodation (s25);
- land (s26);
- membership of clubs and incorporated associations (s27);
- sport (s28); and
- the administration of Commonwealth laws and programs (s29).

The Act is administered by the Australian Human Rights Commission (AHRC), who has the ability to investigate and conciliate discrimination complaints. It also has the ability to grant exemptions (s55) for individuals, organisations and governments to not follow the provisions of the Act. In 2018 the Queensland Government sought an exemption for its new train fleet, which was denied.

PRACTICAL APPLICATION

HUMAN RIGHTS COMMISSION DENIES NEW QLD TRAINS EXEMPTION FOR DISABILITY ACCESS FAULTS

SOURCE: ISOBEL ROE, ABC NEWS ONLINE (ABC.NET.AU/NEWS) 2 MARCH 2018 (EXCERPTS)

The Human Rights Commission has refused a Queensland Government request to exempt their defective new $4.4 billion trains from disability laws, just weeks out from the Commonwealth Games which will rely heavily on the rail network.

Queensland Rail asked for an expedited exemption from The ***Disability Discrimination Act*** because eight of the nine new trains are needed to help transport hundreds of thousands of people to the Gold Coast Commonwealth Games next month.

But in the commission's preliminary view, it has ruled to refuse almost all of the exemption requests on the basis of disability discrimination.

The commission questioned the Government's decision to purchase "non-compliant" trains.

"The *Disability Discrimination Act* has made it unlawful for public transport providers to discriminate on the ground of disability since 1993.

It is believed without an exemption, the defects put Queensland Rail at risk of lawsuits from people with disabilities unable to fully access the trains.

The Government also applied for overall exemption of up to three years to fix the issues, which was preliminarily rejected.

The commission said it did not have the power to order the trains be removed, but the decision confirms the use of the trains is in breach of the Disability Discrimination Act.

It has been frequently expressed by the commission that exemptions to disability laws should not be granted lightly.

1. What was the Queensland Government seeking an exemption for? [C]
2. What was the Human Rights Commission preliminary view? [C]
3. The ability for the Human Rights Commission to grant exemptions may appear contrary to the objectives of the Act. Why do you think these provisions were introduced? Do you think they should remain in the Act or be repealed? [A] [E]
4. What consequences could occur if the Queensland Government is not granted an exemption? [C] [A]

QUEENSLAND LEGISLATION

Queensland also has enacted an *Anti-Discrimination Act 1991* (Qld) and *Human Rights Act 2019* (Qld), which supports the objectives of the CRPD. Individuals and groups can also take legal action if they believe they have been discriminated against on the basis of their disability, although not every complaint is resolved in favour of complainants (as shown in the case study below).

CASE STUDY

Lyons v The State of Queensland [2016] HCA 38

Facts: Lyons is deaf, but a proficient lip reader. She requires an Auslan interpreter when communicating with people who do not know Auslan. Lyons was called for jury service at the Ipswich District Court. She notified the Deputy Registrar that she required two Auslan interpreters to perform jury service. The Deputy Registrar excluded her under provisions in the *Jury Act* 1995 (Qld). Section 4(3)(l) allows a person with a, 'physical or mental disability' to be ineligible for jury service.

Lyons made a complaint to the Anti-Discrimination Commissioner that she had been unlawfully discriminated against (*Anti-Discrimination Act* 1991 (Qld) s10, s11 and s101). After the complaint was unable to be resolved by conciliation, it was referred to QCAT. QCAT found that there had been no unlawful discrimination. QCAT's Appeal Tribunal and the Supreme Court of Queensland agreed with QCAT's findings.

Legal issue: Does the *Jury Act 1995* (Qld) s4(3)(l) directly and indirectly discriminate against a deaf person as it prevents him or her from serving on a jury?

Decision: The High Court of Australia dismissed the appeal. An interpreter cannot be allowed to assist Lyons while the jury is kept together according to the Act and the Deputy Registrar's actions did not constitute unlawful discrimination in the *Anti-Discrimination Act 1991* (Qld) as they were following the law correctly. The Act prohibits a '13th person' from being part of jury deliberations.

1. What type of discrimination did Lyons argue she suffered from? [C]
2. Outline the legal process Lyon's followed to have her complaint heard? What does this demonstrate about the individual's ability to hold Governments to account? [C] [A]
3. Locate a copy of the CRPD. What human right is relevant to this case? Do you think the *Jury Act 1995* (Qld) breaches this human right? [S] [C] [E]
4. What reasons were given regarding why Lyon's case was dismissed? [C]
5. Queensland's Act is not unique. Deaf Australia Inc. have launched a campaign entitled, 'Jury Rights For All' (juryrightsforall.org.au). Do you believe we should amend the *Jury Act 1995* (Qld) to allow deaf and hearing impaired persons to serve on a jury? Why or why not? [E]

REVIEW

1. Describe the main features of the:
   a. *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) (CERD) [C]
   b. *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW) [C]
   c. *Convention on the Rights of Persons with Disabilities* (2006) (CRPD) [C]
2. Explain the process by which the treaty obligations of CEDAW translated into domestic law. [C]
3. Explain the role of the CERD Committee. [C]
4. Describe key human rights promoted by the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth). [C]
5. Describe the body that deals with sex discrimination in Australia. [C]
6. Choosing one area (race, sex or disability) analyse the effectiveness of Australian domestic law in ensuring its citizens are free from discrimination. [A]
7. Despite international and domestic law that makes sexual harassment unlawful, one in three workers in Australia said that they had been sexually harassed at work. Propose and justify a recommendation that would make Australian law more effective at protecting the rights of employees. [E]

TOPIC 2: THE EFFECTIVENESS OF INTERNATIONAL LAW

CHAPTER 18: THE PROMOTION AND MONITORING OF HUMAN RIGHTS INTERNATIONALLY

FOCUS SUBJECT MATTER

18.1 INTRODUCTION

18.2 INTERNATIONAL ORGANISATIONS AS VEHICLES FOR PROMOTING AND MONITORING HUMAN RIGHTS

18.3 THE UN SYSTEM FOR PROMOTING AND MONITORING HUMAN RIGHTS

18.4 THE UN HUMAN RIGHTS COUNCIL AND AUSTRALIA

18.5 NON-GOVERNMENT INTERNATIONAL ORGANISATIONS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- it is important to understand that the principles of human rights are not in themselves laws;
- there are different kinds of inter-governmental organisations, of which the United Nations (UN) and its specialised agencies are responsible for the promotion and monitoring of human rights globally;
- the promotion of human rights is the core principle of the UN *Charter*;
- the Member States of the UN are obliged to report to the Human Rights Council;
- the UN System monitors the human rights performance of Member States; and
- UN Special Procedures groups monitor the performance of Member States.

18.1 INTRODUCTION

It is only possible to make an assessment of the effectiveness of international law and legal institutions in upholding human rights globally by initially examining the extent to which human rights have become accepted and supported by international organisations.

In this chapter, we will **firstly** look at those international organisations whose role it is to promote human rights globally to form a view about the extent to which the nations of the world are receptive to the ideas and principles embodied in the *Universal Declaration of Human Rights* (1948) (the *Universal Declaration*). This is not a matter of law, it is about promoting values and ideas for the benefit of mankind. That inquiry will take place in the chapters which follow in this topic.

Secondly, it is necessary to describe and measure, as far as it is possible to do so, how successful the international organisations of the world have been in spreading the story of human rights, by monitoring and reporting on matters relating to human rights in different parts of the world. It should be clear from earlier chapters, that the starting point of this global promotion of human rights was the *United Nations Charte*r (1945) and the subsequent *Universal Declaration of Human Rights* (1948).

18.2 INTERNATIONAL ORGANISATIONS AS VEHICLES FOR PROMOTION AND MONITORING OF HUMAN RIGHTS

The term **international organisations** is used to refer to **inter-governmental** and **non-government organisations.**

The most obvious example of an **inter-governmental organisation** is the **United Nations** (UN), to which many nations of the world belong. Then there are the **specialised agencies,** such as the **World Trade Organisation** (WTO), which determine their own rules for membership. In addition, there are regional associations such as the Association of South East Asian Nations (ASEAN) and the European Union (EU). The members of all of these **inter-governmental organisations** are Nation States. These organisations have a legal personality, can own land, enter contracts and institute legal proceedings. They also have certain legal privileges and immunities, which we will look at in due course.

Non-government organisations form large group international organisations, many of which through the pursuit of their special objectives, achieve a great deal to promote, monitor, and protect human rights. Such organisations include **World Vision, the Red Cross, Amnesty International, Greenpeace and Doctors without Borders**. These are but a few of the large number of non-government organisations which do humanitarian work globally.

Ch 23.3

MEMBERSHIP IN THE UNITED NATIONS

All Nation States which become members of the UN are signatories to the *Charter,* which sets out the *Purposes, Principles* and *Processes* of the UN as an international organisation. These are set out in Chapter 12. **Human Rights** is the core *Principle* of the *Charter*, and a primary purpose of the *Charter* is the promotion of human rights throughout its Member States and by special agencies established by the UN. How this happens is the subject matter of this chapter.

Ch 12

PRACTICAL APPLICATION

THE NUMBER OF COUNTRIES IN THE WORLD

How many countries are in the World?

196

While the number is disputed for political reasons, this is the best answer because:

- 193 Member States and 2 observer States are in the United Nations.
- 196 countries are recognised by the United States.
- While not recognised as an independent nation by the US or UN, Taiwan meets the requirements for independent country status.

Growth in United Nations membership 1945-present	
1945	original 51 members
1950	60 members
1960	99 members
1970	127 members
1980	154 members
1990	159 members
2000	189 members
2019	193 members

SOURCE: WWW.THOUGHTCO.COM/NUMBER-OF-COUNTRIES-IN-THE-WORLD, DOWNLOADED 7 AUGUST 2019

1. What percentage of the countries in the world are members of the UN? How is this a measurement of the extent to which human rights are acknowledged worldwide? Give your reasons. [C] [A]
2. Describe the growth trend in membership of the UN. Has it achieved worldwide membership? What does the growth of membership over time suggest about the world's commitment to and acceptance of human rights? [C] [A]

TREATIES

As members of the UN, nations are able to become parties to the various treaties which set out specific human rights. This is important because the parties are bound legally to each other, and to the UN. This commits them to put each of the treaties into effect in their domestic law. We have already seen the process by which sovereign states make this commitment, through becoming a signatory, ratification and accession. Human rights are promoted internationally when more countries sign up to the treaties which promote those rights. For example, there are 173 countries which have ratified or acceded to the *International Covenant on Civil and Political Rights* (1966) (ICCPR). These Member States are bound legally to carry out and abide by the terms set out in the ICCPR, **subject of course to any reservations,** which means incorporating the rights contained in the ICCPR in domestic legislation.

RESEARCH

Investigate each of the following: [S]

- *Hague Convention on the Civil Aspects of International Child Abduction* (1980)
- *United Nations Declaration on the Rights of Indigenous Peoples* (2008)

Find out:

1. The number of parties to each. [C]
2. The main purpose of each. [C]
3. Describe and explain the position taken by Australia with respect to each. [C] [A]

CHARTER-BODIES AND TREATY BODIES

In the UN system there are two main types of bodies to **promote, monitor, protect** and **enforce** human rights.

Charter Bodies are established under the *UN Charter* in order to fulfil the UNs general purpose of promoting human rights. They have broad mandates that cover promoting human rights in all member states.

Treaty Bodies have responsibility for monitoring and promoting compliance with a particular human rights treaty. As such, they are only concerned with countries that are a party to that treaty.

The differences between charter bodies and treaty bodies emerge more clearly as we look at how they operate in the UN system. There is some overlap, but the total UN human rights system can be seen more clearly by treating them separately.

18.3 THE UN SYSTEM FOR PROMOTING AND MONITORING HUMAN RIGHTS.

The term 'human rights' is mentioned seven times in the founding *Charter* of the UN, making the promotion and protection of human rights a key purpose and guiding principle of the Organisation. In 1948 the *Universal Declaration* brought human rights into the realm of international law. Since then the UN has protected and promoted human rights through its **charter bodies** and **treaty bodies.**

CHARTER-BASED BODIES

These:

- derive their establishment from provisions contained in the *Charter* of the UN;
- hold broader human rights mandates;
- address an unlimited audience; and
- take action based on majority voting.

HUMAN RIGHTS COUNCIL

PRACTICAL APPLICATION

WELCOME TO THE HUMAN RIGHTS COUNCIL

SOURCE:WWW.OHCHR.ORG/EN/HRBODIES/PAGES/ABOUT COUNCIL, DOWNLOADED 8 AUGUST 2019 (EXCERPTS)

The Human Rights Council is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and making recommendations on them. It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN office at Geneva.

The Council is made up of 47 United Nations Member States which are elected by the UN General Assembly. The Human Rights Council replaced the former United Nations Commission on human rights.

History

The Council was created by the United Nations General Assembly on 15 March 2006 by Resolution 60/251. Its first session took place from 19 to 30 June 2006. One year later, the Council adopted its 'institution-building' package to guide its work and set up its procedures and mechanisms

Among them were the universal periodic review mechanism which serves to assess the human rights situations in all United Nations member states, the advisory committee which serves as the Council's 'Think Tank' providing it with expertise and advice on the thematic human rights issues and the complaint procedure which allows individuals and organisations to bring human rights violations to the attention of the Council

The Human Rights Council also works with the UN **Special Procedures** established by the former commission on human rights and now assumed by the Council. These are made up of **special rapporteurs, special representatives, independent experts and working groups** that monitor, examine, advise and publicly report on thematic issues or human rights situations in specific countries.

Task Force on Secretariat services, accessibility and use of information technology

The Task Force on Secretariat services, accessibility and the use of information technology was established in July 2011. It is mandated to study issues relating to the improvement of the secretarial services to the Council and its mechanisms, the accessibility to the Council's work for persons with disabilities and the feasibility of the use of information technology.

During the 22nd session of the Council in March 2013, additional measures were put in place to enhance accessibility

PRACTICAL APPLICATION

for persons with disabilities to the Human Rights Council, such as improved signage access rooms and accessible toilets, as well as a priority access line for persons with disabilities to enter the Palais the Nations at the Pretty gate.

Public Exhibitions and Special Events

States and international organisations can organize public exhibitions and special events at the UN premises in Geneva, Switzerland. Such exhibitions must be compatible with the values, purposes and principles of the UN, shall not be a profit-generating or otherwise of commercial nature, and shall be of an artistic and/or cultural nature rather than political nature.

1. What kind of body is the Human Rights Council? [C]
2. How many Member States of the UN comprise the Council? [C]
3. Describe the purposes of the Council? [C]
4. What is the purpose of the **Universal Periodic Review** mechanism? Explain how such a mechanism could both promote and monitor human rights in UN Member States. [C] [A]
5. Describe the **UN Special Procedures** established by the former Commission on Human Rights. What do you think might be the purpose of the UN Special Procedures? [C] [A]

UN SPECIAL PROCEDURES

For the proper operation of the Human Rights Council (HRC), it needs to have the staff with the necessary expertise to travel to places where it is necessary to report on thematic issues (such as refugees) or human rights situations in specific countries. One category of staff is referred to as '**UN rapporteurs**'.

Rapporteurs are persons chosen by an organization to prepare reports of meetings or to investigate and report on a problem.

SOURCE: CAMBRIDGE ENGLISH DICTIONARY, DICTIONARY.CAMBRIDGE.ORG/CAMBRIDGE/ENGLISH, DOWNLOADED 8 AUGUST 2019

While described as 'rapporteurs', it is the independence and the expertise which makes these special representatives useful to the HRC. The other thing which is of importance are the details on UN immunities contained in the *Conventions on the Privileges and Immunities of the United Nations* which allows the special representatives of the HRC to go to different countries to observe and report.

INQUIRY FOCUS

IS THERE SUFFICIENT EVIDENCE TO CHARGE THE MILITARY REGIME IN MYANMAR WITH CRIMES AGAINST HUMANITY?

SOURCE 1: LEGAL DEFINITIONS

Genocide: the deliberate and systematic destruction of an ethnic, religious or national group.

Crimes against humanity: a repeated practice of atrocities tolerated or condoned by a government or a de facto authority. Murder, execution, torture, rape, and forms of persecution will only reach the threshold of crimes against humanity if they are part of a widespread or systematic practice. An isolated incident is not enough and would need to be tried under national laws.

SOURCE 2: MEDIA RESPONSES TO UN REPORT

PRACTICAL APPLICATION

NEW IN FACT-FINDING MISSION ON MYANMAR EXPOSES MILITARY BUSINESS TIES, CALLS FOR TARGETED SANCTIONS AND ARMS EMBARGOES

SOURCE: WWW.OHCHR.ORG/EN/HRBODIES/HRCMYANMAR, DOWNLOADED 8 AUGUST 2019 (EXCERPTS)

GENEVA (5 August 2019): The UN Fact-finding Mission on Myanmar urged the international community on Monday to sever ties with Myanmar's military and the vast web of companies it controls and relies on. The Mission said the revenues the military earns from domestic and foreign business deals substantially enhances its ability to carry out gross violations of human rights with impunity.

The report, for the first time, establishes in detail the degree to which Myanmar's military has used its own businesses, foreign companies and arms deals to support military operations against ethnic groups that constitute serious crimes under international law, bypassing civilian oversight and evading accountability.

The Mission said the UN Security Council and Member States should immediately impose targeted sanctions against companies run by the Military, known as Tatmadaw. It encouraged consumers, investors and firms at home and abroad to engage with businesses unaffiliated with the military instead.

The Mission also called the imposition of an arms embargo, citing at least 14 foreign firms from seven nations that have supplied fighter jets, armoured combat vehicles, warships, missiles and missile launchers to Myanmar since 2016. During this period the military carried out extensive and systematic human rights violations against civilians in Kachin, Shan and Rakhine states, including the forced deportation of more than 700,000 ethnic Rohingya to Bangladesh.

1. Describe the involvement of Myanmar's military and its businesses in the actions it has taken against ethnic groups in the country. How does the involvement of the military in business assist it to take the action that it does? [C] [A]
2. What action does the UN special procedures group recommend should be taken? [C] [A]
3. According to an earlier article set out as an example of human rights in chapter 12, Rohingya women were systematically raped by the military and the male members of their family executed. Draw up a statement which alleges the particulars with which the Myanmar military could be charged in the *International Criminal Court*. [C] [A] [R]

PRACTICAL APPLICATION CONTINUED...

TRANSCRIPT FFM ON MYANMAR INTERVIEW – 4 AUGUST 2019

SOURCE: WWW.OHCHR.ORG/EN/HRBODIES/HRCMYANMAR, DOWNLOADED 8 AUGUST 2019 (EXCERPTS)

Answer 1:

Chris Sidoti (one of the three UN rapporteurs responsible for the report on Myanmar-an Australian Human Rights Commissioner):

The Fact-Finding Mission on Myanmar recommended in its major report last September that States and private sector corporations and international financial institutions as well like the World Bank or the International Monetary Fund disengage economically from the Myanmar military. We made that recommendation at the time because we saw the military as the basic problem in Myanmar. It was at the heart of all of the very serious human rights violations, the very grave crimes under international law. And so, the transformation of the military in its current form as a dominant political and economic actor is essential for change to occur in Myanmar and for these human rights violations to end.

In this report we have taken this recommendation further or rather we have tried to give it substance by highlighting the areas in which the military is most active economically and the steps that need to be taken in economic disengagement.

Radhika Coomaraswamy:

Our purpose is not a sanction against Myanmar. We would be very happy if the rest of the society and economic interests of the rest of the society flourish. Our only interest is that the army be a professional army and be limited to military functions and not get involved in economic life, and avoid civilian oversight and in that sense not exploit the economic resources of Myanmar for their own interest and not an interest of their people.

Marzuki Darusman:

… it turns out that this is sourced to the Tatmadaw business empire which is based primarily, on the extraction of precious gems. Primarily jades and rubies. And therefore, in terms of the accountability, there is an urgent need to scrutinize the origins of jades and rubies, which at this stage, risk becoming known as genocide gems akin to the Blood Diamonds, the infamous Blood Diamonds.

Answer 2

Chris Sidoti:

Our findings, firstly, indicate that the military is economically active through two major groups of corporations, in almost all sectors of the Myanmar economy. It's particularly active in the jade and ruby mining area, but other areas of mining as well, in construction, banking, and insurance, tourism, timber industry and so on.

But the second finding is a very significant one. Its dominance is not as great as it was twenty years ago. It's now possible to be involved financially, economically in Myanmar, without having to be involved with the military. And so an important part of what we are doing in this report is identifying those corporations and other businesses active in Myanmar that are military related, and so should be avoided. And areas where people can invest or do business in confidence but they are not dealing with these human rights.

Answer 3

Crhis Sidoti:

The money that the military makes through its economic controls, enables it to operate outside of parliamentary scrutiny. It's essential in any democracy that military forces be subject to control by civilian governments and be funded through normal parliamentary appropriations. When the military has its own economic base and is not dependent upon the civilian government and the parliament to provide the money, then it's not a national defense force it's a

PRACTICAL APPLICATION CONTINUED...

private militia. And this is essentially what the Myanmar military has become – a private militia. Funding itself outside parliamentary scrutiny and control.

It's necessary to cut off those accesses, those sources of private funding, so that proper parliamentary and civilian government oversight on the military can be imposed. And that's key to the transition of Myanmar into a proper inclusive, modern, democratic State.

Answer 4

Chris Sitodi:

We've started the process of mapping the military's economic interests. Essentially, we have to cut them off from their sources of funding. And so that's what we're recommending and we're helping people to do that by identifying those sectors in the economy and those corporate vehicles that the military uses to make its money.

We would like to see international, financial institutions like the International Finance Corporation not providing any money to any projects that these corporations run. We would like to see the private sector not entering into joint ventures. We would like to see governments not providing any financial support, investment, development assistance through these military vehicles.

Radhika Coomaraswamy:

So the linkage is between the Tatmadaw and the human rights violations and our belief that in preventing that and having sanctions against that, we can actually help the situation by getting the Tatmadaw to reform dramatically.

Marzuki Darusman:

We are now appealing also to the general public that we share a responsibility in doing something that will fundamentally change the situation, whereby accountability can be pursued with effective actions, on the basis of a complete exposure of the range, the scale and the depths of the Tatmadaw business empire.

Answer 5

Chris Sidoti:

We have identified in our report a number of states and state-owned enterprises that continue to provide military support to the military in Myanmar, Tatmadaw. We know that there are a number of countries that have imposed arms and arms related embargos, but there are still countries that are trading. Again, these ties need to be cut.

The military now as a seventy-year track record of grave human rights violations, including the responsibility for some of the most serious crimes under the international law. Anyone who continues to provide military arms to such a military force is supporting these kinds of historic and present-day activities. And so, the arms have to be cut off, so that the human rights violations are not committed.

1. Describe the economic activities in which the Myanmar military are involved? Are the funds from their economic activities used to support their military activities? Does the military rely on the Myanmar Government for funding for its operations? [C] [A]
2. What is alleged about the relationship of the military and the government in Myanmar? If the government has no control over the activities of the military, does it have the authority to prevent the military from committing crimes of a humanitarian nature, and violating the human rights of individuals belonging to ethnic groups in Myanmar? [C] [A] [E]
3. Describe what is meant by 'ethnic cleansing'? Does this appear to be happening in a systematic way to the ethnic groups that live in Myanmar? [C] [A]
4. How has the fact-finding mission promoted the cause of human rights, in Myanmar, and worldwide? Do you think that their arguments are effective? [C] [A] [E]

IMMUNITY AND PRIVILEGES

It may have occurred to you that it would be difficult for outsiders to gain access to Myanmar for the UN special procedures rapporteurs and other experts to enable them to get first-hand information by interviewing individuals and groups in Myanmar and other such countries. You would be right except for the:

Convention on the Privileges and Immunities of the United Nations (1946) (the New York Convention)

The ***New York Convention*** defines and specifies numerous issues relating to the status of the UN, its assets, officials, and the terms of the privileges and immunities that must be granted to them by its Member States. It was passed by the UN General Assembly on 13 February 1946 in New York. As of July 2019, the *New York Convention* has 160 State parties, of which 158 are Member States of the UN, the remaining 2 being the Holy See (Vatican) and Palestine. On 21 November 1947, the *New York Convention* was adopted by General resolution 179 (II) to extend similar privileges to the specialised agencies of the UN. This convention has been ratified by 127 States.

KEY PROVISIONS

- Article 1 establishes judicial personality of the UN;
- UN premises shall be inviolable and UN property shall be immune from search, requisition, confiscation etc (Article II);
- UN shall be exempt from taxes and customs duties as well is prohibitions and restrictions on imports and exports (Article II);
- diplomatic immunity of communications and mail (pouch) (Article III);
- functional immunity of delegates (Article IV), officials (Article V) and experts (Article VI); and
- recognition of UN Laissez-Passer (Article VII).

The conventions are in force '*with regard to each state which has deposited an instrument of accession with the Secretary-General of the UN as from the date of its deposit*' i.e. not merely by a States membership in the UN. Several states, for example, the USA, have accepted the conventions only with some reservations. Australia acceded to the *New York Convention* on 2 March 1949.

SOURCE: EN.WIKIPEDIA.ORG/WIKI/CONVENTION ON THE PRIVILEGES. DOWNLOADED 10 AUGUST 2019 (EXCERPTS)

WHAT DO YOU THINK?

All UN Special Procedures operations which are conducted to report on human rights breaches at a national level would seek to rely on the *New York Convention* to carry out their investigations and inquiries. Is this a reasonable representation of what is involved when **Rapporteurs** need to visit the country in which the alleged breach has occurred? [S] [A]

PRACTICAL APPLICATION

KHASHOGGI ENQUIRY HAS SOUGHT ACCESS TO SAUDI CONSULATE, KINGDOM

SOURCE: REUTERS,WWW.REUTERS.COM/ARTICLE/US-SAUDI-KHASHOGGI-INQUIRY DOWNLOADED 10 AUGUST 2019 (EXCERPTS)

UN human rights investigator leading an international inquiry into the murder of Saudi journalist Jamaal Khashoggi said on Saturday she had made a request to have access to the crime scene in Saudi Arabia's consulate in Istanbul and to visit the kingdom. Agnes Calamard, UN special rapporteur on executions, who begins a week long mission to Turkey at government invitation on Monday, said she had not yet had a reply from Saudi authorities. On Thursday, she said the three member legal and forensic panel would seek t o establish 'states' and 'individuals' responsibilities for the killing.

Khashoggi, a Washington post columnist living in the United States, was murdered at the Saudi consulate in Istanbul on October 2 where he had gone to collect documents for his planned wedding. US intelligence agencies believe Crown Prince Mohammed bin Salman ordered an operation to kill Khashoggi, who was a critic, and say his body was dismembered and removed to a location still publicly unknown.

Riyadh denies the crown prince had any involvement in the murder. The Saudi mission in Geneva and government media office in Riyadh have not responded to Reuters inquiries about the international investigation. A Saudi public prosecutors spokesman said last year that 21 Saudis had been taken into custody over the case, 11 of whom had been indicted and referred to trial.

"I conceive of this enquiry to be a necessary step, among a number of others, toward crucial truth telling about and formal accountability for the gruesome killing of Mr Khashoggi," Callamard said. In its report to the UN human rights Council in June, the inquiry will make recommendations about how to ensure "formal (criminal) accountability", she said.

1. Is Saudi Arabia a party to the *New York Convention* dealing with immunities and privileges? [S] [C]
2. Describe the role of Agnes Callamard as a UN human rights investigator. [C]
3. Describe and explain the reasons why the three-member legal and forensic panel might want to access the consulate where Khashoggi was killed and to interview the persons who were present at his death. [C] [A]
4. Explain what it is hoped the investigation will achieve. Is it an appropriate role for an investigator team from the UN Human Rights Council to undertake this task? How would such an investigation contribute to the promotion and monitoring of human rights in Turkey, Saudi Arabia, and the world? [C] [A] [E]

18.4 THE UN HUMAN RIGHTS COUNCIL AND AUSTRALIA

All Member States of the UN pursuant to their obligations under the *Charter* go through a process called a **Universal Periodic Review** (UPR). Australia engages with the UPR process. The UPR process aims to improve the human rights situation in all countries and to address human rights violations where ever they occur. The UNHRC reviews the human rights records of all 193 Member States once every four years. We will look at some documents which explain the process, which is normally cooperative and designed to assist the country under review to improve its human rights record by encouraging it to self-report and to respond to recommendations that are made to it by the UHHRC.

PRACTICAL APPLICATION

REPORT OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW

SOURCE: HUMAN RIGHTS COUNCIL, ADDENDUM TO THIRTY FIRST SESSION, 29 FEBRUARY 2016 (EXCERPTS)

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Domestic frameworks

14. Australia does not propose to alter its federal model of parliamentary supremacy through the introduction of a judicially enforceable Human Rights Act

Indigenous Australians

23. Australia supports the Rights of Indigenous Australians through existing laws, policies and programs at federal, state and territory level.

25. Australia supports the promotion of, and respect for, the principles of the **Declaration on the Rights of Indigenous Peoples.**

24. The Australian Government is continuing to implement the Indigenous Advancement Strategy and is working with state and territory governments to close the gap Indigenous disadvantage, including by addressing the underlying causes of Indigenous disadvantage, increasing opportunities health, education, housing and employment and addressing issues leading to incarceration and contact with child protection systems. The Australian Government is committed to equal access to services for Indigenous Australians, including birth registration.

27. Australia will continue to support the preservation and protection of Aboriginal and Torres Straight Islander Arts, Languages and Cultures, including the return of secret and sacred materials and ancestral remains to communities.

Women's rights

31. Australia is committed to eradicating violence against women, especially family violence. Domestic violence is criminalized in Australian states and territories. Australia is implementing its *National Plan to Reduce Violence against Women and Their Children* as well is the recently announced $100 million Women's Safety Package.

Disability

35. The Australian Government is currently working with state and territory governments finalise the National Disability Strategy's second implementation plan, including the development of an Action Plan to improve outcomes for Indigenous Australians with a disability. Australia is also committed to strengthening disability inclusive development in Australia's aid program through the *Development for All 2015-2020* strategy.

Sexual Orientation, Gender Identity and Intersex Rights

40. The Australian Government will hold a plebiscite on same-sex marriage after the next federal election.

PRACTICAL APPLICATION CONTINUED...

Children and youth

45. Australia will continue to focus on reducing contact of children and youth with the criminal justice system, but considers the age limit for criminal responsibility as appropriate. Mandatory sentences do not apply to any offences committed by children under federal law and most states and territories do not apply mandatory sentences for children. When determining the appropriate sentence for an offender, a court must take into account the age of the defendant. Australia does not sentence children to life imprisonment unless tried as an adult.

47. Australia does not endorse corporal punishment as an approach to student behavior management in schools. Corporal punishment is not a sentencing option in any Juvenile Justice System in Australia.

Migration, refugees and asylum seekers

58. Australia recognizes that the regional processing centres in Nauru and Papua New Guinea (PNG) are facilities within Nauru's and PNG's sovereign borders respectively. The centres operate under Nauru and PNG jurisdiction and are subject to the laws of those countries.

1. Describe two issues raised in the above excerpts of the report for human rights in Australia. For each issue identify the human right to which it is relevant. [C] [A]
2. Since this report was published in February 2016, have any of the issues which were raised been resolved, and laws passed to give effect to a new policy? Do you agree with the new laws? [C] [A] [E] [R]
3. Do you think the work of the Human Rights Council, through reports such as this one, is effectively promoting human rights in Australia? [A] [E] [R]

SPECIAL RAPPORTEUR ON RIGHTS AND THE ENVIRONMENT

All human beings depend on the environment to live. The safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations or even live to a level commensurate with minimum standards of human dignity. It has become increasingly apparent in recent years that there is a strong relationship between promoting human rights and promoting environmental values.

Building on several other resolutions related to human rights and the environment and human rights and climate change, the HRC established the mandate Independent Expert on Human Rights and the Environment during its 19th session and resolution 19/10. Mr John Knox began working on the mandate in August 2012, and subsequently there were other appointees as the mandate was extended firstly in 2015 for a period of three years, and then on 1 August 2018 for an additional three years.

RESEARCH

Go to www.ohchr.org/EN/Issues/Environment/SRenvironment and investigate the scope of the responsibilities of the Special Rapporteur on Rights and the Environment. Make a summary of these in your own words. Find out if the Special Rapporteur has ever reported on climate change and the Great Barrier Reef. If so, indicate the main thrust of the report. [S] [C] [A]

INQUIRY FOCUS

PROMOTING THE GREAT BARRIER REEF, A UNIQUE AUSTRALIAN ENVIRONMENTAL HERITAGE.

SOURCE 1: WHO IS RESPONSIBLE FOR THE GREAT BARRIER REEF?

The Commonwealth Government set up the Great Barrier Reef Marine Park (GBRMP) in 1975. It did this by passing the *Great Barrier Reef Marine Park Act 1975* (Cth) and *Great Barrier Reef Marine Park Regulations 1975* (Cth).

The Act and Regulations:

- set up the **Great Barrier Reef Marine Park Authority (GBRMPA)**;
- establish a framework for the protection and management of the GBRMP;
- establish a zoning plan for the GBRMP based on the concept of multiple use management;
- provide a range of specific management tools such as plans for management and compulsory piloted areas for shipping; and
- prescribe a licensing system to regulate aquaculture discharges into the GBRMP.

The idea of **multiple use management** means different uses are managed by different groups, in this case, the GBRMPA and the Queensland Parks and Wildlife Service (QPWS). The Act and Regulations are administered by the GBRMPA but day-to-day management is conducted largely in conjunction with the QPWS.

The Queensland Government has passed the *Marine Parks Act 1981* (Qld) which:

- establishes a framework for the identification, gazettal and management of protected areas as marine parks and the protection of marine species *Marine Park Regulations 1990* (Qld); and
- adopts the planning and management approach of establishing zoning plans for multiple use management and a permanent system for activities within marine parks such as collecting marine products or commercial whale watching.

The two authorities, the GBRMPA and the QPWS, work closely together.

REVIEW OF THE GREAT BARRIER REEF MARINE PARK ACT 1975 (CTH)

In 2004, the Australian Government set up a review of the *Great Barrier Reef Marine Park Act 1975* (Cth) (the Act).

The board of the GBRMPA made submissions covering a variety of topics to meet the challenges to the reef for the next 30 years. So far as environmental law is concerned, some of the most important recommendations related to the need to upgrade the Act to include the concepts which

were now accepted as law under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Some of the submissions made at the time covered such broad areas as:

- the jurisdictional arrangements between the Great Barrier Reef Marine Park and Queensland;
- proposals for amendments to the Act;
- challenges for the future of the Great Barrier Reef;
- increasing pressures on field management of the Marine Park; and
- recent national and international awards to the GBRMPA.

