LEGAL STUDIES FOR VCE

ACCESS & JUSTICE

14TH EDITION

LISA FILIPPIN
PETER FARRAR
ANNIE WILSON
MARGARET BEAZER
JOSIE GRAY

UNITS 1&2

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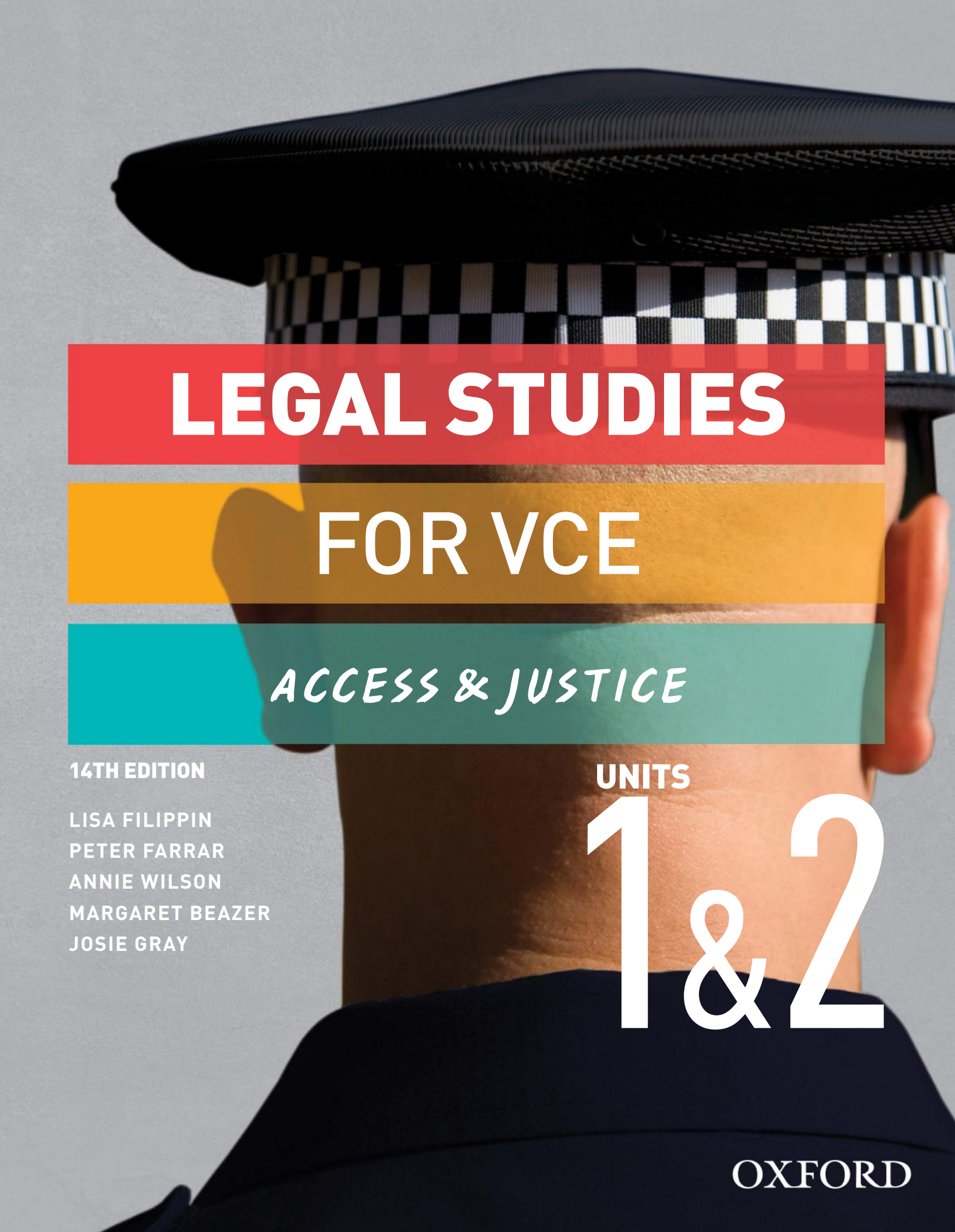

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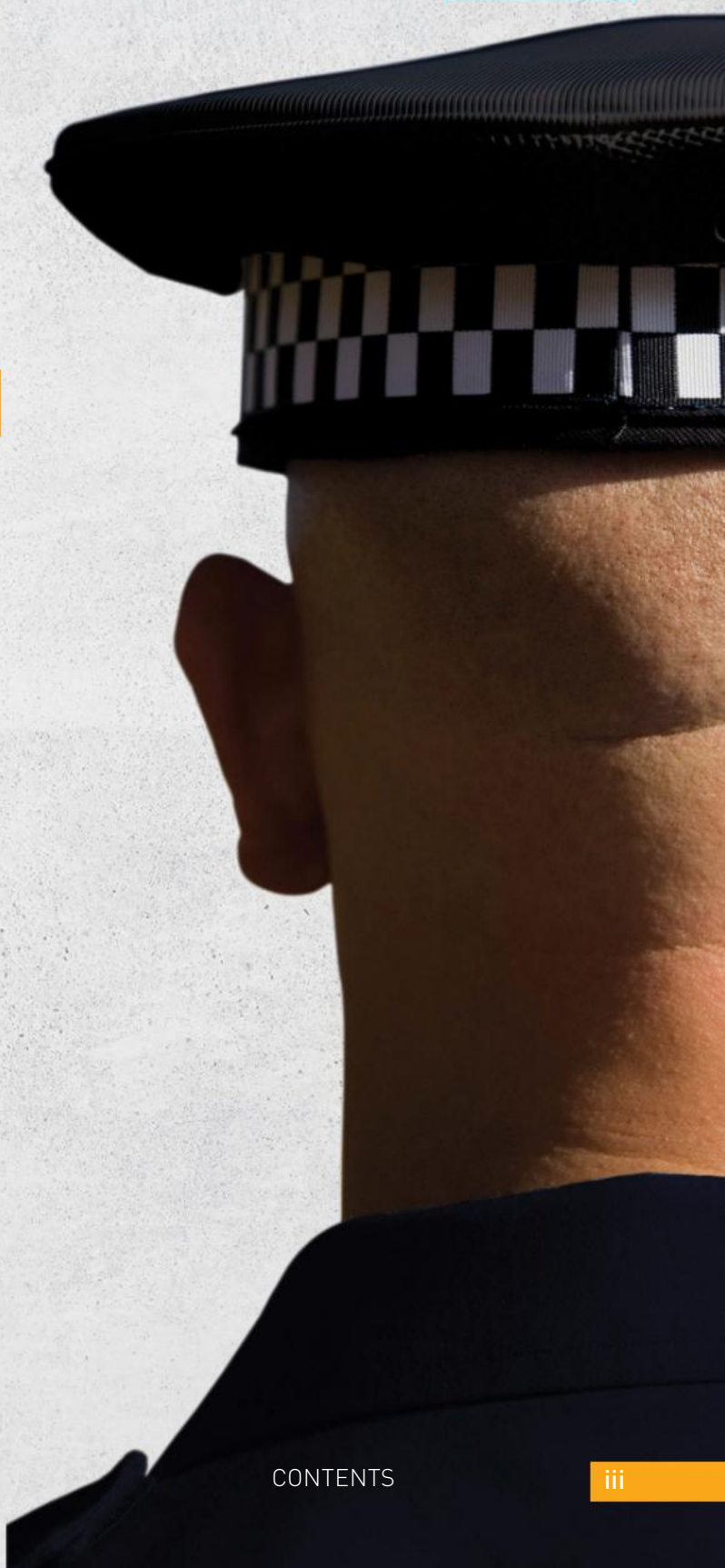

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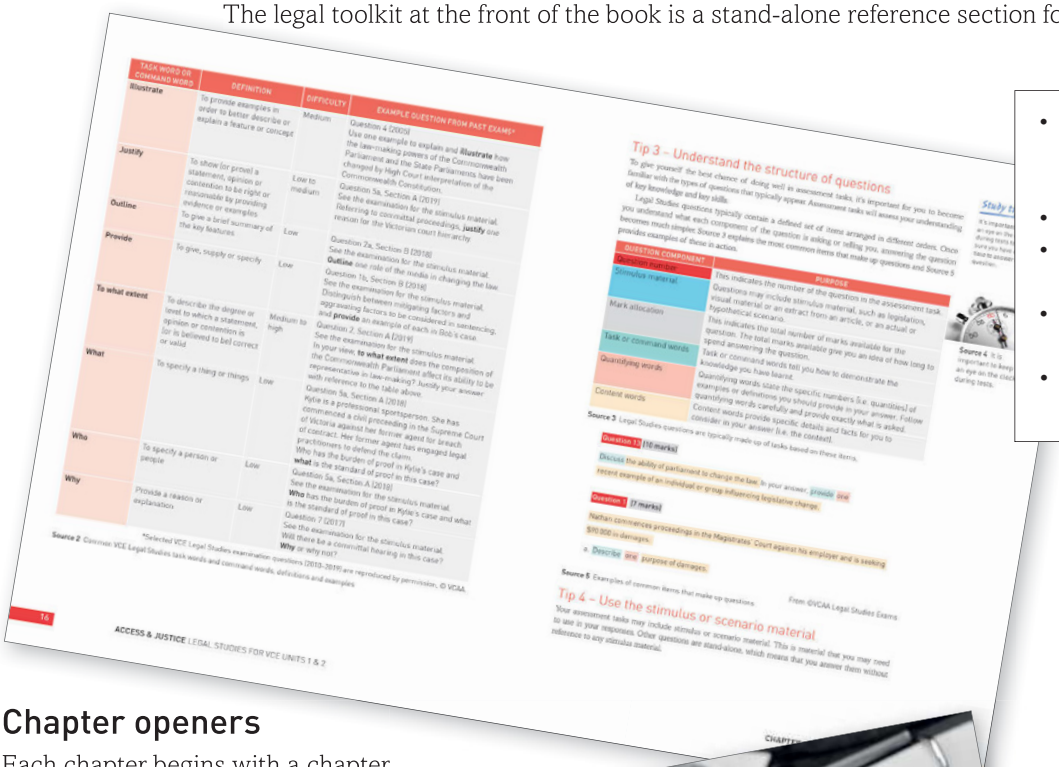
USING *LEGAL STUDIES FOR VCE UNITS 1 & 2*

Legal Studies for VCE Units 1 & 2 (14th edition) offers complete support for teachers and students completing Units 1 & 2 of VCE Legal Studies.

Key features of the Student book

Legal toolkit

The legal toolkit at the front of the book is a stand-alone reference section for students that includes:



- an overview of the structure of the VCE Legal Studies course
- a range of helpful study tips
- tips for success in assessment tasks
- advice on mastering legal citation
- information about careers in the law.

Chapter openers

Each chapter begins with a chapter opener that includes:

- an engaging and relevant image that links to core content in the chapter
- links to expert authored content hosted on Quizlet, where it can be used anywhere, anytime
- a summary of outcomes, key knowledge and key skills dot points from the *VCE Legal Studies Study Design* (2018–2023)
- a list of key legal terms that appear in the chapter (with supporting definitions).

Clear topic-based approach

Content is sequenced in structured topics that are aligned to the Study Design. Each topic contains the following elements:

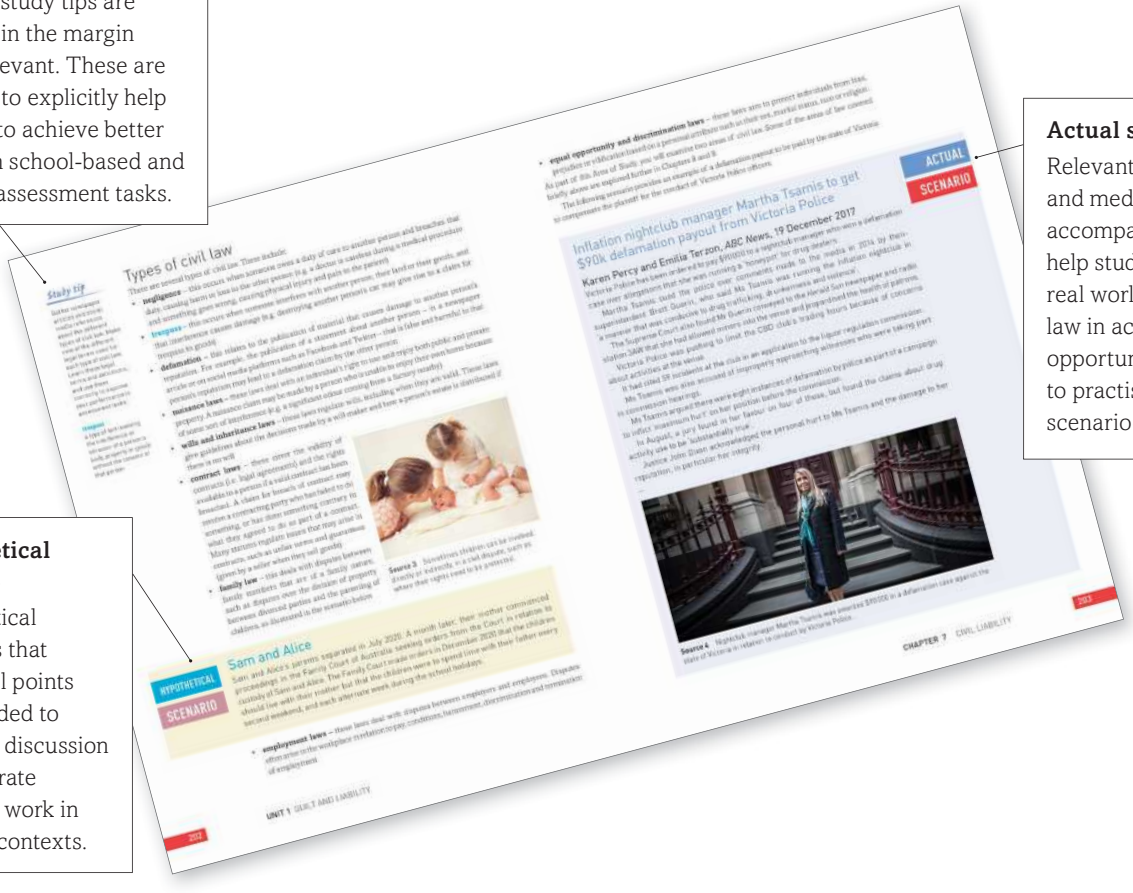
Key legal terms
Definitions are provided in the margin to support student understanding the first time they appear in each chapter All key terms also appear in the glossary at the end of the book.

Extract
Extracts from relevant legislation, Acts, reports, speeches and websites support learning.

Did you know?
Interesting, quirky or fun facts about the law are provided to engage students and bring content to life.

Study tip
Targeted study tips are provided in the margin where relevant. These are designed to explicitly help students to achieve better results on school-based and external assessment tasks.

Actual scenario
Relevant legal cases and media articles with accompanying citation help students understand real world examples of the law in action and provide opportunities for students to practise responding to scenario-based questions.



Hypothetical scenario
Hypothetical situations that raise legal points are provided to stimulate discussion and illustrate how laws work in different contexts.

Check your learning

Structured questions and tasks appear at the end of every topic. These provide opportunities for students to consolidate and extend their understanding. They are levelled under the following headings to allow for differentiation:

- Define and explain
- Synthesise and apply
- Analyse and evaluate.

Links to supporting digital resources on obook assess

Links to a range of supporting digital resources appear at the end of every topic. These include links to videos, worksheets, interactive quizzes, revision notes and weblinks.

Chapter and unit review

Each chapter and unit wraps up with opportunities for review and revisions.

Chapter review

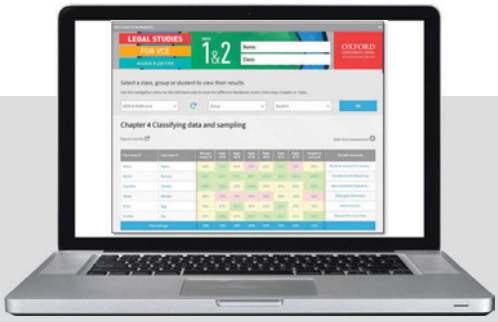
A chapter review appears at the end of every chapter and includes:

- three top tips from the chapter that provide succinct summaries of key points
- graded revision questions
- a practice assessment task.

Unit review

Unit assessment tasks appear at the end of Unit 1 and Unit 2. These cover the key knowledge dot points for the whole Area of Study and are structured in line with a range of suggested assessment tasks covered in the *VCE Legal Studies Study Design*.

Key features of digital support



Legal Studies for VCE Units 1 & 2 (14th edition) offers complete support for teachers and students completing Units 1 & 2 of VCE Legal Studies.

Students receive: obook assess

- a complete digital version of the Student book with notetaking and bookmarking functionality
- targeted instructional videos by some of Victoria's most experienced Legal Studies teachers, designed to help students prepare for exams and assessment tasks
- a range of engaging worksheets for every chapter, designed to consolidate and extend understanding on key points from the study design
- additional scenarios and examples for extension
- annotated on level, below level and above level responses
- auto-correcting quizzes for each chapter, which assess students' level of understanding, monitor progress and feed into the markbook
- direct access to Quizlet.

Teachers receive: TEACHER obook assess

- access to all student resources
- detailed course planners, teaching programs and lesson plans
- answers to every question in the Student book
- chapter summary PowerPoint presentations ideal for whole-class revision
- practice exams and assessment tasks with answers
- access to markbook, where teachers can:
  - filter online test and quiz results by class or group
  - add custom results from self-administered assessments
  - view student progress reports in HTML or PDF
- direct access to Quizlet.