The *Great Barrier Reef Marine Park Amendment Act 2007* (Cth) commenced on 1 July 2007 and implemented key review recommendations relating to governance, accountability and transparency in the management of the Great Barrier Reef. This has been followed by a new Intergovernmental Agreement in 2009.

THE GREAT BARRIER REEF INTERGOVERNMENTAL AGREEMENT JULY 2009 (INTERGOVERNMENTAL AGREEMENT)

The Australian and Queensland governments have been working together for the long-term protection and conservation of the Great Barrier Reef Marine Park since its inception in 1975. In the fifth edition of this book we outlined proposed changes to the legislation governing the GBRMPA. To give effect to these arrangements the two governments put into writing in the July an Intergovernmental Agreement to ensure an integrated and collaborative approach would be taken by the two governments and their instrumentalities to manage marine and land environments within the Great Barrier Reef World Heritage Area. A new Ministerial Council was established to implement the objectives of the Intergovernmental Agreement. It meets regularly.

RESEARCH

Go to the Great Barrier Reef Marine Park Authority home page at: www.gbrmpa.gov.au. Obtain information about the GBRMPA under the following headings:

- Goals and aims
- Whale and dolphin conservation policy
- 25 year strategic plan
- Marine Park management
- World heritage status
- Climate change action plan
- Other topics of interest to you

You will also find useful the information at the webpage of the Department of Sustainability, Environment, Water, Populations and Community (Commonwealth), that is, www.environment.gov.au and the links to the Great Barrier Reef (www.gbrmpa.gov.au).

Assume you are an officer employed by the GBRMPA to publicise awareness of the GBRMPA. Write a press release of not more than 300 words to improve public awareness of how the law protects the Great Barrier Reef based on your research. [S] [C] [A] [E] [R]

SOURCE 2: MEDIA ARTICLES

PRACTICAL APPLICATION

AUSTRALIA GREAT BARRIER REEF OUTLOOK 'POOR AND DETERIORATING'

SOURCE: BBC NEWS, WWW.BBC.COM/NEWS/WORLD-ASIA, 13 AUGUST 2014 (EXCERPTS)

The outlook for Australia's Great Barrier Reef is poor despite conservation efforts, with further deterioration expected in coming years, a report says.

The bleak forecast came in a five-yearly report released by the Great Barrier Reef Marine Park authority. Climate change remained the biggest threat to the site, the report said. But poor water quality, land-based run-off, coastal development and fishing also posed challenges, it said.

'Even with the recent management initiatives to reduce threats and improve resilience, the overall outlook of the Great Barrier Reef is poor, has worsened since 2009 and is expected to further deteriorate,'… the report released on Tuesday said.

The Great Barrier Reef is the world's largest coral structure-rich in marine life. It is a Invesco-listed World Heritage Site, but in recent years the UN body warned that it could be put on its World Heritage Endangered list because of the worsening condition.

1. How frequently does the Great Barrier Reef Marine Park Authority (GBRMPA) report on the state of the Reef? [C]

2. Describe the conclusions that the GBRMPA report came to about the current state of the reef. [C]

3. According to the GBRMPA, what is the biggest threat to the Great Barrier Reef? [C]

PRACTICAL APPLICATION

GREAT BARRIER REEF: UN REPORT LEAD AUTHOR 'SHOCKED' ALL AUSTRALIAN REFERENCES REMOVED

SOURCE: ELLE HUNT, WWW.THE GUARDIAN.COM/ENVIRONMENT, 27 MAY 2016, (EXCERPTS)

Draft chapter warned reef was 'poor and deteriorating' but all references were excised following government intervention. Australia scrubbed UN climate change report after government intervention.

The lead author of the major UN report on climate change has expressed his shock that every reference to Australia was removed from the final version, following intervention from the Australian government. Guardian Australia on Friday revealed that chapters on the Great Barrier Reef and sections on Kakadu and Tasmanian forests were removed from the World Heritage and Tourism in a Changing Climate report, following the Australian Department of environment submission that the information could harm tourism.

The Union of Concerned Scientists (UCS), which jointly published the Report with the United Nations Environment program and UNESCO, published an independent statement on the reef this morning.

'the biggest threat to the GBR today, and to its ecosystem services, biodiversity, heritage values and tourism economy, is climate change, including warming sea temperatures, accelerating rates of sea level rise, changing weather patterns

PRACTICAL APPLICATION CONTINUED...

and ocean acidification.' Adam Markham of the UCS, the lead author of the report, said he was 'really disappointed' by the revelation that parts of the document had been excised. He also noted that with the removal of every mention of Australia went a number of positive stories about research and safeguards, including the protected area management strategies being tested to make Australian world heritage sites more resilient to change.

'Rather than have a negative effect on tourism, I think this information would have helped galvanise the international community to want to reduce greenhouse gas emissions to the level where we might be able to reduce the impact on the Great Barrier Reef in the long term.'

The removals occurred in early 2016, when there was significant pressure on the government in relation to both climate change and world Heritage sites. Less than a year before, the government had successfully lobbied UNESCO to not list the Great Barrier Reef on its list of world Heritage sites in danger.

1. Describe how the Great Barrier Reef was depicted in the draft climate change report prepared by UNESCO. [C]
2. Describe and explain the government's action in approaching UNESCO to remove the chapter describing the effect of climate change on the Great Barrier Reef. [C] [A]
3. What positive stories did Adam Markham say were lost when the chapter was excised? [C]
4. What do you think are the advantages and disadvantages of removing the chapter from the report? [A]
5. Do you think what happened would make the Australian government more aware of its responsibility to promote protection of the Great Barrier Reef? [A] [E]

SOURCE 3: AUSTRALIAN GOVERNMENT DOCUMENT

PRACTICAL APPLICATION

SUBJECT: AUSTRALIAN RESPONSE TO QUESTIONNAIRE

SPECIAL RAPPORTEUR ON THE ISSUE OF HUMAN RIGHTS OBLIGATIONS RELATING TO THE ENJOYMENT OF A SAFE, CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT CALLED FOR INPUTS ON THE ENVIRONMENT AND THE RIGHTS OF THE CHILD

Question 5: Please specify, where relevant, any laws or policies referring to the rights of future generations in relation to environmental matters

SOURCE: AUSTRALIAN GOVERNMENT, FILE NO.: 17/134887, SEPTEMBER 2017 (EXCERPTS)

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), which is Australia's overarching piece of environmental legislation, contains (in s3A) principles of ecological sustainable development, including subsection (c) the principle of inter-generational equity-that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

PRACTICAL APPLICATION CONTINUED...

The Reef 2050 Plan was released by the Australian and Queensland governments in March 2015 and is the overarching framework for protecting and managing the Great Barrier Reef until 2050. The plan sets clear actions, targets, objectives and outcomes to drive and guide the short, medium and long-term management of the Reef through 7 themes that include heritage and community benefits. The heritage theme is focused on the cultural significance of the Reef, comprising all human values and meanings that might be recognized, including aesthetic, historic, scientific, social and spiritual. It encompasses indigenous and non—indigenous values, such as experiences, traditions, historic events and stories. The long-term outcome of these actions is to achieve an informed community that plays a role in protecting the Reef for the benefits a healthy Reef provides for current and future generations.

1. Describe the response of the Australian government to Question 5 as at September 2017. [C]
2. Does the response address the causes of any deterioration in the reef over time, in particular, climate change as a cause of rising sea temperatures, a major contributor to coral bleaching. Should it do so? [C] [A] [E]
3. Does the EPBC Act list climate change as one of the criteria for the judicial determination of whether or not a development meets environmental guidelines to be sustainable and approved by government.? Do you think it should do this? **(you may need to research this question)** [S] [C] [A] [E]

SOURCE 4: THE REEF 2050 PLAN

PRACTICAL APPLICATION

THE REEF 2050 PLAN

SOURCE: AUSTRALIAN GOVERNMENT WWW.ENVIRONMENT.GOV.AU/MARINE/GBR/LONG-TERM-SUSTAINABILITY-PLAN, DOWNLOADED 13 AUGUST 2019 (EXCERPTS)

An updated Reef 2050 Plan was released by the Australian Queensland government in July 2018 and is the overarching framework for protecting and managing reef until 2050. In light of the mass coral bleaching of 2015 and 2017 and the deteriorating outlook for the reef, the Great Barrier Reef Ministerial Forum brought forward the scheduled mid-term review of the Plan to ensure it addresses current pressures and remains effective. The updated Reef 2050 Plan is as a result of the mid-term review.

The Plan is a world first document that outlines concrete management measures for 35 years to ensure the Outstanding Universal Value of the Reef is preserved now and for generations to come. The Plan sets clear actions, targets, objectives and outcomes to drive and guide the short, medium and long-term management of the Reef. The Plan firmly responds to the pressures facing the Reef and will address cumulative impacts and increase the Reefs resilience to long-term threats such as climate change.

PROGRESS IN IMPLEMENTING THE PLAN

Since release of the Reef 2050 Plan in 2015, the Australian and Queensland governments have made good progress in implementing the Reef 2050 Plan actions.

Detailed action-by action progress reporting on the Reef 2050 Plan is undertaken every six months through the Monitoring Evaluation Reporting and Improvement Tool (MERIT) website.

PRACTICAL APPLICATION CONTINUED...

1 Describe and explain how this Australian Government publication is different from the earlier one which answers Question 5 in the questionnaire from the UN Rapporteur. [C] [A]

2. Go to the Internet site referred to as the source of the above publication and find the link to MERIT. When did the 6 monthly reports begin? Do any of the recent (last 3) reports refer to climate change as a cause of reef deterioration? [S] [C] [A]

ON REFLECTION

Do you think you have looked at sufficient resources in order to make a judgment about the relationship between the Australian Government and Australian institutions and the UN Human Rights Council? What other inquiries do you think you could conduct that might improve your understanding of this relationship? Write a short report (300 to 400 words) indicating whether or not the relationship between Australia and the UN is conducive to the UN promoting and monitoring human rights in Australia. [S] [A] [E] [R]

18.5 NON-GOVERNMENT INTERNATIONAL ORGANISATIONS (NGOS)

There is no doubt that NGOs, through the humanitarian work they do, are very effective at promoting human rights, especially in those member nations of the UN that are sometimes referred to as Third World or underdeveloped countries. We will examine these later in the next chapter, and also Topic 3 when considering their role in the Australian context. In the meantime, we recommend to you the research activity which follows.

RESEARCH

Select an NGO with an international focus. It is estimated that there are over 45,000 international NGOs (plus many more national ones). For assistance in finding some international NGOs go to www.worldlii.org/. [S]

1. Provide an overview of the contributions the NGO seeks to make in the world..]C] [A]

2. Who established it and when? [C] [A]

3. How many members does the NGO claimed to have? [C] [A]

4. How does the NGO get its funding? [C] [A]

5. Evaluate the effectiveness of the NGO in meeting its stated aims. Do a summary of up to 300 words which can be expanded under headings to a longer research assignment. [C] [A] [E] [R]

REVIEW

1. Define each of the following: [C]

   Inter-governmental organisations | non-governmental organisations | charter bodies | treaty bodies | UN Special Procedures | UN Rapporteurs

2. Describe and explain the role of the UN Human Rights Council in promoting and monitoring human rights. [C] [A]

3. Describe and explain the purpose of the fact-finding mission by UN Rapporteurs to Myanmar. Do you think the mission achieved its purpose? [C] [A] [E]

4. Describe the various factors which affect the future health of the Great Barrier Reef. Is climate change the most significant of these factors? Give reasons for your answer. [C] [A] [E]

5 Select a non-government organisation of your choice. Outline the nature and extent of its contribution to the promotion of human rights internationally. [C] [A] [E]

TOPIC 2: THE EFFECTIVENESS OF INTERNATIONAL LAW

CHAPTER 19: PROTECTING AND ENFORCING HUMAN RIGHTS INTERNATIONALLY

FOCUS SUBJECT MATTER

19.1 INTRODUCTION

19.2 REPORTING PROCEDURES

19.3 INTER-STATE COMPLAINT PROCEDURE

19.4 INDIVIDUAL COMPLAINT PROCEDURE

19.5 INQUIRIES AND OTHER PROCEDURES

19.6 PEACEKEEPING AND THE SECURITY COUNCIL

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- there are different types of human rights supervisory mechanisms;
- State Parties to treaties must report to treaty bodies (Committees) regularly;
- State Parties can complain about another State Party about human rights violations pursuant to a treaty to the relevant Committee;
- individuals can complain about human rights violations pursuant to a treaty to the relevant Committee;
- there are other Inquiry procedures possible to investigate human rights violations outside the terms of treaty bodies; and
- UN peacekeeping provides support to uphold human rights.

19.1 INTRODUCTION

So far we have looked at **non-treaty-based mechanisms** to study the **promotion** and **monitoring** of International human rights. These are mechanisms that are not based on legally binding obligations, but on the **voluntary membership** of inter-governmental and non-governmental International organisations. We focused on the UN framework, which is based on a Charter, to which Member States adhere, join as members and become part of an assembly or a representative body which makes decisions on behalf of all them.

We referred to these non-treaty-based mechanisms as '**charter-based**' mechanisms. These included the **Human Rights Council**, the **Universal Peer Review** and the **UN Special Procedures**. There are, of course, many charter-based mechanisms which we did not specifically study, such as the **European Commission against Racism and Intolerance**. As you would be aware from Chapter 13, there is no body of **international legislation** and no **police force** on which a charter- based body such as the UN, or its membership, can rely to enforce breaches of human rights. However, we did see that through its membership, its General Assembly, and the many bodies which form part of its human rights system, it has successfully promoted and monitored human rights on a global scale.

Although it is possible for Member States to exercise their sovereign right to withdraw from the UN, to date none have done so. In fact, the work of the Human Rights Council and its various associated bodies, do contribute to the **protection** of human rights globally. Where necessary, we will make this distinction as we look at the way in which treaty-based mechanisms operate.

TREATY-BASED MECHANISMS

These are **supervisory mechanisms** enshrined in legally binding human rights instruments or conventions. Within the UN framework these mechanisms are often called 'treaty bodies'. The origins of these treaty bodies are contained in the treaties themselves, which nation States have formally agreed to and thereby become a party **bound by agreement**. Like all agreements, the obligations of the parties are found **in their terms**. You have already studied a number of these in earlier chapters. For example:

- The *Committee on the Rights of the Child*, in **Chapter 17**

Ch 17

Once a **Sovereign State enters into and becomes a party to a treaty (an agreement) it is legally bound by its terms**. Most human rights treaties negotiated under the auspices of the UN contain various supervisory procedures. We will study the effectiveness of some human rights treaties which illustrate these supervisory procedures. These can be divided into four main groups and form much of the balance of this chapter:

19.2 REPORTING PROCEDURES

19.3 INTER-STATE COMPLAINT PROCEDURE

19.4 INDIVIDUAL COMPLAINT PROCEDURE

19.5 INQUIRIES AND OTHER PROCEDURES

Finally, we will return to a charter-based body, the Security Council, to look at its role in protecting and enforcing human rights by maintaining peace, making an assessment of its effectiveness since the UN was established.

19.2 REPORTING PROCEDURES

Most human rights treaties include a system of periodic reporting. States Parties to them are obliged to report periodically to a supervisory body on the implementation on the domestic level of the treaty in question. For example, State Parties to the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR), of which Australia is one, have agreed to ***Part IV*** of the ICESCR treaty which states among other things:

ARTICLE 16

1. **The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made to achieving the observance of the rights recognized herein.**

SOURCE: OHCHR, WWW.OHCR.ORG/EN/PROFESSIONALINTEREST/PAGES/CESCR.ASPX, DOWNLOADED 17 AUGUST 2019 (EXCERPTS)

Pursuant to the above reporting requirements. Australia submitted a fifth report under articles 16 and 17 of the ICESCR to the Committee on Economic Social and Cultural Rights on 1 February 2019. This periodic report covers the period from 1 July 2009 to 30 June 2018.

PRACTICAL APPLICATION

AUSTRALIA'S FIFTH REPORT UNDER THE *INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (1966) (ICESCR)

Concluding Observation 16-Persons with Disabilities

SOURCE: DFAT.GOV.AU/ABOUT-US/PUBLICATIONS/DOCUMENTS/FINAL-ICESCR-REPORT, DOWNLOADED 17 AUGUST 2019 (EXCERPTS)

39. The Australian Government's disability reform agenda is delivering fundamental changes in our society to improve the lives of people with disability, their families and carers. It works closely with state and territory governments to achieve this through the National Disability Strategy 2010-2020 and the National Disability Insurance Scheme. *The Disability Discrimination Act* 1992 (Cth) (the DDA) offers important protections from discrimination to people with disability at the federal level. All states and territories also have legislation providing remedies for disability discrimination.

42. Australia's commitment to people with disability also continues with its signature reform, The National Disability Insurance Scheme. This provides lifetime support to improve outcomes for people with disability and their carers. It commenced in four trial sites across Australia on 1 July 2013. As at 30 June 2014 there were 7,316 participants with an average package cost of $38,200. Three further trial sites commenced on 1 July 2014, and by July 2019 the scheme will be in all states and territories except Western Australia

1. Describe the steps that are being taken in Australia by all Governments to protect people with disabilities from discrimination and to improve their lives. [C] [A]
2. How effective do you think these government programs will be to achieve their objectives if they are carried out as described? Give your reasons [E]

RESEARCH

Go to the Internet, to the website which displays the report set out in the above Practical Application.

1. Describe the scope of the matters reported on by the Australian Government to the Committee for the ICESCR. [C]

2. Do you think the scope of the report encourages Australian Governments to take the protection of human rights seriously? Give some (two or three) examples from the report which support your view. [A] [E]

Each of the treaty body Committees makes available to Member States guidelines to help them do their reports. The supervisory bodies are meant to initiate and facilitate instructive dialogue between the supervisory body and the State Party. Not all State Parties are able to submit any report. The quality of reports can vary. Additional information is often required from other sources, from NGOs and other agencies of the UN, even from the media. Notwithstanding, all the UN human rights conventions require State party reporting: ***Article 16*** **ICESCR,** ***Article 40*** **ICCPR,** ***Article 9*** **CERD,** ***Article 19*** **CAT,** ***Article 44*** **CRC,** ***Article 18*** **CEDAW,** ***Article 73*** **CMW,** and ***Article 35*** **CRPD.**

There is no doubt that the United Nations Human Rights System is wide ranging, and does its best to enable effective reporting on human rights violations, and to assist member States to protect their citizens from such violations.

19.3 INTER-STATE COMPLAINT PROCEDURE

Some treaties allow States parties to bring a court action and/or file a complaint against another State party. These complaints only proceed in court where both the claimant and the defendant have recognised that the supervisory body is competent to receive the kind of complaint which is made. We have seen an example of this in Chapter 13 which discusses the case of *Georgia v Russia.* . Within the UN human rights system, the *International Court of Justice* is where such claims are heard.

Ch 13.4

Ch 20.2

PRACTICAL APPLICATION

HUMAN RIGHTS COMMITTEE BY ICCPR

SOURCE: CENTRE FOR CIVIL AND POLITICAL RIGHTS, CCPRCENTRE.ORG/CCPR-HR-COMMITTEE, DOWNLOADED 18 AUGUST 2019 (EXCERPTS)

MEMBERSHIP

The Human Rights Committee (HR Committee) was established by *Article 28* of the ICCPR. The HR committee was composed of 18 members, often called 'experts'. Each member serves a four-year term, and may be re-elected if he or she is renominated. A member serves in his or her personal capacity not as a representative of his or her state.

CONSIDERING INTER-STATE COMPLAINTS

Under *Article 41* of the ICCPR A State Party may submit a communication to the Committee alleging that another State Party is not fulfilling its obligations under the Convention. This provision is applicable only when both States Parties have specifically recognized the competence of the Committee in this area. To date however, no inter-State complaint has been submitted to the Committee.

1. Describe the necessary precondition for the Committee to hear a complaint under the ICCPR for a breach of human rights by one State Party against another State Party. [C]

2. Do you think a State Party should be entitled to bring a complaint against another State Party under the ICCPR for a breach of human rights without the need for both parties to specifically recognize the competence of the Committee? Are there any other matters which you think should be addressed in that case before the Committee could hear a complaint? [C] [A] [E] [R]

However, where countries have formed regional affiliations that are formal enough to enable human rights to be promoted by an institution which they will support, this has happened. The European Council, to which representatives are elected to form a European parliament, established *The European Convention for the Protection of Human Rights and Fundamental Freedoms* (1967) (ECPHR). It also established the *European Court of Human Rights* (ECOHR) to hear complaints and applications both from individuals and State Parties under the ECPHR.

PRACTICAL APPLICATION

EUROPEAN COURT OF HUMAN RIGHTS (THE COURT)

SOURCE: INTERNATIONAL JUSTICE RESOURCE CENTER, IJRCENTER.ORG/EUROPEAN-COURT-OF-HUMAN-RIGHTS, DOWNLOADED 18 AUGUST 2019 (EXCERPTS)

JURISDICTION

The Court has jurisdiction to decide applications submitted by individuals and States concerning violations of the ECPHR (commonly referred to as the '*European Convention on Human Rights*'), which principally concerns civil and political rights. It cannot take up a case on its own initiative. Notably, the person, group or non-governmental organisation submitting the complaint ('applicant ') does not have to be a citizen of a State party. However, complaints submitted to the court must concern violations of the ECPHR, allegedly committed by a State Party to the Convention and that it directly and significantly affected the applicant.

ADMISSIBILITY

When the Court receives an application, the Court must determine if it meets all of the admissibility requirements. The decision about admissibility may be made by a single judge, a three-judge committee, or a seven-judge chamber. To be declared admissible, all applications must meet the following criteria:

1. Exhaustion of domestic remedies.
2. Six monthly application deadline (from the date of the final domestic judicial decision).
3. Complaint against a State party to the *European Convention on Human Rights.*
4. Applicant suffered a significant disadvantage.

If an application fails to meet any of the above requirements, it will be declared inadmissible, and cannot proceed any further. There is no appeal from a decision of inadmissibility.

1. Describe the jurisdiction of the Court. [C]
2. Describe and explain the admissibility criteria used by the Court when it receives an application. [C] [A]
3. Do you agree with the criteria used by the Court to determine the admissibility of a complaint against a State Party? Give your reasons. [A] [E]

RESEARCH

The *European Court of Human Rights* has delivered judgment in three cases: *Ireland v the United Kingdom* (1978; *Denmark v Turkey* (2000) and *Cyprus v Turkey* (2001). Select one of these cases and do a case summary under the headings **Facts**, **Legal issues**, and **Decision**. **[S] [A] [E]**

As you would be aware from the discussion of the *International Court of Justice* earlier in Chapter 13, that court did consider a claim made by Georgia against Russia under the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966).

WHAT DO YOU THINK?

Inter-state complaint mechanisms are rarely used because inter-state relationships are delicate and inter-state mechanisms may not be ideal procedures as states bringing complaints may give rise to reprisals. Do you agree or disagree? [S] [A] [E]

19.4 INDIVIDUAL COMPLAINT PROCEDURE

There are at least eight international conventions which have created the opportunity for an individual to bring a complaint alleging a violation of certain treaty rights to the body of experts set up by the treaty (Committee), or to an International court, such as the *European Court of Human Rights*.

All of the supervisory bodies (Committees) set up to hear complaints from individuals have three requirements in common which must be met before a hearing can proceed:

- the alleged violating state must have ratified the Convention relied on by the individual;
- the rights allegedly violated must be covered by the terms of the Convention relied on by the individual: and
- proceedings before the relevant body may only be initiated after all domestic remedies have been exhausted.

RESEARCH

These treaties have individual complaint mechanisms:

- *First Optional Protocol* to the ICCPR, the new *Optional Protocol* to the ICESCR;
- *Article 22 CAT*, *Optional Protocol* to the CEDAW, *Article 14* CERD; and
- *Optional Protocol* to the CRPD.

1. Choose one of the treaties listed above that contains terms which allows individual complaints to be made to its Committee. [S]
2. Locate a copy of the treaty. Identify the article which allows individual complaints. [S] [C]
3. Confirm that Australia is a signatory and has ratified the treaty. [C]
4. Find out how many individual complaints Australian citizens have made under your chosen treaty. Describe and explain a successful one of these complaints. [S] [C] [A]
5. If there are none that have been successful, describe and explain one which was not successful. [S] [C] [A]

PRACTICAL APPLICATION

COMPLAINTS UPHELD AGAINST AUSTRALIA

SOURCE: REMEDY AUSTRALIA, REMEDY.OIG.AU/CASES, DOWNLOADED 19 AUGUST 2019 (EXCERPTS)

Since Australia first joined the individual complaints determination processes at the UN, there have been 47 cases in which human rights violations by Australia have been found.

	CAT	CRPD	ICCPR	CERD	TOTAL
Unremedied	3	3	24	0	29
Partially remedied	0	1	11	0	i2
Remedied	0	0	5	1	6
Total	3	3	40	1	47

1. What percentage of cases were remedied? [A]

2. What percentage of cases were partially remedied? A]

3. What is the full name of each treaty listed in the table? With what rights is each of them mainly concerned? [S] [C] [A]

4. What percentage of cases were claims under the ICCPR? Does this make sense to you? Give your reasons. [C] [A] [E]

PRACTICAL APPLICATION

CASES LODGED UNDER THE ICCPR, CERD, CAAT AND CRPD

SOURCE: REMEDY AUSTRALIA, REMEDY.ORG.AU/CASES/TREATY/3, DOWNLOADED 19 AUGUST 2019 (EXCERPTS)

Hagan v Australia (CERD,2003)

An Aboriginal man alleged that the sign at a football ground bearing the word ' Nigger ' breached the *International Convention on the Elimination of All Forms of Racial Discrimination*. The Committee recommended the sign be removed. Australia rejected the Committee's Views, but, after concerted lobbying by Mr Hagan, the sign was removed in 2007.

Brough v Australia (HRC, 2006)

A 16 year old boy, convicted of burglary and assault, was transferred to an adult prison after participating in a riot at a juvenile detention centre. He was subjected to solitary confinement, forced nakedness, forced anti-psychotic medication and 24-hour lighting. In view of Mr Brough's additional vulnerability as an Indigenous Australian with a mild intellectual disability, the HRC found that he had been treated inhumanely and without the protection due to children, and should be compensated. He has not been compensated.

Cabal & Pasini v Australia (HRC, 2003)

Mexican brothers in law living in Australia were subject to arrest warrants in Mexico. The HRC found that locking the two men in a wire cage with floor area only big enough for a chair constituted a breach of prisoners right to humane and dignified treatment. The men were extradited before the HRC reached its final views. Australia has said it would ensure 'a similar situation does not arise again', but does not accept that Cabal and Pasini are entitled to compensation.

PRACTICAL APPLICATION

Coleman v Australia (HRC, 2006)

This 26-year-old made a speech in Townsville's pedestrian mall without a permit, in breach of a local government by-law. He was fined and subsequently detained by police for five days for non-payment of the fine. The HRC found that his speech was on subjects of public interest (human rights, land rights and mining) and his conduct was neither threatening nor unduly disruptive. His arrest, conviction and imprisonment were 'disproportionate' and 'undoubtedly' a violation of his freedom of expression. Australia was asked to quash his conviction, refund his fines or court costs (nearly $3000) and compensate him for his imprisonment. It has done none of these.

In respect of each of the above cases:

1. Describe the human right which Australia, the defendant, had allegedly breached. [C]
2. Set out the facts relied upon by each of the complainants. [C]
3. Describe and explain the decision made by the tribunals/committee in each case, and the remedy for which the Australian government was responsible. [C] [A]
4. Indicate the position taken by the Australian government in each case. Do you agree or disagree with the Australian position? [C] [A] [E]

19.5 INQUIRIES AND OTHER PROCEDURES

The supervisory mechanisms that have been discussed above generally do not allow the bodies carrying out the supervision to initiate proceedings itself, and are largely dependent on information submitted by governments, NGOs or individual petitioners. There has been a number of supervisory mechanisms established where an independent person or group of persons may raise, on the persons or groups own initiative, issues of non-compliance with human rights. Some examples of these are found in:

Article 20 of CAT

Optional Protocol to CAT

European Committee for the Prevention of Torture (ECPT)

Article 8 Optional Protocol to CEDAW

Article 6 Optional Protocol CRPD

European Commission against Racism and Intolerance (ECRI)

OSCE High Commissioner on National Minorities

RESEARCH

Locate the relevant document for one of the above. Find the relevant term which gives the organisation power to commence an inquiry or procedure of its own motion. Set out any conditions with which the relevant organization must comply to enable it to complete the inquiry. [S] [C] [A]

Ch 18.3

We have already seen how enquiries may be undertaken by the special procedures operating under the Human Rights Council. In Chapter 18, you read the report of a fact- finding mission into Rohingya atrocities in Myanmar.

ARTICLE 20 OF CAT

In addition to a reporting procedure, the inter-state complaint procedure and an individual complaint mechanism, *Article 20* CAT also empowers its supervisory body, the **Committee against Torture**, to undertake certain investigatory action on its own initiative. Although the enquiry is to be confidential and requires the Committee to seek the cooperation of the State party concerned, the Committee is not prevented from proceeding with the investigation because the state fails to co-operate with the Committee. The Committee needs the explicit consent of the State concerned to investigate in the territory of the given State.

PRACTICAL APPLICATION

UN ACCUSES AUSTRALIA OF SYSTEMATICALLY VIOLATING TORTURE CONVENTION

SOURCE: BEN DOHERTY AND DANIEL HURST, THE GUARDIAN, WWW.THEGUARDIAN.COM/AUSTRALIA-NEWS, 10 MARCH 2015 (EXCERPTS)

Australia is systematically violating the international *Convention against Torture* by detaining children in immigration detention, and holding asylum seekers in dangerous and violent conditions on Manus Island, a UN report has found. The UN special rapporteur on torture, Juan Mendez, has investigated allegations of torture and abuse in 68 countries, in a report to be delivered to the UN *Human Rights Council* on Monday. The section on Australia is concerned entirely with the treatment of asylum seekers in immigration detention.

'The government of Australia, by failing to provide adequate detention conditions; and the practice of detention of children; and putting a stop to the escalating violence and tension at the regional processing centre, has violated the right of asylum seekers including children to be free from torture or cruel, inhumane or degrading treatment,' Mendez's report said.

Two asylum seekers on Manus Island, referred to as Mr A and Mr B, alleged they were tied to chairs by security staff and threatened with 'physical violence, rape, and prosecution for becoming aggressive' if they refused to retract statements they had made to police about the murder of Reza Karate during detention centre riots. Mendez's report found those men's rights were also breached.

'The Rapporteur concludes that there is substance in the allegations presented in the initial communication, reiterated above, and thus, that the government of Australia, by failing to provide any additional information or details of the investigation into Mr Hayes and Mr B's allegations, has violated their right to be free from torture or cruel, inhumane or degrading treatment.'

When asked about the report on Monday, Abbott said the UN's representatives 'would have a lot more credibility if they were to give some credit to the Australian government' for stopping dangerous boat journeys by asylum seekers. 'The most humanitarian, the most decent, the most compassionate thing you can do is stop these boats because hundreds, we think about 1200 in fact, drowned at sea during the flourishing of the people smuggling trade under the former government.'

Abbott's criticism of the UN follows his claim the *Australian Human Rights Commission*, in particular its president, Professor Gillian Triggs, acted in a 'blatantly partisan' way with its inquiry into children in immigration detention

The 31-year-old *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is one of the most widely supported conventions in the world. Some 157 countries are parties to the Convention. Australia ratified the treaty in 1989, and is legally bound by it.

PRACTICAL APPLICATION CONTINUED...

Australia is currently actively lobbying for a seat on the *Human Rights Council,* in the ballot to take place in 2017. The Foreign Minister, Julie Bishop told Fairfax Australia's bid was 'consistent with our nation's history of promoting and protecting human rights'.

1 Describe and explain the role of Mr Juan Mendez. [C] [A]

2. Outline the breaches of human rights made by Australia alleged by Mr Mendez. [C] [A]

3. Set out the evidence on which Mr Mendez relies to make his allegations. Do you agree or disagree that if the evidence is proved the allegations are made out? [A] [E]

4. Describe Mr Abbott's argument to discredit the allegations. Does Mr Abbott address the evidence put forward in Mr Mendez's report? Do you agree with Mr Abbott's arguments? Give your reasons. [A] [E]

5. Explain how it is possible for Australia to allegedly breach the terms of the *Convention against Torture* on the one hand, and put itself forward to be elected as a member on the *Human Rights Council.* [A] [E]

19.6 PEACEKEEPING AND THE SECURITY COUNCIL

It is hard to imagine an environment in which there is less respect for human rights than a war zone. In a war zone, the **right to life is under challenge** every day, every hour and every minute. There has been continuous armed conflict in the Middle East in one form or other during the whole time that the United Nations has existed, despite its best efforts to help countries avoid armed conflict. The United Nations has rarely involved itself in armed conflict as a protagonist, but has frequently sent **Peacekeeping Missions** to conflict zones. These missions attempt to fulfil the *Purposes, Principles, and Processes* of the *Charter of the United Nations* to provide a peaceful environment where **human rights** are upheld.

Australian troops are still involved in Afghanistan, where a number of Australian lives have been lost, and the Air Force is still involved in Iraq in the aftermath of the Iraq war. The Iraq war was started in 2003 when allegations were made, including in the United Nations Security Council, that Iraq's Government, led by the dictator Saddam Hussein, 'possessed weapons of mass destruction', and a coalition led by the United States which included Poland, Australia and the United Kingdom, attacked Iraq and removed Saddam Hussein. No weapons of mass destruction were ever found. The claim was clearly wrong. There is now a civil war in Syria marked by the deaths of thousands of innocent people, men, women and children, and possibly the greatest refugee crisis the world has known. There are few, if any, human rights in a war zone.

PRACTICAL APPLICATION

AUSTRALIA BELIEVES IT COULD HAVE KILLED CIVILIANS IN IRAQ AIR STRIKE

SOURCE: JUDITH IRELAND, SYDNEY MORNING HERALD, WWW.SMH.COM.AU/POLITICS/FEDERAL/AUSTRALIA, 1 FEBRUARY 2019 (EXCERPTS)

The Australian Defence Force says reports it killed civilians during air strikes near Iraqi in 2017 are 'credible'. Chief of Joint Operations Air Marshall Mel Hupfeld said Australian Super Hornets 'may have' killed an estimated 6 to 18 civilians at the height of the battle to defeat Islamic State in Mosul in 2017. According to the ADF, Iraqi security forces requested help on June 13, 2017, after Islamic state fighters were spotted setting up positions in a built-up West Mosul neighbourhood. As part of the response from the US led international coalition, two Australian Super Hornets dropped bombs on a building in a courtyard.

PRACTICAL APPLICATION

The ADF says its aircrews with the targets accurately and initial Australian assessments suggested there were no civilian casualties. But Airwars-a website that tracks civilian deaths in war-claim to civilians in a nearby building were killed. The ADF says it was first alerted to the claims in January 2018 by the US-led coalition. This prompted investigations by both Australia and the International coalition, which found the claims were 'credible'.

Air Marshall Hupfeld stressed the strikes were conducted within Australia's strict rules of engagement, adding it was impossible to say exactly who was responsible, as international, Iraqi and Islamic State forces were also nearby.

'Any loss of civilian life is highly regrettable,' M Marshall Hupfeld told reporters in Canberra on Thursday. 'The responsibility to take lethal action in wartime is a heavy burden to carry'.

1. Who is responsible for civilians living in a war zone? What rights do they have? Are any of their rights human rights found in the *Universal Declaration*? [C] [A] [E]
2. Air Marshal Hupfeld seems to suggest that the rules of engagement contemplate a protocol for dropping bombs in a built-up area where civilians live. Do you think this is the case? What might be some appropriate suggestions for rules? [A] [E]
3. Are there any circumstances where the death of civilians in a combat zone is acceptable? Give your reasons. [A] [E]

UNITED NATIONS PEACEKEEPING

INQUIRY FOCUS

THE NATURE OF UN PEACEKEEPING AND AUSTRALIA'S ROLE AS A PEACEKEEPER

SOURCE 1: THE ROLE OF UN ORGANISATIONS

PRACTICAL APPLICATION

ROLE OF THE GENERAL ASSEMBLY

SOURCE: UNITED NATIONS PEACEKEEPING, PEACEKEEPING.UN.ORG/ROLE-OF-GENERAL-ASSEMBLY, DOWNLOADED 20 AUGUST 2019 (EXCERPTS)

The General Assembly plays a key role in the financing of peace operations.

The General Assembly is the main deliberative, policy-making and representative organ of the United Nations. Comprising all 193 Member States of the UN, it provides a unique forum for multilateral discussion of international issues including peace and security.

While not normally directly involved in political decisions on establishing or terminating UN peace operations, the General Assembly does play a key role in peace operation financing.

PRACTICAL APPLICATION

ROLE OF THE SECURITY COUNCIL

SOURCE: UNITED NATION PEACEKEEPING, PEACEKEEPING.UN.ORG/EN/ROLE-OF-SECURITY-COUNCIL, DOWNLOADED 20 AUGUST 2019 (EXCERPTS)

The UN *Charter* gives the Security Council primary responsibility for the maintenance of international peace and security. In fulfilling this responsibility, the Council can establish a UN peace operation.

The *Charter* of the United Nations is the foundation document for all UN work. The UN was established to 'save succeeding generations from the scourge of war' and one of its main purposes is to maintain international peace and security.

It is for the Security Council to determine when and where a UN peace operation should be deployed.

The Security Council responds to crises around the world on a case-by-case basis and it has a range of options at its disposal. It takes many different factors into account considering the establishment of a new peace operation, including:

- whether there is a ceasefire in place and the parties have committed themselves to a peace process intended to reach a political settlement;
- whether a clear political goal exists and whether it can be reflected in the mandate;
- whether precise mandate for a UN operation can be formulated; and
- whether the safety and security of UN personnel can be reasonably ensured, including in particular whether reasonable guarantees can be obtained from the main parties or factions regarding the safety and security of UN personnel.

The Security Council establishes a peace operation by adopting a Security Council resolution. The resolution sets out that mission's mandate and size. The Security Council monitors the work of UN peace operations on an ongoing basis, including through periodic reports from the Sec-General and by holding dedicated Security Council sessions to discuss the work of specific operations. The Security Council can vote to extend, amend or end mission mandates as it deems appropriate.

Under Article 25 of the *Charter* all UN members agree to accept and carry out the decisions of the Security Council. While other organs of the UN make recommendations to Member States, the Council alone has the power to make decisions which Member States are obligated to implement.

WHAT PEACEKEEPING DOES

UN Peacekeeping helps countries navigate the difficult path from conflict to peace, we have unique strengths, including legitimacy, burden sharing, and an ability to deploy troops and police from around the world, integrating them with civilian peacekeepers to address a range of mandates set by the UN Security Council and General Assembly.

SOURCE: PEACEKEEPING.UN.ORG/EN, DOWNLOADED 20 AUGUST 2019

1. Describe and explain the role of the Security Council in the UN's peacekeeping operations. [C] [A]
2. Describe and explain the role of the General Assembly in the UN's peacekeeping operations. [C] [A]
3. Is the description 'What Peacekeeping Does' an adequate way of describing the work of a UN Peacekeeping Force? Give your reasons. [A] [E]

SOURCE 2: AUSTRALIA'S INVOLVEMENT IN PEACEKEEPING

PRACTICAL APPLICATION

PEACEKEEPING AND PEACEBUILDING

SOURCE: DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, DFAT.GOV.AU/INTERNATIONAL-RELATIONS/SECURITY/PEACEKEEPING, DOWNLOADED 23 AUGUST 2019 (EXCERPTS)

Australia has been actively involved in peace operations for over **70 years**. We have provided military and police personnel to **62 United Nations** and other multilateral peace and security operations since 1947. We continue this tradition today, with Australian peacekeepers currently serving in the UN Truce Supervision Organisation (UNTSO), and the Multinational Force and Observers (MFO) in the Middle East and the UN Mission in South Sudan (UNMISS)

In our neighbourhood, Australia has played a leading role in successful regional missions in the Solomon Islands, Timor Leste and Bouganville, Papua New Guinea. Australia was instrumental in the diplomacy that led to the Cambodian Peace Settlement. We made a major contribution to the UN Transitional Authority in Cambodia, including sending the first military contingent and providing the commander of the military component of the mission. Australia has also contributed to Commonwealth missions in Zimbabwe and Uganda and continues to deploy personnel to national stabilization efforts in Afghanistan.

Acknowledging the strain on the peacekeeping system, we pledged at the September 2015 Leader's Summit on Peacekeeping to provide strategic airlift support for UN peacekeeping operations in crisis situations, where and whenever we can. We also pledged to build the capacity of UN troop contributing countries in our region and increase regional expertise on countering improvised explosive devices.

Australia is the 11th largest financial contributor to the UN peacekeeping budget

1. List the countries to which Australia has made a contribution as a peacekeeper on behalf of the UN. [C]
2. Describe Australia's contribution to peacekeeping since the establishment of the UN. Do you think we have made a significant contribution to the human rights of people who live in countries where we have been peacekeepers? Give your reasons. [C] [A] [E]

PRACTICAL APPLICATION

TIMELINE TO INDEPENDENCE- EAST TIMOR

1960 — UN General Assembly adds East Timor, a former Portuguese colony, to its list of Non-Self-Governing Territories.

1974 — Pro-independence and pro - Indonesian integration enter civil war.

1976 — Portugal withdraws, military intervention by Indonesia makes East Timor Indonesia's 27th province.

PRACTICAL APPLICATION

1982 — UN discusses future of East Timor with Indonesia and Portugal.

1998 — Indonesia agrees to limited autonomy for East Timor within Indonesia.

1999 — Indonesia and Portugal entrust the Secretary-General of the UN to organize popular consultation.

1999 — Security Council resolution 1246 (1999) authorizes UN Mission in East Timor. On 30 August 1999 the East Timorese voted 79% to 21% in favour of transition to independence. On 19 October 1999 Indonesia formally recognized the result. Following the announcement of the result, pro-integration militia, at times with the support of elements of the Indonesian security forces, launched a campaign of violence, looting and arson throughout the entire territory. The UN made strenuous diplomatic efforts with Indonesia to halt the violence. On 12 September 1999, the government of Indonesia agreed to accept the offer of assistance from the international community. The Security Council then authorized the multinational force (INTERFET) under a unified command structure headed by a Member State (Australia) to restore peace and security in East Timor, to protect and support the United Nations Mission in carrying out the tasks and within forced capabilities, to facilitate humanitarian assistance operations.

2000 — By February 2000, the INTERFET forces had completed their objective to provide security and maintain law and order throughout territory of East Timor. The INTERFET forces transferred military command to the United Nations Peacekeeping Force which remained in East Timor up to and beyond the establishment of the East Timorese Constitution by its first government on 22 March 2002.

1. Describe the role of the UN in helping to achieve an independent democratic East Timor nation. [C]
2. Describe the role played by Australia on behalf of the UN in the East Timor story. [C]
3. Did the UN, by its actions in East Timor, successfully protect the human rights of the East Timorese people? Set out the rights of the East Timorese people which have been protected. [C] [A] [E]

WHAT DO YOU THINK?

Does the story of the UN involvement in East Timor support the description of 'what peace keeping does' set out above? Give your reasons. [E]

RESEARCH

Australia has been involved with a coalition of military forces in Afghanistan since 2002 as peacekeepers.

1. Locate the details of the coalition military forces in Afghanistan pursuant to the Security Council mandate. How long has the coalition been in Afghanistan? How long has Australia been in Afghanistan as part of the coalition? What changes have there been to the coalition since it started until now? How long is Australia expected to continue to be in Afghanistan in its current role? [S] [C] [A]
2. Has Australia experienced any casualties while in Afghanistan as part of the peacekeeping force? Does this affect your view about supporting Australia's role? Give your reasons. [C] [A]
3. Describe and explain when you think Australia might withdraw from Afghanistan. [C] [A] [E]

ON REFLECTION

Has there been any clue in Australia's involvement with the UN which explains why on the one hand it makes such a significant contribution to UN Peacekeeping and on the other, is prepared to involve itself in armed conflict for which there is no mandate from the UN? [E]

Clearly whenever Australia is involved in an armed conflict as part of a peacekeeping force mandated by the UN, we can be reasonably satisfied that the purpose of Australia's involvement protects and enforces human rights of the citizens of the country or countries where that armed conflict takes place. On the other hand, because of the alliances which we have with other countries in the world, particularly the United States, we have been involved in armed conflict not mandated by the UN. In those conflicts there is an enemy to be killed and the possibility that we will be responsible for the deaths of civilian citizens.

PRACTICAL APPLICATION

IRAQI WAR WAS ILLEGAL AND BREACHED UN CHARTER, SAYS ANNAN

SOURCE: EWEN MACASKILL, JULIAN BORGER, THE GUARDIAN, WWW.THEGUARDIAN.COM/WORLD, 16 SEPTEMBER 2004 (EXCERPTS)

The United Nations Secretary General, Kofi Annan, declared explicitly for the first time last night that the US-led war on Iraq was illegal. Mr Annan said that the invasion was not sanctioned by the UN Security Council or in accordance with the UN's founding charter. In an interview with the BBC World Service broadcast last night, he was asked outright if the war was illegal. He replied: "yes, if you wish."

He then added unequivocally:" I have indicated it was not in conformity with the UN Charter. From our point of view and from the charter point of view it was illegal." Mr Annan has until now kept a tactful silence and his intervention at this point undermines the argument pushed by Tony Blair that the war was legitimized by Security Council resolutions. Mr Annan also questioned whether it will be feasible on security grounds to go ahead with the first planned election in Iraq scheduled for January." You cannot have credible elections if the security conditions continue as they are now," he said.

The UN chief had warned the US and its allies a week before the invasion in March 2003 that military action would violate the UN Charter. But he has hitherto refrained from using the damning word 'illegal'. Both Mr Blair and the Foreign Secretary, Jack Straw, claim that Saddam Hussein was in breach of Security Council resolution 1441 passed late in 2002, and of previous resolutions calling on him to give up weapons of mass destruction. France and other countries claimed these were insufficient.

PRACTICAL APPLICATION

No immediate comment was available from the White House late last night, but American officials have defended the war as an act of self-defence, allowed under the UN Charter, in view of Saddam Hussein's supposed plans to build weapons of mass destruction. However, last September, Mr Annan issued a stern critique of the notion of pre-emptive self-defence, saying it would lead to a breakdown in international order. Mr Annan last night said that there should have been a second UN resolution specifically authorizing war against Iraq. Mr Blair and Mr Straw tried to secure the second resolution early in 2003 in the run-up to the war but were unable to convince a sceptical Security Council.

Mr Annan said the Security Council had warned Iraq in resolution 1441 there would be 'consequences' if it did not comply with its demands. But he said it should have been up to the Council to determine what those consequences were.

1. Did the UN Security Council pass a resolution mandating military intervention in the State of Iraq? Describe the nature of the resolution which was passed in relation to Iraq [C] [A]
2. Describe and explain the point of view of the Secretary-General as to the legality of the invasion of Iraq [C] [A]
3. Describe and explain the point of view of the British prime minister Mr Blair in relation to the legality of the invasion of Iraq. [C] [A]
4. With whose point of view do you agree? Give your reasons. [C] [A] [E]

REVIEW

1. List each of the four supervisory mechanisms common to treaty bodies. Describe and explain the role of the Committee for each treaty body. [C] [A]
2. Describe and explain the difference between a charter-body and a treaty body. [C] [A]
3. Describe and explain each of the four supervisory mechanisms. Indicate the main features of each. Give an example of how each of them has worked in the Australian context. [C] [A]
4. How would you rate the effectiveness of each mechanism to the protection and/or enforcement of human rights in Australia. Give examples. [C] [A] [E]
5. Describe Australia's contribution to the peacekeeping role of the UN. Does this involvement contribute to upholding human rights in the countries where peacekeeping is taking place? Give your reasons. [C] [A] [E]
6. Read the following case and answer the questions below:

Winata & Li v Australia (HRC, 2001)

Indonesians Hendrick Winata and So Lan Li arrived in Australia in the 1980s and overstayed their visas, undetected. They had a son who obtained Australian citizenship on his 10th birthday. The next day his parents applied for refugee status. Their application was rejected and Immigration ordered their deportation. The HRC found that to deport Mr Winata and Ms Li arbitrarily and their family breached Australia's obligation to protect families and children. Australia rejected the Committee's views, but did not deport Mr Winata and Ms Li, who eventually obtained permanent residence in Australia.

1. Describe the complaint made by Mr Winata and Ms Li to the HRC. Were they entitled to make this application? [C] [A]
2. What finding of fact did the HRC make, and did it find that Australia breached the human rights of Mr Winata and Ms Li? Do you agree with the decision of the HRC? [C] [A] [E]
3. Why do you think Austlralia did not deport Mr Winata and Ms Li? Give your reasons. [E]

TOPIC 2: THE EFFECTIVENESS OF INTERNATIONAL LAW

CHAPTER 20: THE INTERNATIONAL COURT SYSTEM

FOCUS SUBJECT MATTER

20.1 INTRODUCTION

20.2 THE *INTERNATIONAL COURT OF JUSTICE* (ICJ)

20.3 THE *INTERNATIONAL CRIMINAL COURT* (ICC)

20.4 *HAGUE ABDUCTION CONVENTION*

20.5 CONCLUSION-JUDGING EFFECTIVENESS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- the roles played by the ICJ and the ICC in the world, including as part of the UN; and
- the role played by the *Hague Abduction Convention* in the resolution of disputes about children.

20.1 INTRODUCTION

There are two courts which have global jurisdiction within the international court system. The *International Court of Justice* (ICJ) and the *International Criminal Court* (ICC). The origins and jurisdiction of each of the ICJ and ICC have been discussed in Chapters 13.4 and 13.5 respectively. Each of these will be discussed separately and an assessment will be made of their respective importance for the **protection and enforcement** of human rights in Australia and globally.

Ch 13.4
Ch 13.5

Arguably, it is the courts at the **regional level** (Africa and Europe), and the domestic courts in Australia (and other nation states) which have the greatest impact on the protection and enforcement of human rights.

EUROPEAN COURT OF HUMAN RIGHTS (ECOHR)

We have already referred to this court, its origins and jurisdiction, earlier in Chapter 19. Some observers have said that the Court has been a victim of its own success, because it covers all the Member States of the European Union and allows legitimate claims to be made by anyone almost without restriction. Since the court began operating in 1959, it has delivered more than 10,000 judgments regarding alleged violations of the *European Convention on Human Rights*, a convention based on the *Universal Declaration.*

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

This court was established by the African Union of States pursuant to the *African Charter on Human and Peoples Rights* (the Charter) in 1998. It has jurisdiction over all cases and disputes submitted to it concerning interpretation of the Charter. It has the competence to receive cases from NGOs and individuals. As at the date of writing, only 9 of the 30 States Parties to the Charter have ratified the competence of the court to receive cases from NGOs and individuals. This clearly limits its effectiveness.

RESEARCH

Select either of the regional courts, the ECOHR or the ACHPR, and proceed to the relevant Internet address, IJRCENTER.ORG./EUROPEAN-COURT-OF-HUMAN-RIGHTS/,or, WWW.AFRICAN-COURT.ORG/EN. locate cases decided by the court of your choice. [S]

1. List three cases of interest to you which claim a breach/violation of human rights. [C]

2. Describe the facts of, and the judgment in, each case. [C[[A]

3. Do you agree with the court's decision in each case? Give your reasons. [A] [E]

The *International Court of Justice* (ICJ) is a permanent court that hears civil complaints made by one state against another. One example of this is set out in Chapter 13.4 in which New Zealand took action against France in relation to nuclear testing in the Pacific. Other cases are set out in 20.2 below.

The *International Criminal Court* (ICC) is also a permanent court that can investigate and prosecute people suspected of committing **genocide, crimes against humanity, war crimes** and (since 2018) the **crime of aggression** in situations where national authorities are unable or unwilling to act genuinely.

20.2 INTERNATIONAL COURT OF JUSTICE

INTRODUCTION

The *International Court of Justice* (ICJ) is the principal judicial arm of the United Nations. It deals with two types of cases. The more important of these is cases involving international legal disputes between countries. These are called **contentious cases.**The ICJ also gives **advisory opinions** on legal issues referred to it by the United Nations. In the **contentious cases** which are adversarial proceedings between two countries seeking to settle a dispute, the ICJ produces a binding ruling between the countries that agree to submit to the ruling of the Court. The ICJ however has jurisdiction only when the parties to the dispute consent to the jurisdiction of the ICJ. Both parties present their case to the Court and after deliberation the Court issues a majority opinion. The major criticism of the ICJ is that the jurisdiction is limited to cases where both parties have agreed to submit to the decision. As a result of that even Member States of the ICJ don't necessarily have to accept the jurisdiction of the Court in any particular cases. It is only the consent of each country that gives the Court the necessary jurisdiction. It follows from this that the effectiveness of the ICJ is limited. However, this is not so surprising when the fundamental principle of international law is the **independence (sovereignty) of States.**

Two recent contentious cases involved Australia.

AUSTRALIA AND JAPAN

CASE STUDY

Whaling in the Antarctic, Australia and New Zealand (Intervening) v Japan
31st March 2014 ([2014] ICJ Rep 226) Oxio 144

Facts: Japan and Australia and other countries had entered into international obligations under the *International Convention on the Regulation of Whaling* (ICRW). The purpose of such a convention was the preservation of marine animals and of the marine environment. Proceedings were instituted in 2010 by Australia accusing Japan of pursuing a 'large scale program of whaling' under the Second Phase of its Japanese Whale Research Program. In particular Australia asked the ICJ to make a finding that by authorising and implementing the Japanese Whale Research Program under a Special Permit in the Antarctic, Japan was in breach of its international obligations under the ICRW and more specifically in breach of various limitations set out in the schedule to the ICRW. Article VIII of the ICRW contained an exception to these limitations whereby a country may:

> *grant to any of its nationals a special permit authorising that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the contracting government thinks fit, and the killing, taking and treating of whales in accordance with the provisions of this article shall be exempt from the operation of the convention.*

Japan argued that this special permit that it issued was for the purpose of scientific research and therefore was exempted from the operation of the Convention. Australia asked the ICJ to make a finding that such program was not for the purpose of scientific research and therefore the permits issued by Japan were not an exemption authorised under the Convention.

Legal issue: Was the granting by the Japanese of a special permit for the purpose of scientific research or not?

Finding: After hearing evidence as to what was permitted to be done under the permit the Court concluded that the permit granted by Japan to one of its nationals could broadly be described as a scientific research program. The Court found however that the design and implementation of the scientific research program was such that it was not granted for the 'purposes of scientific research'. The Court having found that the permits granted were not

CASE STUDY

for the purposes of scientific research agreed that **Japan had breached provisions of the Convention**, namely the moratorium on commercial whaling, the moratorium on the use of factory ships to process whales, and the prohibition of commercial whaling in the Southern Ocean Sanctuary. The Court ordered Japan to revoke any authorisations, permits or licences to kill, take or treat whales and to refrain from granting any further permits under Article VIII of the Convention in pursuance of that program.

1. What was the name of the International Treaty which Japan and Australia had entered into and the interpretation of which was the subject of this case? [C]
2. What is the relevance to the case of the expression for the 'purposes of scientific research'? [C] [A]
3. What three provisions of the Convention were breached by Japan? [C]

PRACTICAL APPLICATION

JAPAN RESUMES COMMERCIAL WHALING FOR FIRST TIME IN 30 YEARS

SOURCE: JUSTIN MCCURRY, THE GUARDIAN, WWW.THEGUARDIAN.COM/WORLD, 1 JULY 2019 (EXCERPTS)

Hunters set sail after country's withdrawal from International Whaling Commission

Japanese fishermen have set sail to hunt whales commercially for the first time in more than three decades after Tokyo's controversial decision to withdraw from the International Whaling Commission.

Five vessels, their harpoons concealed beneath tarpaulins, left Kushiro in northern Japan on Monday morning. At around the same time, three whaling boats left Shimonoseki in south-western Japan.

The five Kushiro vessels will together kill 227 whales through to late December, according to the fisheries agency, which had delayed announcing the quota until the conclusion of the G20 summit in Osaka on Saturday. The quota includes 52 minke, 150 Bryde's and 25 sei whales, the agency said.

The hunts are likely to spark criticism from environmentalists and anti-whaling countries, but whaling officials were in celebratory mood.

Kai, a senior fisheries official in Taiji – whose annual dolphin hunts have caused an international outcry – added: "This is a small industry, but I am proud of hunting whales. People have hunted whales for more than 400 years in my home town."

Japan was the target of international criticism for using a clause in the IWC's 1986 moratorium on commercial whaling to conduct "research" whale hunts in the Antarctic.

Meat from the hunts was sold on the open market, prompting claims that they were a cover for commercial whaling.

Late last year Japan announced it would leave the IWC, frustrated by its failure to convince other members to support a return to "sustainable" commercial whaling.

PRACTICAL APPLICATION CONTINUED...

Japan's whalers killed 333 minke whales during their final "research" expedition to the Antarctic, which ended in March. In previous years, however, they slaughtered almost 1,000 whales a year, amid confrontations on the high seas with the marine conservation group Sea Shepherd.

Fishermen from Abashiri, Taiji, Ishinomaki and Minamiboso – all towns with a whaling tradition – will take part in the commercial hunt in Japan's exclusive economic zone. Japan will no longer send fleets to the Antarctic every winter following its official withdrawal from the IWC on Sunday.

Fisheries officials are hoping that the resumption of commercial whaling will spark renewed interest in whale meat among Japanese consumers.

While a return to whaling for profit has long been a cause celebre for conservative politicians, Japanese consumers have lost their appetite for whale meat, which can be served deep-fried or raw as sashimi.

Domestic consumption of whale meat was about 200,000 tonnes a year in the 1960s, when it was an important source of protein in the postwar years, but has slumped to less than 5,000 tonnes annually in recent years, according to government data.

Tokyo's withdrawal from the IWC ended its most provocative expeditions, in protected Antarctic waters, and while it sparked a firestorm of criticism, some campaigners say it is the first step towards the end of Japanese whaling.

Patrick Ramage, the director of marine conservation at the International Fund for Animal Welfare, said the resumption of commercial whaling "will not magically increase market demand".

"The palates of the Japanese people have moved on," Ramage said. "They have lost their yen for whale meat, even as their government has spent billions in taxpayer yen trying to prop up this economic loser. What we are seeing is the beginning of the end of Japanese whaling."

1. What International organisation has Japan withdrawn from? [C]
2. What is the Japanese quota for whale kills up until late December 2019? [C]
3. To what area is this quota restricted? [C]
4. How many Minke whales were killed by Japanese whalers during their final scientific research expedition to the Antarctic? [C]
5. Prior to the final year how many whales did the Japanese kill each year? [C]
6. What gives rise to the conclusion that what we are seeing is the beginning of the end of Japanese whaling? Do you think this is accurate? Why or why not? [C] [A] [E]

AUSTRALIA AND TIMOR-LESTE (EAST TIMOR)

East Timor was a province of Indonesia. In 1999 after two decades of warfare in resisting the Indonesian occupation and annexation a referendum was held in East Timor to determine the future of East Timor. Approximately 80% of the voters supported independence and the Indonesian parliament rescinded its annexation of the territory. Elections were held in 2002 in which East Timor officially gained its independence from Indonesia. Shortly after that in 2004 East Timor began negotiating territorial borders with Australia. From the East Timorese point of view it was important because of the valuable oil and gas reserves that existed in Asia between East Timor and Australia.

What is known as the **Australian-East Timor spying scandal** began in 2004 when the Australian Secret Intelligence Service (ASIS) planted covert listening devices in the Timor-Leste Cabinet Office at

Dili. This enabled ASIS to obtain top secret information from the treaty negotiations led by the Prime Minister of East Timor. This provided the Australian negotiators with an advantage during the Treaty discussions. In particular the listening devices revealed Timor-Leste's bottom line in negotiation, its negotiating tactics, and the different views of the members of the East Timor delegation. As a result of these negotiations, the *Treaty on Certain Maritime Arrangements in the Timor Sea* (2014) (CMATS) was executed by the Australian Foreign Affairs Minister Alexander Downer and his East Timorese counterpart José Ramos-Horta. The Treaty gave Australia a fifty/fifty split of the greater Sunrise Fields where the oil and gas reserves lay. These Fields are positioned 450 kilometres northwest of Darwin and only 150 kilometres south of Timor-Leste.

It was in 2012 that Witness K (his name has not been released and whose name cannot be released), a former senior ASIS Intelligence Officer revealed that the Australian Government had accessed the top secret cabinet discussions in Dili by use of the bugs which had been planted. Witness K and East Timor and Australian lawyer Mr Bernard Collaery have both been charged for the bugging revelation incident in 2012. Witness K did this however only after approaching the *Inspector General of Intelligence and Security* (IGIS) and obtaining permission to talk to an approved lawyer Mr Bernard Collaery, a Barrister and a one-time Attorney-General for the ACT. Timor-Leste rejected the Treaty and referred the matter by way of arbitration to the *Permanent Court of Arbitration* in the Hague. Mr Bernard Collaery helped the Timor-Leste Government build a case against Australia alleging that the bugging had rendered the **Treaty entered into in 2004 void because of the fraud** associated with the bugging. However a further event occurred when the *Australian Security Intelligence Organisation* (ASIO) raided the Canberra office of Mr Bernard Collaery who was at that time representing the East Timor Government in the Hague, and seized his electronic and paper files. Similarly Witness K was also raided and his passport was seized. This was after East Timor had started its case at the *Permanent Court of Arbitration* in the Hague to withdraw from the Treaty that it had signed. This raiding of the offices and the taking of documents including electronic and other documents from the office of their lawyer caused East Timor to apply to the *International Court of Justice* for orders preventing Australia relying upon the documents seized from Mr Bernard Collaery. Australia resisted this application. Timor-Leste was successful in obtaining provisional orders, pending the full hearing of the case, against Australia. An order was made on 3 March 2014 in the following terms:

1. Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded.

2. Australia shall keep under seal the seized documents or electronic data and any copies thereof until further decision of the Court.

3. Australia shall not interfere in any way in communications between Timor-Leste and its legal advisors in connection with the pending *Arbitration under the Timor Sea Treaty* of 20 May 2002 between Timor-Leste and Australia, with any future bilateral negotiations concerning maritime boundaries limitation or with any other related procedure between the two states including the present case before the Court.

The Court concluded that much of the seized material contained sensitive and confidential information relating to the pending arbitration case and that it was essential to ensure that the content of the seized material would not be divulged at any time to any person or persons who could use it to the disadvantage of Timor-Leste in its relations with Australia over the Timor Sea. The Court also found that it was appropriate to require Australia not to interfere in any way in communications between Timor-Leste and its legal advisors. Thus the Orders were made. It is not at all surprising that such Orders were made given that it is a well established part of Australian law that communications between a litigant and his or her lawyers must be kept confidential and must never be made available to the other side in those proceedings.

Subsequently the old agreement has been abandoned by consent between the parties and a new Timor

Sea Treaty has been signed between Australia and Timor-Leste in 2018. This has made the finalisation of the arbitration case in the Hague unnecessary. Similarly the case in the International Court of Justice was resolved by Australia agreeing to return the seized documents and data to Timor-Leste. The case was concluded by Timor-Leste discontinuing the proceedings by way of correspondence dated 2 June 2015 in which it stated:

> *'Following the return of the seized documents and data by Australia on 12 May 2015 Timor-Leste, successfully achieved the purpose of its Application to the Court namely the return of Timor-Leste's rightful property and therefore implicit recognition by Australia that its actions were in violation of Timor-Leste's sovereign rights.'*

Even though the old Treaty was abandoned and a new Treaty entered into and even though both the arbitration and the case in the *International Court of Justice* was concluded, what is not concluded is the prosecution of Witness K and Mr B Collaery which continues. They were charged with conspiring to breach s39 of the *Intelligence Services Act* for allegedly communicating information they obtained in the course of employment. As this book goes to press the prosecution continues despite condemnation from lawyers and former Judges, Civil Liberty groups and legal academics. The prosecution of these two individuals has raised the sceptre again of how badly whistleblowers are treated in Australia. In this case the two whistleblowers have been prosecuted by the Australian Government for revealing a bugging by the Australian Government to gain an advantage in negotiations about maritime boundaries with East Timor.

PRACTICAL APPLICATION

IT'S DIRTY POLITICAL LINEN': WITNESS K TO PLEAD GUILTY AS LAWYER BERNARD COLLAERY COMMITTED TO STAND TRIAL

SOURCE: ALEXANDRA BACK, THE SYDNEY MORNING HERALD, WWW.SMH.COM.AU/POLITICS/FEDERAL, 6 AUGUST 2019 (EXCERPTS)

More than a year after the former spy Witness K and his lawyer Bernard Collaery were charged over the exposure of an Australian bugging operation on the tiny nation of East Timor, the pair have parted ways, with the spy to plead guilty and the lawyer to fight what he called a "contemptible" charge.

Mr Collaery will now sit alone in the dock as defendant in a court where for 40 years he has defended. At stake, he told a media scrum outside court, was the integrity of Australia's parliamentary democracy, the moral and ethical integrity of political leaders. He said it was a "turning point" in whether Australians have freedom of expression against abuse of power and equality before the law.

"This is an attempt, to make no secret about it, this is a very, very determined push to hide dirty political linen that's what this is all about, dirty political linen under the guise of national security imperatives. It's nonsense," he said.

The background to the case is by now public, though none of it yet aired in court. In 2004, Witness K, a spy with the Australian Secret Intelligence Service, oversaw a bugging operation ordered by the Australian government on the East Timorese cabinet rooms. At the time, Australia was negotiating with its tiny and impoverished neighbour over lucrative oil and gas reserves and the two nations later signed a treaty over how those reserves were to be shared.

Concerned about what he had seen, Witness K took his complaint through official channels to the Inspector-General of Intelligence and Security, who later approved Mr Collaery to act as his representative.

In 2013, Mr Collaery arranged for Witness K to give evidence at a hearing overseas about the allegedly illegal bugging operation but his home and office were raided and the brief seized; Witness K was also raided and his passport confiscated. Mr Collaery later spoke to a number of journalists in protest of the raids.

PRACTICAL APPLICATION CONTINUED...

Speaking outside court, Mr Collaery said that in providing Witness K with advice it had become apparent to him that the misconduct complained of was a "cheating culture motivated by commercial interests and an abuse of process".

Mr Collaery, who said national security orders barred him from saying too much about the case, said he stood by the advice he gave as well as the journalists named in charges against him. "And that is a matter of great concern to me that journalism is as equally under threat as is the giving of legal advice in good faith," he said.

The East Timorese took Australia to The Hague over the allegations exposed by Witness K and the treaty was eventually renegotiated.

Months later, federal prosecutors filed charges against the spy and his lawyer, with the approval of the federal Attorney-General Christian Porter, alleging they conspired to breach s39 of the Intelligence Services Act, which makes punishable the revealing of information of any kind about ASIS.

The charges were laid 14 months ago.

The barrister for Witness K, Haydn Carmichael, said Witness K would be dealt with summarily and plead guilty to the charge but that negotiations continued over the facts. He revealed for the first time in open court that the charge against Witness K was about releasing information to the East Timor government in the swearing of an affidavit for The Hague. Witness K was not present, but as is the court's practice he will have to be in future to formally enter the plea.

1. What was the role of Witness K in the bugging operation? [C] [A]
2. How does Mr Collaery describe the bugging misconduct that was reported? [C]
3. What exactly is the allegation against Witness K that he is being charged with? [C] [A]
4. Do you think that Witness K and/or Mr Collaery should be charged at all? Give your reasons for your answer. [C] [A] [E]

20.3 *INTERNATIONAL CRIMINAL COURT*

INTRODUCTION

If we measure human rights violations by the number of individual persons whose rights have been affected, then it is the crimes against humanity and genocide which are at the top of the list. International criminal law deals with crimes so awful that they cannot be left to one nation to prosecute. After the World War II the atrocities committed by members of Germany's Nazi regime against European Jews, and the annihilation of millions of civilian victims in concentration camps, warranted special trials and punishment. The International Military Tribunal based in Europe was the first international tribunal to apply international criminal law to a specific event.

The horrors and atrocities of World War II did not end in 1945 and continue in the world today. Two special tribunals have been created to punish acts committed in two recent conflicts-the former **Yugoslavia** (for acts of genocide, ethnic cleansing, and serious crimes committed in Bosnia in the early 1990s) and in **Rwanda** (for acts of genocide committed in 1994). These were established under special resolution of the UN Security Council. If it is not possible for such crimes to be dealt with by the judicial system in the country where they occur, they can be referred to the only permanent criminal court with global jurisdiction, the ***International Criminal Court*** (ICC).