Quizlet

Each chapter of *Legal Studies for VCE Units 1 & 2* is supported by expert-authored content on Quizlet. Accessing Quizlet via a web browser or app, students have access to different interactive learning tools, including:

- interactive flashcards to help students learn key legal terminology
- multiple-choice questions to test students on their knowledge
- 'type what you hear' exercises to help students memorise key legal definitions.

Quizlet also provides students with fun revision games to support their learning, including:

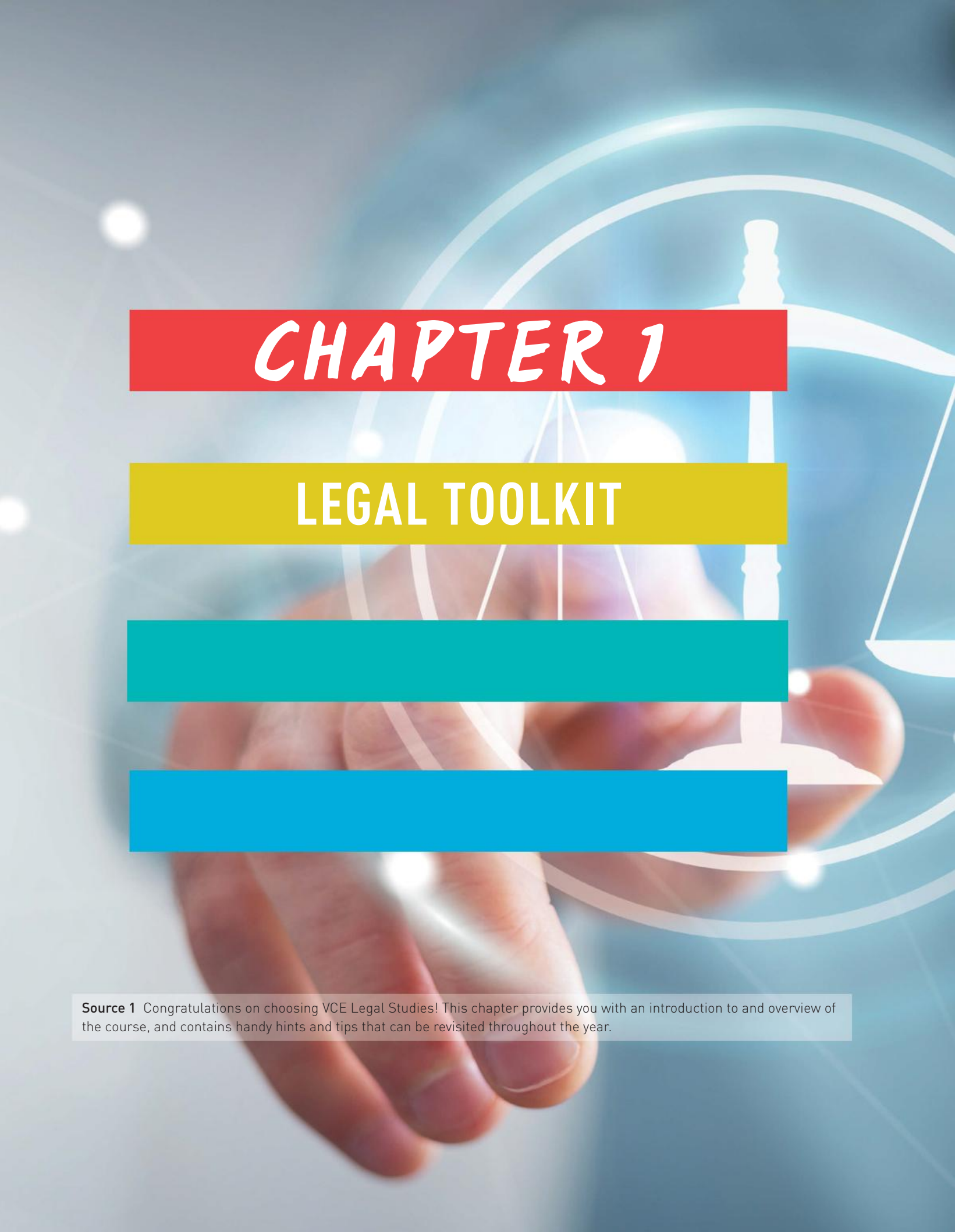
- Quizlet Live, where students battle in teams or individually against other members of their class
- 'match' card game, where students must match the correct term to its definition
- 'gravity' timed test, where students test their knowledge against the clock.

Instructions for teachers launching a game of **Quizlet** Live

1 When prompted in the Student book, log onto Oxford Digital and launch the Quizlet website.
2 Follow the prompts as to how you would like to host the game for your students (i.e. as individuals or in teams).
3 Your game is now set up with students ready to join. They can join by opening the Quizlet app or website and:
   – manually entering the six-digit code that appears on the screen, or
   – scanning the QR code that appears on the screen.
4 Once all students are ready, click the large 'Create game' button and a summary of which students are playing will appear. Click 'start game'.
5 As the teacher, your screen will display a leaderboard that updates in live time as students answer questions.

CHAPTER 1

LEGAL TOOLKIT



Source 1 Congratulations on choosing VCE Legal Studies! This chapter provides you with an introduction to and overview of the course, and contains handy hints and tips that can be revisited throughout the year.

WELCOME TO VCE LEGAL STUDIES UNITS 1 & 2

Congratulations on choosing Legal Studies as part of your VCE studies!

Legal Studies is an exciting, relevant and engaging course that explores the meaning of justice and helps you become active and informed citizens. It will provide you with opportunities to develop problem-solving skills as you navigate your way through criminal and civil cases and legal scenarios – both real and hypothetical.

This student book has been purpose-written to meet the requirements of the *VCE Legal Studies Study Design* (2018–2023) and includes content you are required to cover in Units 1 & 2.

This legal toolkit contains a range of useful and relevant information to help you get the most out of VCE Legal Studies. It can be used as an introduction and overview to the course, but is also designed as a handy reference that can be revisited throughout the year.

TOPICS COVERED

This chapter provides an introduction to the following topics:

- 1.1 Understanding the VCE Legal Studies course
- 1.2 Setting yourself up for success in VCE Legal Studies
- 1.3 Tips for success on assessment tasks
- 1.4 Mastering legal citation
- 1.5 Careers in the law.

Best of luck with your studies this year!

Extracts from the *VCE Legal Studies Study Design* (2018–2023) reproduced by permission, © VCAA

1.1 UNDERSTANDING THE VCE LEGAL STUDIES COURSE

Study tip

Make sure you visit the VCAA website and download a copy of the *VCE Legal Studies Study Design*. It sets out all the information you are expected to learn and provides important information on how you will be assessed.

A link to the current Study Design is provided on your obook assess.

The Study Design

The requirements of the VCE Legal Studies course are set out in a document known as a Study Design. The *VCE Legal Studies Study Design* is published by the Victorian Curriculum and Assessment Authority (VCAA).

The Study Design is the most important document supporting the VCE Legal Studies course. It sets out all the information you are expected to learn and provides important details about the way you will be assessed.

Structure of the VCE Legal Studies course

VCE Legal Studies is a two-year course made up of four units:

UNIT	COMMENTS
Unit 1 – Guilt and liability	• Units 1 & 2 are most commonly completed in Year 11
Unit 2 – Sanctions, remedies and rights	
Unit 3 – Rights and justice	• Units 3 & 4 are most commonly completed in Year 12
Unit 4 – The people and the law	• You do not have to complete Units 1 & 2 to undertake Units 3 & 4

Source 1 Structure of VCE Legal Studies Units 1–4

Each unit of the course is separated into *Areas of Study*. You are required to achieve an **Outcome** for each Area of Study. Sources 2 and 3 show how Units 1 & 2 of the course are broken down into Areas of Study and Outcomes. It also shows the chapters in this book that cover this content.

UNIT 1 – GUILT AND LIABILITY

AREA OF STUDY	OUTCOME	CORRESPONDING CHAPTERS IN THIS BOOK
Area of Study 1 Legal foundations	**Outcome 1** On completion of this unit, the student should be able to describe the main sources and types of law, and assess the effectiveness of laws.	• **Chapter 3** Legal foundations
Area of Study 2 The presumption of innocence	**Outcome 2** On completion of this unit, the student should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.	• **Chapter 4** The presumption of innocence • **Chapter 5** Indictable offences • **Chapter 6** Summary offences
Area of Study 3 Civil liability	**Outcome 3** On completion of this unit, the student should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.	• **Chapter 7** Civil liability • **Chapter 8** Tort law • **Chapter 9** Other areas of civil law

Source 2 An overview of the content, structure and marks allocated in Unit 1. Extracts from the *VCE Legal Studies Study Design* (2018–2023) reproduced by permission, © VCAA

UNIT 2 – SANCTIONS, REMEDIES AND RIGHTS

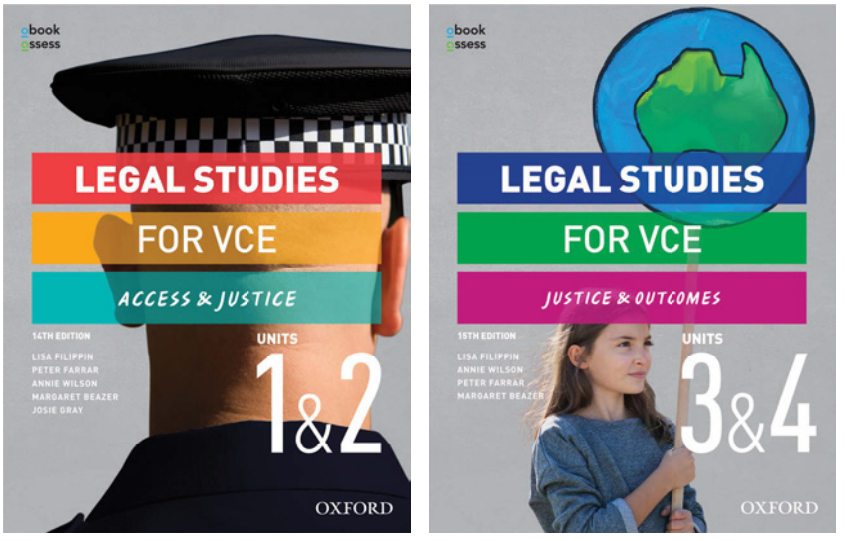
AREA OF STUDY	OUTCOME	CORRESPONDING CHAPTERS IN THIS BOOK
Area of Study 1 Sanctions	**Outcome 1** On completion of this unit, the student should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches.	• **Chapter 11** Sanctions • **Chapter 12** Recent criminal cases
Area of Study 2 Remedies	**Outcome 2** On completion of this unit, the student should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.	• **Chapter 13** Remedies • **Chapter 14** Recent civil cases
Area of Study 3 Rights	**Outcome 3** On completion of this unit, the student should be able to evaluate the ways in which rights are protected in Australia, compare this approach with that adopted by another country and discuss the impact of an Australian case on the rights of individuals and the legal system.	• **Chapter 15** Rights

Source 3 An overview of the content, structure and marks allocated in Unit 2. Extracts from the *VCE Legal Studies Study Design* (2018–2023) reproduced by permission, © VCAA

Each Outcome in the course includes a series of **key knowledge** dot points and **key skills** dot points:

- the key knowledge dot points tell you what you should know and learn
- the key skills dot points tell you what you should do with that knowledge.

You will find the key knowledge and key skills for each Outcome at the start of each chapter of this book. It is important that you read and become familiar with these before you begin each chapter.



Source 4 The VCE Legal Studies course is a two-year course made up of four units. Units 1 & 2 are covered in *Legal Studies for VCE Units 1 & 2 Access & Justice* (14th edition). Units 3 & 4 are covered in *Legal Studies for VCE Units 3 & 4 Justice & Outcomes* (15th edition).

Assessment and reporting

As you complete Units 1 & 2 of the VCE Legal Studies course, your teacher will use a variety of learning activities and assessment tasks to assess your knowledge and understanding of key knowledge and key skills.

Satisfactory completion

The award of satisfactory completion for each unit of the VCE Legal Studies course is based on your teacher's decision that you have demonstrated achievement of the set of Outcomes for that unit. For example, to be awarded satisfactory completion in Unit 1 – Guilt and Liability, you will need to demonstrate the required achievement for Outcomes 1, 2 and 3.

At the end of each unit, your school will submit a result for each student to the VCAA:

- students who demonstrate the required level of achievement will receive an **S (Satisfactory)**
- students who do not demonstrate the required level of achievement will receive an **N (Not Satisfactory)**.

Your teacher's decision to give you an S or N is based on your performance in a range of learning activities and tasks, known as assessment tasks. Your teacher's decision to give you an S or N in each unit is separate from the levels of achievement (i.e. mark) you receive on your assessment tasks.

Assessment tasks

Your level of knowledge and understanding of the Outcomes in each Area of Study (shown in Sources 2 and 3) will be demonstrated through the completion of assessment tasks. All the assessment tasks that you complete in VCE Legal Studies Units 1 & 2 are decided by your school. This means all the assessment tasks are developed and assessed within your school. Your level of achievement (i.e. your mark) will not be reported to the VCAA. Note that for Units 1 & 2, there is no external end-of-year examination.

The types of assessment tasks that you may be required to complete include:

- a folio of exercises
- structured questions
- a classroom presentation
- a role-play
- a debate
- a report
- a question-and-answer session.

Tasks can be presented orally, in writing or by using presentation technology. Your school will determine what these tasks are and will provide guidance on how the tasks will be assessed.

Source 5 Your knowledge and understanding of the Outcomes in each Area of Study will be demonstrated through the completion of assessment tasks. These assessment tasks may take the form of a written report, a class debate, or even a role-play.

Key themes of the VCE Legal Studies course

Several key themes flow through VCE Legal Studies Units 1–4. Being aware of these themes and understanding them will help you to connect the information you learn in each unit of the course and place it in a broader context. The key themes are discussed in Source 6 below.

KEY THEME	DESCRIPTION
Active citizenship	Many parts of the course demonstrate the ways in which we can become active and informed citizens. This is known as active citizenship. You will study this through both Units 1 & 2 in understanding and appreciating how individuals can influence changes in the law and how individuals can use the court system to enforce their rights.
The principles of justice	'Justice' refers to the fair and equitable treatment of all individuals under the law. It is a common concept and something that Australians often want to see being upheld – particularly when it comes to serious crimes that have been committed. In this course you will look at the three principles of justice: • **fairness** • **equality** • **access**.
Problem-solving and application skills	A key focus in this course is developing your problem-solving and application skills. Legal Studies requires you to consider a range of real and/or hypothetical scenarios, and apply your knowledge and skills to those scenarios. You will consider areas of the law such as: • criminal cases and civil disputes • problems with the law and the legal system • problems with the way in which our law-makers operate. In each of these areas, you may be expected to develop possible strategies to help resolve problems and issues.
Recent focus	An important part of this course requires you to be up-to-date with what is happening in Australia's legal system. For example, in Unit 2 you are required to study recent criminal cases and civil cases. 'Recent' means within four years in Legal Studies.

Source 6 Key themes covered in VCE Legal Studies Units 1 & 2

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

Check your Student obook assess for these additional resources and more:

Video tutorial
How to structure an extended response

Weblink
VCAA – the current *VCE Legal Studies Study Design*

1.2 SETTING YOURSELF UP FOR SUCCESS IN VCE LEGAL STUDIES

Successfully completing your VCE is not an easy thing to do. For many people, it can be a challenging and stressful time. This topic is designed to help you plan and prepare so you can successfully complete the course. Some of the tips provided below relate specifically to VCE Legal Studies, but other tips are more general and apply to all of your VCE subjects.

These tips are just a starting point. You might already have your own strategies. If so, stick with those. Your friends and teachers might have some great study tips too, so be sure to ask them, and implement the strategies that work best for you!

Top 10 tips for study success

Tip 1 – Get hold of key documents and read them carefully

One of the quickest and simplest things you can do to set yourself up for success in VCE Legal Studies is to get your hands on key documents and read them carefully.

- The most important document in VCE Legal Studies is the Study Design. It sets out all the information you are expected to learn and provides important details about the way you will be assessed. The current Study Design has been accredited from 1 January 2018. You can download a copy from the VCAA website link on your obook assess.
- The VCAA makes several other useful documents available at no charge on its website. These include past exam papers, examination reports and other support materials. The examination reports are particularly important to read.
- You should make sure you keep all documents from your teacher relating to assessment tasks, and read them carefully. Understanding exactly what is required in an assessment task is your first step towards doing well on it. Make sure you also get copies of any assessment advice related to assessment tasks (e.g. marking criteria or assessment rubrics). These are the documents that your teacher will use to assess your level of achievement, so understanding mark allocation and high-scoring responses will ensure that you give yourself the best chance of success.

Source 1 Understanding exactly what is required in an assessment task is your first step towards doing well on it. Make sure you also get copies of any assessment advice related to assessment tasks (such as marking criteria or assessment rubrics).

Tip 2 – Study

Success in VCE Legal Studies doesn't just begin and end in the classroom. If you're going to perform at your best, you will need to make time for regular periods of study and revision outside school hours. This doesn't mean you have to study for hours every day, but it does mean you should incorporate short periods of revision into your daily routine. Studying daily will help you to continually reinforce new concepts in your mind and help you avoid the stress of last-minute cramming. Here are some tips to help you study effectively.