INQUIRY FOCUS

THE NATURE AND POWERS OF THE INTERNATIONAL CRIMINAL COURT (ICC)

SOURCE 1: LEGAL BASIS

FOUNDING TREATY: *THE ROME STATUTE*

The *Rome Statute of the International Criminal Court* is the international treaty that founded the Court. Comprising a Preamble and 13 Parts, it establishes the governing framework for the Court. Adopted at the Rome Conference on 17 July 1998, it entered into force on 1 July 2002, thereby creating the *International Criminal Court* (ICC).

The statute sets out the ICC's jurisdiction over **genocide, crimes against humanity, war crimes and the crime of aggression.** It also addresses other matters including, for example, admissibility and applicable law, the composition and administration of the Court and its procedures.

Australia is a signatory to the *Rome Statute* and **is a State Party** to the treaty. The USA is not a signatory to the Rome Statute and is **not a State Party** to the treaty. It is an issue for the ICC that the USA does not support it, as it is the support of States Parties 'like Australia which will ensure that the ICC has a future.

SOURCE 2: THE WEBSITE OF THE ICC

PRACTICAL APPLICATION

HOW THE COURT WORKS

SOURCE: WWW.ICC-CPI.INT/ABOUT/HOW-THE-COURT-WORKS, 27 AUGUST 2019 (EXCERPTS)

THE CRIMES

Genocide: The specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part: imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.

Crimes against humanity: Serious violations committed as part of a large scale attack against any civilian population. The 15 forms of crimes against humanity listed in the Rome Statute include offences such as murder, rape, imprisonment, and forced disappearances, enslavement-particularly women and children, sexual slavery, torture, apartheid and deportation.

War crimes: Grave breaches of the Geneva Convention in the context of armed conflict which include, for instance, the use of child soldiers are: the killing or torture of persons such as civilians or prisoners of war, intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes.

PRACTICAL APPLICATION CONTINUED...

Crimes of aggression: The use of armed force by a State against the sovereignty, integrity or independence of another state. Activated on 17 July 2018.

Jurisdiction

The ICC may exercise jurisdiction in a situation where the above crimes were committed on or after 1 July 2002 (except for the crime of aggression-on or after 17 July 2018) and:

- The crimes were committed by a State Party National, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or
- The crimes were referred to the ICC Prosecutor by the UN Security Council pursuant to a resolution adopted under Chapter VII of the UN Charter.

Legal process

1. The ICC does not prosecute those under the age of 18 when a crime was committed.
2. The prosecutor conducts a preliminary examination considering such matters as sufficient evidence, jurisdiction, gravity, complementarity, and the interests of justice.
3. The prosecutor investigates collecting both incriminating and exonerating evidence.
4. The burden of proof lies with the prosecutor. The defendant is innocent until proven guilty.
5. The defendant (called the 'suspect') has the right to information in a language he or she fully understands. ICC proceedings are conducted in multiple languages teams of interpreters and translators at work (applies to pre-trial, trial and appeals) Pre-trial judges issue warrants of arrest, ensure enough evidence to go to trial. Defendant (called the 'accused') when committed to trial.
6. Trial judges hear evidence from Prosecutor, Defence, Victims lawyers, deliver verdict. If accused guilty, pronounce sentence and decision on reparations. Language arrangements apply.
7. Appeals judges here appeal arguments, make decision.
8. If a case is closed without a verdict of guilt, it can be reopened if the Prosecutor presents new evidence.

PRACTICAL APPLICATION CONTINUED...

Cooperation

As a Judicial institution, the ICC does not have its own police force or enforcement body; thus, it relies on cooperation with countries worldwide support, particularly for making arrests, transferring arrested persons to the ICC detention centre in The Hague, freezing suspects assets, and enforcing sentences.

While not a UN organisation, the ICC has a co-operation agreement with the UN. When a situation is not within the ICC's jurisdiction, the UN Security Council can refer the situation to the ICC granting it jurisdiction. This has been done in the situations in Sudan and Libya. The court cooperates with both States Parties and non—States Parties.

1. Define each of the offences which the ICC can prosecute. [C]
2. Describe the jurisdiction of the ICC. Explain the limitations on the ICC's jurisdiction. [C] [A]
3. Describe and explain the legal processes of the ICC from start to finish in a trial, and explain the importance of its need for cooperation to operate effectively. [C] [A]
4. Do you think that Australia made the right decision to be a State Party to the Rome Statute treaty. Give your reasons. [A] [E]

SOURCE 4: INDEPENDENT INVESTIGATIONS

RESEARCH

Go to the website of the ICC. Investigate its current and past court activities, including judgments it has made.

1. Describe the ICCs record. Do you find it satisfactory? [C] [A] [E]
2. Select one case and do a case study under the headings: **Facts, Legal issues, Decision.** [C] [A] [E]

SOURCE 5: MEDIA

PRACTICAL APPLICATION

US THREATENS INTERNATIONAL CRIMINAL COURT

SOURCE: HUMAN RIGHTS WATCH, WWW.HRW.ORG/NEWS, 15 MARCH 2019 (EXCERPTS)

Visa Bans on ICC Staff

The United States decision to impose Visa Bans on ICC staff will imperil accountability for grave international crimes, Human Rights Watch said today. US Secretary of State Michael Pompeo on March 15, 2019 announced that the bans will apply to ICC personnel involved in the courts potential investigation of US citizens and may possibly be used to determine ICC investigations against citizens of U.S allies.

PRACTICAL APPLICATION CONTINUED...

ICC judges have yet to rule on the ICC prosecutors November 2017 request to investigate certain crimes committed in the context of the armed conflict in Afghanistan since May 2003. In addition to grave crimes by the Taliban and and Afghan government forces, the court could also investigate alleged crimes by foreign forces-notably those by the US military and Central Intelligence Agency (CIA), most of which are alleged to have been committed between 2003 and 2004. Pompeo also announced that the same policy may be used to deter ICC investigations of Allied personnel, including Israelis. The ICC prosecutor is examining alleged crimes by Israelis and Palestinians in Gaza and the West Bank. Palestine is an ICC member country.

Pompeo made clear that the US would take further action if the ICC moves forward with investigations of US nationals. In a September 2018 speech, the US national security adviser, John Bolton, announced a change in US policy toward the court and outlined several steps the US would take if ICC investigations reached US nationals or the nationals of US allies in addition to travel bans, Bolton threatened prosecutions and financial sanctions against ICC staff, as well as against countries and companies assisting in ICC investigations of US nationals. He warned that the US would restart long abandoned efforts to negotiate agreements with other countries against surrendering US nationals to the court and put other governments diplomatic, military, and intelligence ties to US at risk if those governments cooperate with the ICC in investigations of the US or its allies.

ICC member countries announced in December that they were 'undeterred by any threats against the court, its officials, and those cooperating with it,' and would 'stand united against unity .'In addition to speaking out publicly, member countries will need to work together to resist US obstruction, Human Rights Watch said. The US, it is not a party to the courts Rome Statute, objects to the ICC's jurisdiction over nationals of non-member countries, absent a referral to the court by the United Nations Security Council. Afghanistan, however, is an ICC member country, giving the ICC authority to investigate and prosecute crimes committed by their nationals or by anyone on Afghan territory.

The courts authority is nothing unusual. US and other citizens who commit crimes abroad are already subject to the jurisdiction of foreign courts. Countries that ratify the Rome Statute are simply delegating their authority to prosecute certain grave crimes committed on the territory to an international court.

1. Describe and explain US policy towards the ICC as expressed by Pompeo and by Bolton. Does either of them have any basis objecting? Do you agree with the US position? Give your reasons. [C] [A] [E]
2. Describe the investigatory activities of the ICC proposed in Afghanistan between 2003 and 2004, and the investigations into Israeli and Palestinian activities in the Palestine/Gaza Strip. [C] [A]
3. Do you think Australia should join with the US and object to the ICC, or should we support the ICC as it carries out its role pursuant to the Rome Statute. [A] [E]

WHAT DO YOU THINK?

Having had the opportunity to study the nature and activities of the ICC, have you formed any view about whether or not you would like those activities curtailed or increased? If so, indicate you think and why, in about 300-400 words. [A] [E] [R]

20.4 HAGUE ABDUCTION CONVENTION

CHILD ABDUCTION

An extremely important issue for the citizens of Nation States which have young children, is what happens to them when parents come from different national jurisdictions and want to return to their home country with their children. Some Member States of the UN had been prepared to agree to the *Hague Convention on the Civil Aspects of International Child Abduction* (1980) (The *Hague Abduction Convention*). Others have not. Therefore, there are those Member States who are able to resolve abduction disputes within a relatively straightforward set of rules, and others who engage, at great expense, private investigators to find and recover their children from a foreign state.

One of the great fears of many Australian parents is that the other parent might **abduct the child and take the child out of Australia**. This fear is worsened by the idea that if the child is taken to some countries in the world then there is effectively **no chance of having the child returned**. Of course a child cannot leave Australia without a passport. However it is quite possible to have applications for passports forged and for passports to issue to a parent planning an abduction.

The first action that is usually taken to prevent a child being abducted is to place the child on the '**Watch List**'. This is a list operated by the Australian Federal Police. A child can be placed on this list if an order has been made by an Australian court that the child not leave the country or an application for such an order has been made to the court and notice of that application has been given to the Australian Federal Police.

However, once the child has left the country the issue becomes whether or not the country in which the child is currently living will ensure that the child is returned to Australia. In 1980 Australia signed a convention known as the '**Child Abduction Convention**' or more commonly the '**Hague Convention**'. The countries which are signatories to the Hague Convention have agreed to take the necessary steps to secure the prompt return of a child to the child's country of origin, when the child is removed from one convention country to another. The convention countries have agreed that in the event that a child has been wrongfully removed from one convention country to another or wrongfully retained in another convention country then the courts in the country where the child is, will ensure the return of the child to the home country of the child. An application is made to the Family Court of Australia generally for a declaration that the removal of the child from Australia, or the retention of a child in another convention country, was wrongful. Currently there are **98 countries which have ratified the Hague Convention and which are recognised by Australia**. Each country appoints a central authority to administer the Hague Convention and in Australia this is now the Department of Communities, Child Safety & Disability Services (DOCS).

The list of convention countries is set out in Schedule 2 of the *Child Abduction Regulations*. Most of the convention countries are European, North or South American. There are **no Asian or Pacific Island country** save for Thailand and Fiji which are **convention countries**. Nor is India, China, the Philippines or the Arab states.

You often see in newspapers the despair of a parent when a child has been taken to a country that is not a convention country. Some parents resort to hiring private agents to bring the child back to Australia.

20.5 CONCLUSION-JUDGING EFFECTIVENESS

PRACTICAL APPLICATION

A number of propositions to which you can answer yes/no are set out below. These are not intended to be totally comprehensive, but to direct your thoughts in a general way to consider some propositions about Australia and human rights to enable you to form a view about where Australia stands in relation to this very important topic.

Australia's involvement in the United Nations

1. Australia is a foundation Member State of the UN ——— Yes/No
2. Australia Is a State Party to more than 10 treaties ——— Yes/No
3. Australia is a signatory to, and has ratified, the Universal Declaration, ICCPR, and the ICESCR (the Bill of Rights) ——— Yes/No
4. An Australian has been President of the United Nations ——— Yes/No
5. Australia has been involved as a peacekeeper and continues to be a peacekeeper in Afghanistan ——— Yes/No
6. Australia has sought and attained a seat on the Human Rights Council ——— Yes/No

Australia's reporting obligations to the Human Rights Council and to treaty bodies

7. Australia generally complies with reporting obligations ——— Yes/No
8. Australia generally responds when questions are delivered about human rights performance ——— Yes/No

Australia and the ICJ and ICC

9. Australia has sought relief against Japan in the ICJ ——— Yes/No
10. Australia opposed France's nuclear testing in the Pacific in the ICJ ——— Yes/No
11. Australia is a State Party to the Rome Statute treaty, and supports the ICC ——— Yes/No

Human rights in Australia's domestic law

12. Many human rights in Australian law preceded the UN Bill Of Rights ——— Yes/No
13. There are some limited rights embedded in the Australian Constitution ——— Yes/No
14. A large number of human rights are found in our common-law ——— Yes/No
15. Many human rights are found in Commonwealth and State statutes ——— Yes/No
16. Australia does not have a Commonwealth Bill of Rights ——— Yes/No
17. Australia's citizens are well served by the Australian Human Rights Commission ——— Yes/No
18. A Commonwealth Act has established a Parliamentary Joint Committee to scrutinize new legislation for compliance with Australia's human rights obligations ——— Yes/No
19. Australia has been accused of 'inhuman treatment' amounting to torture of refugees in detention ——— Yes/No

Australia and International armed conflict

20. Australia, as part of a coalition, attacked Iraq in 2003 without a specific mandated resolution being passed by the Security Council ——— Yes/No

WHAT DO YOU THINK?

In what areas of human rights law does Australia perform well? In what areas of our human rights law could Australia improve? [S] [C] [A] [E]

REVIEW

1. Define the meaning of: [C]

   Genocide | crimes against humanity | war crimes | crimes of aggression

2. Describe and explain the jurisdiction of the ICJ. [C] [A]
3. Select a case in which Australia has been involved as a party in the ICJ. Describe briefly the facts, issues, and outcomes of the case. Do you think being able to attend at the ICJ and resolve the issues in dispute was advantageous to Australia? Give your reasons. [C] [A] [E]
4. Describe and explain the jurisdiction and legal processes of the ICC. How are these different from the court processes of the Supreme Court of Queensland? [C] [A]
5. Describe and explain the position that each of Australia and the USA take with respect to supporting the ICC. Which do you prefer? Give your reasons. [C] [A] [E]
6. Explain how the *Hague Abduction Convention* works. Do you think it is a suitable mechanism for resolving disputes between parents who live in separate countries? [A] [E]
7. Describe and explain in 300 to 400 words the criteria you think are appropriate to draw a conclusion about how effective international human rights are in the Australian context. [C] [A] [E]

TOPIC 3: HUMAN RIGHTS IN AUSTRALIAN CONTEXTS

CHAPTER 21: THE RIGHTS OF AUSTRALIANS IN CRIMINAL AND CIVIL CONTEXTS

FOCUS SUBJECT MATTER

21.1 INTRODUCTION TO CRIMINAL AND CIVIL RIGHTS

21.2 RIGHT TO EQUALITY BEFORE THE LAW

21.3 RIGHT TO A FAIR TRIAL

21.4 RIGHT TO FREE SPEECH

21.5 RIGHT TO PROTEST, TO FREEDOM OF ASSEMBLY AND ASSOCIATION

21.6 LIMITATIONS TO SPECIFIC RIGHTS

21.7 FREEDOM FROM DISCRIMINATION

21.8 RIGHT TO DEMOCRATIC REPRESENTATION

21.9 RIGHT TO FREEDOM OF RELIGION

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- Australia is a signatory to the ***International Covenant on Civil and Political Rights*** (1966), and many of its provisions are found in our laws;
- the right to a fair trial is well-established in both civil and criminal court processes, which apply in the Australian legal system;
- there is a range of circumstances which give rise to issues about human rights for Australians;

- all adult Australians have the right to vote and are required to do so by law;
- generally all Australians enjoy the right to protest, to freedom of speech, and to freedom of assembly and association, even though these rights are not set out in the common law, or by statute;
- there are limits to our freedoms which are found in many of our laws and in the common law rights individuals can exercise to protect themselves when their rights are infringed;
- Australian laws have provided citizens with freedom from discrimination since the *Racial Discrimination Act 1975* (Cth);
- although freedom of religion is set out in s116 of *the Constitution*, its meaning and application in the Australian legal system has recently been challenged; and
- Australian laws and the Australian judicial system strongly support the right to equality before the law.

21.1 INTRODUCTION TO CRIMINAL AND CIVIL RIGHTS

CIVIL RIGHTS

As you would have read in **Chapter 15**, in keeping with the tradition in the English legal system of not enshrining civil rights in a constitution (the United Kingdom **does not have a written constitution**), there are a limited number of civil rights in the *Australian Constitution*. Most of our civil rights are found in the common law, except for the notable exception of various forms of rights against discrimination. The cornerstone of our criminal and civil rights is the treatment of our citizens in **court proceedings.**

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CIVIL PROCEEDINGS

Civil proceedings in the Australian legal system are generally adversarial (parties to a dispute oppose each other). Federal and State Governments provide the framework of legal rules and pay for the tribunals and courts which hear and decide the disputes between members of the community.

The main features of the Australian legal system which ensure **equality, independence, and impartiality** in civil proceedings are:

- rules for the conduct of the proceedings (e.g. court rules);
- the rules of evidence (these decide the evidence which can be presented to the court/ tribunal);
- access to legal representation; and
- an independent judicial system (judges and tribunal members who make independent and impartial decisions).

The above features of the Australian legal system are set out in detail in **Chapters 16 and 17** of *Legal Studies for Queensland Volume 1* (Eighth Edition).

PRACTICAL APPLICATION

Read Chapter 17 of *Legal Studies for Queensland Volume 1* (Eighth Edition) and, if possible, arrange with your class teacher to attend at a court close to your school to observe and make a record of a civil proceeding. Using this information, answer the following questions.

1. What was the plaintiff's claim and how was it presented to the court? [C] [A]
2. What was the defence of the defendant and how was it presented to the court? [C] [A]
3. Were there any witnesses other than the parties (plaintiff and defendant), and if so, what evidence did each of them give? [C] [A]
4. Were the parties both legally represented? Describe the role of each legal representative. How important was legal representation to the presentation of each party's case? Give reasons. [C] [A]
5. Was all the evidence that the judge needed to make a decision available to him/her? [C] [A]
6. Describe the conduct of the judge during the proceeding. Did he/she favour either party during the proceeding? [C] [A]
7. Using the material you have observed and studied when doing this Practical Application, prepare a balanced argument for and against the following proposition: 'The proceeding was conducted in a fair and impartial manner by an independent judicial officer'. [A] [R]

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RIGHTS IN CRIMINAL PROCEEDING

In the criminal context, these are set out in detail in **Unit 1: Beyond reasonable doubt**, in particular in **Topic 3: Criminal trial process**. These rights include:

- the presumption of innocence;
- the right to silence (when arrested);
- the right to procedural fairness in the pre-trial phase of proceedings;
- the right to trial by jury when charged with a serious offence;
- the right to procedural fairness during trial including the right to at-trial silence;
- the right not to be charged twice for the same offence (double jeopardy); and
- the right of appeal against both conviction and/or sentence.

All of the above criminal rights were part of the Australian legal system before they were given expression in the *Universal Declaration of Human Rights* (1948) and subsequently in the *International Covenant on Civil and Political Rights* (1966) (ICCPR). As criminal offences are regarded as offences against **all of society**, it is the State itself that brings the **charge**, gathers the **evidence** and conducts the **trial** against a person accused of an offence. In the Australian legal system an accused person is **innocent until proven guilty**. This is a basic and important principle in our system. It is called the **presumption of innocence**. The **State (prosecution) has the onus (responsibility)** of proving **beyond reasonable doubt** that the accused person is guilty of the offence with which he or she is charged.

When a crime is committed, the police have **special investigative powers** to enable them to search for evidence and interview people. For example, if the police have **reasonable grounds for suspecting that relevant evidence for an offence can be found in a particular place**, they can conduct a search of private property. Once a person has been **arrested and charged with an offence, a search of their person** can be carried out lawfully.

It is always a **balancing act between individual freedoms**, such as a citizen's right to privacy and fair treatment, **and the society's need to be safe and protected from crime**. For example, there is **no legal duty to answer questions** asked by police officers, both before and after arrest.

In addition to those features identified above in civil proceedings which ensure equality, independence, and impartiality, there are additional features of criminal proceedings in the Australian legal system, which, it can be argued also contribute to a fair trial. It should be said that the key ideas and features relevant to civil proceedings are also present in criminal proceedings to a large extent. Some features, which we are about to discuss in section 21.3 are, by and large, not present in civil proceedings. These features are:

- trial by jury;
- the right to silence;
- the rule against double jeopardy; and
- the right to legal representation.

Before we do this, however, we do a short discussion of the important principle of equality before the law.

21.2 RIGHT TO EQUALITY BEFORE THE LAW

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In Chapter 11: Barriers to justice and equity, *Legal Studies for Queensland Volume 1* (Eighth Edition), there is a quote from the first edition foreword of the *Equal Treatment Benchbook* (Supreme Court of Queensland) explaining that the judiciary aims to provide equal treatment to all participants in court proceedings. The chapter sets out rules and approaches in the treatment of children, Aboriginal and Torres Strait Islander peoples, persons with a disability, and on gender equity to ensure a fair and impartial approach to persons who come before the court. These views are widely shared in the Australian legal system. For example, in the New South Wales equivalent to the *Queensland Equal Treatment Benchbook* the following can be found:

Equality before the law is a fundamental concept of our legal system.

All judicial officers take an oath to administer the law without fear, affection or ill will.

Judicial officers must treat all parties fairly regardless of gender, ethnicity, stability, sexuality, age, religious affiliation, socio-economic background, size or nature of family, literacy level or any other such characteristic. Respect and courtesy should be the hallmarks of judicial conduct. Paternalistic or patronising attitudes have no place in the court system.

SOURCE: EQUALITY BEFORE THE LAW BENCH BOOK (NSW), WWW.JUDCOM.NSW.GOV.AU/PUBLICATIONS, DOWNLOADED 26 JULY 2019 (EXCERPTS)

The position of the judiciary in the Australian legal system with respect to its role, is recognisably similar to Article 14.1 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 14.1 of the ICCPR states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

SOURCE: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966), WWW.EN.ORG/HUMAN RIGHTS (EXCERPTS), DOWNLOADED 26 JULY 2019

WHAT DO YOU THINK?

The key features of *Article 14.1* of the ICCPR are found in the Australian legal system. Do you agree or disagree? Give your reasons. ([C] [A]

21.3 RIGHT TO A FAIR TRIAL

Chapter 9 of *Legal Studies for Queensland Volume 1* (Eighth Edition) (hereafter Volume 1) sets out in detail the **attributes of a fair trial** in the Australian (Queensland) legal systems. To fully understand the importance of these concepts to our legal system you should refer to this chapter. Three of these attributes are set out hereafter as they coincide with the principles enunciated by the ICCPR. These are **trial by jury, the right to silence**, the **principle of double jeopardy**, and the right to legal representation.

TRIAL BY JURY

Chapter 9.3 of Volume 1 looks in detail at how the jury system works. To understand the jury system properly, you may like to read Chapter 9.3.

The jury system has been part of the common law since the ***Magna Carta*** in 1215. The ***Magna Carta*** essentially said that a free man could not be imprisoned '***except by the legal judgment of his peers, or by the law of the land***'. Section 80 *Constitution* of Australia confirms the principle that:

> *The trial on indictment of any offence against the law of the Commonwealth shall be by jury.*

This principle is enshrined in the law of each State and Territory in Australia, as well as the Commonwealth. The jury is **regarded as the cornerstone of our criminal justice system.** Juries decide whether the accused is guilty or not guilty on the **admissible evidence** presented in the trial. Juries are regarded as **impartial fact finders** because they are randomly selected and represent a cross-section of the community.

PRACTICAL APPLICATION

Read Chapter 9.3 of Volume 1, and, if possible, attend the opening day of a jury trial at your local court.

1. Describe the main features of the jury system under the following headings:
   a. Why are juries important? [C] [A]
   b. The historical background of our jury system. [C] [A]
   c. How representative are our juries? [A]
   d. What recent reforms have been made to our jury system? Do you agree with them? [C] [A] [E]
   e. Select one of the activities set out between Page 174 and Page181 of Volume 1 to answer. Compare your answers to those of another student who did that activity in groups. Give yourself a suitable rating. [C] [A] [E]
2. Conduct a class debate on the following: 'The right to trial by jury, like the right to vote, is an inseparable part of our democratic system'. [C] [A] [R]
3. As an alternative to Question 2 above, in 500 to 600 words, read the *INQUIRY 'IS IT TIME FOR JURIES TO BE ABOLISHED'* on pages 181-185, and set out the arguments for and against the proposition.

THE RIGHT TO SILENCE

The right to silence has two aspects:

- the right of a suspect not to answer questions asked before trial (**pre-trial silence**); and
- the right of an accused person not to give evidence in his or her defence at trial (**at trial silence**).

The responsibility of the State to ask questions is matched by the right of a suspect, or an accused, not to answer them. The first aspect (**pre-trial silence**) can be studied in Volume 1 Chapter 4 of **Topic 2: Criminal Investigation Process.**

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In *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws* (Interim Report 127) the Australian Law Reform Commission (ALRC) discusses in **Chapter 12: Privilege against Self-Incrimination, the right to silence.** It says:

The right to silence protects the right not to be made to testify against oneself (whether or not the testimony is incriminating) the privilege against self-incrimination is narrower in that it protects the right not to be made to incriminate oneself. Statute might require a person to answer questions, thus breaching the right to silence, but allow the person to refuse to give incriminating answers, thus preserving the privilege against self-incrimination.

Further:

the privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'. It reflects ' the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.

The right to silence, particularly in its aspect of privilege against self-incrimination, has been suggested to have originated in the 12th and 13th centuries, and in its present form developed as part of the rise of the adversarial criminal justice system later in the 19th century. The right evolved in the common law partially as a consequence of the presumption of innocence, and also because of distrust at how police obtained information from suspects.

AT-TRIAL SILENCE

It is argued that the right to silence would be weakened if juries could infer guilt or other negative consequences from an accused person not taking the stand and answering questions. Hence, the exercise of this right means that a judge, prosecutor or co-accused **cannot make any adverse (negative or harmful) comments about the fact that the accused remained silent** during the trial. A judge should also warn the jury not to do so.

An incident of that right to silence is that no adverse inference can be drawn against an accused by reason of his or her failure to answer such questions to provide such information. To draw such inference would be to erode the right to silence or to render it valueless.

PETTY AND MAIDEN (1991) 55 A CRIM R 322.

WHAT DO YOU THINK?

Would it be unfair to an accused person if the judge, in his or her summing up to the jury, said any of the following? [E] [R]

a. 'You will have noticed that the defendant failed to give evidence. She must have had no possible explanation for her conduct on the night in question.'

b. 'You will have noticed that the defendant failed to give evidence. Although the law says she doesn't have to do so, it certainly must make you wonder.'

c. 'There can only be one reason why the accused did not give evidence – she is guilty.'

d. 'I remind you that the accused does not have to give evidence. This is her right. It is the Crown who has the onus of proof.'

e. 'There can be many reasons why an accused person chooses to remain silent. You must not treat this as an admission of guilt.'

The **reasons for the right to silence** include:

- it protects the innocent defendant from convicting himself by a bad performance on the witness stand;

- it spurs the prosecutor to carry out a complete and competent independent investigation; and
- it contributes towards a fair state/individual balance by requiring the government to leave the individual alone and requiring the government in its contest with the individual to shoulder the entire load.

SOURCE: DAVIES JA, 'THE PROHIBITION AGAINST ADVERSE INFERENCES FROM SILENCE: A RULE WITHOUT REASON?' (2000) 74 ALJ 105 (EXCERPTS)

At-trial silence differs from pre-trial silence in the following ways:

- questioning at trial takes place in a public courtroom and under the control of a judge. There is no possibility of threats or pressure being applied as is suggested can occur in the police questioning stage;
- by the time of trial, an accused will have had legal advice and will be in a position to give well-considered answers;
- the accused knows the case that the prosecution has made against him or her, as the accused does not have to testify until after the close of the Crown case; and
- at trial, the jury will be aware that the accused has not testified, but will probably not know about the pre-trial questioning.

Eminent judges of the High Court have argued for the existence of the right to silence (**privilege against self-incrimination**) in the following judgments.

In *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, at 346, Murphy J explained that the privilege is:

> *...part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of the human personality.*

Privilege against self- incrimination is said to be necessary to preserve the presumption of innocence, and to ensure that the burden of proof remains on the prosecution. In *Cornwell v R* (2007) 231 CLR 260, at 176, Kirby J said:

> *...such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrongdoing from the evidence of others, not from the mouth of a person accused, given otherwise than by his or her own free will.*

THE RULE AGAINST DOUBLE JEOPARDY

No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure for each country.

Article 14 (7) *International Covenant on Civil and Political Rights 1966* (ICCPR)

Once a judge or jury finds a person not guilty, he or she is acquitted of that offence and can never be tried for the same offence again.

This rule is not only enshrined in the ICCPR, it was stated by Sir William Blackstone in his *Commentaries on the Law of England* (1789) to be… a universal maxim of the common law of England... It is also contained in ss16 and 17 of the *Criminal Code 1899* (Qld). In the United States, the Fifth Amendment guarantees double jeopardy protection in the *Constitution*. It is the law in the Commonwealth, and in all Australian States and Territories.

There is always the possibility that a person **acquitted or convicted of an offence** has been wrongly found guilty or not guilty. This is particularly the case because of advances in forensic science in recent years.

PRACTICAL APPLICATION

CAMPAIGN FOR CHANGE TO DOUBLE JEOPARDY LAW

SOURCE: LOUISE WILLIS, ABC.NEWS.COM/PM, 9 APRIL 2003 (EXCERPTS)

MARK COLVIN: The Prime Minister has agreed with the mother of a murdered baby girl who's campaigning for changes to the "double jeopardy" law, which prevents a person from being tried twice for the same crime.

John Howard has questioned whether justice was served in a controversial Queensland murder case, which has dragged on through two trials, two acquittals and a failed High Court appeal.

The mother of the murdered toddler, Faye Kennedy, today launched a petition urging the Queensland Government to overhaul the 800-year old legal rule of double jeopardy.

Tomorrow, Federal, State and Territory Attorneys-General will discuss the issue in Melbourne, as Louise Willis reports.

LOUISE WILLIS: There's been a national outpouring of sympathy for the years of legal wrangling the Kennedy family has endured since the brutal murder of 17-month old Deidre at Ipswich in Queensland in 1973.

Now, the Prime Minister has joined the family's campaign.

JOHN HOWARD: It does seem to me that this particular case is a, you know, it just horrific that a law such as that… I mean, it's a simple test of justice. The, you know, demented, dogmatic adherence to something because it's been around for a long time, and here is a social conservative speaking, I'm not in favour of changing things that work, but I am very much in favour of changing things that don't work, and this rule doesn't work.

LOUISE WILLIS: Mr Howard's comments on the same day that the mother of the murdered toddler, Faye Kennedy, has launched a petition urging the Queensland Government to overhaul the double jeopardy principle. The petition calls for an amendment to the rule to be known as "Deidre's Law".

FAYE KENNEDY: And I thought it was very fitting. That way I believe, you know, her death and her little short life wouldn't be in vain. I promised my children, when the perjury trial was on, they both asked me – mum, would you please, when this is done, let it be done. And I broke that promise to them, because now I need to pursue this and have this law changed.

LOUISE WILLIS: Faye Kennedy says going public with this petition is painful, but she feels she has a responsibility to promote a debate.

FAYE KENNEDY: And there should be an avenue in this law that if there is new evidence and DNA, that we can put these people to trial again. I don't want this law to be open slather for every fiddly crime. But when it comes to rape and murder, and heinous crimes, we need to know that our public are protected.

LOUISE WILLIS: Faye Kennedy. Queensland's Attorney General has prepared a discussion paper for a meeting of his Federal, State and Territory colleagues tomorrow. Rod Welford says he has an open mind on the issue, but would prefer a nationally uniform approach.

PRACTICAL APPLICATION CONTINUED...

MARK COLVIN: Louise Willis reporting. The man convicted of the murder, Raymond John Carroll, was later acquitted on appeal. He was tried again on perjury charges from the original trial, found guilty, but then set free after the Court of Appeal found the double jeopardy principle applied, a decision later backed by the High Court.

1. What law was Prime Minister John Howard referring to when he stated 'this rule doesn't work'? [C]
2. Why was it unfair for the High Court to apply the double jeopardy principle and acquit Raymond John Carroll? [C] [A]
3. How does Faye Kennedy want to change the rule against double jeopardy? Explain why. [C] [A]
4. Read the *Inquiry* into whether or not the rule against double jeopardy should be overturned or modified set out in Chapter 9.8, Volume 1 on pages 201 to 205 and answer the questions in the 'What do you think?' activity on page 205. [C] [A]

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THE RIGHT TO LEGAL REPRESENTATION

Article 11 the *Universal Declaration of Human Rights* states:

> *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.*

It should be apparent to you that lawyers play an important role in criminal proceedings. It has been asked **how fair a trial can occur** if the accused is not given **skilled legal representation**. The High Court considered this question in *Dietrich's* case, where Dietrich was convicted after a 40 day trial in which he was legally unrepresented. The High Court found there was no absolute right to legal representation through the provision of legal counsel at public expense, but, it held that in criminal trials for serious offences, where the judge felt an accused could not get a fair trial due to lack of legal counsel, the judge could stay (stop a trial) until legal representation could be obtained. In *Dietrich's* case the majority of the High Court (5:2) quashed his conviction and ordered that there be a new trial.

WHAT DO YOU THINK?

Do you agree with the High Court that in circumstances where an accused lacks legal representation the procedure of the trial is so difficult, complicated, and unfair on the accused, that it is justification for abandoning the trial? [A] [E]

21.4 RIGHT TO FREE SPEECH

> *If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.*
>
> SOURCE: JOHN STUART MILL, ON LIBERTY

Freedom of speech is one of the most **fundamental** of all **freedoms** in a **free and democratic society** like Australia. However, freedom of speech does not give the person communicating, whatever the form of communication, the **right to harm others**. For example, the right to publish malicious and false rumours on Facebook, Twitter, or on other Internet communications should be curtailed.

WHAT DO YOU THINK?

Should the Internet be censored? Should films be subject to a system of classification which allows some films to be prohibited by refusing to classify them? Give your reasons. [A] [E] [R]

INQUIRY FOCUS

WHAT, IF ANY, IS AN APPROPRIATE FORM OF REGULATION FOR THE MEDIA?

PRACTICAL APPLICATION

SOURCE 1: THE FINKELSTEIN REPORT

At the request of the Australian Government, Mr Ray Finkelstein QC, conducted an independent inquiry into the media and produced a report, published March 2012, entitled ***Report of the Independent Inquiry into the Media and Media Regulation*** (Finkelstein Report). The following are some excerpts from the Finkelstein Report.

Media code of ethics and accountability

1. There is common ground among all those who think seriously about the role of the news media and about journalistic ethics that:

- a free press plays an essential role in democratic society, and no regulation should endanger that role;
- a free press has a responsibility to be fair and accurate in its reporting of the news;
- a free press is a powerful institution which can, and does, affect the political process, sometimes in quite dramatic ways;
- a free press can cause harm-sometimes unwarranted-to individuals and organisations;
- a free press should be publicly accountable for its performance; and
- codes of ethics regarding accuracy, fairness, impartiality, integrity and independence should guide journalists and news organisations.

6. I have come to the conclusion that these mechanisms (those under which the media currently operates) are not sufficient to achieve the degree of accountability desirable in a democracy…

8. I therefore recommend that a new body, a News Media Council, be established to set the journalistic standards for the news media in consultation with the industry, and handle complaints made by the public when those standards are breached…

9. Moreover, I recommend that the News Media Council have those roles in respect of news and current affairs coverage on all platforms, that is, print, online, radio and television…

PRACTICAL APPLICATION CONTINUED...

SOURCE 2: THE MEDIA RESPONDS TO THE FINKELSTEIN REPORT

MEDIA INQUIRY: RECOMMENDATIONS AND REACTIONS

SOURCE: DRUM WRAP, ABC.NET.AU, BROADCAST 9 MARCH 2012

ABC's The Drum takes a look at the media's reaction to the recommendations of the Finkelstein media inquiry.

Simons: how the Fink nailed the media inquiry

Margaret Simons, Crikey

Start with this. You will find it difficult to get an idea of what the Finkelstein report on news media regulation actually says, or why it has reached its controversial conclusions, from reading the mainstream media.

The irony is lost on no-one, judging from all the eye-rolling in the ministerial offices this morning, except perhaps those editors and reporters who will deny it is so.

On Saturday and again today, the newspapers were full of opinion, mostly from the interested parties, but harder to find was a decent summary or report of the Fink's substance and arguments. A newspaper reader would struggle to discern that the Fink had some critical things to say about the way the media performed. Indeed, some breakout quotes used by the tabloids suggested he had been only complimentary.

For the record, the Fink's report is not calling for direct government control of the media, nor does it contain a bid by Labor to control the media, as the headline in the Australian Financial Review claimed, over a fair and balanced article by Laura Tingle that said nothing of the sort.

Freedom of the press is not open to political meddling Mark Day, The Australian

There is little point in the media industry getting its collective knickers in a knot over the Finkelstein report. It is merely one small and, regrettably, flawed chip in a much bigger media mosaic and I predict its central recommendation will never be implemented.

This is partly because the proposal for a government controlled News Media Council to regulate all print, broadcasting and online news material is an ill-advised misstep down the wrong road and partly because of the alignment of the stars in the political universe. The Finkelstein report is worth a read. You'll find it on the Department of Broadband, Communications and the Digital Economy website (www.dbcde.gov.au) and it contains some quite erudite material about the history and justification of press freedom along with arguments for and against its curtailment.

Journalists should read it and pause to reflect on their obligations as well as their rights and most, I suspect, would do so accepting that there is considerable room for improvement in what we do and how we do it. Editors and managers should act on the obvious need for more care and attention to be given to proper training and the raising of editorial standards.

But the failure of media outlets to reach the highest of standards does not require government intervention and control.

Freedom from the press

Mr Denmore, The Failed Estate

A significant number of journalists - the supposed protectors of the public interest - see their duty as reflecting the political opinions of the media owners that employ them ahead of advocating for the interests of their readers and viewers. That shouldn't be surprising since one company is so dominant and since the opportunities for alternative employment are so limited.

PRACTICAL APPLICATION CONTINUED...

The ideal solution to the failures of our media - inaccurate or unfair reporting, unbalanced commentary and the deliberate or inadvertent misrepresentation of facts - would be self-regulation, not by media companies (who have a commercial interest in the outcome) but by journalists themselves. It should be a professional tribunal, not an industry regulator. But without statutory backing, their proclamations would lack any punch.

Giving journalists oversight of their own craft makes sense if you believe, as I do, that the mainstream media and journalism are separate and should be seen as such. That the distribution and business models of the media are broken does not mean that journalism is dead. On the contrary, good journalism is needed more than ever. The public needs an independent voice that they can trust.

But what is happening in the response to Finkelstein is that commercial interests are co-opting high-minded appeals to free speech and freedom of the press to protect their own interests. (BTW, it's the same thing that has happened in the attempts to reform resource taxes, the pokies industry and financial sales dressed up as advice). The industry wants you to believe that the government is the bad guy; they don't want you to countenance that the media that supposedly "defends our freedoms" is the bigger threat to democracy.

1. What does the Finkelstein Report say is common ground among all those who think seriously about the role of the news media and about journalistic ethics? [C]
2. What form of regulation does the Finkelstein Report recommend for Australian media? [C]
3. Outline the arguments for and against the Finkelstein Report proposal to establish a News Media Council in the above articles. [C] [A]
4. Should a News Media Council be established as proposed by the Finkelstein Report? Give your reasons. [C] [A] [E]

PRACTICAL APPLICATION

BATTLE LINES DRAWN AS A CROP OF FREE SPEECH CASES COME BEFORE HIGH COURT

SOURCE: PAUL KARP, THE GUARDIAN, WWW.THEGUARDIAN.COM/LAW, 26 DECEMBER 2018

Should developers be able to make political donations? Or anti-abortion advocates protest outside abortion clinics? How much should campaign groups be able to spend on political ads? And can public servants really be sacked for their tweets?

They are all questions on free speech raised by cases before the High Court to be heard and decided in 2019. They come at a time when arguments for a human rights charter-long a demand of the left in Australia-have been reinvigorated from a surprising quarter, as human rights discourse is taken up by conservatives in the religious freedom debate.

The courts are just one arena for free-speech questions. Another is public debate about a human rights charter, already decades-old but amping up yet again. A charter would entrench in Australian law obligations in the *International Covenant on Civil and Political Rights* to protect the right to life, freedom of religion, freedom of expression, the right to peaceful assembly, freedom of association and the right to non-discrimination and equal protection of the law.

The Guardian is editorially independent, meaning we set our own agenda. Our journalism is free from commercial bias and not influenced by billionaire owners, politicians or shareholders. No one edits our editor. No one steers our opinion. This is important as it enables us to give a voice to those less hurt, challenge the powerful and hold them to account. It's what makes us different to so many others in the media, at a time when factual, honest reporting is critical.

PRACTICAL APPLICATION CONTINUED...

1. Describe and explain how each of the issues in the first paragraph of the above article is an issue which might raise the question of free speech. [C] [A]
2. Where does *The Guardian* consider free speech questions should be discussed? Why do you think this is? [C] [A]

SOURCE 3: FREEDOM OF SPEECH AND THE RIGHT TO PRIVACY

PRACTICAL APPLICATION

PHONE HACKING TRIAL: REBEKAH BROOKS JURY SHOWN FOOTAGE OF ALLEGED COVER-UP

SOURCE: ABC NEWS, ABC.NET.AU,15 JANUARY 2014 (EXCERPTS)

The trial of Rebekah Brooks, who ran Rupert Murdoch's British newspaper arm, has been shown footage of what the prosecution alleges was her husband's attempt to hide evidence from police investigating accusations of phone hacking.

The day Brooks was first quizzed by police, and before her home was searched, prosecutors say her husband, racehorse trainer Charlie Brooks, hid a laptop and a bag behind a bin in an underground parking lot of their plush London apartment block where it was picked up by the Brooks's security team.

After the police completed a search, the security team returned with a bag and left it in the car park.

Prosecutors say the plan went awry because a cleaner then found the material and it was given to the police.

News International, the British newspaper division of Mr Murdoch's News Corp, became engulfed in the police inquiry in 2011 after it was alleged journalists had hacked the phone of a murdered schoolgirl, amongst others.

Both Charlie and Rebekah Brooks deny conspiracy to pervert the course of justice by hiding material from detectives.

Brooks also denies conspiracy to hack phones and authorising illegal payments to public officials.

The closed circuit television (CCTV) footage shown to the jury captured Charlie Brooks emerging from a doorway clutching a bag and a laptop on July 17, 2011, at about the same time his wife, who had quit as News International boss days earlier, was heading to a police station where she would be arrested.

After looking around, he disappeared from view and less than a minute later, the CCTV film showed him returning empty-handed.

On Tuesday (local time), the jury at London's Old Bailey court saw Mark Hanna, the ex-head of security at News

PRACTICAL APPLICATION CONTINUED...

International, arriving at the car park about two hours after Brooks, and phone records indicate he had been in regular contact with the trainer.

He disappeared out of camera shot, to the same area where Brooks had been earlier, returning with a brown bag and other material, before driving away.

Hanna also denies a charge of perverting the course of justice.

1. What is phone hacking? Who used phone hacking in the United Kingdom? Why was Rebekah Brooks charged with a conspiracy to hack phones and authorise illegal payments to public officials? [C] [A]
2. What individual right is infringed by someone hacking your phone or bribing a public official to obtain confidential information? [C] [A]
3. Are there laws in Australia to prevent journalists from obtaining information about private individuals by phone hacking or other such means? Are there also laws to prohibit and punish journalists who bribe public officials (including the police) for confidential information? [A] [E]

SOURCE 4: AUSTRALIAN PRESS COUNCIL

The Australian Press Council (APC) was established in 1976 and is responsible for promoting good standards of media practice, community access to information of public interest, and freedom of expression through the media. The Council is also the principal body responsible for responding to complaints about Australian newspapers, magazines and associated digital outlets.

A statement of principles which is binding on all publications subject to the jurisdiction of the Council are set out hereafter.

PRACTICAL APPLICATION

THE STATEMENT OF GENERAL PRINCIPLES

THE FOLLOWING GENERAL PRINCIPLES APPLY TO MATERIAL PUBLISHED ON OR AFTER 1 AUGUST 2014

Publications are free to publish as they wish by reporting facts and expressing opinions, provided they take reasonable steps to comply with the following Principles and the Council's other standards of practice.

Accuracy and clarity

1. Ensure that factual material in news reports and elsewhere is accurate and not misleading, and is distinguishable from other material such as opinion.
2. Provide a correction or other adequate remedial action if published material is significantly inaccurate or misleading.

Fairness and balance

3. Ensure that factual material is presented with reasonable fairness and balance, and that writers' expressions of opinion are not based on significantly inaccurate factual material or omission of key facts.

PRACTICAL APPLICATION CONTINUED...

4. Ensure that where material refers adversely to a person, a fair opportunity is given for subsequent publication of a reply if that is reasonably necessary to address a possible breach of General Principle 3.

Privacy and avoidance of harm

5. Avoid intruding on a person's reasonable expectations of privacy, unless doing so is sufficiently in the public interest.

6. Avoid causing or contributing materially to substantial offence, distress or prejudice, or a substantial risk to health or safety, unless doing so is sufficiently in the public interest.

Integrity and transparency

7. Avoid publishing material which has been gathered by deceptive or unfair means, unless doing so is sufficiently in the public interest.

8. Ensure that conflicts of interest are avoided or adequately disclosed, and that they do not influence published material.

1. Select a daily newspaper or Internet reporting service (for example, *The Guardian*) and identify articles which you think raise issues that might offend the **statement of principles of the APC**. State in your own words the issue raised for you and the particular principle you have identified as being offended in up to 5 articles. [S] [C] [A] [E]

2. Were there any issues raised for you by the newspaper articles you identified which were not covered in the APC principles? If so, what were they and why were they offensive? Do you think the statement of principles covers all the issues that ought to be considered when determining standards in the media? Give your reasons. [S] [C] [A] [E]

RESEARCH

Go to presscouncil.org.au and to any other source available to you and prepare a brief report on the activities of the APC. Do you agree with the findings of the Finkelstein report and its recommendations which are set out earlier? Give your reasons. [S] [C] [A] [E] [R]

21.5 RIGHT TO PROTEST, TO FREEDOM OF ASSEMBLY AND ASSOCIATION

The *International Covenant on Civil and Political Rights* (ICCPR) states:

Article 21:
The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22.
1. *Everyone should have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.*

Australia is a signatory to the ICCPR. The right to **peaceful assembly** protects the right of individuals and groups **to meet and to engage in peaceful protest**. The right to **freedom of association** protects the right to **form and join associations to pursue common goals**.

There is **no express right** in the Australian Constitution to either of these rights, although there is an implied right to freedom of political communication, set out by the High Court in *Lange*'s case. The High Court has recently confirmed the implied right to freedom of political communication in the case of *Clubb v Edwards* (2019) HCA . This right has been discussed in full in **Chapter 15** earlier in this book.

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In the Australian community, **individuals and groups frequently exercise the right to assemble and associate for peaceful protest** or to form associations to pursue common goals. These activities occur freely although they can be affected by laws about when and where such gatherings take place or the nature of the goals they hope to achieve. For example, permits are generally required where protests such as street marches occur, because they can affect other people going about their lawful business. There have been occasions permits have been refused because governments have opposed the views of the protesters.

PRACTICAL APPLICATION

WHAT'S A PROTESTER WORTH?

SOURCE: TED WITHAM, REFLECTIONS, HTTP://TEDWITHAM.WORDPRESS.COM/TAG/AUSTRALIA, ACCESSED 28 JANUARY 2014 (EXCERPTS)

At the end of June 1971, I found myself in Ward 52 of Royal Melbourne Hospital, prescribed complete bed rest and given heavy duty drugs to help my back pain. At the same time, the Moratorium Movement was planning its third march to protest against the Vietnam War. My hospital regime allowed visitors… Several of my fellow-theological students… were keen to recruit me. It was my first opportunity to march… 'We could put you in a wheelchair and push it down Swanston Street' my friends said, as though it was a student lark… I was torn, but in the end, when June 30 came around, I was too unwell to participate. At 7 pm that night I saw the black and white images on TV and heard my friends' first hand reports of the 100,000 citizens who marched to the Shrine on St Kilda Road.

PRACTICAL APPLICATION CONTINUED...

In the late 60s and on into the 70s many people, particularly those of us who were students, had to decide whether or not to take part in protests. These were not easy or automatic decisions. We saw people arrested and locked up at protests and knew prison was a possible consequence of civil disobedience. We heard of students in Queensland being jailed simply for gathering. 'Don't bother applying for a march permit,' premier Bjelke-Peterson told potential protesters, 'You won't get one. That's government policy now!'

1. What movement was planning a march, and against what event? [C]
2. What evidence of the protest march did the author see from his hospital bed? [C]
3. What does the author say happened to some protesters? [C]
4. Should persons who wish to march in a peaceful protest against a war in which Australian troops are involved overseas be allowed to do so? Why? Why not? [A] [E]

21.6 LIMITATIONS TO SPECIFIC RIGHTS

It should be apparent to you from reading the above that these rights must be exercised responsibly to protect the rights of other citizens in the community. There are laws which protect the privacy, convenience, reputations, and safety of citizens, to enable them to live peacefully in a free and fair society. Some of the areas in which laws have been passed to do this are:

- Privacy
- Inciting racial hatred
- Discrimination
- Censorship
- National security
- Perjury and contempt of court
- Intellectual property laws, such as copyright
- Defamation

The limits to these rights are enshrined in Article 29 (2) of the *Universal Declaration of Human Rights* 1948:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and meeting the just requirements of morality, public order and the general welfare in a democratic society.

INCITING RACIAL HATRED

Racist speech or racial vilification is harmful to individuals and society. Reasons for this include the following:

- individuals experience negative emotions such as humiliation, outrage, fear, sadness and may suffer financially through loss of business custom and job opportunities;
- the racial group as a whole suffers harm as the insult felt by one is transmitted to the group as a whole. It goes against the principle that all members of a community should be treated fairly and equally; and
- society suffers when individuals or members of that racial group feel alienated from society, and it may discourage them from fully participating in that society.

However, there is debate about whether laws that punish people for using racist speech are the best way to counter racism. There is an argument that, when people are unable to express their views openly, these views do not go away but are forced 'underground'. This has two effects. The first is that resentment against other races can fester and lead to 'speaking out' in other ways through intimidation, violence, trolling and graffiti. The second is that society is denied the opportunity to challenge and to educate those holding these racist views.

There are Commonwealth laws, the *Racial Hatred Act 1995* (Cth) and the *Racial Discrimination Act 1975* (Cth), which prohibit and punish acts of racial vilification. The *Anti-Discrimination Act 1991* (Qld) also prohibits racial discrimination and, in 2001, an amendment to the Act made racial or religious vilification unlawful. Section 124A of the Queensland Act states:

> *(1) a person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or persons on the grounds of the race or religion of the person or members of the group.*

CASE STUDY

Deen v Lamb [2001] *QADT 20*

Facts: Mr Lamb was a candidate in the federal election held in December 2001. As part of his campaign, he published and distributed a pamphlet containing some of his opinions which included views about the content of the Quran, and about people who believe in its teachings. A complaint was lodged by Mr Deen who is a Muslim and was the Chairman of the Islamic Council of Queensland.

He wanted an order prohibiting further publication of the pamphlet.

Legal issue: Should the court stop the publication of the pamphlet on the ground that Mr Lamb's opinions about Islam and Muslims incite hatred towards, or serious contempt for, a person or group of persons on the ground of religion?

[An offence under s124A of the *Anti- Discrimination Act 1991* (Qld)]

Decision: Mr Deen's complaint was dismissed. Queensland Anti-Discrimination Tribunal President Sofronoff was of the opinion that Mr Lamb had, by distributing the pamphlet (a public act), incited serious contempt and hatred for Muslims as a whole. However, because Mr Lamb's publication was made for the purpose of, and in connection with, a Federal election campaign, the implied freedom of communication on matters relevant to political discussion applied. For this reason, it was clearly in the public interest that candidates' views on issues affecting the electorate be known, even if those views are thought by some to be despicable.

'The public has an interest in knowing the opinions of candidates, even when those views are unreasonable, unsupportable, one sided or even plainly wrong; and perhaps particularly when they are of that character.' (President Sofronoff)

CASE STUDY CONTINUED...

1. Which tribunal heard this case? [C]
2. How did the implied right of political communication affect the outcome of the case? [C]
3. Why is it an implied right? [C]
4. What would have been the outcome if Mr Lamb had published this pamphlet not as a candidate in an election? [A]
5. Is it fair just to have an exception for political, and not all types of, communication? [A] [E]

DEFAMATION

Defamation is one of the more important limits to freedom of speech. The law of defamation gives individuals the right to protect their reputation in the community. An important issue in today's society is free speech on the Internet and whether the nation's local laws, especially the law of defamation, should be used to limit what is placed on this global medium. The following case study highlights some of the difficulties in applying existing national defamation laws to regulate this new form of transnational communication.

CASE STUDY

Dow Jones & Company Inc v Gutnick (2002) 210 CLR 575

Facts: A well-known Melbourne businessman, Joe Gutnick, alleged that he was defamed in an article, which was published by Dow Jones in the United States and accessible over the internet. The article claimed he was the biggest customer of a convicted money-launderer, and that he was masquerading as a reputable citizen when in fact he was a tax evader who had laundered large sums of money.

Legal issue: Could the action for defamation be brought in Victoria, given that the claim involved material written in the US and published on the internet by a web server located in the US? The Victorian Supreme Court had earlier ruled it had jurisdiction because when people in Victoria read the article on the Internet, the tort had been committed there. However, it was also downloaded in 60 or more countries.

Decision: The High Court of Australia dismissed the appeal by Dow Jones and upheld the earlier decision of the Victorian Supreme Court. The claim could be heard in Victoria on the basis that the material was downloaded and read in Victoria and that is also where Mr Gutnick suffered most harm.

The court acknowledged the difficulty the Internet raised as countries give different priorities to free speech. The publication would not be defamatory in the US because the First Amendment to the US Constitution effectively prohibits restrictions being placed on 'freedom of speech or of the press'. In Australia, protection of individual reputation is a higher priority.

Mr Justice Kirby expressed concern at the spectre of 'global liability' but dismissed the appeal on the basis that the reputation and honour of individuals must also be defended, as required by local law, especially in the absence of any international agreement.

CASE STUDY CONTINUED...

1. For internet users in Australia, where does publication occur? [A]
2. What did Kirby J mean when he referred to 'global liability'? [A]
3. The appellants invited the High Court to think beyond national Australian law - to think globally. Do you agree with the argument by the appellants that the internet is not a structure that can be controlled by a 'myriad of national laws' devised long before its arrival? [A] [E]
4. If material does not break the law in the country where it is posted on the internet, do you think that a person should be liable for defamation in a different country with stricter laws? [E] [R]
5. Do we need a unified world-wide online defamation law? [E]
6. Do we need international courts to hear such cases? [A] [R]

Ultimately, if Australia decides to move towards some form of statutory Bill of Rights, the extent to which freedom of speech, assembly, and association give way to other individual and community rights will be an important issue.

21.7 FREEDOM FROM DISCRIMINATION

In 30 September 1975 Australia ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) (Convention). Article 1 of the *Convention* defines '**racial discrimination**' as follows:

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> *… any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

The first Act guaranteeing freedom from discrimination in Australia was passed in the same year by the Commonwealth Government. Since then the Commonwealth Government has passed additional Acts prohibiting discrimination and the States and Territories have passed similar legislation.

FEDERAL ANTI-DISCRIMINATION LAWS

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Fair Work Act 2009* (Cth)
- *Workplace Gender Equality Act 2012* (Cth)

An important consequence of the *Racial Discrimination Act 1975* (Cth) was that the High Court decided that its provisions made the *Queensland Coastal Islands Declaratory Act 1985* (Qld) invalid. This prevented the Queensland Government from using the Act to extinguish any possible native title rights which existed following the *Mabo* case. Progress in the Australian community and in Australian public life and policy is best captured by the widespread acceptance of the Australian of the Year 2014, Adam Goodes.

PRACTICAL APPLICATION

AUSTRALIAN OF THE YEAR 2014: ADAM GOODES, SYDNEY SWANS FOOTBALLER, RECOGNISED FOR ANTI-RACISM ADVOCACY AND YOUTH WORK

SOURCE: ABC NEWS, ABC.NET.AU, 26 JANUARY 2014 (EXCERPTS)

Updated Sunday, 26 January 2014, 2:27pm AEDT (accessed 30/1/2014)

Aboriginal AFL player and anti-racism campaigner Adam Goodes has been named the 2014 Australian of the Year.

Prime Minister Tony Abbott presented Goodes with the award at a ceremony on the lawns outside Parliament House attended by a large crowd of dignitaries and fellow award finalists.

Goodes, a Sydney Swans legend and dual AFL premiership winner, was chosen from a diverse field of nominees that represented the scientific and medical communities, the arts and community groups.

According to the National Australia Day Council, Goodes was chosen "for his leadership and advocacy in the fight against racism both on the sporting field and within society - a stance which has won him the admiration and respect of people around Australia".

The two-time Brownlow Medallist won recognition last year for his stance against racism after a 13-year-old girl called him an "ape" during an AFL game at the MCG.

Describing the Australian of the Year award as "a huge honour" for "doing stuff that I love and [believe in]", Goodes said his early experiences with racism had shaped his outlook and spurred his interest in advocacy work.

"Whilst it has been difficult a lot of the time, it has also taught me a lot and shaped my values and what I believe in today," he said during his acceptance speech.

"I believe racism is a community issue which we all need to address and that's why racism stops with me."

"There are always two ways we can look at a situation. We can choose to get angry or not. We can choose to help others or not, or choose to be offended or not. We can keep our silence or educate ourselves and others about racism and minority populations."

Goodes urged fellow Australians to take a broader view of race relations, and also to treat "people the way you want to be treated".

"It is not just about taking responsibility for your own actions, but speaking to your mates when they take out their anger on their loved ones, minority groups, or make racist remarks," he added.

"It is about how you choose to give back and make a difference to those around you, your community or your country, that goes outside of just yourself. I believe we are all connected whether we like it or not. We are all equal and the same in so many ways. My hope is that we as a nation can break down the silence between races, break down those stereotypes of minority populations, Indigenous populations and all the other minority groups."

Describing himself as "a very proud Indigenous man from Adnyamathanha tribe" and proud to be an Australian, he said: "I'm not here to tell you what to think or how to act or raise your children. All I'm here to do is to tell you about my experiences and hope you choose to be aware of your actions and interactions so that together we can eliminate racism."

Goodes holds an esteemed place in AFL history having won two premierships with the Sydney Swans.

The 34-year-old is also a four-time All-Australian member of the Indigenous Team of the Century, and has represented Australia in the International Rules Series.

However, he is also seeking to make a difference for his people, particularly troubled youths, with whom he has worked in detention centres.

PRACTICAL APPLICATION CONTINUED ...

He runs a foundation with his cousin and former teammate Michael O'Loughlin that aims to assist young girls and boys to get an education and a job, and also promotes healthy lifestyles.

He concluded his speech by urging his compatriots to have "a great Australia Day".

1. What reasons did the National Australia Day Council give for choosing Adam Goodes as Australian of the Year 2014? [C]
2. What sporting award did Adam Goodes win as an AFL player? What abuse did he receive from a 13-year-old girl during an AFL game? What stance did he take in response to the abuse? [C] [A]
3. Outline the views attributed to Adam Goodes in the article. [C]
4. Do you agree with the views attributed to Adam Goodes or disagree with them? Give your reasons. [A] [E]
5. Give some further thought to your answer to question 4, and then outline, in your own words, a public policy response to the issues raised for lawmakers. Having decided on your policy, what laws do you think are appropriate to strike a balance between freedom of speech and freedom from discrimination in this area? [A] [E] [R]

Australians, since 1975, have been able to rely on laws which have been passed to protect them from discrimination, by complaining to the Australian Human Rights Commission or taking legal action in an appropriate court.

THE AUSTRALIAN HUMAN RIGHTS COMMISSION (AHRC)

Set up in 1986, the purpose of the AHRC is to provide a forum where persons who have been the subject of discrimination, can go to seek a remedy.

The AHRC has wide ranging powers to receive complaints where there are breaches of human rights within its jurisdiction. Its jurisdiction extends to any Commonwealth body or agency and discrimination in employment covered by the *Fair Work Act 2009* (Cth). Complaints must be made in writing to the AHRC which decides if it has the jurisdiction to deal with the matter. If it does, it investigates the matter, then reviews the complaint to see if it should be terminated or if it is suitable for conciliation. If the complaint cannot be conciliated it will be terminated by the President of the commission. A complainant may then take the matter to the Federal Court of Australia or the Federal County Court.

All the States and Territories have similar commissions with statutory powers under the State Acts to hear complaints.

There have been many instances of successful actions taken by individuals to seek redress for alleged discrimination, particularly in the workplace.

A recent court case highlights the fact that a complaint about alleged discrimination may restrict the right to freedom of expression.

CASE STUDY

Eatock v Bolt and the Herald and Weekly Times [2011] FCA 1103 (28 September 2011)

Facts: Mr Bolt wrote two articles published by the *Herald and Weekly Times* (HWT) which conveyed, according to the judge, messages (what lawyers call 'imputations'), including the following:

- there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal people but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and
- fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

Ms Eatock complains that the articles contained offensive messages about fair-skinned Aboriginal people, by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so they could access benefits that are available to Aboriginal people. She made her complaint under the *Racial Discrimination Act 1975* (Cth).

In the articles Mr Bolt identifies a number of named individuals who are said to have chosen to identify as Aboriginal, as examples of a wider 'trend' by persons who falsely claim to be fair-skinned Aboriginals. Mr Bolt named 18 individuals in the articles. Nine of these gave evidence in the trial. According to the judge, referring to the evidence of the nine:

Each of them genuinely identifies as an Aboriginal person and has done so since their childhood. Each was raised to identify as an Aboriginal person and was enculturated as an Aboriginal person. None of them 'chose' to be Aboriginal. Nor have they used their Aboriginal identity inappropriately to advance their careers. Each is entitled to regard themselves and be regarded by others as an Aboriginal person within the conventional understanding of that description.

Legal issue: Is Ms Eatock entitled to a remedy under the *Racial Discrimination Act 1975* (Cth)?

Decision: Section 18C of the *Racial Discrimination Act states:*

Offensive behaviour because of race, colour or national or ethnic origin

(1) it is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

The judge explained

Whether conduct is reasonably likely to offend, insult, humiliate or intimidate a group of people calls for an objective assessment of the likely reaction of those people. I have concluded that the assessment is to be made by reference to an ordinary reasonable member of the group of people concerned and the values and circumstances of those people. General community standards are relevant but only to an extent. Tolerance of the views of others may be expected in a multicultural society, including from those persons who are the subject of racially based conduct…

I have concluded that, for the purpose of section 18C…

Aboriginal people are a race and have common ethnic origin.

The imputations… were plainly calculated to convey a message about the race, ethnicity or colour of fair-skinned Aboriginal people, including whether those people are sufficiently of Aboriginal race, colour or ethnicity to be identifying as Aboriginal. I am satisfied that Mr Bolt both understood and intended that imputations of that kind were conveyed by the newspaper articles he wrote, I have therefore found that in writing those parts of the newspaper articles which conveyed the imputations, Mr Bolt did so including because of the race, ethnic origin or colour of fair-skinned Aboriginal people.

The judge went on to consider if the offensive conduct under s18C was exempted by s18D. Section 18D states:

Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:…

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

CASE STUDY CONTINUED ...

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

The judge decided that the offensive conduct that he found occurred was not exempted from unlawfulness by s18D (b) and (c). He summarised these reasons and stated:

The reasons for that conclusion have to do with the manner in which the articles were written, including that they contained errors of fact, distortions of the truth and inflammatory and provocative language.

In coming to that view, I have taken into account the possible degree of harm that I regard the conduct involved may have caused. Beyond the hurt and insult involved, I have also found that the conduct was reasonably likely to have an intimidatory effect on some fair-skinned Aboriginal people and in particular young Aboriginal persons or others with vulnerability in relation to their identity… In the balancing process, I have also taken into account the silencing consequences upon freedom of expression involved in the Court making a finding of contravention.

Answer the following questions about the above case.

1. How important do you think it was to the judge's decision that he made findings of fact that the articles contained 'errors of fact, distortions of the truth and inflammatory and provocative language'? Give your reasons. [A] [E]
2. If the judge had found that the evidence led in the trial of *Eatock's* case did not contain 'errors of fact, distortions of truth, and inflammatory and provocative language', do you think he would have made a decision in favour of the respondents? Give your reasons. [A] [E]
3. Does the *Racial Discrimination Act 1975* (Cth) achieve an appropriate balance between freedom of speech and protection of the individual from discrimination? If the Australian Constitution expressly guaranteed freedom of speech, would you also want it to provide a limitation on that to protect individuals from discrimination? Give your reasons. [A] [E]

21.8 RIGHT TO DEMOCRATIC REPRESENTATION

This topic has been covered in detail in **Chapter 3.** It is such a wide-ranging topic that you will find most of the following is different so you should probably read Chapter 3 again. Essentially the focus on the right to democratic representation here will be on the **right to vote.**

Ch 3

Since the *Electoral Act 1918* (Cth) was amended in 1962 to give all Aboriginal adult citizens the right to vote, there has been **universal suffrage** in Australia. That is, all adult Australian citizens have the right to vote. In fact, voting is compulsory in Australia and all persons entitled to vote must do so. Although there was a long delay before Aboriginal Australians were granted the right to vote in Federal elections, the Commonwealth Parliament originally granted the right to vote to men and women who were British subjects 21 years or older in the *Franchise Act 1902* (Cth).

When the *Australian Colonies Government Act 1850* (UK) was passed by the **British House of Commons,** making Victoria, South Australia, and Tasmania, separate States from New South Wales, this gave each of those states the power to alter their constitutions and change the voting qualifications of electors.

RESEARCH

Investigate the state voting rights of Australian citizens from the different States of Australia. You should at least investigate voting rights in your home state and in one other state. Find the answers to the following questions as part of your research.

1. At what age was an elector entitled to vote? [C] [A]
2. Were men and women treated equally? If not, when did this occur? [C] [A]
3. Were there some members of Parliament who were not elected by the voters? [C] [A]
4. Was eligibility to vote sometimes restricted to persons with certain property qualifications? If so, what were they? [C] [A]
5. In your research, have you formed any conclusions about the history of the 'right to vote' in the states of Australia? Do you think it is a history which has been progressive and forward looking or did the Australian states attempt to restrict the rights of its citizens to select their governments by universal suffrage? [R]

AUSTRALIA'S INTERNATIONAL COMMITMENT TO THE HUMAN RIGHT TO VOTE

The ICCPR, to which Australia is a signatory, states in Article 25:

Every citizen should have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and to be elected at genuine periodic elections which shall be held by ***universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and***

(c) to have access, on general terms of equality, to public service in his country.

In addition, Australia is a signatory to the *Universal Declaration* which the right to vote is set out in Article 21. The United Nations Human Rights Committee publishes General Comments to support the principles set out in the ICCPR and the *Universal Declaration*. It states that human rights are not infringed by restrictions on who can vote in an election, as long as those restrictions are based on objective and reasonable criteria.

INQUIRY FOCUS

IS THE RIGHT TO VOTE ENJOYED EQUALLY BY ALL AUSTRALIANS?

SOURCE 1: INVESTIGATING THE SCOPE OF THE INQUIRY

A preliminary examination of the sources of information about the right to vote in Australia suggests that the above inquiry is one which is appropriate. Such an inquiry is suggested by the Australian Human Rights Commission (AHRC) in an article entitled, The right to vote is not enjoyed equally by all Australians (see www.human rights.gov.au/publications/right-vote-not-enjoyed-equally-all-australians). In its opening remarks, the article states:

> *If you are young, live in a rural or remote area, have a disability, are indigenous, homeless or a prisoner serving a sentence of more than three years, your right to vote in a Federal election may be restricted as a legal or practical matter.*

SOURCE 2: THE UNDERPINNING FACTS, LAW AND CONCEPTS WHICH FORM THE INQUIRY

THE YOUNG

In Australia, all persons who are Australian citizens and have attained the age of 18 are entitled to vote. (See *Electoral Act 1918* (Cth), s 93(1). There are different views about whether or not 18 is the appropriate age to grant entitlement to young persons to vote. This issue has been debated in the Australian community, just as the proposal to lower the voting age from 21 to 18 was debated before it became law. It was the subject of a recent newspaper article in the Canberra Times which is set out in the Practical application which follows.

PRACTICAL APPLICATION

VOTING AGE DEBATE HITS AUSTRALIA

SOURCE: LARISSA NICHOLSON,THE CANBERRA TIMES, 4 APRIL 2013 (EXCERPTS)

Austria has lowered its voting age to 16, and Scotland may follow for its upcoming independence referendum.