Choose the best place to study

- Everyone has their own idea about the best study environment. Whether it's in your bedroom, at your local library, or at your favourite cafe, you need to find a regular study space that works for you. Ideally, your study space should be quiet, comfortable, bright and airy, and free from distractions.

- Make sure your study space is stocked with the things that you need (such as stationery) and decorated with things that make you feel calm (such as artworks or plants).
- If you like to listen to music while you study, make sure you can do this without disturbing others.

Choose the best times to study

- Choosing the best time of day for regular study is important. Some people find it easier to concentrate early in the morning, while other people find it easier to concentrate at night. Decide what works best for you and plan for regular study sessions at this time of day. Do not work too late into the evenings though, as this can make you tired for school the next day.

Source 2 Whether it's in your bedroom, at your local library, or at your favourite cafe, you need to find a regular study space that works for you.

Remember that studying can take many different forms

- Finding time for study can sometimes be difficult, so keep in mind that effective studying can take different forms and happen almost anywhere:
  - you might read over your notes for 10 minutes on the bus on your way to school
  - you might have a chat to your friends at lunch about a concept that you found difficult in class or organise regular group study sessions with your friends
  - you might make an audio recording of your notes and listen to them while you are exercising.

Tip 3 – Manage your study time effectively

Now that you have your study space set up and have chosen a regular time to study, it helps to put some practical strategies in place to stay on track. Try one or more of the following time management strategies.

TIME MANAGEMENT STRATEGY	DETAILS
Create a study timetable	• Creating a study timetable that helps you schedule periods of regular study and revision in all your subjects is key to your success. • Once you set your study timetable, be sure to stick to it. If your timetable is not working, revisit it and make a new one.
Use a diary, wall planner or calendar to record key dates	• Recording key dates is essential to your success. Adding due dates for assessment tasks and assignments will help you manage your time effectively and meet your deadlines (especially in weeks when you have multiple assessment tasks due). • Recording the dates of tests and exams will also help you keep your preparations on track.
Make lists	• A simple 'to do' list can be a great tool to help you manage your time and achieve your goals. Creating a short list of daily goals for each study session can also be a great way of keeping you on track each day. • A separate list of weekly or monthly goals can help you keep the bigger picture in mind. • Using lists is a great way to help you break big tasks down into smaller, more manageable tasks, so that you gain a sense of achievement.
Set reminders	• Setting a regular alarm to remind you it is time to study can keep you on track.

Source 3 Time management strategies

Tip 4 – Discover your learning style

Everyone learns differently, so get to know the way you learn the best so you can use strategies for study that are most effective for you.

TYPE OF LEARNER	WAYS IN WHICH YOU LEARN THE BEST	BEST LEARNING STRATEGIES AND TOOLS
Visual learner	You learn best by seeing and looking	You learn best by using pictures, images, diagrams, colour coding and mind maps
Auditory learner	You learn best by hearing and listening	You learn best by using sounds, music, audio recordings and mnemonics (songs, rhymes or phrases designed to aid memory)
Verbal learner	You learn best by using words, both in speech and writing	You learn best by reading content aloud, engaging in discussions and using word-based memory techniques (such as scripting)
Physical learner	You learn best by touching and doing	You learn best by drawing diagrams and using physical objects and role-playing situations

Source 4 Strategies for different learning styles

Tip 5 – Take care of yourself

Once of the most important things you can do during your VCE is look after yourself. Staying healthy is key to your success. Make sure you:

- **eat a balanced diet** – try to avoid consuming too much caffeine and junk food
- **get enough sleep** – ideally around 7–8 hours per night
- **stay hydrated** – try to drink lots of water and limit your intake of soft drinks and energy drinks
- **get regular exercise** – a brisk 30-minute walk every day is a great place to start and any more is a bonus.

As part of staying healthy, it is important to maintain not only good physical health, but also good mental health and wellbeing. Reach out for support when you need it. Support comes in many ways, including face-to-face support (families, friends, carers, social workers and health professionals) as well as digital support. There are some excellent apps and websites dedicated to young people's mental health and wellbeing.

Tip 6 – Use different strategies to review and revise

At the end of each week of class it's a great idea to summarise your notes so that you can review and revise what you've learnt ahead of any assessment tasks, tests or exams. Regular revision will help you understand concepts more fully and recall key information when you need to. A range of common revision strategies and ideas are provided below. Try one or more of the following revision strategies.

REVISION STRATEGY	DETAILS
Create detailed revision notes	• Creating your own revision notes can be time consuming, but it is time well spent! • Taking the time to create your revision notes reinforces what you have learnt and means that they will be written in language that makes sense to you, not someone else.
Write dot-point summaries on index cards	• Detailed revision notes are great, but you may also benefit from creating brief study notes in the form of dot-point summaries. • Copy these summaries onto index cards so you can carry them with you and revise on your way to school or at home on the couch.

REVISION STRATEGY	DETAILS
Record your revision notes and listen to them	• Record yourself as you read your revision notes or dot-point summaries aloud. • Listen to yourself.
Quiz yourself	• Quizzes are quick, fun, and a good way to test what you know and find out your areas of weakness. • Use your textbook, revision notes or quiz cards to quiz yourself. • Ask friends or family members to quiz you on key legal terms and key concepts.
Do practice questions, essays and exams	• Practice makes perfect, so the more you test your knowledge and develop your skills by completing practice questions, essays and exams, the better. • Ask your teacher to provide feedback on your practice responses to help you improve.

Source 5 Revision strategies

Source 6 Detailed revision notes are great, but you may also benefit from creating brief study notes in the form of dot-point summaries. Copy these summaries onto index cards or cue cards that you can carry with you and use them to revise on your way to school or at home on the couch.

Tip 7 – Stay up-to-date with current events

This course focuses on our law-makers and our justice system, which are constantly evolving and reforming. So are our laws. It's important to stay up-to-date with developments in our legal system so you can incorporate current details and facts into your coursework and assessment tasks.

Newspaper articles, digital news feeds, television programs and journal articles are all good sources of current information. Keep your eye out for ongoing developments in legal cases and current events and file these away for later! One way to do this is by creating an automatic internet search. Alert services (such as Google Alert) can send you emails when they find results that match your search terms – such as webpages, newspaper articles, blogs, or even legal cases.

As you collect current information, make sure you label it and save it carefully so you can easily find the information when you need it.

Study tip

Setting up automatic alerts is a great way of keeping up-to-date with developments in legal cases and legislation. Just enter the keywords you want to search for, and your email address. You'll receive regular updates on anything you're interested in – and it's free!

A link to Google Alerts is provided on your obook assess.

Tip 8 – Make time for breaks

Make sure you plan to take regular study breaks. You should aim to work in 50-minute blocks and then take a meaningful 10-minute break.

Your break should have nothing to do with your studies. Get up from your desk and leave your study space. Take the dog for a quick walk, make something to eat or chat to your family or friends.

Some days are tough, so if you're feeling tired, upset or frustrated you might need to take a break or take a night off from study. Just make sure you don't do this too often!

Tip 9 – Ask for help

Completing your VCE can be a challenge sometimes – especially if you have other commitments like work, sport, or music outside school hours. If you're feeling stressed or overwhelmed, make sure you talk to people around you and get support if you need it. Your teachers, friends and family are there to help you and many schools have services and programs that can assist you.

If you're having problems understanding a particular concept or completing a certain task, make sure you ask for help! Your teacher is there to help you in class and will make time to explain things you don't understand. If your teacher isn't available, talk to your friends and other students in your class to see if they can help.

Tip 10 – Keep a positive attitude

Source 7 Some people find it motivating to decorate their study space with inspirational quotes or pictures of the people they care about. These things can help you stay motivated by reminding you of your goals and the reasons why you are working so hard.

Keeping a positive attitude is important during your VCE. Tips for staying positive include:

- rewarding yourself for achieving your daily and weekly goals
- trying not to compare yourself with other students in your class; instead, set goals that are right for you and focus on achieving these personal goals
- decorating your study space with inspirational quotes or pictures of the people you care about; these things can help to remind you of your goals and the reasons why you are working so hard
- remembering that many concepts in the VCE Legal Studies course are complex, and you may not understand them the first time you come across them. These concepts require repetition, practice and resilience to master. Don't give up! Try some of the different tips and strategies listed above to understand them.

Check your Student obook assess for these additional resources and more:

Weblink
Victorian Curriculum and Assessment Authority (VCAA)

Weblink
Google Alerts

Weblink
Headspace

Study timetable
Study timetable template

1.3 TIPS FOR SUCCESS ON ASSESSMENT TASKS

As you work your way through the VCE Legal Studies course, your teacher will use a variety of learning activities and assessment tasks to assess your understanding of the key knowledge and the key skills of the course. To give yourself the best chance of success on these assessment tasks, be sure to follow these tips.

Tip 1 – Use key legal terminology

One of the key skills you are expected to demonstrate throughout Units 1 & 2 is the ability to define and use key legal terminology.

A list of key legal terms (with definitions) is provided at the start of every chapter of this student book. These words then appear throughout each chapter and are also listed in the glossary at the end of the book.

Some simple strategies to help you learn and remember key legal terms include:

- writing words and definitions on sticky notes and sticking them around your room or house
- making flashcards that you can carry with you and use to quiz yourself and others
- using the digital flashcard glossary interactive provided on your obook assess to quiz yourself and others
- getting into the habit of using legal terms in your responses (e.g. use 'plaintiff' instead of 'a person who is suing another person').

Source 1 Learning key legal terms and using them correctly in your assessment tasks will show your teacher that you understand them.

Tip 2 – Understand task words and command words

In the assessment tasks you are asked to complete throughout the year, it is likely that questions and tasks will include a 'task word' or a 'command word'. In Legal Studies, task words and command words are words that tell you how to demonstrate the knowledge you have learnt.

Task words range in level of difficulty. Some (such as **identify** or **define**) are simple to understand and master. Others (such as **evaluate** or **justify**) are more challenging to understand and will take practice to master.

Command words tend to start with a 'w' – **with**, **why**, **what** and **who** are the more common ones in Legal Studies assessment tasks. Another command word is **how**. Like task words, they range in difficulty. For example, 'who' questions are generally simple and require you to identify a person or party. Others, such as 'how', can be more challenging.

Source 2 lists a range of common task and command words, their definitions, and an indication of their level of difficulty. The difficulty level can depend on the task or command word, and also the key knowledge being assessed – so an 'explain' question, for example, can range from medium to high in terms of difficulty.

The table also provides example questions so you can see each task word and command word in context. Some of these questions have come from exam papers for past Study Designs, so they may or may not reflect key knowledge and key skills that are in the current Study Design. You should check with your teacher about this. Because these questions come from actual VCAA Legal Studies exams and examine content from Units 3 & 4, you are not expected to know many of these concepts at Units 1 & 2!

TASK WORD OR COMMAND WORD	DEFINITION	DIFFICULTY	EXAMPLE QUESTION FROM PAST EXAMS*
Advise	To offer suggestions about the best course of action or make recommendations	Medium to high	Question 1a, Section B (2018) See the examination for the stimulus material. **Advise** Ada on one enforcement issue she should consider before initiating this claim.
Analyse	To examine a complex feature, issue or concept by breaking it down into smaller parts and showing how they relate to one another	High	Question 12 (2013) Using one successful referendum and one High Court case, **analyse** the impact of referendums and the High Court's interpretation of the Commonwealth Constitution on the division of law-making powers.
Comment on	To express an opinion or reaction (in order to demonstrate your understanding of it)	Medium	Question 5 (2009) 'Pre-trial procedures are designed to speed up the resolution of civil disputes.' **Comment on** this statement. In your answer, describe one civil pre-trial procedure.
Compare	To explain or discuss how concepts, definitions or features are similar and different (by identifying the qualities or features they have in common as well as those they don't)	Low to medium	Question 5 (2010) Jane and David have been involved in an ongoing dispute. They have been advised to use either mediation or arbitration as a dispute resolution method. **Compare** mediation and arbitration as methods of dispute resolution.
Define	To state the exact nature, features or meaning of a term, feature or concept	Low	Question 1 (2015) A plaintiff is seeking an injunction and damages of $1 million in the Supreme Court of Victoria. **Define** the term 'injunction'.
Describe	To give a detailed account of a system, process or feature	Low	Question 1b, Section A (2019) John has been charged with an indictable offence. He has pleaded not guilty. The victims are worried about giving evidence at the upcoming trial, which is expected to last for six weeks. John's lawyer has recommended that John should apply to the court for a sentence indication and consider pleading guilty. **Describe** one impact that a guilty plea may have on John's criminal case.

TASK WORD OR COMMAND WORD	DEFINITION	DIFFICULTY	EXAMPLE QUESTION FROM PAST EXAMS*
Discuss	To give a reasoned argument for and against a particular issue (and provide strengths and weaknesses if applicable). You can also give your opinion, and should do so if the question asks you to give it	High	Question 6, Section A (2019) Section 116 of the Australian Constitution states: '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'. **Discuss** the extent to which the Australian people can prevent the Commonwealth Parliament from making any laws on religion.
Distinguish	To explain the differences and distinctive characteristics	Low	Question 1b, Section B (2018) See the examination for the stimulus material. **Distinguish** between mitigating factors and aggravating factors to be considered in sentencing, and provide an example of each in Bob's case.
Evaluate	To identify key features and assess their relative merits by discussing the strengths and weaknesses and providing a concluding judgment about the (overall) benefit or worth of what is being evaluated	High	Question 6 (2018) **Evaluate** two ways in which the Australian Constitution enables the Australian people to act as a check on parliament in law-making.
Examine	To consider in detail and establish the key facts and important issues related to a topic or issue	Medium to high	Question 9 (2010) The doctrine of precedent allows for both consistency and flexibility. Critically **examine** these two strengths of the doctrine of precedent.
Explain	To clarify a point, feature or concept by describing it in more detail or revealing relevant facts about it	Medium to high	Question 2, Section A (2018) Kai is in a dispute with his landlord. The landlord refuses to repair the pipes in the bathroom and has declined Kai's requests to meet to resolve the matter. Kai has been advised that Consumer Affairs Victoria (CAV) is the most appropriate body to resolve this dispute. **Explain** one reason why CAV may not be the most appropriate body to resolve this dispute.
How	To specify a particular way, means or method	Medium	Question 2d, Section A (2018) See the examination for the stimulus material. If the Commonwealth Parliament were to pass legislation allowing the commercial use of tanning units, **how** might section 109 of the Australian Constitution be relevant?
Identify	To state or recognise a feature or factor (and possibly provide some basic facts about it)	Low	Question 4a, Section A (2018) **Identify** two rights of victims in the Victorian criminal justice system.

TASK WORD OR COMMAND WORD	DEFINITION	DIFFICULTY	EXAMPLE QUESTION FROM PAST EXAMS*
Illustrate	To provide examples in order to better describe or explain a feature or concept	Medium	Question 4 (2005) Use one example to explain and **illustrate** how the law-making powers of the Commonwealth Parliament and the State Parliaments have been changed by High Court interpretation of the Commonwealth Constitution.
Justify	To show (or prove) a statement, opinion or contention to be right or reasonable by providing evidence or examples	Low to medium	Question 5a, Section A (2019) See the examination for the stimulus material. Referring to committal proceedings, **justify** one reason for the Victorian court hierarchy.
Outline	To give a brief summary of the key features	Low	Question 2a, Section B (2018) See the examination for the stimulus material. **Outline** one role of the media in changing the law.
Provide	To give, supply or specify	Low	Question 1b, Section B (2018) See the examination for the stimulus material. Distinguish between mitigating factors and aggravating factors to be considered in sentencing, and **provide** an example of each in Bob's case.
To what extent	To describe the degree or level to which a statement, opinion or contention is (or is believed to be) correct or valid	Medium to high	Question 2, Section A (2019) See the examination for the stimulus material. In your view, **to what extent** does the composition of the Commonwealth Parliament affect its ability to be representative in law-making? Justify your answer with reference to the table above.
What	To specify a thing or things	Low	Question 5a, Section A (2018) Kylie is a professional sportsperson. She has commenced a civil proceeding in the Supreme Court of Victoria against her former agent for breach of contract. Her former agent has engaged legal practitioners to defend the claim. Who has the burden of proof in Kylie's case and **what** is the standard of proof in this case?
Who	To specify a person or people	Low	Question 5a, Section A (2018) See the examination for the stimulus material. **Who** has the burden of proof in Kylie's case and what is the standard of proof in this case?
Why	To provide a reason or explanation	Low	Question 7 (2017) See the examination for the stimulus material. Will there be a committal hearing in this case? **Why** or why not?

*Selected VCE Legal Studies examination questions (2010–2019) are reproduced by permission, © VCAA

Source 2 Common VCE Legal Studies task words and command words, definitions and examples

Tip 3 – Understand the structure of questions

To give yourself the best chance of doing well in assessment tasks, it's important for you to become familiar with the types of questions that typically appear. Assessment tasks will assess your understanding of key knowledge and key skills.

Legal Studies questions typically contain a defined set of items arranged in different orders. Once you understand what each component of the question is asking or telling you, answering the question becomes much simpler. Source 3 explains the most common items that make up questions and Source 5 provides examples of these in action.

Study tip

It's important to keep an eye on the clock during tests to make sure you have enough time to answer every question.

Source 4 It is important to keep an eye on the clock during tests.