But Australia should not follow suit, according to an ANU academic. Prof Ian McAllister said allowing 16 and 17 year olds to vote would not make young people politically engaged or create a fairer democratic system. In his study 'The Politics of Lowering the Voting Age in Australia, Evaluating the Evidence,' Mr McAllister used data from the Australian Election Study survey to evaluate some of the most commonly used arguments for giving younger people the vote. Mr McAllister said 18, or sometimes 17, was the age when young people gain the right to do many things, including marry and drive a car, so a similar rule on voting age was not inequitable. He said there was no evidence young people would become more engaged in the political process if the voting age was lowered, and young people have no more political

PRACTICAL APPLICATION CONTINUED ...

knowledge now than they did two decades ago. 'In terms of political interest there has been very little change over the past 25 to 30 years, which surprised me a bit because if you look at the expansion of tertiary education… to 30% of the population, you would expect young people to be more interested in politics, but in fact they are not,' he said.

ANU Politics and International Relations undergraduate student Amy MacKinnon, 23, disagreed.

Ms MacKinnon recently debated Professor McAllister on the subject of lowering the voting age, and she said allowing 16 year olds to vote would fight voter apathy. "I think we need to catch people at a really young age and really teach them what the consequences of the vote really is," she said. Ms MacKinnon said older people were more aware of how public policy could change their lives. "They have owned a house, they have paid rent, they have had a job, they have been taxpayers and they have really had to stand up and pay attention because it has affected them. I don't think young people are aware of how significant the debate going on in Australia is," she said.

1. Which country has lowered its voting age to 16? [C]
2. Does Prof McAllister think that the voting age should be lowered in Australia? [C]
3. What source does Prof McAllister use to evaluate the arguments for giving younger people the vote? [C]
4. What reasons does Prof McAllister give for not lowering the voting age? [C] [A]
5. What does Ms MacKinnon think that lowering the voting age would achieve? [C] [A]
6. What reasons does Ms MacKinnon give for lowering the voting age? [C] [A]
7. Using the article and any other sources you obtain, prepare a questionnaire/survey covering the issues and circulate it among the students who are 15 years and over in your grade. Collate your results, and summarise any findings you reach. Do you agree with the opinions expressed by your fellow students? Give your reasons. [A] [E]

ENROLLING TO VOTE

HYPOTHETICAL

Facts: Belinda lived with her parents in August 2007 on a small farm outside Caboolture, in Queensland. She was to turn 18 on 20 September 2007. She left school after Year 10. She was working at this time as a farm worker on her parents' farm and on a neighbour's poultry farm who raised chickens on contract to a large chicken producer. Belinda was interested in politics and wanted to vote in the upcoming Federal election which the media suggested was likely to be in November 2007. Belinda had also read the local newspaper that changes had been made to the system which meant that she was required to enrol by 8 PM on the same day as the election writ was issued. (This was in fact correct and the changes were made under the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) (primary source). Before these changes, a new voter had a 7 day 'grace period' after the official election announcement (when the 'election writ' is issued) to make sure that they were validly enrolled.

Belinda did not have a computer. She found it difficult to get time off work to obtain the enrolment form to lodge. The election was announced, and she missed the deadline.

Legal issues:

1. When Belinda was denied enrolment because she was late with her application, she wanted to challenge the decision rejecting her enrolment. Do you think Belinda would be successful if she brought such an application to court? [C] [A]
2. Do you think that the 7 day 'grace period' was a fairer arrangement for new voters? Give your reasons. [A] [E]

VOTER DISQUALIFICATION

HYPOTHETICAL

Facts: Walter was fined for driving over the speed limit. Walter did not pay the fines. A warrant was issued for his arrest. In early August 2007, Walter was jailed for 90 days because he refused to pay the fines. Walter had turned 18 in 2005 after the 2004 Federal election. He needed to enrol in order to vote. When he applied to enrol, he was refused because changes made under the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures)* Act 2006 (Cth) denied all prisoners the right to vote. Walter sought legal advice. He was informed that, prior to the changes, the *Electoral Act 1918* (Cth) prohibited persons serving a sentence of imprisonment of three years or longer from voting at a Federal election. In fact, it had always been the case that some prisoners had been denied the right to participate in the political life of the community by voting. Walter was also informed that the legislation denying all prisoners the right to vote was currently being challenged in the High Court.

Legal Issues:

1. Was Walter entitled to vote in a Federal election if it was held before the High Court decided that the amending legislation was valid? [C]
2. Should all prisoners be denied the right to vote? What if a person was in prison awaiting trial, for example, a person charged with murder who is pleading not guilty and has been refused bail? [A] [E]

In *Roach v Electoral Commissioner* [2007] HCA 43 (26 September 2007) (***Roach's case***) the legal issue which the High Court had to decide was whether or not the amending 2006 Act which **prohibited a person serving any sentence of imprisonment from voting** was invalid. The court decided that the amending legislation was indeed invalid. It also decided that the prior legislation which determined that a prisoner serving a sentence of **three years or more was not entitled to vote was valid.**

RESEARCH

Go online to austlii.edu.au and follow the prompts to access *Roach's* case. Your teacher should be able to help you to obtain copies of relevant extracts from the case for you to read and help you to understand the judgment. Answer the following questions.

1. Does the High Court consider that the Constitution of Australia protects the right to vote of prisoners? Outline the reasons it gives. [C] [A]
2. The High Court concluded that it was legitimate for some prisoners to lose the right to vote in Australia. Summarise the reasons the court gave in *Roach's* case. Do you consider these reasons to be adequate? Are any of the reasons ones which you consider should be rejected? Are there any further matters which you consider are important that should be added? [A] [R]

PERSONS WHO ARE HOMELESS, VISION IMPAIRED, MENTALLY ILL, OR HAVE AN INTELLECTUAL DISABILITY

A person who falls into any of these categories is a person with special needs who will find it difficult to enrol or difficult to vote. For example, one of the requirements to be validly enrolled as a voter is to provide a current residential address and to update your address if it changes. A homeless person clearly does not have such an address. In addition, an application to vote must satisfy evidence of identity.

Persons who are visually impaired must ask someone to fill out the ballot form for them. They do not have the opportunity of a secret ballot. Mentally ill persons whose illness prevents them from understanding what it means to vote are excluded from voting. Persons with an intellectual disability can be illiterate and find it extremely difficult to complete an application for enrolment or even to vote once enrolled.

PRACTICAL APPLICATION

ELECTORALLY ENGAGING THE HOMELESS

The Australian Electoral Commission (AEC) has published material collected by conducting a survey of homeless persons recruited from a total of nine different centres across Melbourne. A paper has been published setting out the way in which the survey was conducted including the information given to participants about their rights. A summary of the outcomes of the interviews from the paper is as follows:

Profile of Participants

- Total Number of Participants: 39 (25 male, 14 female)
- Average Age: 33 (range: 19-47)

Voting Behaviours of Participants

- Percent of regular voters: 28% - Percent of intermittent voters: 26%
- Percent of discouraged voters (have voted but are no longer interested in voting; state they will not vote again; last voted over 10 years ago): 13%
- Percent that stated they had never voted: 33%
- Total percent of non-active voters: 46%

Voting intentions of participants for 2004 Federal Election

- Percent stating desire to vote: 64%
- Percent stating desire not to vote: 27%
- Percent unsure: 9%

Enrolment of participants

- Percent enrolled (only 1 participant at correct address): 62%
- Percent not enrolled: 36%

SOURCE: HTTP://AEC.GOV.AU/ABOUT_AEC/RESEARCH/ PAPER6/APP01.HTM "RESEARCH REPORT 6-ELECTORALLY ENGAGING THE HOMELESS: APPENDIX 1".

Information about these issues is available on the website of the Australian electoral commission at www.arc.gov.au. There is also a publication on the website of the AHRC entitled "The right to vote is not enjoyed equally by all Australians" (seehttp:// human rights.gov.au/publications/right-vote not enjoyed- equally-all Australians).

1. Where was the survey of homeless people conducted? [C]
2. Describe the number and age of participants? [C]
3. Do homeless people want to vote? [C]
4. Are many homeless who want to vote, not enrolled? [C]
5. Why is it important to survey homeless people about voting issues? [E]

ON REFLECTION

1. Are there other issues or information relevant to this inquiry which need to be addressed to ensure that the right to vote is enjoyed equally by all Australians? [S] [E]
2. Are the current laws sufficient to ensure that all Australians enjoy an equal right to vote? What additional laws, if any, do you think are necessary? [A] [E]

21.9 RIGHT TO FREEDOM OF RELIGION

DEFINITION

In *The Church of the New Face v Commissioner for Pay-roll Tax* (Vic)(1983) 154 CLR 116 *(the Scientology* case), Mason ACJ and Brennan J proposed the following criteria for the existence of religion:

The criteria of religion are twofold: first belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion .Those criteria may vary comparative of importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.

In the above case the High Court decided that the Church of the New Face, whose faith was based on Scientology, was a religion and therefore could be exempt from payroll tax, despite two earlier decisions to the contrary.

WHAT DO YOU THINK?

Can you think of any religion which would be disqualified by this definition? If so, explain how it is disqualified. [A] [E]

The *Australian Constitution* provides, in s116, that:

> *The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office of public trust under the Commonwealth.*

The inclusion of the right to religious freedom in the *Australian Constitution* provides this right with constitutional protection from statutory encroachment. There are four prohibitions contained in s116-the ***'establishment', 'observance', 'free exercise'*** and ***'religious test'*** clauses respectively. It stops the Commonwealth from passing laws that would establish a religion or prohibit the free exercise of religion, but **does not explicitly create a personal or individual right to religious freedom.**

The *Scientology* case shows that the High Court has given a wide interpretation to the meaning of religion, which will encourage the various religions that exist in Australia to seek out the court when they want to qualify as religious organisations for some purpose. Otherwise, of the three other aspects to the constitutional provision, two have been considered by the High Court.

ESTABLISHMENT CLAUSE

CASE STUDY

Attorney-General (Vic) v Commonwealth (1981) 146 CLR

Facts: An organisation called Defence of Government Schools (DOGS) challenged federal funding of non-government schools operated by religious organisations.

Legal issue: The question before the High Court was whether or not the funding provided by the Federal Government was establishing a religion.

Decision: The High Court held that the funding did not contravene the establishment provision in s116 when the funding was for ordinary education purposes.

1. Compare this case to the *Williams* case outlined in Chapter 14. Does it surprise you that Commonwealth funding is used to support church schools? Give your reasons. [A] [E]
2. Write a short scenario with a set of facts which you consider would attract the prohibition of the '*establishment*' provision in s116. [A] [R]

FREE EXERCISE CLAUSE

CASE STUDY

Kruger and Bray v Commonwealth (1997) 146 ALR 126 (Kruger's case)

Facts: A number of Aboriginal plaintiffs challenged the constitutionality of a Northern Territory law (Ordinance) giving power to the government officials to remove Aboriginal children from their homes. Commonwealth Human Rights and Equal Opportunity Commission concluded a comprehensive investigation into the history of the now-defunct 'removals policy 'and its past and continuing effects. The report severely condemned virtually every aspect of the removals policy. The policy at the time it was implemented, was to assimilate Aborigines into the Australian society, by removing them from their parents, their homes, and indirectly, their language and culture. The Commonwealth Government failed to implement many of the Report's recommendations. The challenge assumed considerable symbolic significance in the circumstances.

The legislation challenged was an Ordinance enacted under s 122 of the Constitution which gives the Federal Government 'power to make laws for the government of territories '. The Ordinance was repealed in 1953. If the plaintiffs could establish its contemporaneous illegality, the Ordinance would provide no authority for the actions taken under it. It would open the door for general law actions against persons who had acted under the purported authority of the Ordinance.

One of the plaintiff's claims was that the impugned law prohibited the free exercise Aboriginal religious beliefs, by separating persons from their Aboriginal culture, in contravention of s116 of the Constitution.

Legal issue: Was the Ordinance in contravention of s116 of the Constitution because it prevented the 'stolen generations' from the free exercise of their religious practices?

Decision: The majority of the Judges of the High Court sitting in this constitutional hearing confirmed the earlier position of the court that s116 was directed at the making of the law, rather than the administration of the law. Therefore, a noxious anti-religious 'purpose' had to be apparent from the face of the statute. Of course, there were no words in the Ordinance, or legislation under which it was established that stated any anti-religious purpose, despite the policy undoubtedly having that effect. The claim failed.

1. How would you describe the view the majority took of s116? Is it a 'narrow' view or a 'wide' view? Explain your reasoning? [A] [E]

PRACTICAL APPLICATION

Article 18.1

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.

SOURCE: *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1966)

1. Set out in your own words what you understand **Article 18.1** to mean. Explain your answer. [C] [A]
2. Does your answer include the possibility that the legislation referred to in *Kruger's* case infringes the human right promoted by **Article 18.1**? Do you consider that in similar cases the High Court should take into account **Article 18.1** of the ICCPR? [A] [E] [R]

REVIEW

1. Outline the most important provisions contained in the *International Covenant on Civil and Rights* (1966). [C]
2. Describe and explain the main features which ensure a fair trial in Australian civil proceedings? Summarise them briefly. [C] [A]
3. Describe and explain the additional features to those found in civil proceedings which ensure a fair trial in criminal proceedings? Summarise them briefly. [C] [A]
4. What is 'Deidre's law' and why is it important? [C] [A]
5. Describe who has the right to vote in Australia. Explain why the right to vote is fundamental to our representative democracy. [C] [A]
6. Describe and explain what prevents some people from exercising their right to vote? [C] [A]
7. Outline the reasons in the Finkelstein report for establishing a Media Council. [C] [A]
8. What are the arguments for and against establishing a Media Council in Australia? Is it still necessary to do so given the existence of the current Australian Press Council? [A] [E]
9. Broadly define what is meant by freedom from discrimination in Australia. [C] [A]

TOPIC 3: HUMAN RIGHTS IN AUSTRALIAN CONTEXTS

CHAPTER 22: RESOLVING HUMAN RIGHTS COMPLAINTS

FOCUS SUBJECT MATTER

22.1 INTRODUCTION

22.2 LOBBYING FOR HUMAN RIGHTS

22.3 COURT ACTION INVOLVING HUMAN RIGHTS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- that there are many legal processes available to citizens to resolve human rights complaints in Australia;
- these processes can include protesting, lobbying, lodging complaints and taking court action; and
- these processes can have benefits and limitations.

22.1 INTRODUCTION

Throughout your study into human rights, you would have realised that the Federal, State and Territory Governments breach their human rights obligations from time to time. When this occurs, **citizens are able to utilise many different legal processes to resolve complaints**. Some of these methods will be familiar to you, as we have examined them previously in earlier chapters on human rights and in other topics, such as law reform. They include:

- carrying out protesting or lobbying campaigns to draw the attention of the international human rights community or the Australian public to an issue occurring in Australia (which you will soon see in the 17 year old issue);
- lodging a complaint with the Australian Human Rights Commission (AHRC), Queensland Human Rights Commission (QHRC) or a relevant United Nations Committee (which you saw with the *Toonan* case; or
- taking court action in a Federal or State tribunal or court (which you saw in the *Lyons* and *Shama* cases.

Ch 14.2
Ch 17.2
Ch 17.7

We are about to examine two of the legal processes listed above, focussing on the role the Youth Affairs Network Queensland (YANQ) and Youth Advocacy Centre (YAC) had in protesting and lobbying for the Queensland Government to change a law that allowed 17 year old persons to be treated as an adult in the criminal justice system. We will then look at a number of cases that involve individuals taking human rights complaints to a court or tribunal. While you are examining these legal processes, begin to think about the benefits and limitations of each process and how effective they are achieving just and equitable outcomes.

22.2 LOBBYING FOR HUMAN RIGHTS

The concepts of lobbying and protesting can be quite broad and can have both positive and negative implications. If done ethically, it can lead to positive outcomes for society, but if a persons' motivations are to further their own interests it can have negative impacts. For this section we are examining 'ethical lobbying'. Ethical lobbying is viewed by the Queensland Integrity Commissioner (QIC) as being:

> *…a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest to the government and opposition and, in doing so, improve outcomes for the community as a whole.*
>
> SOURCE: QUEENSLAND INTEGRITY COMMISSIONER (INTEGRITY.QLD.GOV) 2019

When you examined why laws change, the influence of individuals and the media was sometimes raised as a key driving force to law being created, amended or repealed. To understand how citizen's use lobbying and protesting can resolve human rights complaints, we will use the inquiry approach.

INQUIRY FOCUS

WAS LOBBYING EFFECTIVE IN RESOLVING HUMAN RIGHTS CONCERNS SURROUNDING 17 YEAR OLDS BEING HELD IN ADULT PRISONS?

BACKGROUND: COMPREHENDING LEGAL CONCEPTS, PRINCIPLES AND PROCESSES

Ch 16.5

In a human rights context the difference between a child and an adult is found by reading the *Convention on the Rights of the Child* (1990) Article 1, which states:

> *For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*

Two years after Australia ratified the *Convention*, Queensland passed the *Juvenile Justice Act* 1992 (Qld). **Parliamentary debates at the time demonstrate that there was some concern about whether the law would allow 17 year olds to be held in an adult prison.**

But, before you examine the section of the relevant law as it was introduced in 1992, you may remember that Australia filed a reservation to Article 37(c), which requires that children not be detained with adults. **Reservations are statements that allow a State to exclude or modify the legal effect of a certain provision (*Vienna Convention on the Law of Treaties*, Article 2(1)(d))— it limits the commitments of a State.** The key reason at the time given to justify this reservation was that Australia's geography and demography sometimes hamper efforts to keep children and adults separate. Successive UN Committees have recommended Australia withdraw this reservation, but it is yet to do so.

PRACTICAL APPLICATION

JUVENILE JUSTICE ACT 1992 (QLD)

CHILD'S AGE REGULATION

SECTION 6

(1) The Governor in Council may, by regulation, fix a day after which a person will be a child for the purposes of this Act if the person has not turned 18 years.

(2) A person of 17 years who commits an offence before the commencement of the regulation will not be taken, after the commencement, to have committed the offence as a child in a subsequent proceeding for the offence.

(3) A court that sentences a person to whom subsection (2) applies for the offence mentioned in the subsection must have regard to the sentence that might have been imposed if the person were sentenced as a child.

(4) The court cannot order the person -

PRACTICAL APPLICATION CONTINUED...

(a) to serve a term of imprisonment longer than the period of detention that the court could have imposed on the person if sentenced as a child; or

(b) to pay any amount by way of fine, restitution or compensation greater than that which the court could have ordered the person to pay if sentenced as a child.

(5) Subsection (3) applies even though an adult would otherwise be liable to a heavier penalty which by operation of law could not be reduced.

CHILDRENS COURT MAY ORDER TRANSFER TO PRISON

SECTION 211

(1) Subject to subsection (2), a person serving a period of detention in a detention centre or the chief executive may apply to a Childrens Court Judge for an order that the unserved portion of the period of detention be served as a term of imprisonment.

(2) Subsection (1) only applies if -

(a) the person is 18 or more; or

(b) the person is 17 or more and has been sentenced to serve a term of imprisonment.

1. Applying this Act how would you define a 'child' and an 'adult'? [C] [A]
2. Imagine you were the Attorney-General for the State of Queensland in 1992, how would you respond to this question: 'Can a 17 year old serve a term of imprisonment in an adult prison in Queensland?' [E]
3. Does this Act breach the *Convention on the Rights of the Child* (1990) Article 1? Why or why not? [E]

ANALYSE LEGAL ISSUES

In 1997 a non-government organisation sector report on Australia's First Report concerning the *Convention on the Rights of the Child* (1990) noted that, 'in some jurisdictions 16, 17 and 18 year old offenders are classed as adults.' In that same year, the Australian Law Reform Commission (ALRC) recommended that, 'the age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all Australian jurisdictions…All States and Territories that have not already done so should legislate to this effect.' Over the next thirteen years, **Queensland continued to come under constant criticism from both local and international institutions about this law.**

PRACTICAL APPLICATION

2002 — The *Juvenile Justice Act 1992* (Qld) is amended, but children aged 17 years old or more can still be placed in an adult prison.

2003 — The Youth Justice Conference in Brisbane recommends that the Act should be amended to increase the age of a child to 18 years. Judge O'Brien, President, Children's Court of Queensland, states, 'I believe real concerns involved with the potential incarceration of 17 year olds with more seasoned and mature adult offenders. The United Nations Convention on the Rights of the Child considers a person as a child until he/she reaches the age of 18 and other Australian States have adopted a similar approach. The recommendation deserves careful consideration' (Children's Court of Queensland Annual Report, 2002-03, p. 5-6).

2005 — The Committee on the Rights of the Child recommends Queensland remove 17 year olds from the adult justice system.

2006 — The Anti-Discrimination Commission recommends that Queensland should change the law to ensure that the age at which a child reaches adulthood in criminal law should be 18.

2010 — The Commission for Children and Young People releases a position paper asking for all persons under the age of 18 years to be treated as juveniles under the law.

SOURCE: YOUTH AFFAIRS NETWORK QLD (YAC.NET.AU) JULY 2012, PG. 5-7 (EXCERPTS)

The Youth Advocacy Centre (YAC) Chair Damian Atkinson reflected on this period writing:

YAC lobbied successive governments to make good on the promise. Janet Wight began pressing for the reform about three years after the Act was passed, and the campaign was continued by Anne McMillan, Gwenn Murray, Damian Bartholomew, Cristy Dieckmann, Paul Spooner, Rosslyn Munro and Craig Mackie to name a few. Political inaction meant that 17 year olds were deprived of the benefits of the children's courts (with their strong focus on diversion and rehabilitation) and, if those young people were given a custodial sentence or even just placed on remand, they were housed with adult prisoners. Wonderful opportunities were lost; unspeakable things happened in their place.

Soon after the 2015 State Election, I arranged to meet with the relevant Ministers in the new Government, along with Damian B., our longest serving legal caseworker. We pointed out that this particular reform was ALP policy and we presented letters of support from community leaders. It became very apparent to us, however, that there were no immediate plans to make the change.

SOURCE: YAC (YAC.NET.AU) 2016

1. What stakeholders were asking for the law to change? What were some of their viewpoints on the law? [C]
2. What did the Youth Advocacy Centre (YAC) do in an attempt to amend the law? [C]
3. According to Youth Advocacy Centre (YAC) Chair Damian Atkinson what were the implications of this law? [A]
4. Why do you think the Government did not wish to change the law? [E]

RESEARCH

In 2012 YAC launched 'The Castaway Campaign' (castawaycampaign.wordpress.com). Engage with this campaign and answer the following questions:

1. What was the aim of the campaign? [C] [S]
2. In what ways could members of the community become involved in the campaign? [C] [S]
3. What strategies and methods did YAC use to make the public aware of the campaign and the legal issues involved? Do you think they were effective? [C] [S] [E]

By now it should be clear to you that despite lobbying from various stakeholders and various recommendations from human rights and legal bodies, the law remained unchanged. YAC believed it needed to share the story of a 17 year old being imprisoned with adults to highlight this issue to a wider audience.

PRACTICAL APPLICATION

INCIDENT REPORT FROM BRISBANE CORRECTIONAL CENTRE SHINES LIGHT ON 'SPIT HOOD' CONTROVERSY

SOURCE: ROHAN SMITH, (NEWS.COM.AU), 30 AUGUST 2016 (EXCERPTS)

JARROD Clayton was 17 years old when, inside an adult prison, he was subjected to treatment outlawed in every Australian state and territory.

Footage sent to *The Courier Mail* on Tuesday morning showed the Aboriginal inmate surrounded by seven guards at the Brisbane Correctional Centre. He was placed in a "spit mask" and a body restraint and made to sit in the corner of an empty cell for an hour.

The images were captured on a CCTV camera inside cell 24 S3 on the afternoon of February 13, 2013. They offer a bleak insight into conditions within the centre which, on Tuesday, were roundly criticised by human rights groups and experts.

Professor Kerry Carrington, head of Queensland University of Technology's School of Justice, told news.com.au she was appalled at what she saw in the footage.

"It's a breach of the rights of a child," she said.

Prof Carrington said the inclination to automatically lock young people up — particularly young indigenous people — costs a huge amount of money and leads to poor outcomes.

"To treat a young person like that, you're traumatising them. You're setting them up to fail, all the research suggests that the far better way to deter reoffending is to treat people with respect and dignity.

Queensland's corrective services minister Bill Byrne told parliament on Tuesday the hood — or helmet — was used to "protect a prisoner from injuring themselves" (but) "this government does not tolerate the mistreatment of prisoners."

1. What did the footage obtained by *The Courier Mail* show? [C]
2. Professor Kerry Carrington states that the footage demonstrates a 'breach of the rights of a child'. Locate a copy of the *Convention on the Rights of the Child* (1990). What articles may Queensland be in breach of? [C] [S] [A]
3. According to the article what consequences may placing 17 year olds in adult prisons have? [A]
4. What reasons are given by the Government Minister to justify the use of the 'hood'? Do you believe these reasons justify the actions of corrective services? Why or why not? [C] [A] [E]

EVALUATE LEGAL SITUATIONS

Around a week after the footage was aired, the Hon Annastacia Palaszczuk (Premier of Queensland and Minister for the Arts), the Hon Yvette D'Ath (Attorney-General and Minister for Justice, Training and Skills) and the Hon Bill Byrne (Minister for Police, Fire and Emergency Services and Minister for Corrective Services) issued a joint statement:

The Palaszczuk Government will introduce legislation to Parliament next week to end the practice of treating 17-year-olds as adults in Queensland's justice system.

Premier Annastacia Palaszczuk said the move would tackle a number of complex issues that successive previous governments have been unwilling to address for more than two decades…

'Next week, the Attorney will introduce legislation into the Parliament to right this wrong. Once the Bill has gone through Committee, and is then brought back for a vote later this year and passed, we aim to have all 17-year-olds removed from adult prisons within 12 months.'

SOURCE: QUEENSLAND CABINET, (STATEMENTS.QLD.GOV) 7 SEPTEMBER 2016 (EXCERPTS)

PRACTICAL APPLICATION

When a law is being considered by parliament, people from the community are invited to make submissions about whether or not they support the proposed law.

Imagine it is 2016. Make a decision about whether or not you support amending the law announced by the Palaszczuk Government. Write a submission to the Queensland Government justifying your decision. [E] [R]

ON REFLECTION

THIS LAW WAS CHANGED BECAUSE OF THE EFFORTS OF VARIOUS STAKEHOLDERS, SUCH AS YAC. WHAT CAN YOU LEARN FROM THEIR SUCCESSFUL LOBBYING CAMPAIGN? [R]

22.3 COURT ACTION INVOLVING HUMAN RIGHTS

Taking legal action is another way citizens can resolve human rights complaints in Australia. However, going to court is often used as a last resort. The relevant Act of Parliament that applies to a specific human rights dispute will create provisions that allow the Act to be enforced, set timeframes and state how a breach can be compensated. The Act will also state which statutory body, court or tribunal can decide the outcome of the complaint. These provisions will often encourage the use of alternative dispute resolution before the complainant files a claim in a court. We have already examined a range of cases involving human rights in previous chapters, but we will examine a few more cases to help you understand how the legal process can protect our human rights.

CASE STUDY

McBain v Victoria [2000] FCA 1009

Facts: Dr McBain was a Melbourne doctor specialising in reproductive technology. He wished to provide infertility treatment, specifically in-vitro fertilisation using donor sperm, to Ms Meldrum, a single woman. The *Infertility Treatment Act 1995* (VIC) s8(1) provided that to be eligible to undergo infertility treatment a women must be either married or living in a de-facto relationship.

Legal issue: Is the Victorian Act inconsistent with the *Sex Discrimination Act 1984* (Cth)? Is infertility treatment considered a 'service' within the *Sex Discrimination Act 1984* (Cth) s22?

Decision: The Federal Court of Australia found that infertility treatment is considered to be a 'service' within the meaning of *Sex Discrimination Act 1984* (Cth) s22. Justice Sundberg decided that the requirement for women to be married or in a de-facto relationship to receive infertility treatment unlawfully discriminated against women on the basis of their marital status, in breach of the *Sex Discrimination Act 1984* (Cth). The *Infertility Treatment Act 1995* (VIC) is therefore inconsistent with Commonwealth law, and is invalid to the extent of its inconsistency (*Commonwealth of Australia Constitution Act 1901* (Cth) s109).

1. What international treaty concerns discrimination on the basis of sex? [C]
2. Who bought this case to the Federal Court of Australia? Why do you think they decided to take legal action? [C] [A]
3. What word required interpretation in this decision? [C]
4. How do you think this decision impacted women in Victoria? Has any law reform occurred in this area after this decision was made? You may need to complete some reasearch to answer this question. [S] [A] [E]

CASE STUDY

ZIL v Queensland Police Service [2019] QCAT 79 (27 March 2019)

Facts: Senior Constable Neil Punchard accessed the QPrime records of the Queensland Police Service (QPS) without lawful authority to find out ZIL's residential address. He did so at the request of a childhood friend. At the time there was a domestic violence order in place to protect ZIL and her children from her estranged husband-Senior Constable Punchard's friend. ZIL alleges her ex-husband used this information to further breach domestic violence orders.

Legal issue: Did Senior Constable's Punchard's actions breach the QPS's obligations under the *Information Privacy Act 2009* (Qld) and the *Information Privacy Principles* (IPPs) 4, 9, 10 and 11? Did the QPS take all reasonable steps to prevent unauthorised use or disclosure of ZIL's personal information?

Decision: The QPS had no systematic auditing procedures to check whether people's accessing to QPrime was lawful. For this reason, the QPS did not satisfy the tribunal that they had taken all reasonable steps to prevent unauthorised use or disclosure of personal information. The QPS is under an obligation to ensure information is not used for another purpose than the purpose for which it was obtained. The tribunal found the QPS breached *Information Privacy Principles* (IPPs) 4 and 10.

Note: This decision is being appealed (shown below).

CASE STUDY CONTINUED...

'GUT-WRENCHING': QUEENSLAND POLICE TRY TO BLOCK COMPENSATION FOR DOMESTIC VIOLENCE VICTIM

SOURCE: BEN SMEE, THE GUARDIAN (THEGUARDIAN.COM.AU) 29 APRIL 2019 (EXCERPT)

The Queensland police service has launched another attempt to block compensation to a domestic violence victim, who was forced into hiding after her details were accessed by a senior constable and leaked to her abusive former partner.

Julie* won a landmark breach of privacy case against the police in the Queensland Civil and Administrative Tribunal (QCAT) last month. The ruling would have entitled Julie to compensation, including for the cost of having to relocate her family, capped at $100,000.

On Friday, the state government's legal office, Crown Law, filed an appeal against the tribunal decision, likely dragging the case through another complex hearing.

"This appeal is gut-wrenching because I've worked so hard to fight for justice," Julie told Guardian Australia. "This just adds another devastating level to the abuse and the Queensland police service failing to accept responsibility. When will this end?"

The Queensland government has already come under intense criticism for refusing to settle Julie's compensation claim in the first instance, instead choosing to fight the breach of privacy case in QCAT.

Throughout the case, police have not disputed that Julie's privacy was breached. Instead they claimed police were not responsible for that breach.

Crown Law claims, in the application to appeal, that the tribunal erred on several grounds, including by taking into account that Julie was a domestic violence victim.

1. Identify the court or tribunal that heard this case. [C]
2. Identify the Act that protects Queenslanders' right to privacy. Research what international treaty contains this right. [C] [S]
3. The applicant in this case represented herself. Outline one benefit and one limitation of this approach. [A]
4. What grounds of appeal are being used by Crown Law? How is this impacting the complaint? [C]
5. The *Guardian Australia* found that most cases involving inappropriate access to QPrime result in no punishment. Why do you think this is? [E]
6. Do you believe the QPS's actions were in line with community expectations of how its law enforcement agency deals with citizens' protection and privacy? Explain your point of view. [E]

CASE STUDY

Sinclair v Mining Warden at Maryborough (1974-5) 132 CLR 473

Facts: On 20 December 1972 Queensland Titanium Mines Pty Ltd lodged with the Warden for the Mining District of Maryborough applications for mining leases over some 1,100 acres on Fraser Island. John Sinclair, on his own behalf and on behalf of the Fraser Island Defence Organisation (FIDO) opposed the applications, on the ground that for environmental reasons it was not in the public interest that they be granted. At the hearing of the application and the objections before the Warden it appeared that there were minerals under only 60 acres of the land covered by the application. John Sinclair and FIDO adduced extensive expert evidence of the damage

CASE STUDY CONINTUED...

to the environment that mining was likely to cause. The Warden recommended that the applications be granted. In the course of this decision he stated that the objectors (Sinclair and FIDO) represented 'the views of a section of the public' and that he was unable to conclude from the evidence that 'the interests of the public as a whole' would be prejudicially affected by the grants. He further stated that unless it could be shown that it was against the public interest as a whole for the leases to be granted, the applicant was entitled to a recommendation that the leases be granted.

Legal issue: Should the High Court review the Mining Warden's decision because there was an error of law? It was alleged by the appellant (Sinclair) that the Warden had made an error of law by deciding that it was impossible for him to conclude that any interests of the public would be prejudicially affected because of the limited interest of the objectors.

Decision: The whole of the High Court held that the Warden had failed to hear the applications and objections according to law. The court said that the Warden had erred by holding that the limited interests of Sinclair and FIDO made it impossible for him to conclude that any interest of the public would be prejudicially affected by the granting of the leases. In addition, the court held that the Warden had failed to appreciate, that quite apart from any objections that might be made to an application, it was essential that there should be evidence that would warrant his recommendation. The court held that an applicant for a mining lease is not entitled to a recommendation for a licence simply by observing the formalities of an application.

A writ of mandamus (stopping the Warden from granting the licence) was granted to the appellant, Sinclair.

RESEARCH

The key figure in FIDO was Dr John Sinclair AO. He had lived in Maryborough most of his life and was employed by the Department of Education. He had strong personal links to Fraser Island. In 1971 he was FIDO's first President. He died, aged 79, in early 2019.

Write a brief assessment of John Sinclair's role in protecting the environment of Fraser Island, paying particular attention to the legal processes he used to achieve just and equitable outcomes. [C] [S] [E]

REVIEW

1. Identify the different types of legal processes available to citizens to resolve human rights complaints in Australia, using examples to illustrate your response. [C]
2. Identify the different stakeholders that were involved in amending the *Juvenile Justice Act 1992* (Qld) to allow 17 year olds to be kept in juvenile detention instead of adult prison. How long did it take for the law to be changed? [C]
3. Taking court action to resolve a human rights complaint is a big decision. Analyse the benefits and limitations of this approach, using the case study *ZIL v Queensland Police Service* [2019] QCAT 79 (27 March 2019). [A]

TOPIC 3: HUMAN RIGHTS IN AUSTRALIAN CONTEXTS

CHAPTER 23: WHAT ROLE DO LEGAL AND SPECIAL INTEREST GROUPS PLAY IN PROTECTING AND ADVOCATING FOR HUMAN RIGHTS IN AUSTRALIA?