QUESTION COMPONENT	PURPOSE
Question number	This indicates the number of the question in the assessment task.
Stimulus material	Questions may include stimulus material, such as legislation, visual material or an extract from an article, or an actual or hypothetical scenario.
Mark allocation	This indicates the total number of marks available for the question. The total marks available give you an idea of how long to spend answering the question.
Task or command words	Task or command words tell you how to demonstrate the knowledge you have learnt.
Quantifying words	Quantifying words state the specific numbers (i.e. quantities) of examples or definitions you should provide in your answer. Follow quantifying words carefully and provide exactly what is asked.
Content words	Content words provide specific details and facts for you to consider in your answer (i.e. the context).

Source 3 Legal Studies questions are typically made up of tasks based on these items.

Question 1 **(7 marks)**

Nathan commences proceedings in the Magistrates' Court against his employer and is seeking $90 000 in damages.

a. Describe one purpose of damages.

Question 13 **(10 marks)**

Discuss the ability of parliament to change the law. In your answer, provide one recent example of an individual or group influencing legislative change.

From ©VCAA Legal Studies Exams

Source 5 Examples of common items that make up questions

Tip 4 – Use the stimulus or scenario material

Your assessment tasks may include stimulus or scenario material. This is material that you may need to use in your responses. Other questions are stand-alone, which means that you answer them without reference to any stimulus material.

For questions that are attached to stimulus material, you must use that material to avoid any risk of losing marks. The stimulus material is there to test your application and analysis skills – that is, it is not testing whether you remember or have memorised the material, but rather whether you can apply it to a set of facts or circumstances.

Tip 5 – Practise questions with varying degrees of difficulty using the same key knowledge

The key knowledge in VCE Legal Studies can be assessed in different ways, and sometimes to varying degrees of difficulties. For example, take one of the principles of justice. A question can be asked about fairness, but that question can be of low, medium or high difficulty.

The following three sample questions are examples of this in action.

QUESTION	LEVEL OF DIFFICULTY	HOW TO ANSWER
Q1: Describe the principle of fairness.	Low	• Provide a detailed account or summary of what the principle of fairness is and what it means • Likely to be worth about 3 marks
Q2: Explain how the principle of fairness could be achieved in this case.	Medium	• More detail needed than in the first question about the ways in which fairness could be achieved through a case • Answer must be more specific to the case, not just summarise what fairness means • Likely to be worth 4 to 5 marks
Q3: Discuss the extent to which the principle of fairness was achieved in this case.	High	• Consider both sides (arguments) as to whether fairness was achieved • Requires a detailed consideration of events • Likely to be worth at least 6 marks

Source 6 Sample questions and levels of difficulty

Check your Student obook assess for these additional resources and more:

Flashcard glossary
An interactive digital resource to help you learn key legal terms

1.4 MASTERING LEGAL CITATION

As you work your way through the VCE Legal Studies course, you will be learning about many different laws and legal cases. To be able to recognise laws and legal cases, and to reference them in your notes and assessment tasks, you should master the basics of legal citation.

What is legal citation?

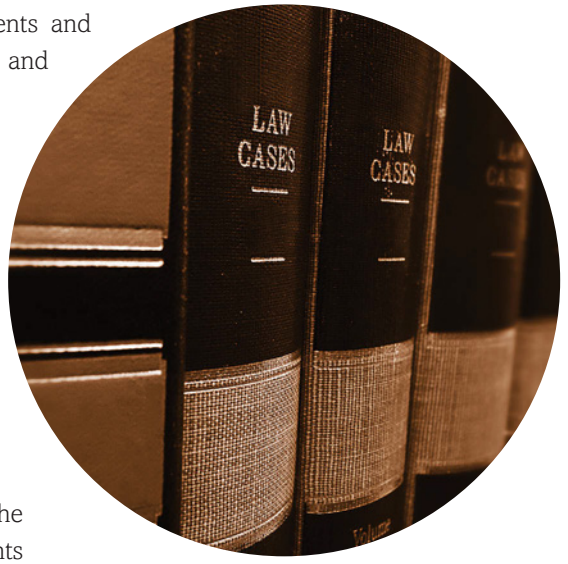
legal citation
the system used to refer to legal documents and sources such as cases and statutes

Act of Parliament
a law made by parliament; a bill that has passed through parliament and has received royal assent (also known as a statute)

Legal citation is the system used to refer to legal documents and sources such as cases and Acts of Parliament in a consistent and accurate way. The most commonly cited legal documents are:

- **Acts of Parliament** (also known as statutes and legislation)
- judgments from legal cases (also known as court decisions).

The following information will help you when reading and understanding legal citations. It will also help you cite legal documents correctly in your coursework and assessment tasks.



Source 1 Legal citation is a system designed to help people cite (i.e. refer to) specific laws and legal cases in a consistent and accurate way.

Citing Acts of Parliament

Acts of Parliament (often called just 'Acts') are laws made by the various parliaments in Australia (i.e. state and territory parliaments and the Commonwealth Parliament) and in other countries around the world.

Acts of Parliament generally feature the following pieces of information in this order:

- **the name of the act or statute** – the title that has been given to the statute. It is always written in *italics*
- **the year that it was made by parliament** – also written in *italics*
- **the parliament that passed it** – this will be either a state or territory parliament, or the Commonwealth Parliament. The name of the parliament is never written in full; instead, abbreviations for each parliament are used (e.g. Vic or Cth).

Example 1 – an Act made by the Victorian Parliament

***Crimes Act 1958* (Vic)**

Title Year Parliament

This Act (i.e. the *Crimes Act*) was made in 1958 by the Victorian Parliament.

Example 2 – an Act made by the Commonwealth Parliament

***Competition and Consumer Act 2010* (Cth)**

Title Year Parliament

This Act (i.e. the *Competition and Consumer Act*) was made in 2010 by the Commonwealth Parliament.

Study tip

If you are looking for an Act in a database (e.g. the Australasian Legal Information Institute (AustLII) database) and you can't find it in the list called 'Victorian current Acts', it might be an amending Act rather than a principal Act. If you know the year, you can look it up under 'Victorian numbered Acts'. However, for your purposes, you will generally be citing the principal Act anyway.

Citing amending Acts

Amending Acts are statutes that amend (i.e. change or update) a statute that already exists. Amending Acts are repealed (i.e. cancelled) once the amendments are made to the existing statute.

For example, the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) is an amending Act which amends the *Sentencing Act 1991* (Vic), the *Bail Act 1977* (Vic) and various other Victorian Acts. The sole purpose of the *Sentencing (Community Correction Order) and Other Acts Amendment Act* is to amend (i.e. change or update) those Acts. For example, the amendments might delete certain sections of the existing Acts, or change certain words or phrases, or add new sections.

An amending Act is cited in the same way as other Acts. Sometimes the title of the Act will let you know that it is an amending Act, as in the above examples, but not always.

Example 3 – an amending Act passed by the Victorian Parliament

***Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic)**

Title | Year | Parliament

This amending Act (i.e. the *Sentencing (Community Correction Order) and Other Acts Amendment Act*) was made in 2016 by the Victorian Parliament.

Once the amending Act has done its work, it is repealed, and it no longer appears in the list of current Acts. This occurs once the changes it makes to the principal Act (i.e. the Act it is amending) commence. For example, the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) states that it will be repealed on 2 October 2018. This is because the changes it makes to various principal Acts take effect on 1 October 2018.

Citing bills

Bills are drafts of proposed laws that have been presented to parliament but haven't been passed into law. When citing bills, you should adopt the same approach as Acts, except the word 'Act' is replaced by the word 'Bill', and the title of the bill is not italicised.

Example 4 – a bill being presented to the Victorian Parliament

Disability Amendment Bill 2004 (Vic)

Title | Year | Parliament

This Bill (i.e. the Disability Amendment Bill) was presented in 2004 to the Victorian Parliament.

Citing legal cases

Like Acts, decisions from legal cases that are heard in tribunals or courts also have citations (i.e. titles). Whenever a written decision or judgment has been handed down by a tribunal or court, it is given a citation so that people can refer to it.

Legal case citations generally feature the following pieces of information in this order:

- **the names of the parties** – the name of the person who starts the case (usually called the plaintiff, prosecutor or applicant) goes first. The names of the parties are separated with the word 'v' (e.g. *Smith v Jones*). The names are written in italics. If there are multiple parties, the case name is generally shortened to include just the first party in the list
- **the year of the decision** – the year that the decision or judgment is published. It might be in square brackets or round brackets, depending on the report in which the decision is published

- **the citation it has been given** – all Australian court cases now have a 'medium neutral citation', which is the court's own unique identifier for the decision in its online database. These citations are given by the court, and they always use an abbreviation that shows the court that heard the case. The most common abbreviations are set out below.

COURT IDENTIFIER	COURT
HCA	High Court of Australia
FCA	Federal Court of Australia
FamCA	Family Court of Australia
VSCA	Victorian Supreme Court (Court of Appeal)
VSC	Victorian Supreme Court (Trial Division)
VCC	County Court of Victoria
VMC	Magistrates' Court of Victoria
VCAT	Victorian Civil and Administrative Tribunal

Source 2 Court identifiers in medium neutral legal citations make it clear in which court a case was heard.

Examples of ways cases can be cited are as follows.

Example 5 – a civil case

Commonwealth v Tasmania **(1983) 158 CLR 1**

Parties | Year | Law report

- The parties in this civil case were the Commonwealth of Australia and the state of Tasmania.
- The 'v' between the names of the parties is short for 'versus', but is pronounced 'and'.
- The decision was published in 1983.
- This is an example of a written judgment published in a law report. It is not a medium neutral citation. It was published in Volume **158** of the Commonwealth Law Reports (**CLR**) on page **1**. 'CLR' means that the case was heard in the High Court.

Example 6 – a criminal case

DPP v Styles **[2017] VCC 96 (9 February 2017)**

Parties | Year | Court identifier | Date of judgment

- The parties in this criminal case were the **Director of Public Prosecutions (DPP)** and a man called Christian Patrick Styles.
- The 'v' between the names of the parties is short for 'versus', but is pronounced 'against' or 'and'.
- The case finished in 2017, and the written judgment was given by the Court on 9 February 2017.
- The decision was handed down in the County Court of Victoria (VCC).
- The case was No. 96 in the Court's list for that year.

Director of Public Prosecutions (DPP) the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

Citing other laws, rules and regulations

Rules and regulations

The parliament can authorise other bodies to make regulations and rules. These are described as 'delegated legislation' or 'secondary legislation'. To cite them, you use the name they have been given ('Rules' or 'Regulations') and follow the same format as citing an Act of Parliament.

Example 7 – rules passed by the Victorian Parliament

***Supreme Court (General Civil Procedure) Rules 2005* (Vic)**

Title Year Parliament

These rules (i.e. the *Supreme Court (General Civil Procedure) Rules*) were passed in 2005 by the Victorian Parliament.

Example 8 – regulations passed by the Commonwealth Parliament

***Native Title (Federal Court) Regulations 1998* (Cth)**

Title Year Parliament

These regulations (i.e. the *Native Title (Federal Court) Regulations*) were passed in 1998 by the Commonwealth Parliament.

Local laws

Local laws are passed by local councils. They are easily identifiable because they will contain the words 'Local Law' in the title.

Example 9 – a local law passed by the Melbourne City Council

Melbourne City Council Activities Local Law 2019

Title Year

This local law (i.e. the Melbourne City Council Activities Local Law) was passed in 2019 by the Melbourne City Council.

Check your Student obook assess for these additional resources and more:

- **Video tutorial** Citing legal cases and Acts of Parliament
- **Worksheet** How to find and understand Acts and cases
- **Weblink** Australasian Legal Information Institute (AustLII)

Source 3 In 2019, the Melbourne City Council passed the Activities Local Law 2019 to help with the ongoing vitality, prosperity and security of the city's residents and environment.

1.5 CAREERS IN THE LAW

There are a wide range of exciting and meaningful careers related to the study of law, and VCE Legal Studies is an important first step towards gaining a range of skills and knowledge that can help get you there.

While many people who choose to study the law go on to become lawyers, this is certainly not the only career path available. In fact, a sound knowledge and understanding of the law is highly valued in a range of different industries.

In this topic we look at what it means to be a lawyer. We also take a brief look at a range of other career and job opportunities in which a sound knowledge of the law is highly valued and will help you secure a great job in the future.

Source 1 Becoming a lawyer is not the only career path available after studying law. Many other industries value a solid understanding and knowledge of the law.

What do lawyers do?

lawyer
a general term used to describe somebody who has been trained in the law and is qualified to give legal advice (e.g. a barrister or a solicitor)

solicitor
a qualified legal practitioner who gives advice about the law and a person's rights under the law

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

Members of the legal profession in Australia are known as **legal practitioners**, also called **lawyers**. Legal practitioners can generally be divided into two groups:

- **solicitors**
- **barristers**.

All lawyers must have a law degree and be 'admitted' to the profession. Admission is a ceremony in the Supreme Court which takes place after extra time spent in practical training. The lawyer then needs to be registered as a lawyer and obtain a practising certificate from the Legal Services Board (the regulator in Victoria). Both solicitors and barristers provide certain types of legal services, and often the types of legal services they provide overlap. To get a better idea of what lawyers do, we will now look briefly at both.

Solicitors

Lawyers who see clients direct (also known as solicitors, to distinguish them from barristers) provide a range of legal services depending on the areas of law in which they are willing to accept work. Some of the more common services offered by lawyers are outlined in Source 2 below.

Source 2 Some of the more common legal services offered by lawyers

There are different ways in which a person can practise as an employed lawyer in Australia. These include government lawyers, in-house lawyers and private practice lawyers.

TYPE OF LAWYER	DESCRIPTION
Government lawyers	Government lawyers are employed by the government (e.g. government departments). They provide legal services exclusively to the governments they work for. For example, the Victorian Government Solicitor's Office (VGS) provides legal services to the Victorian Government.
In-house lawyers	In-house lawyers are employed by private companies and organisations. They provide legal services to the companies and organisations they work for. For example, Qantas may have its own lawyers who provide the Qantas business with legal services.
Private practice lawyers	Private practice lawyers are employed by private law firms. Private law firms can be: • small 'boutique' firms (that specialise in a particular area of law such as intellectual property) • medium-sized firms • large top-tier firms (that have a number of different teams specialising across different areas of the law). Private practice lawyers provide legal services to their clients in accordance with their needs. For example, a person who believes they have been unfairly treated by their employer may engage a private practice lawyer to help resolve their legal dispute.

Source 3 Ways employed lawyers can practise in Australia

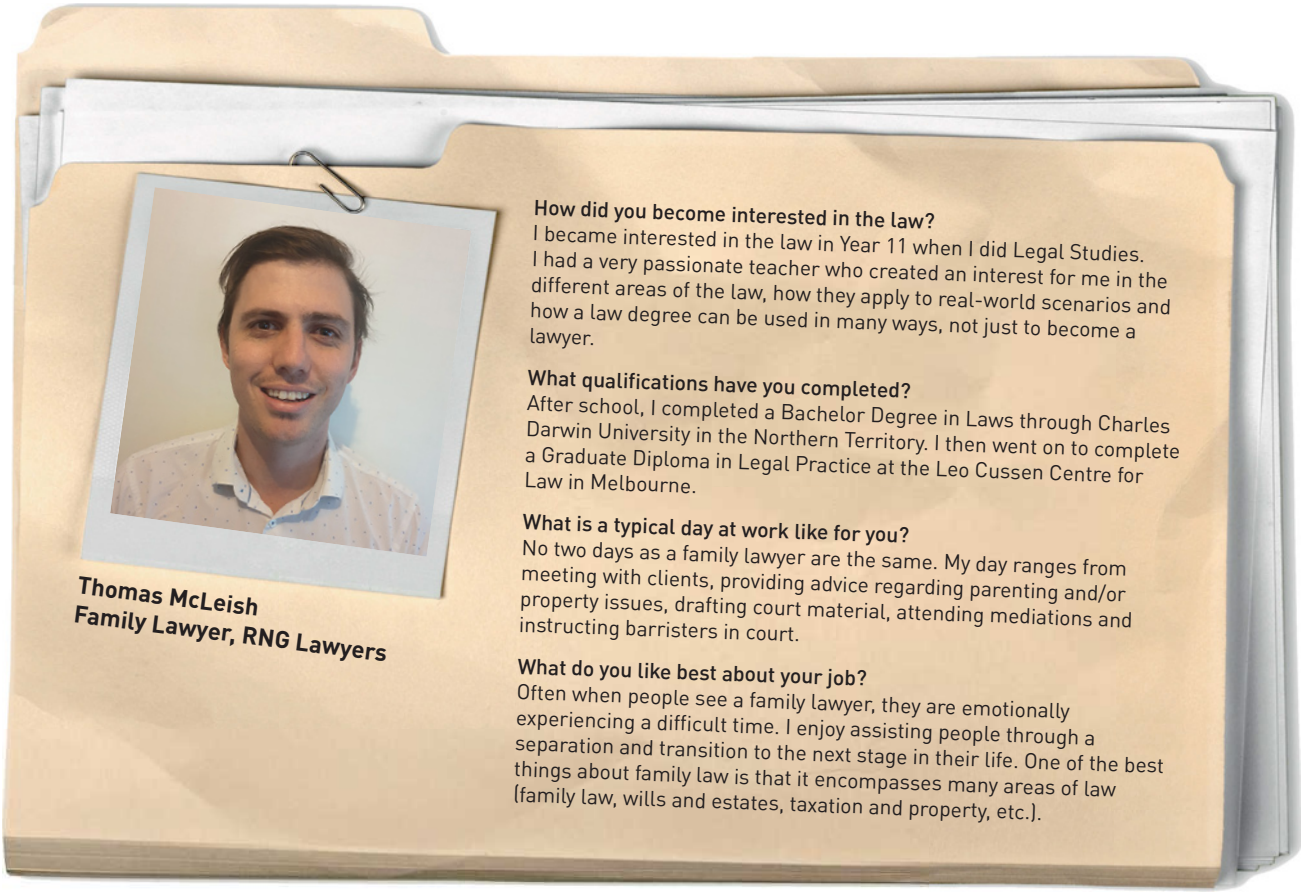
Source 4 The Legal Studies course is a stepping-stone to a career in law.

A lawyer may choose to provide legal services across different areas of law, or they may choose to specialise in one area of law. For example, some lawyers specialise in **employment law**, while others specialise in **mergers and acquisitions**. There are many other different areas of law that a lawyer may specialise in, including:

- wills and inheritance
- family law
- personal injury
- commercial disputes
- large infrastructure projects
- property
- entertainment
- building and construction
- class actions
- charities and not for profit.

Career profile

Thomas McLeish is a solicitor who works at RNG Lawyers in Melbourne. RNG Lawyers provides a wide range of legal services to help its clients. Thomas' main interest is in family law, including custody, separation and divorce. He enjoys helping people with their family law issues and their transition from one stage of life to the next.



Source 5 Thomas McLeish's profile

Barristers

A barrister is a lawyer who specialises in giving advice in difficult cases and representing clients in court. In Victoria, a lawyer who wishes to practise as a barrister must become a member of the **Victorian Bar**. The Victorian Bar is the professional association that represents more than 2000 barristers in Victoria. Becoming a barrister requires a lawyer to undertake an exam and a course.

What about other legal careers?

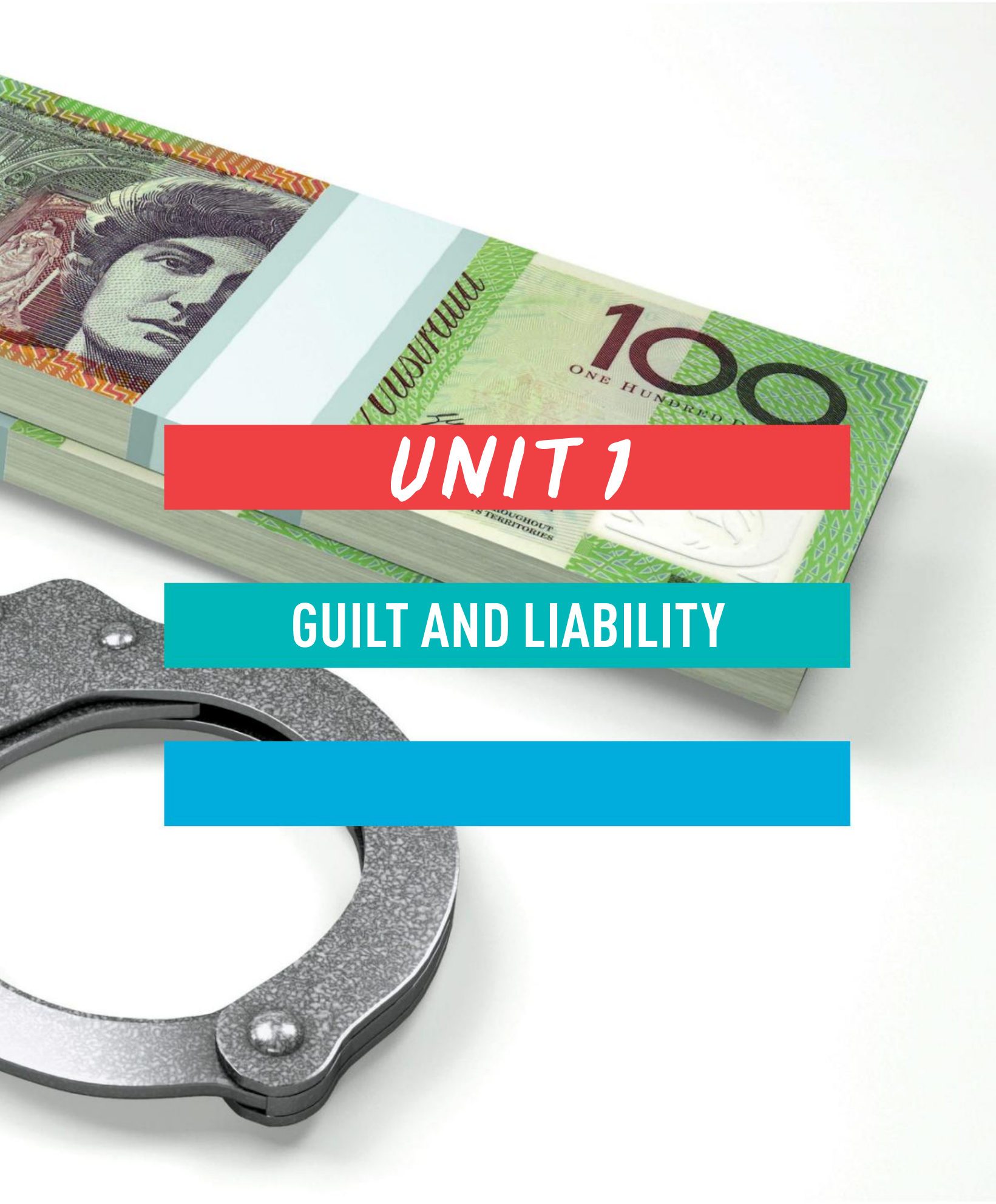
Choosing to become a practising lawyer (a solicitor or a barrister) is not the only option available to people who study law. There are many other job options and career opportunities for people who have a sound knowledge and understanding of the law. Some of these include:

- law clerk
- court personnel
- conveyancer
- policy adviser
- paralegal
- legal assistant
- legal analyst
- document database specialist
- legal recruiter
- teacher
- journalist
- mediator
- politician
- legal editor
- police officer.

Check your Student obook assess for these additional resources and more:

Weblink
Victorian Bar

Source 1 The law aims to protect the rights of individuals and to ensure society remains peaceful. In Unit 1, you will learn about two main types of law: criminal law and civil law. Criminal law is aimed at maintaining social order. Infringing criminal law can result in charges and sanctions. Civil law is aimed at protecting the rights of individuals and groups in society. Breaching civil law can result in litigation (legal action in court) and remedies.



UNIT 1

GUILT AND LIABILITY

Area of Study 1 – Legal foundations

OUTCOME 1

On completion of this unit, you should be able to describe the main sources and types of law, and assess the effectiveness of laws.

	CHAPTER	CHAPTER TITLE	KEY KNOWLEDGE
UNIT 1 – AREA OF STUDY 1: LEGAL FOUNDATIONS	Chapter 3	Legal foundations	• the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals • the principles of justice: fairness, equality and access • characteristics of an effective law, such as it reflects society's values; is enforceable; is known; is clear and understood; and is stable • sources of law such as common law and statute law • an overview of the relationship between parliament and the courts • types of law such as criminal law and civil law • the distinction and relationship between criminal law and civil law • an overview of, and reasons for, the Victorian court hierarchy

Area of Study 2 – The presumption of innocence

OUTCOME 2

On completion of this unit, you should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

	CHAPTER	CHAPTER TITLE	KEY KNOWLEDGE
UNIT 1 – AREA OF STUDY 2: THE PRESUMPTION OF INNOCENCE	Chapter 4	The presumption of innocence	• the purposes of criminal law • the presumption of innocence • key concepts of criminal law, including: – the elements of a crime: *actus reus* and *mens rea* – strict liability – the age of criminal responsibility – the burden of proof – the standard of proof • types of crime such as crimes against the person and crimes against property • the distinction between summary offences and indictable offences • possible participants in a crime such as principal offenders and accessories
	Chapter 5	Indictable offences	• two criminal offences and for each offence: – the elements of the offence – possible defences – the role of statute law and common law in developing the elements of the offence and the defences – trends and statistics in relation to the offence in Victoria and in one other jurisdiction – the possible impact of the offence on individuals and society
	Chapter 6	Summary offences	• two criminal offences and for each offence: – the elements of the offence – possible defences – the role of statute law and common law in developing the elements of the offence and the defences – trends and statistics in relation to the offence in Victoria and in one other jurisdiction – the possible impact of the offence on individuals and society

Area of Study 3 – Civil liability

OUTCOME 3

On completion of this unit, you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

	CHAPTER	CHAPTER TITLE	KEY KNOWLEDGE
UNIT 1 – AREA OF STUDY 3: CIVIL LIABILITY	Chapter 7	Civil liability	• the purposes and types of civil law • key concepts of civil law, including: – breach – causation – loss – limitation of actions – the burden of proof – the standard of proof • possible plaintiffs and defendants to a civil dispute
	Chapter 8	Tort law	• two areas of civil law and for each area of law: – the rights protected by the law – the elements required to establish liability – the limitation of actions – possible defences – the role of statute law and common law in developing the elements and defences – the impact of the breach on the parties
	Chapter 9	Other areas of civil law	• two areas of civil law and for each area of law: – the rights protected by the law – the elements required to establish liability – the limitation of actions – possible defences – the role of statute law and common law in developing the elements and defences – the impact of the breach on the parties

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CHAPTER 2

INTRODUCTION TO UNIT 1 – GUILT AND LIABILITY

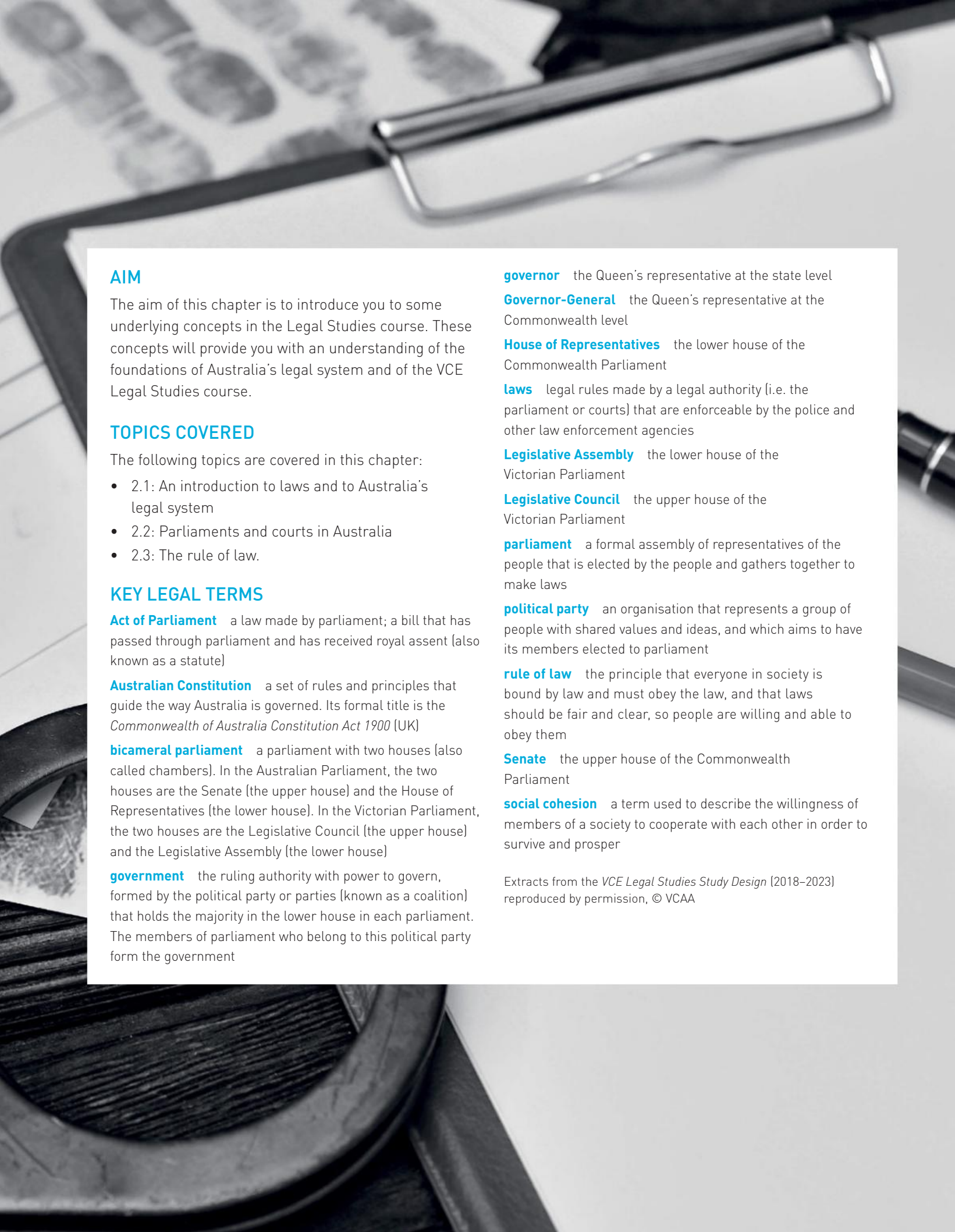
Source 1 There is a range of offences that individuals in society can be found guilty of. In Unit 1, you will explore two criminal offences and determine when a person may be guilty of those offences.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students



AIM

The aim of this chapter is to introduce you to some underlying concepts in the Legal Studies course. These concepts will provide you with an understanding of the foundations of Australia's legal system and of the VCE Legal Studies course.

TOPICS COVERED

The following topics are covered in this chapter:

- 2.1: An introduction to laws and to Australia's legal system
- 2.2: Parliaments and courts in Australia
- 2.3: The rule of law.

KEY LEGAL TERMS

Act of Parliament a law made by parliament; a bill that has passed through parliament and has received royal assent (also known as a statute)

Australian Constitution a set of rules and principles that guide the way Australia is governed. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

bicameral parliament a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (the upper house) and the House of Representatives (the lower house). In the Victorian Parliament, the two houses are the Legislative Council (the upper house) and the Legislative Assembly (the lower house)

government the ruling authority with power to govern, formed by the political party or parties (known as a coalition) that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

governor the Queen's representative at the state level

Governor-General the Queen's representative at the Commonwealth level

House of Representatives the lower house of the Commonwealth Parliament

laws legal rules made by a legal authority (i.e. the parliament or courts) that are enforceable by the police and other law enforcement agencies

Legislative Assembly the lower house of the Victorian Parliament

Legislative Council the upper house of the Victorian Parliament

parliament a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

political party an organisation that represents a group of people with shared values and ideas, and which aims to have its members elected to parliament

rule of law the principle that everyone in society is bound by law and must obey the law, and that laws should be fair and clear, so people are willing and able to obey them

Senate the upper house of the Commonwealth Parliament

social cohesion a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

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2.1 AN INTRODUCTION TO LAWS AND TO THE AUSTRALIAN LEGAL SYSTEM

An introduction to laws

laws
legal rules made by a legal authority (i.e. the parliament or courts) that are enforceable by the police and other law enforcement agencies

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

Act of Parliament
a law made by parliament; a bill that has passed through parliament and has received royal assent (also known as a statute)

non-legal rules
rules made by private individuals or groups in society, such as parents and schools, that are not enforceable by the courts

In any society, it is necessary to have rules that govern family, social, political and economic life to provide some form of social order.

Rules tell us what we can and cannot do or what we can expect in dealing with others. Imagine playing a tennis match or participating in a tournament without rules. Would you know what to do or expect? Would you be treated without discrimination? What might happen if you argued with your opponent during the game? Rules help to resolve the conflicts that are inevitable when people live or interact in groups.

Throughout our lives we are bound by rules. Some of these are **laws** (also known as legal rules). Laws are generally made by **parliament** and apply to all members of society. Laws are enforceable by the courts. Any individual who breaks certain laws may receive a penalty (also known as a **sanction**). Penalties can include fines or, for a serious breach, spending time in prison. Laws made by parliament are generally referred to as legislation, statutes, or **Acts of Parliament**.

There are also **non-legal rules**. Non-legal rules are made by private individuals or groups in society. For example, parents, schools and sporting clubs make rules that are imposed upon the members of that specific group (i.e. family members, students, or team members) so the group can operate in a peaceful and unified manner. Non-legal rules are not enforceable by the courts but like laws, there are consequences for breaking non-legal rules.

An introduction to the Australian legal system

The first inhabitants of Australia, the Aboriginal and Torres Strait Islander peoples, had their own system of law and had well-established rights, responsibilities and codes of behaviour. Indigenous Australians have the oldest living cultural history in the world, dating back at least 75 000 years.

Following the arrival of the British, the Commonwealth of Australia did not exist. Instead, there were six separate British colonies in Australia, each with a parliament that could make laws for the residents of its own colony.

Source 1 Aboriginal and Torres Strait Islander peoples have inhabited Australia for over 75 000 years, and have their own laws and customs.

As the colonies grew throughout the 1800s, it became clear that, in addition to having separate parliaments in each colony, a central parliament was needed to make consistent laws for the entire country.

By the 1880s, the six colonies had begun formal discussions to consider what laws would be best made by a central parliament and what areas of law-making power should be kept by the individual colonies. It was considered best that a central parliament be given the power to make laws on national matters that affected the whole country. These powers included laws relating to defence, currency, postal services, overseas matters, and immigration and trade.

In the 1890s, each of the colonies sent a group of representatives to special meetings (called constitutional conventions), where it was decided that a new central Commonwealth Parliament would be created.

On 1 January 1901, the date celebrated as the anniversary of the **Federation of Australia**, the British Parliament passed a law called the *Commonwealth of Australia Constitution Act 1900* (UK).