FOCUS SUBJECT MATTER

23.1 WHO PROTECTS AND ADVOCATES FOR HUMAN RIGHTS IN AUSTRALIA?

23.2 STATUTORY BODIES

23.3 LEGAL ORGANISATIONS AND SPECIAL INTEREST GROUPS

23.4 MEDIA

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- that various government and non-government groups have a role in protecting and advocating human rights in Australia; and
- the key motivation behind the work of these groups is to resolve human rights issues or improve access to human rights in Australia and Queensland.

23.1 WHO PROTECTS AND ADVOCATES FOR HUMAN RIGHTS IN AUSTRALIA?

The **key concepts of accountability and transparency** that we explored earlier in the context of governance **also apply to human rights** - as in order to ensure Australia fulfils its obligations there needs to be bodies, organisations or individuals that monitor our compliance and speak out against the Government if a citizen's human rights have been breached.

In earlier chapters, you learnt that many key treaties (such as the *International Covenant on Civil and Political Rights* (1966) (ICCPR) or the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW) contain articles that provide a reporting schedule for State Parties and give authority to a committee to monitor compliance. These mechanisms hold State Parties to account for their actions. In addition, the publishing of reports, concluding observations and other comments assist with maintaining a sense of openness and transparency.

However, these are not the only means the international human rights community use to make sure the Australian Government is protecting its citizens' human rights. In the previous chapter, you learnt that Australian citizens can lobby, protest, lodge complaints and take court action to resolve human rights complaints and make the Government respond to alleged breaches of human rights. **In this chapter, we now turn to another group of legal and special interest organisations to understand and investigate their role in protecting and advocating for human rights issues in Australia**. Some of these will be very familiar to you (such as the Australian Human Rights Commission or the Australian Law Reform Commission), but there are countless others. The ones we will specifically examine in this chapter are:

- Council for Civil Liberties;
- Australian Human Rights Law Centre;
- Australian Lawyers for Human Rights;
- Amnesty International (Australia); and
- International Federation of Red Cross and Red Crescent Society.

The reason you need to examine the role of these groups is to **develop a complete understanding and appreciation of the various government and non-government organisations, processes and individuals that** advocate for and protect human rights in Australia. This will become essential when you are asked to evaluate whether Australian human rights law is effective and supports just and fair outcomes.

23.2 STATUTORY BODIES

WHAT IS A STATUTORY BODY?

A statutory authority is a body set up by Parliament through the passing of specific legislation. These bodies have the ability to exercise specific powers.

PRACTICAL APPLICATION

RESPECT INDEPENDENT STATUTORY BODIES AS CENTRAL TO DEMOCRACY

SOURCE: DANIELLE CELERMAJER, THE CONVERSATION (THECONVERSATION.COM) 16 FEBRUARY 2015 (EXCERPTS)

In his incautious remarks about the Australian Human Rights Commission's (AHRC) report into children in detention, Prime Minister Tony Abbott has shown a disregard for basic institutions of democracy that should worry all Australians.

Last week, Abbott decried the report as a "blatantly partisan politicised exercise" and said the AHRC "ought to be ashamed of itself".

PRACTICAL APPLICATION CONTINUED...

Undeniably, Australians hold a wide range of views about the treatment of asylum seekers. Many such views run deeply contrary to the positions advocated by human rights organisations. This fact has been deeply distressing for many other Australians who believe that we have moral and legal obligations to respect the rights of those seeking asylum.

However, what transcends such disagreements is a shared commitment among all Australians to our democratic system and with this to the institutions and practices that constitute and sustain a healthy democracy. These include universal suffrage, respect for the rule of law and the separation of powers.

To avoid the perils that we know flow from the concentration of power, we distribute power across different bodies. Modern well-functioning democracies depend upon the proper operation of independent statutory authorities. These agencies, such as the AHRC, the Australian Electoral Commission and the Office of the Australian Information Commissioner (OAIC), are established by laws passed by our elected representatives to ensure that all arms of government respect the full range of laws.

1. What criticisms did then Prime Minister Tony Abbott level at the Australian Human Rights Commission (AHRC)? [C]
2. What examples of statutory bodies are within this article? [C]
3. How are statutory bodies created? [C]
4. Why does the author believe statutory bodies are important? Do you agree with this point of view? Why or why not? [C] [E]

AUSTRALIAN HUMAN RIGHTS COMMISSION (AHRC)

We protect and promote human rights in Australia and internationally

According to the Attorney-General's Department, the Australian Human Rights Commission (AHRC) is 'Australia's national human rights institution.' The AHRC is an independent statutory organisation. It was established by a federal Act of Parliament, the *Australian Human Rights Commission Act 1986* (Cth). The AHRC duties are outlined in s10A:

AUSTRALIAN HUMAN RIGHTS COMMISSION ACT 1986 (CTH) SECTION 10A: DUTIES OF COMMISSION

(1) It is the duty of the Commission to ensure that the functions of the Commission under this or any other Act are performed:

(a) with regard for:

(i) the indivisibility and universality of human rights; and

(ii) the principle that every person is free and equal in dignity and rights; and

(b) efficiently and with the greatest possible benefit to the people of Australia.

(2) Nothing in this section imposes a duty on the Commission that is enforceable by proceedings in a court.

The AHRC is made up of a President (s8A), currently Emeritus Professor Rosalind Croucher AM, and seven commissioners. Each Commissioner targets a specific area of discrimination, human rights or social justice - there is an Aboriginal and Torres Strait Islander Social Justice Commissioner (s46B), Age Discrimination Commissioner, National Children's Commissioner (s46MC), Disability Discrimination Commissioner, Human Rights Commissioner (s8B), Race Discrimination Commissioner and Sex Discrimination Commissioner.

The AHRC has a range of duties, functions and powers, including undertaking inquiries, intervening in court proceedings, conducting education programs and developing public awareness campaigns. One of its functions is to inquire into and attempt to conciliate alleged infringements under the:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)

If conciliation is unsuccessful, in some circumstances, a complainant may decide to commence court proceedings in the Federal Court of Australia or the Federal Circuit Court, which has jurisdiction to hear discrimination matters (49B).

We will now investigate a specific area it oversees, the area of sex discrimination.

INQUIRY FOCUS

WHAT IS THE ROLE OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION (AHRC) IN THE AREA OF SEXUAL DISCRIMINATION AND HARASSMENT?

PRACTICAL APPLICATION

Table 1: Complaints concerning the *Sex Discrimination Act 1984* (Cth) over the past five years

2013-14	2014-15	2015-16	2016-17	2017-18
474	453	409	465	552

Table 2: *Sex Discrimination Act 1984* (Cth) - Complaints received by complainant category 2017-18

Complainant category	Number	Percentage
Female	380	68%
Male	160	29%
Intersex	3	<1%
Other category	9	2%

PRACTICAL APPLICATION CONTINUED...

Table 3: *Sex Discrimination Act 1984* (Cth) - Complaints received by ground 2017-18

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%

SOURCE: AUSTRALIAN HUMAN RIGHTS COMMISSION, 2017-18 COMPLAINT STATISTICS, PG: 9, 15-16.

1. What year received the highest and lowest number of complaints? [A]
2. How would you describe the trend of complaints over the last five years? [A]
3. Were females or males more likely to file a complaint? Why do you think this is the case? [A]
4. Which ground received the most complaints? [A]
5. Did you think any grounds of complaint would be higher than they were? Why or why not? [A] [E]

PRACTICAL APPLICATION

WORLD-FIRST NATIONAL INQUIRY INTO WORKPLACE SEXUAL HARASSMENT

SOURCE: AUSTRALIAN HUMAN RIGHTS COMMISSSION, NEWS RELEASE (HUMANRIGHTS.GOV.AU) 20 JUNE 2018 (EXCERPTS)

The Sex Discrimination Commissioner Kate Jenkins has announced a national inquiry into sexual harassment in Australian workplaces.

"I am delighted to announce that the Australian Human Rights Commission will be undertaking this National Inquiry into sexual harassment in Australian workplaces, and I commend the Australian Government on their decision to fund this work," Commissioner Jenkins said.

PRACTICAL APPLICATION CONTINUED...

The 12-month inquiry will consider the economic impact of sexual harassment, the drivers of these behaviours and the adequacy of the existing legal framework.

It will speak with individuals and organisations from all over Australia about their experiences.

It will also identify examples of existing good practice, and make recommendations for change, providing a way forward for preventing sexual harassment in the workplace.

1. What did Sex Discrimination Commissioner Kate Jenkins announce in June 2018? [C]
2. What will the 12-month inquiry consider? [C]
3. How will the inquiry formulate recommendations? [C]

EVERYONE'S BUSINESS: 2018 SEXUAL HARASSMENT SURVEY

SOURCE: AUSTRALIAN HUMAN RIGHTS COMMISSION, NEWS (HUMANRIGHTS.GOV.AU) 12 SEPTEMBER 2018 (EXCERPT)

Sex Discrimination Commissioner Kate Jenkins has released new figures today that show sexual harassment continues to be a major problem in Australian workplaces.

"One in three workers in Australia said that they had been sexually harassed at work over the last five years, compared with one in five from our 2012 survey and one in ten in 2003.

"What is clear is that this conduct begins the moment people enter the workplace, and that harassers prey on those less powerful than them.

The Commission's survey of 10,000 people was undertaken by Roy Morgan Research.

It showed that sexual harassment continues to affect both men and women.

"We found that 39% of Australian women and 26% of Australian men told us they have been sexually harassed at work in the past five years, both a significant increase on 2012," Commissioner Jenkins said.

1. Who is the Sex Discrimination Commissioner? [C]
2. How was the survey conducted? [C]
3. What percentage of Australian women and men say they have been sexually harassed? [C]
4. How have the figures surrounding sexual harassment changed over time? What do you think may have caused these changes? [C] [E]

PRACTICAL APPLICATION

FOURTH BATCH OF SUBMISSIONS TO THE NATIONAL INQUIRY PUBLISHED

SOURCE: AUSTRALIAN HUMAN RIGHTS COMMISSION, NEWS RELEASE (HUMANRIGHTS.GOV.AU) 8 JULY 2019 (EXCERPTS)

The Commission has published on its website the fourth batch of submissions received, where the author has indicated their submission can be made public. This batch includes submissions received from individuals, unions, legal stakeholders, academics and non-government and community organisations.

View the project here: humanrights.gov.au/our-work/sex-discrimination/national-inquiry-sexual-harassment-australian-workplaces-submissions

1. Who is making submissions to the inquiry? [C]
2. Locate a submission from an organisation, an individual and a legal stakeholder. For each submission:
    a. Who made the submission? [C] [S]
    b. What legal issue or problem was identified in the submission? What are the implications of this legal problem or issue? [S] [A]
    c. Were there any recommendations for change made in the submission? If so, what did the individual or organisation want changed? [S] [E]

ON REFLECTION

1. Are submissions a useful source of information? Why or why not? Will you try and locate a submission in your next assignment? [E] [R]
2. Does sexual harassment in the workplace concern you as a young person in Australia? Why or why not? [E] [R]

AUSTRALIAN LAW REFORM COMMISSION (ALRC)

We touched on law reform commissions when we examined the process of law reform. Now, we will look at this statutory body from another perspective—specifically how they can advocate and protect human rights.

But first, let's understand the legislative basis of this statutory body. The Australian Law Reform Commission was established by the *Australian Law Reform Commission Act 1996* (Cth). It is also governed by the *Public Governance, Performance and Accountability Act 2013* (Cth).

Like the AHRC, the ALRC sits within the Attorney-General's portfolio, but they are also independent. This is important as it means the ALRC can conduct inquiries into areas of law and make recommendations without fear, favour or political interference. They are headed by a President, who can be a judge, legal practitioner or academic (s7). Currently the President of the ALRC is the Hon Justice Sarah Derrington.

As the name suggests **the ALRC conducts inquiries and provides recommendations on how an area of law can be reformed**. Like Royal Commissions, the Executive, specifically the Attorney-General of Australia, refers matters to the ALRC (s20). It is not free to choose any area to examine. The Attorney-General also provides the ALRC with terms of reference to define the scope of its inquiry. Its functions are outlined in s21:

AUSTRALIAN LAW REFORM COMMISSION ACT 1996 (CTH)
SECTION 21- THE COMMISSIONS FUNCTIONS

(1) The Commission has the following functions in relation to matters referred to it by the Attorney-General:

(a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:

(i) bringing the law into line with current conditions and ensuring that it meets current needs; and

(ii) removing defects in the law; and

(iii) simplifying the law; and

(iv) adopting new or more effective methods for administering the law and dispensing justice; and

(v) providing improved access to justice;

(b) to consider proposals for making or consolidating Commonwealth laws about those matters;

(c) to consider proposals for the repeal of obsolete or unnecessary laws about those matters;

(d) to consider proposals for uniformity between State and Territory laws about those matters;

(e) to consider proposals for complementary Commonwealth, State and Territory laws about those matters.

(2) It is a function of the Commission to report to the Attorney-General on the results of any review or consideration it carries out under subsection
(1), and to include in the report any recommendations it wants to make.

ON REFLECTION

When you evaluate legal situations as part of your assessment you are often asked to justify a decision or recommendation using legal criteria. What legal criteria do you often use? Is there anything in s21 that you use to support your ideas? [R]

When making recommendations, the ALRC, 'aims to ensure that the proposals and recommendations it makes do not trespass unduly on personal rights and liberties of citizens, or make those rights and liberties unduly dependent on administrative, rather than judicial, decisions and, as far as practicable, are consistent with Australia's international obligations' (ALRC website). We will now look at a specific inquiry that identified and examined how Commonwealth law encroaches on its citizens' rights, freedoms and privileges. It was officially entitled the '*Traditional Rights and Freedoms—Encroachments by Commonwealth Laws Inquiry*', or the 'Freedoms Inquiry'.

PRACTICAL APPLICATION

ALRC REPORT – RIGHTS AND FREEDOMS IN COMMONWEALTH LAWS

SOURCE: ALRC MEDIA RELEASE, (ALRC.GOV.AU) 2 MARCH 2016

ALRC report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), was tabled and launched in Parliament today by the Attorney-General, the Hon Senator George Brandis QC and is now publicly available.

PRACTICAL APPLICATION CONTINUED...

In this far-reaching inquiry, the Australian Law Reform Commission was asked to identify and critically examine Commonwealth laws that encroach upon traditional rights, freedoms and privileges recognised by the common law. In the final Report, the ALRC discusses the source and rationale of these important rights and freedoms and provides an extensive survey of current Commonwealth laws that limit them. The ALRC has identified a range of Commonwealth laws that may warrant further consideration or review, providing a road map for future work to ensure that encroachments on rights, freedoms and privileges are avoided or appropriately justified.

1. What was the ALRC asked to identify and examine as part of this inquiry? [C]
2. On what date was this report tabled? [C]
3. What did the ALRC recommend for the future? [C]

INQUIRY FOCUS

WHAT DID THE ALRC 'FREEDOMS INQUIRY' RECOMMEND TO PROTECT THE RIGHT TO PROCEDURAL FAIRNESS?

In Article 14(1) the *International Covenant on Civil and Political Rights* (1966) (ICCPR) provides that:

all persons shall be equal before the courts and tribunals…everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

This right, known as 'procedural fairness' or 'natural justice', is synonymous with the rule of law. We see this right applied in our legal system every day— for example the *High Court of Australia Act 1979* (Cth) s11 says judicial officers take an oath to decide matters, 'without fear, favour or affection.' Section 7 outlines what qualifications a Justice must possess to be appointed, ensuring competency and all cases are argued in open court allowing the community to see justice being done. But, the *Australian Constitution* does not prevent legislatures from passing law that encroach or modify this right, as it is not an express right. The ALRC found that, '*the common law recognises a duty to accord a person procedural fairness*,' but also found evidence that many Commonwealth Acts limit or deny this right. We will now examine how the ALRC viewed this right in a specific context, that is, whether decisions regarding the cancellation or granting of a visa have procedural fairness. But, before we do this, we will examine a controversial case that involved the cancellation of a visa. This will help you understand how the law applies in practice.

CASE STUDY

Haneef v Minister for Immigration and Citizenship [2007] FCA 1273 (21 August 2007)

Facts: Dr Mohamed Haneef was related to the Ahmed brothers (they were second cousins) who were linked to a failed terrorist attack that occurred in London and Glasgow. He was arrested at Brisbane Airport and held for 12 days before he was charged with recklessly providing resources to a terrorist organisation. Dr Haneef

CASE STUDY CONTINUED...

was granted bail, but the Minister for Immigration and Citizenship Kevin Andrews cancelled his immigration visa on character grounds. The changes against Dr Haneef were discontinued a month later.

Legal issue: Did the Minister for Immigration and Citizenship exceed his power? Did the Minister misconstrue the criterion for 'failing the character test', *Migration Act 1958* (Cth) s501(6)(b). This section allows the Minister to cancel a visa if a person has 'an association with someone else whom the Minister reasonably suspects has been or is involved in criminal conduct.'

Decision: The Federal Court of Australia found the Dr Haneef's visa should be reinstated, as the Minister had erred when he cancelled Dr Haneef's visa on character grounds. The Hon Justice Spender stated:

> *I reject the submission by the Solicitor-General for the Minister that the "character test", which a person does not pass if the person has or has had an association with a person or group or organisation that the Minister reasonably suspects has been or is involved in criminal conduct, does not involve any question about the character of the person. In my opinion s 501(6)(b) is a composite phrase and has to be construed as such. In my opinion it has the connotation that there is an alliance or link or combination between the visa holder with the persons engaged in criminal activity. That alliance, link, or combination reflects adversely on the character of the visa holder. (In Explanatory Statement).*

This was appealed by the Government, with the full bench of the Federal Court upholding the earlier decision.

POOR LAW, POOR DECISIONS: IMMIGRATION VS DR HANEEF

SOURCE: JOCELYNNE A SCUTT, ABC NEWS ONLINE (ABC.NET.AU) 31 JULY 2017

Please note this is an opinion piece.

Revocation of Dr Haneef's visa focuses attention on fundamental breaches of human rights and the rule of law under the Migration Act 1958.

Principles of 'natural justice' or procedural fairness are fundamental in Australia's legal system. They rest squarely on notions of fairness.

Nonetheless, since the 1990s the Australian Parliament has, to its shame, infected the Migration Act with provisions seriously breaching individual's rights to natural justice in decision-making, ignoring international treaties and conventions Australia has ratified.

Natural justice requires that a before a judicial or administrative decision is made, the person concerned has a right to be heard. It requires the party making the decision to be unbiased, taking into account relevant information only, and putting aside irrelevant information. Decisions must be prompt or timely.

Yet the Migration Act is framed to deny or truncate natural justice. It is responsible for decisions denying fairness to visa applicants and visa holders, many of whom have lived in Australia since they were infants, believing they were, for all purposes, Australian. It is responsible for poor decision-making by successive ministers for immigration, officers of the Immigration Department, migration and refugee tribunals, and courts constrained by its provisions.

1. Why was Dr Haneef's visa cancelled? [C]
2. What did the Federal Court of Australia decide? Was this decision upheld on appeal? [C]
3. How the term 'association' should be viewed was a key legal issue in this case. The Solicitor-General submitted that any association is sufficient, whereas Dr Haneef argued that an 'innocent' association is not enough to fail the character test. Which viewpoint do you agree with? Why? [E]
4. How does Jocelynne A Scutt (a barrister and human rights lawyer) define 'natural justice'? [C]
5. What reasons does Ms Scutt provide to support her view that the Migration Act denies people natural justice? [A]

PRACTICAL APPLICATION

TRADITIONAL RIGHTS AND FREEDOMS—ENCROACHES BY COMMONWEALTH LAWS (ALRC REPORT 129)

CHAPTER 14. PROCEDURAL FAIRNESS

Decisions to refuse to grant or to cancel a visa

14.48 A visa may, or in some circumstances, must, be cancelled or not granted if the visa holder does not satisfy the Minister that they pass a 'character test'. A person does not pass the character test if, among other things, the person has a 'substantial' criminal record; has been convicted of certain offences; or is reasonably suspected of being a member of, or having an association with, a group or organisation involved in criminal conduct.

14.49 Section 501(3) excludes natural justice from the Minister's discretionary power to refuse to grant or to cancel a visa if the Minister reasonably suspects that a person does not satisfy the character test and is satisfied that the decision is in the national interest. Decisions made under s 501(3) may only be made by the Minister personally.

14.52 A number of submissions raised concerns about the Minister's visa cancellation powers. There was particular concern about the mandatory visa cancellation under s 501(3A). Prior to 2014, visas were not subject to mandatory cancellation on character grounds. A decision maker was able to consider a range of factors when exercising the discretion to cancel a visa. Kingsford Legal Centre argued that, 'in removing the Minister's discretion to consider these factors, the person whose visa is to be cancelled is denied due process'. Councils for Civil Liberties observed that the 'exclusion of natural justice in these circumstances does not appear to serve any legitimate purpose'.

14.53 Some stakeholders argued that the seriousness of a decision to cancel a visa necessitates the application of procedural fairness to the decision-making process. Cancellation of a visa may have implications for a person's liberty: a non-citizen in Australia without a valid visa is subject to mandatory detention. Where a person cannot be removed from Australia, that person may be detained indefinitely.

Conclusions

14.83 A number of migration laws encroach on the duty to afford procedural fairness. The ALRC concludes that some of these laws would benefit from further review to consider whether they unjustifiably exclude the duty to afford procedural fairness, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those in the Migration Act relating to:

- the mandatory cancellation of visas; and
- the fast track review process for decisions to refuse protection visas.

1. What section of the *Migration Act 1958* (Cth) is being discussed in the report extract shown above? [C]
2. Identify the two stakeholders in this report extract. What do they say about the law? What legal implications do they raise about the current law? [C] [A]
3. How does this section limit procedural fairness? What could be raised as a counter-argument? [C] [A]
4. What additional protections or safeguards could be put in place to ensure this law has procedural fairness? [E]
5. How do the ALRC's conclusions support the proposition that the ALRC is an independent advocate for human rights in Australia? [E]

23.3 LEGAL ORGANISATIONS AND SPECIAL INTEREST GROUPS

Statutory bodies are not the only source of independent human rights monitoring in Australia. Many organisations and groups have made it their mission to promote and advocate for human rights issues. Some of these you may have encountered in earlier chapters - for example, when we examined the use of automated facial recognition technology, one of the sources quoted was the viewpoint of the Queensland Council for Civil Liberties (QCCL). The QCCL is a voluntary organisation, founded in 1966. It is focussed on maintaining and protecting the civil liberties of Queensland citizens who interact with the government and its departments. Other examples include:

- Human Rights Law Centre (HRLC), an independent, not-for-profit, non-government organisation that protects and promotes human rights in Australia and in Australian activities overseas.
- Australian Lawyers for Human Rights (ALHR), founded in 1993, an association of legal professionals who practice, support and promote awareness of international human rights standards in Australia.
- Amnesty International (Australia), a non-government organisation that campaigns and advocates for the protection of human rights. In 1977 the organisation was awarded the Nobel Peace Prize. It has sections around the world, including Australia.
- International Federation of Red Cross (IFRC) and Red Crescent Society, one of the oldest organisations here - it was founded in 1919 (after World War One). It carries out relief operations to assist victims of disasters and health emergencies, but also helps communities in developing countries. The Australian Red Cross is a member of this organisation.

These legal organisations and special interest groups may be a good source of stakeholder viewpoints and information for your assessment.

RESEARCH

Log onto the website of two of the legal and special interest groups listed above, which are involved in promoting and advocating human rights in Australia. Answer these questions in relation to each of the organisations.

a. What do each of the above organisations stand for? [C] [S]

b. Using an example to support your response, what methods does the organisation use to promote and advocate for human rights? Do you think these are an effective way to gain the public's attention and force governments to change or adapt their positions? [C] [S] [E]

c. What is one specific legal issue that each organisation identifies as involving important human rights issues? What viewpoint does the organisation hold on this issue? Do you agree with their positon? Why or why not? [C] [S] [A] [E]

23.4 MEDIA

A healthy democracy cannot function without its media being free to bring to light uncomfortable truths, to scrutinise the powerful and inform our communities

MEDIA, ENTERTAINMENT AND ARTS ALLIANCE, 2019

A free press is essential to democracy, as it informs the citizens of a country about matters concerning our political and legal system. Its function as the 'fourth estate' is seen to be vital, as it is separate from

the Government, the Judiciary and the Executive. We have learnt in previous chapters that the media has been instrumental in uncovering unethical behaviour and corruption. For example, the decision to call two of the most recent royal commissions, the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* and the *Royal Commission into Institutional Responses to Child Sexual Abuse* were largely influenced by investigative reporting. Queensland's largest anti-corruption inquiry, the *Fitzgerald Inquiry*, may not have occurred but for reports filed by the ABC and *The Courier Mail*. It provides an important mechanism to keep the Government accountable. The media also play a vital role in the area of human rights. Thomas Hammarberg, Council of Europe Commissioner for Human rights, suggests that, 'The media play an enormously important role in the protection of human rights. They expose human rights violations and offer an arena for different voices to be heard in public discourse.' We will now look at an example that you are familiar with, but we will look at it from a different perspective, one that demonstrates that the media can be used as a vehicle to influence a human rights issue.

PRACTICAL APPLICATION

HUMAN RIGHTS: MEDIA'S KEY ROLE IN THE WAKE OF CHILD DETENTION ABUSES

SOURCE: KATE FITZ-GIBBON, MONASH UNIVERSITY LENS (LENS.MONASH.EDU) 28 FEBRUARY 2018 (EXCERPTS)

The media plays an essential role in calling to account the actions of those in power and in shining a light into spaces that are often hidden from view, such as youth detention facilities. This research illustrated how the significant level of media coverage in the wake of the Don Dale allegations was able to generate a degree of local accountability and bring to the public's attention debates surrounding human rights and the conditions by which Australian children are held in detention.

The study identified more than 220 newspaper articles covering Don Dale published in 2016 alone. Articles identified and included in the study were published in national and state-based media outlets, demonstrating the reach and level of attention on this issue.

The study also identified media reports of alleged abuses at Don Dale in the years preceding the *Four Corners* documentary, including 40 relevant articles in 2015, demonstrating that abuses were known and exposed before the July 2016 coverage. In 2014, for example, multiple articles described the use of 'tear gas' on young people held in detention.

This isn't a problem to which the federal government can turn a blind eye.

However, despite media coverage and some smaller reviews into aspects of the NT youth justice system, until the national outcry following the *Four Corners* documentary there was relative inaction at the official level.

The speed with which the Prime Minister responded to the documentary and called for a royal commission can be linked in part to the value of visual evidence in generating community concern surrounding human rights abuses. Like the images from Abu Ghraib on the world stage, the still image of a young Dylan Voller wearing a spit hood and restrained in a mechanical chair while held in detention bought to the light a human rights issue that Australians could no longer ignore.

1. What human rights issue did the media assist to uncover? [C]
2. How wide was the news coverage on this human rights issue? [C]
3. What impact did this media coverage have? What does this demonstrate about the power of the media? [A] [E]

The stories filed by journalists can uncover human rights abuses, but it is also placing them at risk of attack as government's try and silence them - as shown below

PRACTICAL APPLICATION

UNESCO LAUNCHES OBSERVATORY OF KILLED JOURNALISTS, TRACKING ACTIONS TAKEN TO PUNISH CRIMES AGAINST MEDIA PRACTITIONERS

SOURCE: UNESCO (UNESCO.ORG/NEWS) 6 NOVEMBER 2018 (EXCERPTS)

On International Day to End Impunity for Crimes against Journalists, 2 November, UNESCO launched the Observatory of Killed Journalists. The Observatory is an online database providing information on the status of judicial enquiries into each killing of a journalist or media worker recorded by UNESCO since 1993, based on information provided by the country in which the killing took place.

According to the 2018 UNESCO Director-General Report on the Safety of Journalists and the Danger of Impunity, one journalist or media personnel is killed every four days. These deaths provide a tragic demonstration of the risks many journalists face in the line of duty and the latest UNESCO statistics show that in 89% of cases, the perpetrators go unpunished.

1. What is the purpose of the Observatory of Killed Journalists? Who developed this resource? [C]
2. How often are journalists or media personnel killed? [C]
3. What happens to most of the perpetrators? What may this demonstrate? [C] [A]
4. Access the Observatory of Killed Journalists. How many journalists have been killed since 1993? [C] [S]

REVIEW

1. Identify five key groups that promote and advocate for the protection of human rights in Queensland and Australia. [C]
2. Explain the role of two of the groups examined in this chapter in protecting or advocating for human rights in Australia. [C]
3. Using examples to support your response, analyse how effective the AHRC has been in promoting the right to not to be discriminated against on the basis of sex. [A]
4. Analyse the effectiveness of the media in the promotion of human rights issues present in youth detention facilities. [A]

TOPIC 3: HUMAN RIGHTS IN AUSTRALIAN CONTEXTS

CHAPTER 24: HUMAN RIGHTS STUDIES IN AUSTRALIA

FOCUS SUBJECT MATTER

24.1 HUMAN RIGHTS SNAPSHOTS

24.2 INQUIRY-CLIMATE CHANGE, A GLOBAL CHALLENGE

24.3 INQUIRY-SHOULD AUSTRALIA HAVE A BILL OF RIGHTS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- Australia's involvement in human rights occurs in a global context;
- there is a range of circumstances which give rise to issues about human rights for Australians; and
- not all human rights are necessarily protected in the Australian legal system by corresponding legal rights.

24.1 HUMAN RIGHTS SNAPSHOTS

PRACTICAL APPLICATION

We have set out some examples of current issues in the following 'snapshots' that may raise human rights for you to consider. For each snapshot, respond to the following questions:

1. Describe the human right you identify. Start your description with 'Right to…'. [C] [A]
2. Set out the facts on which you rely to decide which human right you identified. If you need to infer some facts to come to a conclusion, say what they are. [C] [A]
3. Is there a legal remedy available for a breach of this human right? Do you think there is sufficient evidence of a violation to proceed with a complaint or legal action in the circumstances? To whom? [C] [A] [E]

SNAPSHOT A. CRITICALLY ILL NAURU REFUGEE FEDERAL COURT OVERTURNS ATTEMPT TO BLOCK MEDEVAC TRANSFER FROM NAURU

Appearing to set an important precedent, judge rules doctors don't have to speak to patient to make assessment.

The Federal Court has overturned the Home Affairs Department's attempt to block the medevac transfer of a critically ill 29-year-old Iraqi man from Nauru, by ruling that doctors don't have to speak to a patient in order to make a medical assessment.

In a judgment delivered on Tuesday, Justice Mordecai Bromberg found in favour of the refugee, whose lawyer had claimed the Department Secretary, Mike Pezzullo, had refused to notify the minister of the man's application for medical transfer, which would commence the process.

Bromberg ordered the Minister for Home Affairs, Peter Dutton, be notified as soon as practicable but the man is to be assessed for transfer. Bromberg's judgment appears to set an important precedent, ruling the doctor's assessment of the medical file without assessing the individual either in person or via teleconference is acceptable under the law.

SOURCE: HELEN DAVIDSON, THE GUARDIAN, WWW.THEGUARDIAN.COM/AUSTRALIA-NEWS, 19 JUNE 2019 (EXCERPTS)

SNAPSHOT B. DUTTON FORCED TO TRANSFER SICK CHILD FROM NAURU PETER DUTTON AGAIN FORCED BY COURT TO TRANSFER SICK CHILD FROM NAURU TO AUSTRALIA

Case joins more than a dozen failed attempts by immigration Minister to block transfer of a child

The Federal Court has again forced Peter Dutton to transfer a dangerously sick child from Nauru to Australia for treatment, dismissing arguments from the Immigration Minister's representatives that the girl wasn't seriously ill. On Thursday the Federal Courts Justice Robertson ordered an adolescent girl for transfer to Sydney for urgent medical care, accompanied by a family member.

In early July, the girl self-harmed and was eating and drinking very little, prompting hospitalisation. She was diagnosed with a severe major depressive disorder and pervasive refusal syndrome-a rare but serious child psychiatric disorder, also referred to as resignation syndrome, which has been documented at high rates among asylum seeker children, especially in Sweden.

SOURCE: HELEN DAVIDSON, THE GUARDIAN, WWW.THEGUARDIAN.COM/WORLD, 1 AUGUST 2018 (EXCERPTS)

PRACTICAL APPLICATION CONTINUED...

SNAPSHOT C. AUSTRALIAN DEPORTED TO PNG PNG REFUSES ENTRY TO MAN DEPORTED BY AUSTRALIA UNDER CHARACTER TEST LAW

Gus Kuster, 40, who came to Australia at the age of three, was turned back by Papua New Guinea after being deported because of criminal record

Papua New Guinea has refused to accept a 40-year-old man who lived in Australia since he was three, after the Australian government tried to deport him to his country of birth under its controversial character test laws.

Kuster's family said Australian authorities had put him on a plane in Brisbane with two weeks of accommodation booked and $250. Kuster has said he has no close family in Port Moresby. Kuster, whose mother is Papua New Guinean, describes himself as a 'fourth-generation Australian' who has lived in Australia for 37 of his 40 years.

Kuster was deported under section 501 of the *Immigration Act*, a controversial six-year-old law which allows the Australian government to cancel visas of non-citizens who have been convicted of crimes and sentenced to 12 months jail or more. The government is seeking to expand these powers.

SOURCE: HELEN DAVIDSON, THE GUARDIAN, WWW.THEGUARDIAN.COM/AUSTRALIA-NEWS, 21 AUGUST 2019 (EXCERPTS)

SNAPSHOT D. ABORIGINAL WOMAN ARRESTED ON TRAIN FOR PUBLIC DRUNKENNESS TANYA DAY DIED 17 DAYS AFTER FALLING ASLEEP ON A TRAIN. NOW HER FAMILY WANT ANSWERS

The inquest into Days death, beginning on Monday, will be the 1st to examine whether systemic racism contributed to death in police custody.

Before Tanya Day sustained a fatal injury while in police custody, she fell asleep on a train. The Yorta Yorta woman, 55, was catching the V/Line service from Echuca to Melbourne on 5 December 2017 to see her family. Day had been drinking. Just past Bendigo, about two hours into the journey, she started to nod off. By Castlemaine she was asleep, her legs allegedly blocking the aisle.

As the train pulled into Castlemaine, the conductor told her to move. He had called the police to request help with an 'unruly' drunk passenger who could not find a ticket.