Federation of Australia the union of sovereign states that gave up some of their powers to a central authority to form Australia

The Australian Constitution

The *Commonwealth of Australia Constitution Act 1900* is commonly known as the **Australian Constitution** or the Commonwealth Constitution.

Australian Constitution a set of rules and principles that guide the way Australia is governed. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

A constitution is a legal document that outlines the basic rules of government and the law-making powers of the elected parliament (also known as the legislature). The Australian Constitution established the Commonwealth Parliament (which you will study in the next topic), which did not exist before then, as well as the High Court of Australia (our highest court). It also established the division of law-making powers, setting out which powers would be given to the Commonwealth Parliament and which powers would remain with the states.

Source 2 The Australian Constitution outlines the composition, role and powers of the Australian Parliament and High Court.

2.1 CHECK YOUR LEARNING

Define and explain

1. Explain the different consequences that may apply if you break a law as opposed to a non-legal rule.
2. Did Australia exist as a unified nation before 1901? If not, what did exist?
3. What is the Australian Constitution, and what does it do?

Synthesise and apply

4. Why do you think it was the British Parliament that passed the Australian Constitution?
5. List five laws that, as an Australian citizen, you must obey. For each law, suggest why the law was made and the likely consequences of breaking the law.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 2.1 Check your learning
- **Video tutorial** Introduction to Unit 1
- **Video** What is law?
- **Video worksheet** What is law?

2.2 PARLIAMENTS AND COURTS IN AUSTRALIA

In Australia, there are two main sources of law: common law and statute law. You will learn more about these sources of law in Chapter 3. To understand the different sources of Australian law, it is necessary to have some background understanding of the courts and **parliaments** in Australia. This topic provides you with an overview of the Commonwealth Parliament, the Victorian Parliament, **government** and **opposition**, and the courts.

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

government
the ruling authority with power to govern, formed by the political party or parties (known as a coalition) that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

opposition
the political party that holds the second largest number of seats (after the government) in the lower house. The opposition questions the government about policy matters and is responsible for holding the government to account

Parliaments in Australia

A parliament is made up of representatives of the people who are elected by the people, and together make laws.

There are nine parliaments in Australia. They are:

- **one** Commonwealth Parliament (the Parliament of Australia, also known as the Federal Parliament)
- **six** state parliaments (in New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania)
- **two** territory parliaments (in the Australian Capital Territory and the Northern Territory).

Each parliament is a supreme law-making body within its area of law-making power. This means that each parliament can make or change laws whenever it wants to within its area of law-making power, subject to certain restrictions that may be imposed on that power. Those areas of law-making power are established by the Australian Constitution. For example, the Australian Constitution states that only the Commonwealth Parliament can make laws in areas such as defence and immigration. Other areas, such as health and education, were left with the states to make laws on. Further areas are shared between the Commonwealth and state parliaments so that they can both make laws on these areas – such as marriage.

The nine parliaments in Australia are all based on Britain's **Westminster system** (named after the location of the British Parliament in Westminster, London). A number of the characteristics of this system have been adopted in Australia.

Westminster system
a parliamentary system of government that developed in Britain. Australia's parliamentary system is modelled on this system

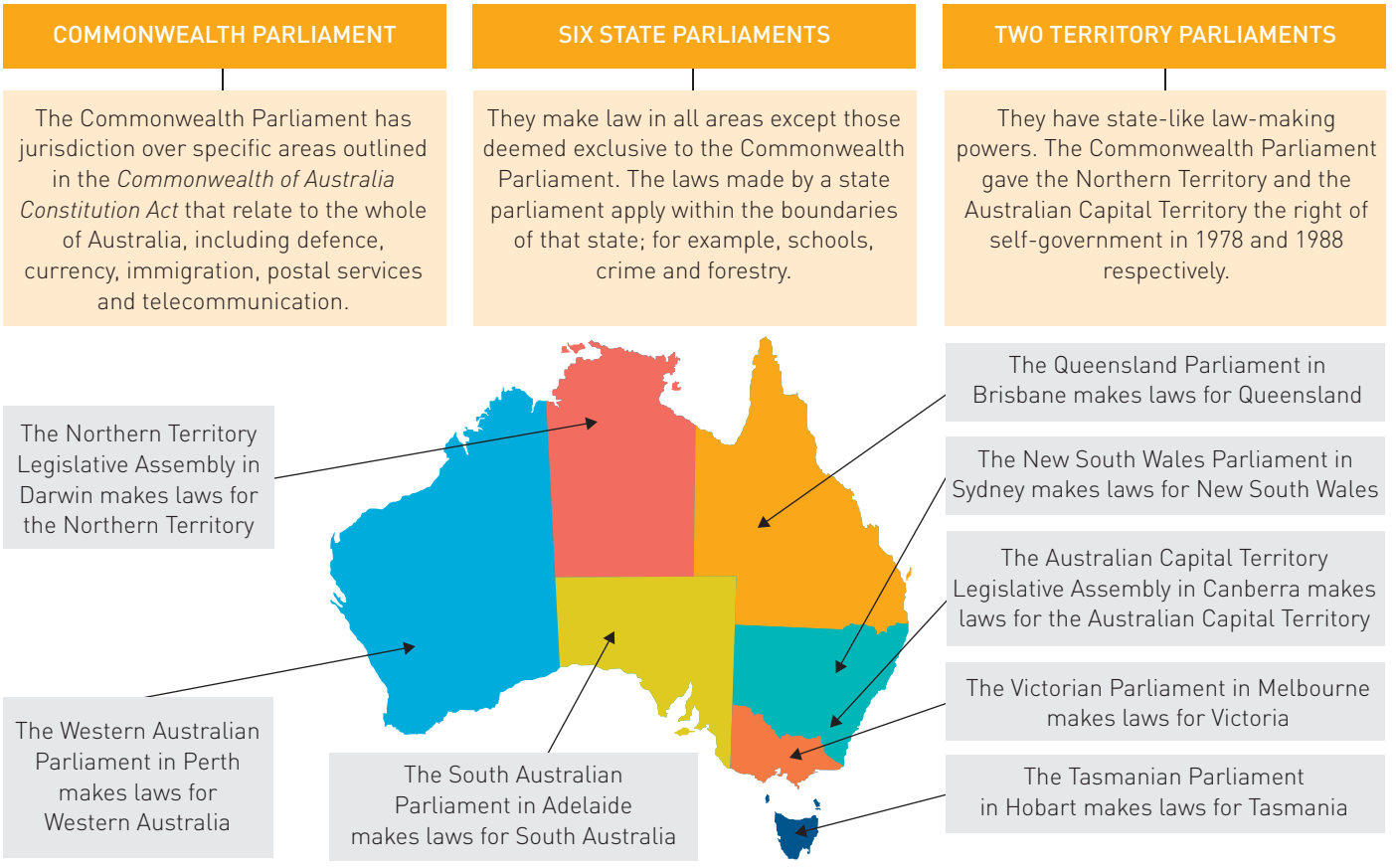
One of the characteristics of the Westminster system that was adopted in Australia is the structure of Australia's parliaments. As in Britain, most of the parliaments in Australia consist of:

- the **Queen** – who is the head of the parliament (but who is represented by the Governor-General in the Commonwealth Parliament and by a governor in state parliaments)
- **two houses** – an upper house and a lower house.

The existence of two separate houses or chambers of parliament means that the parliament is a **bicameral parliament**. All the parliaments in Australia are bicameral, except for the Queensland Parliament and the parliaments of the territories, which all only have one house of parliament.

bicameral parliament
a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (the upper house) and the House of Representatives (the lower house). In the Victorian Parliament, the two houses are the Legislative Council (the upper house) and the Legislative Assembly (the lower house)

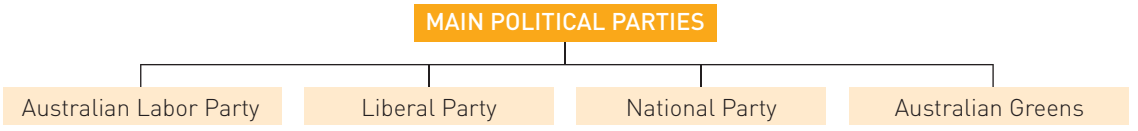
Source 1 Australia's system of government is known as a constitutional monarchy. This means that Australia's head of state is the Queen (the monarch) but our parliamentary system is governed by the Australian Constitution.



Source 2 There are nine parliaments in Australia.

Houses of parliament consist of elected members or representatives known as parliamentarians or members of parliament (MPs). Most parliamentarians belong to a **political party.** Political parties are made up of people who have a common belief in values, ideas, future directions and political objectives. Those parliamentarians who do not belong to a political party are known as **independents**.

The main political parties in Australia are shown in Source 3 below.



Source 3 The main political parties in Australia are the Australian Labor Party, the Liberal Party, the National Party and the Australian Greens.

Commonwealth Parliament

The Commonwealth Parliament – also called the Parliament of Australia or the Federal Parliament – is a bicameral parliament. It consists of:

- the Queen (often referred to as the Crown), represented by the **Governor-General**
- the **Senate** (the upper house)
- the **House of Representatives** (the lower house).

The role of the Commonwealth Parliament is to pass laws for the good government of Australia in its area of law-making powers.

political party
an organisation that represents a group of people with shared values and ideas, and which aims to have its members elected to parliament

independents
individuals who stand as candidates in an election but do not belong to a political party

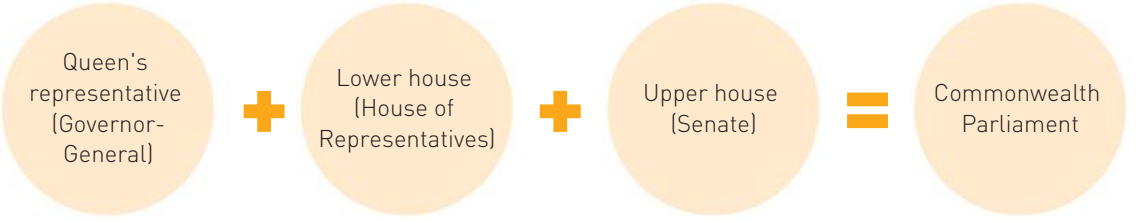
Governor-General
the Queen's representative at the Commonwealth level

Senate
the upper house of the Commonwealth Parliament

House of Representatives
the lower house of the Commonwealth Parliament

Did you know?

A parliament where a political party does not hold a majority of seats in the lower house is called a 'hung parliament'.



Source 4 The structure of the Commonwealth Parliament

House of Representatives

The main roles of the House of Representatives are to represent the people, introduce and pass proposed laws (which are called **bills**), review bills passed by the Senate, and form the Australian Government. The political party that has the majority of members in the lower house forms the government for the whole of Australia. You will learn more about how bills are passed in the next topic.

bill
a proposed law that has not yet been passed by parliament

At the federal level, each state is divided into geographical areas known as electoral divisions. Each division has approximately the same number of electors. The voters in each division elect their representative, who takes a seat in the House of Representatives. As at 2021, there were 151 electoral divisions in Australia, and therefore, 151 members of the House of Representatives. All members of the House of Representatives are elected for a period of up to three years.

Senate

The main roles of the Senate are to represent the interests of the states and territories of Australia, introduce and pass bills, and review bills passed by the House of Representatives.

The Senate consists of 76 senators. Each of the six states in Australia is represented in the Senate by 12 senators, and each of the two mainland territories (the Northern Territory and the Australian Capital Territory) is represented by two senators. All senators are elected for six years (except for the territory senators, who are elected for three years). A half-Senate election is held every three years (only half the senators stand for election).

Did you know?

Decorating the lower house (the house of government) in green is a tradition adopted from the United Kingdom.

The Senate is often called the **house of review** (because most bills are introduced in the House of Representatives and reviewed by the Senate) and the **states' house** (because each state has equal representation).

Source 5 Left: The House of Representatives, which is the lower house of the Commonwealth Parliament. Right: The Senate, which is the upper house of the Commonwealth Parliament. Members of government sit on one side of the house and the members of the opposition sit on the other side.

Victorian Parliament

The Victorian Parliament consists of:

- the Queen, represented by the **Governor** of Victoria
- the **Legislative Council** (the upper house)
- the **Legislative Assembly** (the lower house).

The role of the Victorian Parliament is to pass laws for the good government of Victoria in its area of law-making powers.

governor
the Queen's representative at the state level

Legislative Council
the upper house of the Victorian Parliament

Legislative Assembly
the lower house of the Victorian Parliament

Source 6 The structure of the Victorian Parliament

Legislative Assembly

The main roles of the Legislative Assembly are to introduce and pass bills and to form the Victorian Government. The government consists of the members of the political party that has the majority of members in the lower house. The Legislative Assembly can also review bills passed by the Legislative Council.

Each member of the Legislative Assembly represents one electoral district in Victoria. There are 88 electoral districts in Victoria and, therefore, there are 88 members of the Legislative Assembly. Each member of the Legislative Assembly holds their seat in parliament for a fixed term of four years.

Legislative Council

The role of the Legislative Council is to introduce bills and review bills passed by the Legislative Assembly. Bills passed by the Legislative Assembly can be rejected or amended by the Legislative Council.

For the purposes of appointing members to the Legislative Council, the state of Victoria is divided into eight regions, and five representatives are elected from each region. Therefore, there are 40 members of the Legislative Council. Members of the Legislative Council hold their seats for four years.

Study tip

Students often confuse the names of the lower house and the upper house of the Victorian Parliament. One way to remember which house is which is to think that 'A' comes before 'C' in the alphabet, so the Legislative Assembly is the first or **lower** house, and the Legislative Council is the second or **upper** house.

Source 7 Left: The Legislative Assembly, which is the lower house in the Victorian Parliament. Right: The Legislative Council, which is the upper house in the Victorian Parliament. Members of government sit on one side of the house and members of the opposition sit on the other side.

Government and opposition

The political party with the majority of members elected to seats in the lower house of each parliament forms government. Sometimes, a political party will join forces with another political party to form government. This is known as a **coalition**. For example, historically at a federal level, the Liberal Party and the National Party have joined to form government. The Prime Minister is the leader of the federal government (also known as the Commonwealth Government), and the Premier of Victoria is the leader of the Victorian Government.

coalition
an alliance of two or more political parties that join to form government

The Premier of Victoria and the Prime Minister choose senior members of their party who have been elected to parliament (referred to as **ministers**) to be responsible for different areas of government, such as education and health. This senior group of members is known as the **Cabinet**. The Cabinet decides the government's policy program and what proposed laws should be presented to the parliament.

minister
a member of parliament who is a member of the party in government and who is in charge of a government department

At a federal level, the Cabinet is made up of the Prime Minister and senior ministers. At a state level, the Cabinet is made up of the Premier of Victoria and senior ministers.

Cabinet
the policy-making body made up of the Prime Minister (or the Premier at a state level) and a range of senior government ministers who are in charge of a range of government departments. Cabinet decides which bills or legislation should be presented to parliament

The next largest political party forms the opposition. The role of the opposition is to challenge and question the government on policy matters. The opposition also appoints some of its parliamentarians as 'shadow ministers' in various areas such as health and defence. These shadow ministers hold the government ministers accountable for decisions they make in their relevant portfolios.

Parliament and government are not the same thing. The government is the political party (or coalition of parties) that has the majority of seats in the lower house. On the other hand, the parliament consists of all elected members of both the upper house and lower house of parliament, and the Queen's representative. The main role of the parliament is to make the law, whereas the main role of the government is to administer or implement the laws made by the parliament.

Subordinate authorities

Although parliament is our main or supreme law-maker, it does not have the resources or time to make all the laws necessary to maintain order and ensure **social cohesion**. Therefore, the state and Commonwealth parliaments can delegate their law-making powers to subordinate authorities. These authorities can make minor laws in their areas of expertise. For example, local councils make local laws about matters such as pet ownership, rubbish removal and parking. VicRoads makes laws about roads and traffic. The laws made by authorities like these are known as **secondary legislation** or delegated legislation.

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

secondary legislation
rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) that are given the power to do so by parliament (also called delegated legislation)

Source 8 The High Court of Australia in Canberra is the highest court in Australia.

The courts

The main role of the courts is to resolve the disputes and cases brought before them. There are many different courts in Australia – some are federal courts, and some are state courts. Federal courts generally deal with issues that arise under federal law, and state courts generally deal with issues that arise under state law.

The four federal courts are the High Court, the Federal Court, the Family Court and the Federal Circuit Court. The High Court was established by the Australian Constitution and is the highest court in Australia.

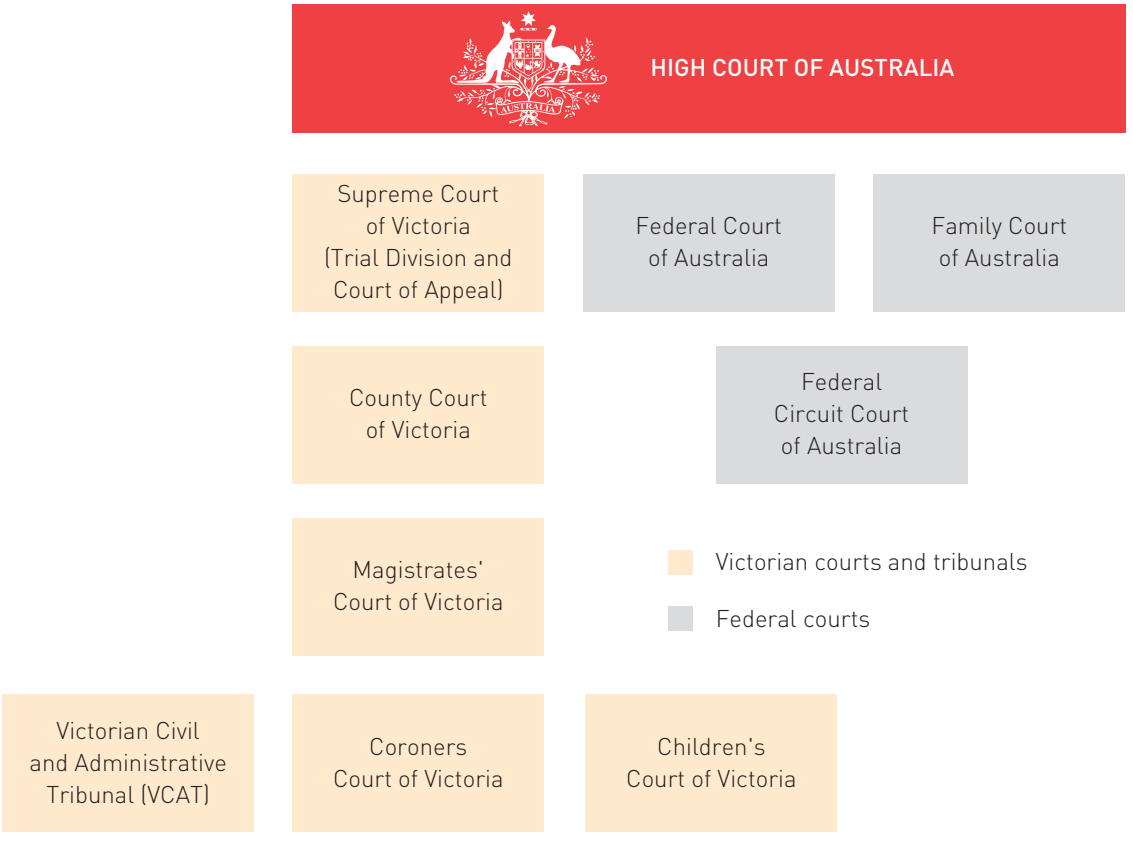
The three main Victorian courts are the Supreme Court, the County Court and the Magistrates' Court. There are also two specialist courts: the Children's Court and the Coroners Court.

The courts are arranged in a **court hierarchy**. The highest court in Victoria is the Supreme Court, and the lowest court is the Magistrates' Court. You will learn more about the Victorian court hierarchy, including the reasons why a hierarchy exists, in Chapter 3.

court hierarchy the ranking of courts from lowest to highest according to the seriousness and complexity of the matters they deal with

The courts are independent of the parliament. That means judges and magistrates are free to interpret and apply the law, and resolve cases, independently and without interference or influence from parliament or the government.

Keeping judges and magistrates independent of parliament and government upholds the rule of law, and also ensures fairness in deciding cases (i.e. the people who make the law aren't deciding whether the law has been broken). You will learn more about the rule of law in Topic 2.3.



Source 9 Which courts and tribunals operate in Victoria?

2.2 CHECK YOUR LEARNING

Define and explain

1 How many parliaments are there in Australia?
2 What is a bicameral parliament?
3 Explain the difference between parliament and government.
4 Create a visual diagram or table that shows:
- the members of each of the houses of the Commonwealth Parliament and the Victorian Parliament
- the names of each house
- the name of the Queen's representative for each of the parliaments.

Synthesise and apply

5 Research and explain why the Queensland Parliament only has one house.
6 Name four political parties in Australia. Research one of these political parties, then answer the following questions:
a When was the party created or established?
b Who is the current leader of the party?
c Identify four main policies, values or laws that the party supports.
d Would you consider voting for this political party? Give reasons for your response.
7 Access the Parliament of Australia's website. A link is provided on your obook assess.
a Which political party is currently in government at a federal level, and which political party is in opposition?
b Who is Australia's current Prime Minister?
c Who is Australia's current Governor-General?
d Identity four political parties that currently have senators in the Senate.
e When will the next federal election be held?
8 Access the Parliament of Victoria's website. A link is provided on your obook assess.
a Which political party is currently in government at a state level, and which political party is in opposition?
b Who is Victoria's current Premier?
c Who is Victoria's current governor?
d Identify four political parties that currently have members in the Legislative Council.
e When will the next state election be held?
9 Create a quiz or crossword for another person in your class about the courts, the Commonwealth Parliament and the Victorian Parliament.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 2.2 Check your learning
- **Worksheet** The parliamentary system
- **Weblink** Parliament of Australia
- **Weblink** Parliament of Victoria
- **Weblink** Parliamentary Education Office

Source 10 The main role of courts is to resolve the disputes and cases brought before them.

2.3 THE RULE OF LAW

rule of law
the principle that everyone in society is bound by law and must obey the law, and that laws should be fair and clear, so people are willing and able to obey them

government
the ruling authority with power to govern, formed by the political party or parties (known as a coalition) that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

The concept of the **rule of law** underpins much of what you will study in Legal Studies. The rule of law means that everyone – individuals, groups and **government** – is bound by and must adhere to laws, and that the laws should be such that people are willing and able to abide by them. That is, even the people who made the laws are bound by them. This includes our Prime Minister, our government departments, our judges and our public officials.

Although you may not have realised it, the principle of the rule of law is often mentioned in the media, in relation to international issues as well as issues in Australia. For example, the rule of law was discussed in early 2020 in relation to Poland. The Parliamentary Assembly of the Council of Europe, which is a parliamentary arm dedicated to upholding human rights and the rule of law, voted to open a monitoring procedure for Poland regarding its rule of law. Since 2015, Poland's ruling party has introduced a series of judicial reforms that some have said breached the standards of the rule of law. One of these reforms allows politicians to fire and discipline judges who are critical of the changes made by the Polish Government. The reforms were considered to mean that judges and courts were under the control of parliament, when they should be free and independent, and not be criticised for doing their job.

As part of the Legal Studies course, you will come across principles designed to uphold the rule of law. These principles include:

- **the law must be clear, understood, known and enforceable** – you will explore this further in Chapter 3
- **the law must uphold the right that people are presumed innocent until proven guilty** – you will look at the **presumption of innocence** in Chapter 4
- **hearings and trials must be heard by independent and impartial adjudicators** – you will look at the role of the courts and judges in Unit 2 (Chapters 11 and 13)
- **the law must be applied equally and fairly** – you will explore the concepts of fairness and equality further in Chapter 3, and throughout Unit 2.

presumption of innocence
the right of a person accused of a crime to be presumed not guilty unless proven otherwise

2.3 CHECK YOUR LEARNING

Define and explain

1 Define the term 'the rule of law'.
2 Describe three principles that aim to uphold the rule of law.

Synthesise and apply

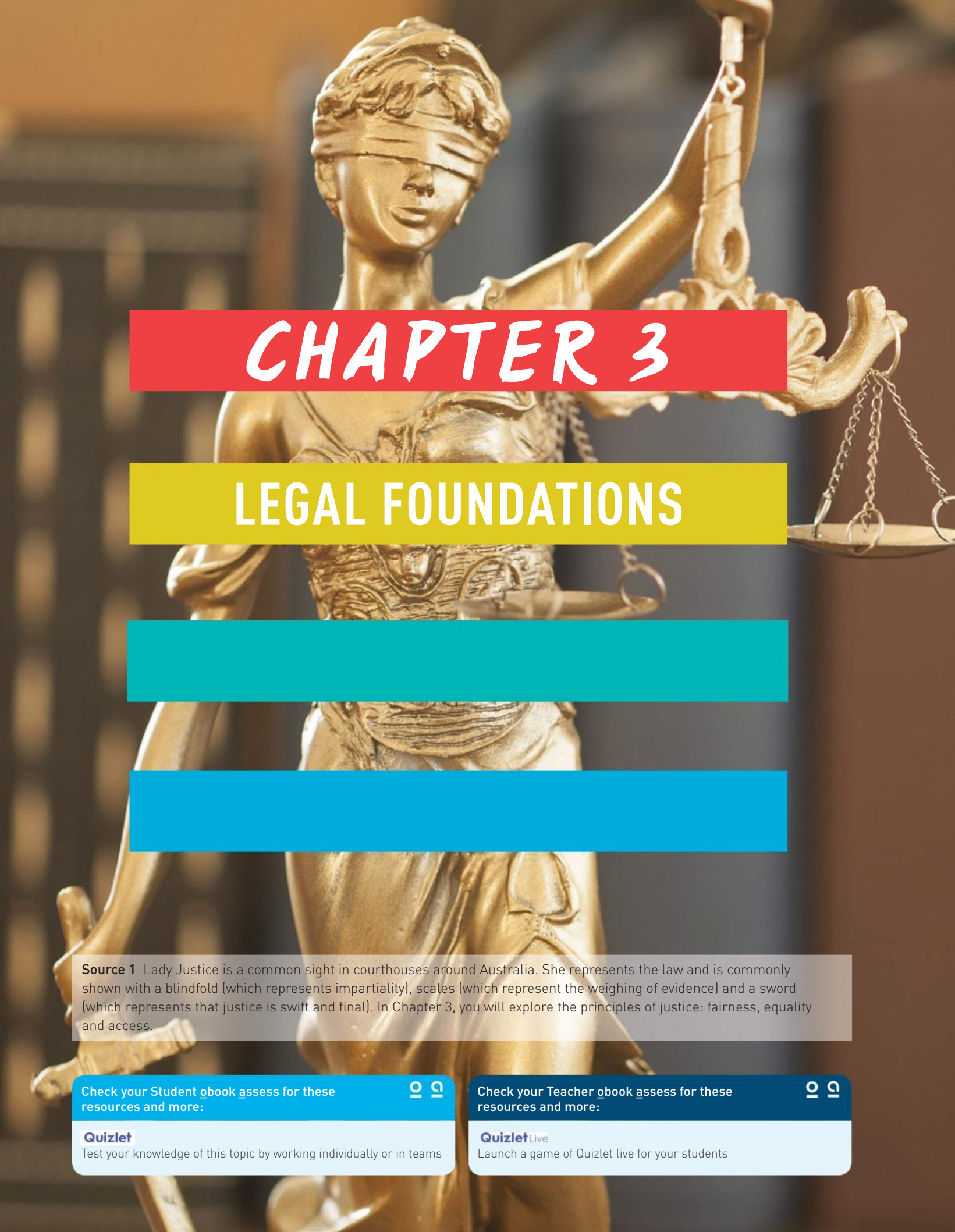
3 Conduct some research and find two countries that do not uphold or recognise the rule of law. Share your findings with the class and discuss some of the impacts that this has on the country's citizens.
4 Access the Rule of Law Institute of Australia website (a link is provided in your obook assess). Browse through the website and watch one of the videos about the rule of law. Discuss with the class one new thing that you learnt about the rule of law after watching the video.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 2.3 Check your learning
- **Weblink** Rule of Law Institute of Australia
- **Worksheet** The rule of law

CHAPTER 3

LEGAL FOUNDATIONS



Source 1 Lady Justice is a common sight in courthouses around Australia. She represents the law and is commonly shown with a blindfold (which represents impartiality), scales (which represent the weighing of evidence) and a sword (which represents that justice is swift and final). In Chapter 3, you will explore the principles of justice: fairness, equality and access.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 1 – Area of Study 1** (i.e. Chapter 3), you should be able to describe the main sources and types of law, and assess the effectiveness of laws.

KEY KNOWLEDGE

In this chapter, you will learn about:

- the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals
- the principles of justice: fairness, equality and access
- characteristics of an effective law, such as it reflects society's values; is enforceable; is known; is clear and understood; and is stable
- sources of law such as common law and statute law
- an overview of the relationship between parliament and the courts
- types of law such as criminal law and civil law
- the distinction and relationship between criminal law and civil law
- an overview of, and reasons for, the Victorian court hierarchy.

KEY SKILLS

By the end of this chapter, you should be able to:

- define key legal terminology
- research and analyse relevant information about the sources and types of laws
- explain the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals
- classify a law according to its source and type
- assess whether a law is effective
- explain the relationship between parliament and the courts, using examples
- justify the existence of the Victorian court hierarchy.

KEY LEGAL TERMS

access one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

binding precedent the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

civil law an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

common law law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

crime an act or omission that is (1) against an existing law, (2) harmful to an individual or to society as a whole, and (3) punishable by law

criminal law an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

equality one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

fairness one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

persuasive precedent the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence) even though it is not binding (see binding precedent)

precedent a principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

ratio decidendi a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. *Ratio decidendi* forms the binding part of a precedent

social cohesion a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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3.1 SOCIAL COHESION AND THE RIGHTS OF INDIVIDUALS

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

A functioning and productive society is one in which there is **social cohesion**, and the rights of individuals are protected.

The Scanlon Foundation was established in 2001 to undertake research and make financial grants that help to unite Australian society. While there is not one single definition of 'social cohesion', the Scanlon Foundation identifies one definition as the willingness of members of a society to cooperate with each other in order to survive and prosper. Another definition of social cohesion, by Europe's leading human rights organisation, the Council of Europe, is 'the capacity of a society to ensure the wellbeing of all its members, minimising disparities and avoiding marginalisation'. This means that individuals are free to make choices in society, feel like they belong, are not discriminated against, and are keen to cooperate with other members of society so that they live in harmony.

A society that is socially cohesive has a number of benefits. Its members are unified and are provided with opportunities in work, education and in their social life. People feel a sense of belonging, and individuals work together to challenge disharmony and to promote theirs and others' wellbeing.

Did you know?

Every year, the Scanlon-Monash Index of Social Cohesion provides an overview of the state of social cohesion in Australia. It considers five core areas of social cohesion:

- belonging
- worth
- social justice and equity
- participation
- acceptance and rejection legitimacy.

In 2019, Australia scored well in all of the areas of social cohesion except for two: acceptance and rejection legitimacy, and belonging.

A link to the Scanlon-Monash Index of Social Cohesion is provided on your obook assess.

Source 1 Social cohesion is about individuals working together and living in harmony.

In addition to achieving social cohesion, a functioning society ensures that **the rights of individuals are protected**. Individual rights are varied. They include rights to freedom of speech and freedom of religion, the right to vote and the right to silence. Individual rights are fundamental to a cohesive society. Without them, individuals may be manipulated or taken advantage of, and would have no recourse to justice.

In this topic you will explore the role of laws, individuals and the legal system in achieving social cohesion and protecting the rights of individuals.

The role of laws

Laws provide guidelines on what behaviour is acceptable and what behaviour is not acceptable. They set expectations about the way individuals should behave. For example, laws in Australia make murder a crime. If there were no such laws, some members of society might believe that killing another person is acceptable.

rule of law
the principle that everyone in society is bound by law and must obey the law, and that laws should be fair and clear, so people are willing and able to obey them

Laws are fundamental to achieving social cohesion. They establish a framework in which people live, set boundaries for behaviour, and allow individuals to make choices about how they live. For example, some laws specify what we **must do** (e.g. pay for goods or services, respect others) and some specify what we **should not do** (e.g. steal, interfere with a person's goods). Laws apply to everybody, regardless of their position in society. The idea that laws apply to all upholds the **rule of law**, which is a central part of Australia's legal and political systems.

Laws also protect the rights of individuals. A number of laws establish individual rights and say what happens if those rights are infringed. For example, some laws in Australia state that people must not discriminate against others based on a personal attribute such as age, race, religion, gender identity or pregnancy. Consequences can occur if a person's actions are contrary to (inconsistent with) those laws.

In all societies, conflicts are inevitable. Laws also set out how disputes are resolved, so that they are resolved peacefully. The penalty imposed or compensation awarded in cases help to prevent future conflict, as people are aware of the consequences if they engage in unacceptable behaviour.

Source 2 Laws set out the rules to follow when resolving disputes to ensure they are resolved peacefully and consistently. For example, in Australia, authorised officers ensure people do not commit offences on public transport.

The role of individuals

Once laws are in place that enable social cohesion and protect the rights of individuals, it is the responsibility of individuals to ensure that they are aware of the laws and abide by them.

While no one person will know about every law in Australia, or the source of those laws, it is the responsibility of every person to obey the law. Before taking any important action, a person needs to find out what the law is, particularly if it impacts them. For example, a person who decides to open a business is expected to familiarise themselves with laws about businesses, such as registering a business name, and the obligations to keep accounts and records for a certain period of time.

Further, individuals are expected to respect human rights, and not act in a way that is contrary to those rights. Doing so may lead to disharmony, and ultimately to a fractured society.

Source 3 Laws aim to ensure social cohesion. For example, traffic rules help to ensure people cooperate with each other on the roads.

Individuals can also help to achieve social cohesion and protect individual rights by assisting the police with their investigations, by reporting crime, and by using the legal system to resolve their disputes when their rights have been infringed. All of these acts help to ensure a society that is cohesive, and in which rights are upheld.

The role of the legal system

The legal system is a set of methods and institutions that makes, administers (implements) and enforces laws. The legal system includes courts, tribunals, and enforcement bodies (e.g. Victoria Police). The legal system aims to deal fairly and justly with individuals who have broken the law or breached someone else's rights.

Applying the law and enforcing it are two of the roles of the legal system that help to achieve social cohesion and protect the rights of individuals when a dispute arises. For example, there is a law in Victoria that states that a person who sells goods to another person guarantees that those goods are of an acceptable quality. If a vendor sells a television that is defective and does not work, but then refuses to refund the purchaser or replace the television, a dispute will arise that will need to be resolved.