The police arrived at 3:10 PM and shook Day awake. They decided to arrest her and take her to the police station under an archaic and well used offence: being found drunk in a public place. Shortly after 8 PM, when police would have been preparing to release Day from custody after a four hour spell to sober up, they realized something was wrong. An ambulance was called but did not arrive almost an hour.

By the time they arrived at Bendigo Hospital she had been bleeding in her brain for almost 5 hours as a result of a traumatic injury sustained when she fell, unnoticed, in the cell. A large black bruise covered her forehead. She did not wake between then and 22 December, when she died in Melbourne's St Vincent's Hospital.

A three-week inquest into her death in custody will begin in Melbourne on Monday. The coroner, Caitlin English, has already made two significant findings. The first was that Victoria should abolish the offence of public drunkenness. The second was unprecedented: that the inquest would consider whether systemic racism contributed to her death.

SOURCE: CALLA WAHQUIST, THE GUARDIAN,WWW.THEGUARDIAN.COM/AUSTRALIA-NEWS, 24 AUGUST 20 19 (EXCERPTS)

PRACTICAL APPLICATION CONTINUED...

SNAPSHOT E. WHEELCHAIR ACCESS WOMAN WINS DISCRIMINATION CASE

After a 3 ½ year legal battle, Julia Haraksin won a a discrimination case against the bus company that wouldn't let her book a trip and did not have wheelchair accessible vehicles. Ms Haraksin, who was born with brittle bone disease, said she hopes the victory in the Federal Court on Thursday will inspire other disabled people to take action when they have been discriminated against. Ms Haraksin tried to book a trip from Sydney to Canberra with coach company Murrays Australia in August 2009 so she could attend a conference, but was told her booking could not be taken as the buses could not accommodate wheelchairs.

SOURCE: STEPHANIE GARDNER, THE SYDNEY MORNING HERALD, WWW.SMH.COM.AU, 14 MARCH 2014 (EXCERPTS)

SNAPSHOT F. PROTEST LAWS TO CHANGE QLD COUNSELLOR CLAIMS RIGHT-TO-PROTEST WIN

A Brisbane court fight for the right to protest ended with the city's Lord Mayor failing to block a traffic-stopping demonstration led by a Greens Councillor Jonathan Sri. Chief Magistrate Terry Gardiner came down on the side of Councillor Sri, knocking back the application less than 24 hours before the protest was due to kick-off.

Before court he accused the State Labor government and the LNP-led Brisbane City Council of trying to demonise people who have turned up to a series of traffic-crippling protests in Brisbane in recent months, mostly about climate change. In some instances protesters glued themselves to road surfaces at busy intersections, and used steel pipes filled with concrete to lock their arms onto fences, bridges and other infrastructure.

The State government is drafting laws to outlaw what the Premier has called dangerous devices used by some 'extremists'. Lord Mayor Adrian Schrinner has said his bid to stop the protest was not an attack on civil liberties. 'People have the right to protest, but not at the expense of the travelling public' he said.

SOURCE: TRACY FERRIER AND WARREN BARSLEY, THE COURIER WWW.THECOURIER.AU/STORY, DOWNLOADED 29 AUGUST 2019 (EXCERPTS)

24.2 INQUIRY-CLIMATE CHANGE, A GLOBAL CHALLENGE

It has become accepted that a right to a safe and sustainable physical environment is a human right. This is particularly obvious when human activities violate the safety and sustainability of the environment which indirectly threats where we live, and how we source the means of life. The other thing which has become more and more apparent, is that the Australian community does not live in isolation, and that our policies and activities can indirectly affect the lives of people in neighbouring countries.

INQUIRY FOCUS

DO RISING SEA LEVELS ILLUSTRATE THE GLOBAL NATURE OF CLIMATE CHANGE?

SOURCE 1: THE CLIMATE SCIENCE

PRACTICAL APPLICATION

THE UN INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC)

SOURCE: WWW.UN.OIG/EN/SECTIONS/ISSUES-DEPTH/CLIMATE-CHANGE, DOWNLOADED 28 AUGUST 2019 (EXCERPTS)

The IPCC was set up by the World Meteorological organization (WMO) and United Nations Environment to provide an objective source of scientific information. In 2013 the IPCC provided more clarity about the role of human activities in climate change when it released its Fifth Assessment Report. This was categorical in Its conclusion. Climate change is real and human activities are the main cause.

Fifth Assessment Report

The report provides a comprehensive assessment of sea level rise, and its causes, over the past few decades. It also estimates cumulative CO2 emissions since pre—industrial times and provides CO2 budgets for future emissions to limit warming to less than 2°C. About half of this maximum amount was already emitted by 2011. The report found that:

- from 1882 to 2012, the average global temperature increased by 0.85°C;
- oceans have warmed, the amounts of snow and ice have diminished and the sea level has risen. From 1901 to 2010, the global average sea level rose by 19 cm as oceans expanded due to warming and ice melted. The sea ice extent in the Arctic has shrunk in every successive decade since 1979, with 1.07×106 km² of ice loss per decade; and
- given current concentrations and ongoing emissions of greenhouse gases, it is likely that by the end of this century global mean temperature will continue to rise above the preindustrial level. The world's oceans will warm and Ice melt will continue. Average sea level rise is predicted to be 24 – 30 cm x 2065 and 40-63 cm x 2100 relative to the reference period of 1986-2005. Most aspects of climate change will persist for many centuries, even if emissions are stopped.

There is alarming evidence that important tipping points, leading to irreversible changes in major ecosystems and the planetary climate system, may already have been reached or passed. Ecosystems as diverse as the Amazon rainforest and the Arctic tundra, may be approaching thresholds of dramatic change through warming and drying. Mountain glaciers are in alarming retreat and the downstream effects of reduced water supply in the driest months will have repercussions that transcend generations.

Global Warming of 1.5°C

In October 2018 the IPCC issued a special report on the impacts of global warming of 1.5°C, finding that limiting global warming to 1.5°C would require rapid, far-reaching and unprecedented changes in all aspects of society. With clear benefits to people and natural ecosystems, the report found that limiting global warming to 1.5°C compared to at 2°C could go hand-in-hand ensuring a more sustainable and equitable society. While previous estimates focused on estimating the damage if average temperatures would arise by 2°C, this report shows that many of the adverse impacts of climate change will come at the 1.5°C mark.

The report also highlights a number of climate change impacts that could be avoided by limiting global warming to 1.5°C compared to 2°C, or more. For instance by 2100, global sea level rise would be 10 cm lower with global warming 1.5°C compared with 2°C. The likelihood of an Arctic Ocean free of sea ice in summer would be once per century with global warming of 1.5°C, compared with at least once per decade at 2°C. Coral reefs would decline by 70 to 90% with global warming at 1.5°C, whereas virtually all (greater than 99%) would be lost with 2°C.

PRACTICAL APPLICATION CONTINUED...

The report finds that limiting global warming to 1.5°C would require 'rapid and far-reaching' transitions in land, energy, industry, buildings, transport, and cities. Global net human-caused emissions of carbon dioxide (CO2) would need to fall by about 45% from 2010 levels by 2030, reaching 'net zero' around 2050. This means that any remaining emissions would need to be balanced by removing CO2 from the air.

1. At current concentrations and ongoing emissions of CO2 what is likely to happen to global mean temperatures, sea levels and ice melt. What visible evidence in the environment does the fifth assessment report of the IPCC say is apparent? [C] [A]
2. In October 2018 the IPCC issued a report highlighting a number of climate change impacts that could be appointed by limiting global warming to 1.5°C compared to 2°C. List the effects on the environment used for comparison and describe each one. How does the report suggest it is possible to limit global warming to 1.5°C? What would this require? [C] [A] [E]

SOURCE 2: INTERNATIONAL LEGAL FRAMEWORK

PRACTICAL APPLICATION

UNITED NATIONS LEGAL INSTRUMENTS

SOURCE: WWW.UN.OIG/EN/SECTIONS/ISSUES-DEPTH/CLIMATE-CHANGE, DOWNLOADED 28 AUGUST 2019 (EXCERPTS)

The UN family is at the forefront of the effort to save our planet. In 1992 it's 'Earth Summit' produced the *United Nations Framework Convention on Climate Change* (UNFCCC) as a first step in addressing the climate change problem. Today, there is near universal membership. The 197 countries that have ratified the *Convention* are Parties to the *Convention*. The ultimate aim of the *Convention* is to prevent 'dangerous' human interference with the climate system.

Kyoto Protocol

By 1995, countries launched negotiations to strengthen the global response to climate change, and two years later, adopted the *Kyoto Protocol*. The *Kyoto Protocol* legally binds developed country Parties to emission reduction targets. The *Protocol's* first commitment period started in 2008 and ended in 2012. The second commitment period began on 1 January 2013 and will end in 2020. There are now 197 Parties to the Convention and 192 Parties to the *Kyoto Protocol*.

Paris Agreement

At the 21st Conference of the Parties in Paris in 2015, the Parties to the UNFCCC reached a landmark agreement to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low carbon future. The *Paris Agreement* built upon the *Convention* and-for the first time-brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so. As such, it charts a new course in the global climate effort.

The *Paris Agreement's* central aim is to keep the global temperature rise this century well below 2°C above preindustrial levels. On 22 April 2016, 175 world leaders signed the *Paris agreement* at UN headquarters in New York. There are now 184 countries that have joined the *Paris agreement*

A Climate Summit Is Planned for September 2019.

PRACTICAL APPLICATION CONTINUED...

1. Describe the *Kyoto Protocol*. What was its purpose? [C] [A]
2. Describe the *Paris Agreement*. Outline its objectives. How is it different from the *Kyoto Protocol*? [C] [A]
3. Do you think it is necessary for all of the countries of the world to make a commitment to a global effort to combat climate change? Give your reasons. [E]

SOURCE 3: AUSTRALIAN GOVERNMENT POLICY

PRACTICAL APPLICATION

DEPARTMENT OF THE ENVIRONMENT AND ENERGY

SOURCE:AUSTRALIAN GOVERNMENT, WWW.ENVIRONMENT.GOV.AU/CLIMATE-CHANGE, DOWNLOADED 1 SEPTEMBER 2019 (EXCERPTS)

PARIS AGREEMENT

Australia is committed to taking strong domestic and international action on climate change. The Government is implementing national policies to reduce emissions and adapt to the impacts of climate change in the context of co-ordinated global action. The Paris agreement sets in place a durable and dynamic framework for all countries to take climate change action from 2020, building on existing international efforts in the period up to 2020. Key outcomes include:

- a global goal to hold average temperature increase to well below 2°C and pursue efforts to keep warming below 1.5°C above pre-industrial levels;
- all countries to set mitigation targets from 2020 and review targets every five years to build ambition over time, informed by a global stock take;
- robust transparency and accountability rules to provide confidence in countries actions and track progress towards targets;
- promoting action to adapt and build resilience to climate impacts; and
- financial, technological and capacity building support to help developing countries implement the Agreement.

Australia has set an ambitious target to reduce emissions by 26-28% below 2005 levels by 2030, which builds on our 2020 target of reducing emissions by 5% below 2000 levels. Australia's targets will be achieved through a credible policy suite that is already reducing emissions, encouraging technological innovation and expanding our clean energy.

1. Describe Australia's climate policy. How does it compare to the stated policy of all State Parties to the *Paris Agreement*? [C] [A]

SOURCE 4: ANALYSIS OF AUSTRALIAN GOVERNMENT POLICY

PRACTICAL APPLICATION

COUNTRY SUMMARY: OVERVIEW

SOURCE: AUSTRALIA CLIMATE ACTION TRACKER, CLIMATEACTIONTRACKER.ORG/COUNTRIES/AUSTRALIA, UPDATED 17 JUNE 2019

Australia's climate policy is further deteriorating, as it focuses on propping up the coal industry and ditches efforts to reduce emissions, ignoring the record uptake of solar PV and storage and other climate action at state level. The Australian government has turned its back on global action by dismissing the findings of the IPCC Special Report on Global Warming of 1.5°C and announcing it would no longer provide funds for the Green Climate Fund (GCF). It will also continue to subsidise fossil fuel extraction and export, against the need to phase out fossil fuels, in particular coal, globally. There are no signs from the recently re-elected government that they intend to scale up climate action.

Australia's emissions from fossil fuels and industry continue to rise, and are now 7% above 2005 levels. These emissions have increased by around 1% per year on average since 2014, the year in which Australia's national carbon pricing scheme was repealed. Under current policies, these emissions are headed for an increase of 8% above 2005 levels by 2030, rather than the 14 to 17% decrease in these emissions required to meet Australia's Paris Agreement target.

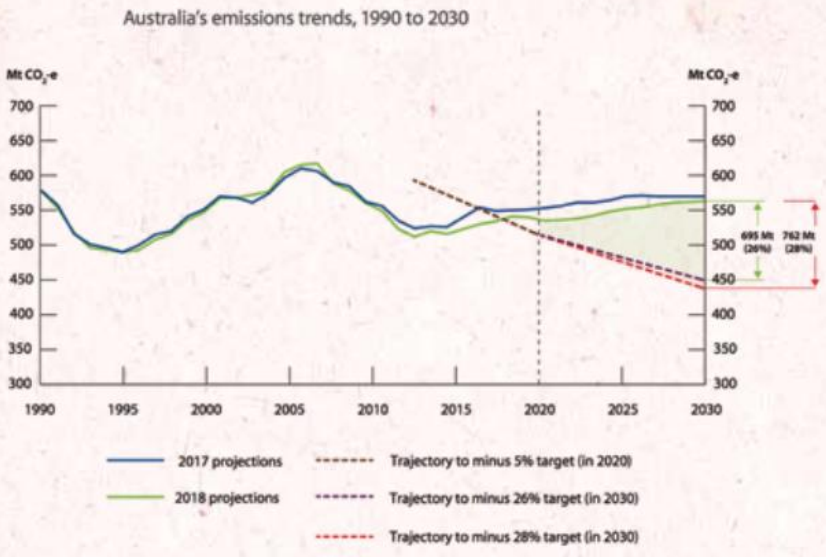
1. According to the author, what is happening to Australia's emissions? Does the author think Australia will reach its emissions target under the *Paris Agreement*? Give your reasons. [C] [[A]

2. Do you think it is possible that Australia could have other climate policies that might generate a reduction in emissions to offset against the increase in emissions because of its support for fossil fuels, particularly coal? Give your reasons. [C] [A] [E]

PRACTICAL APPLICATION

LET'S GET SOMETHING STRAIGHT – AUSTRALIA IS NOT ON TRACK TO MEET ITS PARIS CLIMATE TARGET

SOURCE: PETER STOCK, CLIMATE COUNCIL, WWW.CLIMATECOUNCIL.ORG.AU/AUSTRALIA-NOT ON TRACK, 21 DECEMBER 2018



PRACTICAL APPLICATION CONTINUED...

The federal Government has released updated Emissions Projections confirming Australia is not on track to meet its woefully inadequate 2030 emissions reduction target. The federal Government's own published data shows Australia's greenhouse gas pollution levels are expected to continue to go up over the next decade. Australia's emissions in 2030 are expected to be higher than today.

The Federal Energy Minister Angus Taylor is misleading the public by claiming Australia will meet its target ahead of schedule. The Prime Minister Scott Morrison is misleading the public by claiming Australia will meet the Paris target 'in a canter'. Both claims are incorrect

The Federal Government's own Emission Projections clearly shows Australia is not on track to meet its Paris commitments. The Federal Government has no credible climate policy in place to tackle our rising greenhouse gas pollution.

Australia's current 2030 emissions reduction target of 26-28% (below 2005 levels) falls significantly short of what is required to effectively tackle climate change.

1. Assuming that the data which Peter Stock (the author) has relied on is indeed the Australian Government's own information, and is accurately presented, does Australia have any reasonable prospect of reaching its emissions target in accordance with the ***Paris Agreement***? Give your reasons. [A]
2. Do you think Australia should develop a credible climate policy which enables it to reach its emissions target under the ***Paris Agreement***? Give your reasons. [E]

SOURCE 5: THE MEDIA

PRACTICAL APPLICATION

CLIMATE CRISIS DECLARED BY PACIFIC ISLAND STATES

SOURCE: MATANGITONGA, MATANGITONGA.TO/2019//01/CLIMATE-CRISIS-DECLARED, 1 AUGUST 2019 (EXCERPTS)

A climate crisis has been declared by Pacific Island States, Including Tonga, after signing the Nadi Bay Declaration earlier this week, calling on developed countries to urgently address climate change including phasing out coal mining and fossil fuel use and production.

The declaration was signed at the Pacific Islands Development Forum (PIDF) Leaders Summit and first Conference held in Nadi, Fiji, 29-30 July.

It stated the Pacific's deep concern for the 'lack of comprehension, ambition, or commitment shown by developed nations' towards the consequences of the climate crisis on vulnerable Pacific nations.

The declaration confirms that climate change poses the single greatest threat to the human rights and security of present and future generations of Pacific Island peoples. Some coral atoll nations could become uninhabitable as early as 2030, with the possibility of the Marshall Islands, Tuvalu, Kiribati, Tokelau, and the Maldives submerged by 2100.

The declaration listed a number of requests including asking the global community to urgently address the warnings of the Intergovernmental Panel on Climate Change (IPCC) Special Report on the dire ramifications of the lack of urgent actions to address climate change sea level rise.

PRACTICAL APPLICATION CONTINUED...

It also calls for an end to any new coal mining and the phase-out and the closure of all existing coal production over the next decade, as well as to relinquish subsidies to fossil fuel use and production and transition to affordable technologies.

It requested that relevant parties cease from using 'carryover credits' as abatement for the additional Paris Agreement emissions reduction targets, and for developed countries to support climate finance, as well as capacity development and the transition to renewable energy.

1. What does the PIDF say that the consequences of climate change will be for rising sea levels and a number of Pacific Islands? [C]
2. What does the PIDF say that the developed countries of the world should do in order to combat climate change and help the Pacific Islands? Can any of these statements be referred directly to Australia's circumstances and policies? Say what they are. [C [A]
3. Do you agree with the PIDF criticisms of the climate policies of developed countries, including Australia? You should refer to source 4 (see above) when doing your answer. [A] [E]

PRACTICAL APPLICATION

CLIMATE CHANGE STRIKES ACROSS AUSTRALIA STUDENT PROTESTERS DEFY CALLS TO STAY IN SCHOOL

SOURCE: ABC NEWS, WWW.ABC.NET.AU/NEWS/2019-03-15/STUDENTS-WALK-OUT, DOWNLOADED 1 SEPTEMBER 2019 (EXCERPTS)

Tens of thousands of young Australians have walked out of their classrooms to stage protests in capital cities demanding action on climate change. Rallies began in Melbourne, Sydney, Adelaide, Canberra and Hobart outside State Parliament buildings and town halls on Friday.

Students have also marched at rallies across regional Australia with large crowds protesting at Geelong, Byron Bay, Coffs Harbour, Cairns and Townsville.

Many used humour to get their point across, with posters referencing Internet themes and suggesting fail grades for the nation's political efforts on climate change policy. Others were more serious-one poster urged politicians to 'panic' about addressing climate change and another warned 'there is no Planet B'.

In Melbourne, protesters filled Spring Street in the CBD, blocking traffic and trams and chanting 'this is what democracy looks like' and 'students united will never be divided'.

1. Are school students being irresponsible by missing class in order to protest about climate change? Give your reasons. [A] [E]
2. Why do you think school students are protesting about lack of action by the Australian government on climate change? Do you agree or disagree with them? Give your reasons. [A] [E]

RESEARCH

Most commentators agree that the politics of decision-making about climate change has failed the Australian people. All political parties have not performed. Research the political decisions and views of politicians from 2006 until 2019. [S]

1. Outline the views of the various political parties over the period in question chronologically. [C] [A]
2. Highlight the actual policies implemented by funding and legislation, and identify when these were reversed by an opposing political party. [C] [A]
3. Do you agree with the commentators? Give your reasons. [A] [E]

ON REFLECTION

Did you join the recent student protest movement to protest against lack of action to combat climate change? Do you need to conduct more research to form your own view about this topic? What would you say to people who argue that the views of your generation should be listened to because **it is your future that hangs in the balance?** [S] [A] [E]

24.3 INQUIRY: SHOULD AUSTRALIA HAVE A BILL OF RIGHTS?

WHAT IS A BILL OF RIGHTS?

A Bill of Rights is a document that contains a **formal list of the rights of a citizen in a society.** The rights listed in a Bill of Rights are ones which society regards as being **fundamentally important** to its citizens.

Australia does not have a Bill of Rights - the only western democratic country that does not have a Bill of Rights. Over the course of Unit 4 you have learnt that Australia has ratified a number of international human rights instruments, but in many cases, has failed to include the rights listed in these treaties in domestic legislation. Instead, Australian citizens rely on a combination of statute law, common law and the *Commonwealth of Australia Constitution Act 1901* (Cth) to protect their rights. This has led some human rights groups, such as the *Human Rights Law Centre* (HRLC), to advocate for a Bill of Rights.

HUMAN RIGHTS ACT 2019 (QLD)

But, before we investigate this issue, we will take a moment to examine Queensland's recently enacted *Human Rights Act 2019* (Qld), which is planned to commence in 2020.

HUMAN RIGHTS ACT 2019 (QLD)

Section 3 Main objects of Act

The main objects of this Act are—

(a) to protect and promote human rights; and

(b) to help build a culture in the Queensland public sector that respects and promotes human rights; and

(c) to help promote a dialogue about the nature, meaning and scope of human rights.

Section 11 Who has human rights

(1) All individuals in Queensland have human rights.

(2) Only individuals have human rights.

According to the then Bill's *Explanatory Notes* the law's aim is to:

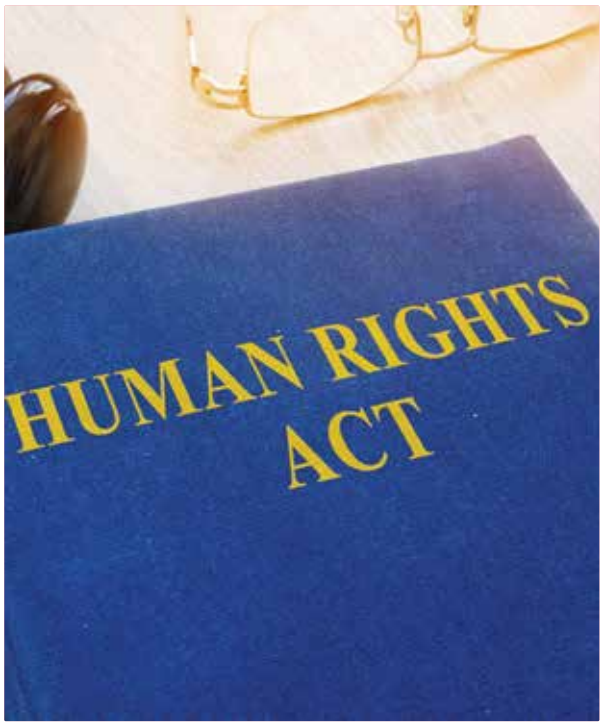
> *consolidate and establish statutory protections for certain human rights recognised under international law including those drawn from the ICCPR, as well as the rights to health services and education drawn from the ICESCR, and property rights drawn from the UDHR (p. 2).*

The *Act* protects 23 fundamental civil, political, economic, social and cultural human rights. As you can see above, it only applies to individuals in Queensland (s11). It requires all public entities (defined in s9) to consider human rights in all decision-making and action, but the Act also acknowledges that human rights are not absolute and may be subject to reasonable limits (s13). The *Explanatory Notes* state that there is no stand-alone legal remedy for a contravention and that no monetary damages will be available for a contravention (see s59, but other remedies are available such as quashing or setting a decision aside). It also contains a complaints process that involves the Queensland Human Rights Commission (QHRC) (s68-87).

RESEARCH

Locate a copy of the *Human Rights Act 2019* (Qld). List the 23 human rights it protects under the categories civil, political, economic, social and cultural rights. Where possible, identify the international human rights instrument it is drawn from. [C] [S] [A]

This Act is one of three current pieces of legislation specifically concerning human rights protection in Australia's States and Territories. Other Acts include the *Charter of Human Rights and Responsibilities Act 2006* (VIC) and the *Human Rights Act 2004* (ACT). Due to their nature, these laws only apply to inhabitants of these States and Territories. To ensure the human rights of all Australians are protected, law must be enacted by the Federal Parliament.



THE VICTORIAN EXPERIENCE

In Victoria, there have been a number of cases in which the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Charter Act*) has been used in both civil and criminal matters to support a plaintiff's claim (civil) or a defendant's defence (criminal) in proceedings. We will now see how the *Charter Act* was applied to a specific case.

CASE STUDY

Momcilovic v the Queen [2011] HCA 34 (8 September 2011)

Facts: The defendant was charged with trafficking in a drug of dependence *(Grounds, Poisons and Controlled Substances Act 1981* (Vic) (the *Drugs Act*), s71AC) on the basis that she had methylamphetamine in her '**possession for sale**' pursuant to the definition of traffick in s70(1) of the *Drugs Act*. Her partner, with whom she lived had been convicted of trafficking in a separate trial, although he gave evidence at Ms Momcilovic's trial stating that she had no knowledge of the drugs, she was convicted.

At trial, the prosecution relied on the *Drugs Act,* s5, which provides the meaning of '**possession.**' Under the *Drugs Act* the burden of proof shifts to the accused, deeming an occupier of the premises where drugs are found to be in possession of the drugs unless he or she proves on the balance of probabilities that they were unaware of their presence. Section 5 places a **legal burden of proof** on the accused, rather than an **evidential burden** that would only require a person to introduce evidence capable of negativing possession. Ms Momcilovic was found guilty in the County Court of Victoria.

Legal issue: Does the construction of s5 infringe her right to be presumed innocent as protected by s25(1) of the *Charter Act?*

Decision: It was argued on her behalf that s5 should be 'read down' to **impose an evidentiary burden of proof** in accordance with the interpretive rule in s32(1) of the *Charter Act,* which provides that:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

The Court of Appeal refused to do so and held that while s5 infringed the right to be presumed innocent, s32(1) could not be used to reinterpret s5. When the matter went to the High Court, a majority of the High Court of Australia agreed with the Court of Appeal. Section 32(1) could not be used to 'read down' s5 to impose an **evidentiary burden of proof only.**

However, this was not the only ground of appeal. The High Court decided that the matter should be returned to the County Court of Victoria for retrial. It found that s5 **did not apply to the offence of trafficking** because there was a difference between the meaning of the words '**possession for sale**' and the word '**possession**'. Ms Momcilovic merely had the drugs in her possession, and on the evidence from the lower court s5 **did not apply**.

It is interesting to note that there have been cases in the UK *House of Lords* which found that a deeming provision could be **'read down'** to impose an evidentiary burden. The authors await further clarification of the application of the *Charter Acts* of Queensland, Victoria, and the ACT in due course.

RESEARCH

To see how this law applies in practice, locate the *Charter Act* in Austlii. Choose a particular human right located in the *Charter Act* and use the Noteup function to see judgments, journals and scholarship that refer to that section. [S] [A]

INQUIRY FOCUS

SHOULD AUSTRALIA HAVE A BILL OF RIGHTS?

There are **two traditional ways of protecting rights. The first of these is to have the rights incorporated in the Constitution of Australia.** If they are so incorporated, then those rights can only be withdrawn or modified by changes to the Constitution, that is, by way of a referendum. Historically, successful changes to the Constitution by way of referenda, on any issue, have been very difficult to achieve. No

doubt, a referendum designed to remove a fundamental right from a citizen would be extremely difficult to achieve. **The entrenchment, therefore, of rights set out in the Constitution of Australia would be very strong.** This is the case in the United States of America. The Bill of Rights in the United States has been developed by amendments to its Constitution. A change therefore of any of those entrenched rights in the United States requires an amendment to the Constitution of the United States. However, a recent study by two US professors concluded that the United States model, which was once a foundational document for new nations in search of proper government, has fallen out of favour. This is because it fails to protect an extensive set of rights, and because it has enshrined rights (such as a right to bear arms) which other nations do not value and which cannot effectively be changed because of the difficulty of making changes to the Constitution of the US.

The other traditional way of protecting rights is by a simple passage of legislation. Some rights are currently protected in Australia by statute law passed by Commonwealth, State and Territory Governments. However, **when rights are protected by means of the passing of statutes, the entrenchment of those rights is very weak. This arises from the simple fact that statutes or acts of parliament can be repealed or amended by later statutes.** Generally, it requires nothing more than a subsequent statute passed by the government of the day to repeal the earlier statute and remove any entrenched rights.

ARGUMENTS FOR AND AGAINST A BILL OF RIGHTS

The arguments for and against having a Bill of Rights in Australia are many. Political parties, individuals and particular interest groups have all adopted positions. It is not possible to represent all of the arguments for and against a Bill of Rights in this work, however we set out the principal arguments as follows.

AGAINST	FOR
A Bill of Rights is unnecessary Australia is one of the most free countries in the world and has not needed, and does not need, to set out citizen's rights and to provide protection for those rights. It has developed a system of protection of rights using both legislation and the Common Law.	A Bill of Rights would set out and protect fundamental rights of Australians, including many which are not currently protected by Australian law. Even though Australia has ratified international treaties, which cover some human rights, there has never been a comprehensive effort made by Australia to set out rights which are fundamental to our own citizens. A Bill of Rights would achieve this.
A Bill of Rights is essentially undemocratic This argument, in its simplest form, is that we have adopted and developed a system of government in which the parliament is supreme. The parliament consists of elected representatives who represent all of the people and pass laws in line with the will of the people. If rights are to be protected, then the protection of those rights should primarily be the result of legislation passed by our elected representatives. It is the parliament that represents all of the people and if the parliament does not conform with the people's wishes then it will be replaced at the next general election.	The democratic system of government that we have represents the majority. Minority groups in our society require protection as well. The rights of minority groups are not always protected in a system where the majority rules. The weak, the poor and the marginalised should have rights which the majority cannot take away from them. General elections are never about one issue alone. If one of the issues is the removal of a right, then other issues may dominate at the general election

A Bill of Rights gives too much power to Judges (judge stacking and judge bashing)

If a strongly entrenched Bill of Rights exists (as in the USA Constitution), then the parliament cannot pass laws which are inconsistent with, or infringe, those rights. Laws passed by the government must be in accordance with the rights granted in the Bill of Rights.

> If any law purports to withdraw any rights of a citizen which have been granted in a Bill of Rights, that citizen is able to challenge that particular law in the courts. The judiciary then makes the decision as to whether any Acts of Parliament are invalid because they infringe the citizen's rights set out in the Bill of Rights. Judges have the final word on how extensive a particular human right is. As judges are unelected, being appointed by the government of the day (at the time of their appointment), and as they generally represent a particular demographic (usually older, male-dominated, and fairly well off financially), our society should not empower them to invalidate laws passed by the elected members of parliament. To allow this would be to undermine democracy.

The placing of such tremendous powers in the judiciary tends to enliven speculation of judge stacking (an allegation that a particular government selects a judge to a very senior position on the basis of the government's perception that he or she is more inclined to their view than the view of the opposition) and of judge bashing (where interest groups in our society do not like the decisions made by individual judges and where they publicise, at times widely, what they regard as incompetent or biased decisions – often without regard to the publication of the full facts of each case). Both of these forms of attack upon the judiciary weaken the confidence of the public in the judiciary. The judicial arm of our government is an arm which requires the utmost confidence of its citizens. Any system which allows for such attacks upon the judiciary weakens the whole democratic fabric of our society.

Even without a Bill of Rights, the judiciary is still required to:

(a) interpret the meaning of the words in any statute; and

(b) develop the principles of common law.

These tasks are no less revolutionary than interpreting the words contained in a Bill of Rights.

The training and experience of the judiciary is such that they are trustworthy and suitable interpreters of the words describing the rights given to citizens. Some citizens will place more trust in the judiciary than in politicians.

Judges are relieved of the burden of finding implied rights in the Constitution and developing principles of common law. The interpretation of the meaning of words in a Bill of Rights, as opposed to these duties, can be regarded as the judiciary playing a lesser role in deciding the extent of human rights.

Speculation about judge stacking occurs outside of the consideration of a Bill of Rights. In fact, several High Court judges in Australia have called upon the Federal government at different times to make public the discussions between the Government and the judiciary in the making of decisions as to whom should be appointed as a High Court Judge or a State Supreme Court Judge.

Judge bashing occurs with or without a Bill of Rights

The rights set out in a Bill of Rights become dated and are difficult to change

There are some rights regarded as fundamental to our society that may, in fact, become less important over time. Such rights, if strongly entrenched, become very difficult to change. The future holds different types of challenges which may make a particular right no longer relevant and, thus, dispensable. One example often given of this is the right to bear arms in the US Constitution. It is argued that the inability of American governments to pass laws restricting the bearing of arms has resulted in indiscriminate shootings. This is often compared to the laws in Australia that restrict the sale of firearms which was achieved by uniform legislation throughout Australia because there was no such entrenched right.

There are some rights which are so fundamental that they are always applicable in a democratic society. These rights need to be entrenched. There is no system of Bill of Rights, from the strongly entrenched to the weakly entrenched, that cannot be changed. No system fully entrenches rights. Any change to rights can be made if the will is present.

Defined rights exclude other rights The listing of rights necessarily means the exclusion of rights that are rejected. It is better to have a system that is flexible and able to include all rights as and when they become fundamental.	It is better to list fundamental rights and entrench them despite necessarily excluding some rights. It is better to act in the protection of rights than not to act at all.
The current system is working well enough The recognition of and entrenchment of rights in Australia is working well enough, such that there is no sufficient public outcry requesting change. Our flexible system has the benefit of future legislation to give any further protection	The current system is not working well enough. Rights determined by the courts can be overridden by legislation. This applies to rights which many Australians regard as fundamental (see *Al-Kateb v Godwin* (2004) 219 CLR 562 and ***Behrooz v Secretary of the Department of Immigration*** (2004) 219 CLR 486. A system allowing for the taking away of such rights is not working well enough.

WHAT DO YOU THINK?

Using the arguments listed above or ones you have located from your own research, do you think Australia should have a Bill of Rights? Why or why not? [S] [A] [E]

REVIEW

1. Select 2 or 3 newspaper articles in which you recognised that a human right is being challenged, breached, or violated. Use the questions set out to respond to the snapshots in 24.1 to analyse your chosen article. [C] [A] [E]
2. How can Australia help the Pacific Islands to combat the challenge of climate change? Does Australia share any responsibility for the difficulties in which the Pacific Island peoples find themselves? [C] [A] [E]
3. Write a short essay (500 to 600 words) putting forward an argument in favour or against of an Australian Bill of Rights. [C] [A] [E] [R]

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