There are a number of dispute resolution bodies, such as courts and tribunals. The role of these bodies is to help people settle disputes in a way that avoids further conflict or disruption to society.

If a system of laws existed without being applied and enforced, there would be no consequences if an individual breached a law. Therefore, having a legal system to help enforce the law ensures that rights are upheld, and that society functions effectively.

3.1 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by social cohesion. Identify two benefits of a society that is socially cohesive.
2 What role do you play in ensuring that our society is socially cohesive?
3 Do courts have a role to play in protecting the rights of individuals? Explain your answer.

Synthesise and apply

4 Look at Source 3 on page 45.
   a Make a list of the laws that could apply to the picture (try to think beyond road laws).
   b Explain how each of the laws on your list helps to achieve social cohesion. What individual rights is each law protecting?
   c Do you think that each of these laws would be accepted in the community? Explain your answer.
   d Explain one possible consequence of a breach of each of the laws on your list. Justify why you have chosen that consequence.
5 The television series, *The Walking Dead*, is based on a comic book series in which the world has been overrun by zombies. There is no government, no law and no legal system.
   a Make a list of the five most critical laws that you think need to be established by the people who survived the zombie attack. They can be new laws or old laws.
   b How would you seek to establish the new laws?
   c If each of the laws was infringed, what would be the consequences?

Analyse and evaluate

6 Consider the following statements. Write down whether you agree or disagree with each statement.
   a If there were no laws in society, then individuals would still aim to achieve social cohesion.
   b If there were no laws in society, then most people's possessions would still be safe.
   c If there was no legal system, then people would be able to work out their conflicts between themselves.
   d The human race is basically 'good' by nature, so there is no need for laws.
   e If there were no laws in society, then humans would use their animal instincts to survive.
   f If there were no laws in society, then I would be fearful most of the time.
   g If there were no laws in society, then there would be no respect for individual rights.

   Choose one of these statements and find someone in the class who has written down the opposite answer. Engage in a debate with them about the statement.

Check your Student obook assess for these additional resources and more:

Student book questions
3.1 Check your learning

Video tutorial
Introduction to Chapter 3

Weblink
The Scanlon-Monash Index of Social Cohesion

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

3.2 THE PRINCIPLES OF JUSTICE

Study tip

In Unit 2, you will look at the principles of justice more closely. However, to successfully complete Unit 1, you need to understand what these principles mean.

The word 'justice' is often used when people discuss laws and the legal system. People recognise that laws should be fair, and that there should be justice when a law is broken. But what does justice mean?

Justice is a difficult concept to define, and its definition can vary from person to person, and from society to society. For example, if a person who has a substance addiction steals money to buy illegal drugs, some people might think a just penalty is imprisonment. Others, however, might see justice achieved through a focus on the deeper social issues. That could mean a penalty that recognises that the reasons for the theft are related to substance abuse, considers the needs and circumstances of the offender, and aims to address the underlying reasons for the crime. This may be a penalty that requires the offender to seek assistance, like counselling and professional support, to overcome their substance addiction.

When thinking about justice when a law has been broken or when a case needs to be resolved, rather than applying a single definition, you should consider the following three principles:

- fairness
- equality
- access.

Source 1 Lady Justice, blindfolded and holding scales and a sword, is depicted on the County Court of Victoria building in Melbourne.

These three principles are known as the **principles of justice** and are used to determine whether justice has been achieved.

Fairness

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

Fairness is the first principle of justice. A dictionary definition is 'impartial and just treatment or behaviour without favouritism or discrimination'. But, like justice, fairness can mean different things depending on a person's values and perspectives.

Laws must be fair. For example, a law that allows big businesses to threaten small businesses when entering into contracts would be unfair, because it means that one group with power in society is getting an unfair advantage over another group. Similarly, a law that makes imprisonment the penalty for jaywalking is unfair, as the penalty does not fit the crime.

When disputes arise, fairness means there are fair legal processes in place to deal with them, and all parties receive a fair hearing. People should be able to understand court processes and have an opportunity to present their case and rebut (challenge) the other side's case. Also, the processes involved in determining a case should be fair and impartial.

The right to a fair trial or hearing is a right protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Human Rights Charter), which is a law that promotes and protects human rights in Victoria. A link to the Human Rights Charter is provided on your obook assess. A right to a fair trial is also protected through a series of decisions made by our courts. It is a fundamental part of our legal system.

However, fairness doesn't just apply to a final trial or hearing – it applies to all aspects of our legal system, including our interaction with police officers and our right to understand allegations made against us.

Fairness does not necessarily mean that people are treated the same – but if they are treated differently, it should be because of the laws that have been applied, and because of the circumstances of the case, and not because the person has been discriminated against due to a personal attribute or characteristic. Also, fairness is not about the sanction imposed or remedy awarded in the case – rather, it's about the processes that are used in the case.

Equality

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

Equality is the second principle of justice. A dictionary definition is 'the state of being equal, especially in status, rights or opportunities'.

Equality in the legal system means that all people should have the right to be recognised as a person before the law. No person or group should be treated advantageously or disadvantageously – they should be treated equally regardless of their characteristics or attributes, such as status, race, religion, marital status, or sexuality. In addition, people should not suffer any form of discrimination in our legal system. Equality in the legal system also means that people should be given an equal opportunity to present their case. Legal processes should be free from bias or prejudice, and those who make decisions in the legal system should be impartial when making decisions. This includes judges, who must act impartially, and **jury** members, who must be unbiased and have no links with the parties.

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

Laws should not be discriminatory (i.e. they should apply to everyone and should not single out one group), and there should be laws that prohibit discrimination against a person or group because of some characteristic.

Equality does not necessarily mean treating people the same. Sometimes, to treat people equally, you need to treat people differently, as explained in the scenario below.

HYPOTHETICAL SCENARIO

Fire at a shopping centre

Late last year there was a major fire at a local shopping centre and 40 people were injured. The people's injuries ranged from severe to minor.

A paramedic handed out gauze and bandages to the injured people. He had exactly 40 pieces of gauze and 40 bandages. He wanted to treat everybody fairly and equally, so he gave one piece of gauze and one bandage to each injured person.

A second paramedic disagreed with this distribution of gauze and bandages. She thought the distribution of one piece of gauze and one bandage to each injured person was *unfair* even though it was supposed to be *equal* treatment. The second officer believed that to be fair and equal, they should hand out the gauze and bandages according to need, depending on the severity of a person's injuries. The first paramedic didn't like this. He thought that this would create inequality.

Therefore, sometimes it is necessary to treat someone differently to ensure there is equality. For example, a person with a mental impairment who does not understand the legal system as well as their counterpart may need more assistance than the other party to understand court processes. In this situation, courts have recognised that they have a duty to assist a vulnerable party to ensure there is fairness and equality. If everybody was always treated the same, then the outcome may not necessarily result in justice. So sometimes, there are measures that need to be put in place to make sure that someone is treated equally and without discrimination. In the case of the shopping centre scenario above, the second paramedic may have a better understanding of equality than the first – to treat someone equally, you may need to treat them differently.

Access

Access is the third principle of justice. A dictionary definition is 'the ability to approach or make use of something'.

Access means that the laws and the legal system should make it possible for people to use the legal procedures, methods and institutions that help to resolve civil disputes and determine criminal cases. This includes being able to access the institutions that make decisions about cases, as well as being able to have contact with bodies and institutions that provide legal advice, education, information and assistance, and being able to be informed about cases. Access also means that people should have access to information about their legal rights so they can understand when their rights may have been infringed.

Access to justice is an essential principle of the rule of law. People need to be able to access the law and the legal system to enforce their rights, and people who have been harmed because of someone else's actions should be able to seek compensation.

Source 2 Chief Justice Anne Ferguson is a judge in the Supreme Court of Victoria. The use of unbiased and impartial judges is one of the ways in which the legal system tries to achieve justice.

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

3.2 CHECK YOUR LEARNING

Define and explain

1. Identify and explain the three principles of justice.
2. Identify five attributes that a person may suffer discrimination over.
3. Describe what is meant by the term 'access'.
4. Is fairness limited to having a fair hearing? Explain your answer.

Synthesise and apply

5. List three different groups of people who might be affected by a sentence imposed on someone found guilty of an offence. How might people in those categories define what is meant by a 'fair trial'? Would their ideas of fairness differ?
6. Read the scenario 'Fire at a shopping centre'. Create another scenario where there is a need to treat some people differently. Provide a solution that is both fair and equal.
7. Conduct some research about Lady Justice. Who is Lady Justice? What are the three symbols usually associated with Lady Justice? What do each of the symbols mean?

Analyse and evaluate

8. When hearing cases, judges sometimes assist parties who do not have a lawyer to understand court processes and legal jargon. Do you think that this achieves fairness? Be prepared to share your opinions with the class.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 3.2 Check your learning
- **Weblink** *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- **Weblink** 'What is justice?' speech by the former Chief Justice, Marilyn Warren
- **Worksheet** The principles of justice

3.3 CHARACTERISTICS OF AN EFFECTIVE LAW

Study tip

In Unit 1 – Area of Study 1, you are expected to be able to assess the effectiveness of laws. When you are asked about whether a particular law is effective, address each of the five characteristics of an effective law.

For society to function properly and for there to be social cohesion, laws must be effective. To be effective, laws must have the following five characteristics:

- reflect society's values
- be enforceable
- be known
- be clear and understood
- be stable.

If one of these characteristics is missing, then it is possible that the law is not as effective as it could be.

Laws must reflect society's values

For a law to be effective, it **must reflect society's current values**. If a law is in line with society's current values, then members of society are more inclined to follow that law than disregard it. This means that laws need to change when society's values change.

Did you know?

In South Australia, a person who intentionally disturbs a wedding is guilty of an offence. The maximum penalty is $10 000 or two years' imprisonment.

For example, in 2018, changes were made to Australia's marriage laws to allow people of the same sex to lawfully marry each other. This means that any two people, regardless of their sex, are able to marry in Australia. This followed a public vote on whether the laws should change to allow same-sex marriage. The public voted in favour of the change. Society's views and values about same-sex couples have changed over time, and the law has also changed to recognise this.

Laws must be enforceable

An effective law must be **enforceable**. That is, if people break the law, it must be possible to catch and punish them, or **sue** them. If this is not possible, people may be less inclined to follow the law.

sue
to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

Imagine if there was a law that made it an offence to dream of going on holiday. Such a law would be ineffective, because the police would not be able to find out who was breaking this law.

On the other hand, it is an offence in Victoria to cause damage to public property. This type of law is more likely to be effective because it requires the behaviour to occur in public; therefore, the behaviour is more likely to be visible to police officers and members of society, and the police will be able to enforce the law.

Laws must be known

For a law to be effective, the **public must know about it**. If people do not know about a law, they cannot follow it.

It is the responsibility of individuals to find out what the law is on a matter that affects them. If someone breaks a law, saying 'I didn't know I was breaking the law' is not an acceptable answer. This principle is commonly expressed as 'ignorance of the law is no excuse'.

However, law-makers also need to keep the public informed of any new laws that are passed by parliament. Major changes in the law, or new laws, are usually reported in the media, and many laws are debated in the media and in society before they are introduced.

For example, in 2020 a state of emergency (and then a state of disaster) was declared in Victoria to combat COVID-19 and to contain the spread of the virus. This provides the Chief Health Officer with wide-ranging powers, which includes the power to restrict people's movements. The Victorian Government publicised the changes widely, including embarking on a social media and television campaign. It also

used the '#stayathome' hashtag, which appeared on people's mobile phones. Because the changes impacted everybody, it was necessary for the Victorian Government to ensure that the public was aware of them – not only to protect the health of members of our community, but also to avoid someone inadvertently breaking the law because they were not aware of them.

Laws must be clear and understood

It is important for a law to be written in a way so that **people can understand it, and so the intent of the law is clear**. If a law is ambiguous, unclear, or written in language or in jargon that people don't understand, it is possible people won't follow it and the law will be ineffective.

For example, in Victoria, the Law Institute of Victoria has called for an overhaul of the 'confusing and ambiguous' contempt of court laws. Under these laws, a person can be convicted of the offence of disobeying, or being disrespectful towards, the courts or its officers. This is discussed further in the scenario below.

Source 1 Road users in Australia are generally aware of the road laws because of visible signs on roads.

ACTUAL SCENARIO

'Chilling effect on public scrutiny': Peak legal body calls for overhaul of contempt of court laws

Simone Fox Koob, *The Age*, 8 July 2019

Victoria's peak legal body has called for an overhaul of 'confusing and ambiguous' contempt of court laws, saying it is 'impossible' for people to know what conduct will lead to a conviction.

The Law Institute of Victoria (LIV) on Monday said current laws threatened free speech and could have 'a chilling effect on proper public scrutiny and comment on the work of our courts'.

LIV president Stuart Webb said, 'contempt [of court] is entirely up to the discretion of an individual judge', which was 'clearly unsatisfactory', as he released the institute's submission to an upcoming review of contempt of court laws, commissioned last year by the state government.

...

'The law is not clear, and this can create a chilling effect on proper public scrutiny and comment on the work of our courts', Mr Webb said.

Contempt of court is a broad-ranging offence that takes into account various acts of disobedience or disrespect towards the courts or its officers.

The review into the laws, which will be completed by the Victorian Law Commission before the end of the year, will look at whether the legislation needs to be modernised to increase public confidence in the justice system, and allow for clearer enforcement.

...

Laws must be stable

For a law to be effective, **it must be stable**. If a law is constantly changing, no one would be certain what the law is, and it may not be as effective as a law that has remained constant for some time.

For example, there have been very few changes to the law relating to murder in Australia. Murder has always been a crime, and so there is certainty that murdering another person is against the law.

AN EFFECTIVE LAW MUST ...				
reflect society's values	be enforceable	be known	be clear and understood	be stable

Source 2 The characteristics of an effective law

3.3 CHECK YOUR LEARNING

Define and explain

1 Identify and describe three characteristics of an effective law.
2 Explain two ways in which Victoria's physical distancing measures during the 2020 coronavirus pandemic were made known to the public.
3 Identify one law in Victoria that you think reflects society's current values. Give reasons for your answer.

Synthesise and apply

4 Identify one law in Australia that you consider to be unclear or ambiguous (or that you don't understand). What is it about the law that you don't understand, or that you think is unclear or ambiguous?
5 Do you think a law that makes it an offence to smoke in private homes would be easy to enforce? Justify your answer.
6 Read the scenario '"Chilling effect on public scrutiny": Peak legal body calls for overhaul of contempt of court laws'.
   a What are contempt of court laws?
   b Explain why Stuart Webb believes the contempt of court laws are confusing and ambiguous.
   c In what context did Stuart Webb make his comments?
   d Conduct some additional research about contempt of court laws. Describe situations when a person may be found in contempt of court. Discuss why contempt of court laws may be ambiguous in these situations.

Analyse and evaluate

7 On the Parliament of Victoria's website, access the 'Legislation and Bills' webpage. A link is provided on your obook assess. Find a law that has been passed this year. Prepare a short report or PowerPoint presentation on why you think this law will be effective, addressing each of the five characteristics of an effective law.
8 Read the statements below and write down whether you think each statement is fact or fiction. Then access the *Summary Offences Act 1966* (Vic). A link is provided on your obook assess. See whether you are correct (hint: use the search button to find particular words in the Act).
   a It is illegal to sing an obscene song within earshot of someone.
   b It is illegal to roll a drum in a public place in all circumstances.
   c It is an offence to drive a dog or goat harnessed to a vehicle in a public place.
   d It is illegal to burn rubbish shavings in a private house.
   e It is illegal to fly a kite in a public place to the annoyance of another person.

   For the statements that are incorrect, find a law in the *Summary Offences Act* that is similar. Be prepared to discuss with your class whether you think that each of the laws is effective.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 3.3 Check your learning
- **Video tutorial** How to assess whether a law is effective
- **Weblink** The Parliament of Victoria – legislation and bills
- **Weblink** *Summary Offences Act 1966* (Vic)

3.4 SOURCES OF LAW

Study tip

One of the key skills you are expected to demonstrate in Unit 1 – Area of Study 1 is your ability to classify a law according to its source and type. This topic (Topic 3.4) and Topic 3.6 will help you to develop this skill.

There are many laws in Australia. Australian laws can be classified or grouped in different ways, including:

- **the source of the law (i.e. who made the law)** – in this topic you will consider two main sources of law: statute law (i.e. laws made by the parliament) and common law (i.e. laws made by the courts)
- **the type of law (i.e. what area the law covers)** – in particular, this means the behaviour the law is trying to regulate and the possible consequences if the law is broken. In Topic 3.6 you will consider two types of law: criminal law and civil law.

To understand common law and statute law, you need to have an understanding of parliaments and courts in Australia. For a refresher, reread Topic 2.2 in Chapter 2 of this student book.

Statute law

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

Act of Parliament
a law made by parliament; a bill that has passed through parliament and has received royal assent (also known as a statute)

supremacy of parliament
(also known as 'sovereignty of parliament') the concept that the final law-making power rests with parliament (i.e. a statute), which can repeal and amend its own statutes and pass legislation to override common law

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or a governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

The main role of parliament is to make laws. Laws made by parliaments are called **statutes**, **Acts of Parliament** or legislation. Australia's parliamentary system is based on the concept of the **supremacy of parliament** – this means that parliaments are able to override laws made by other bodies, including the courts, and the final law-making power rests with parliament.

The government generally decides what laws should be made. However, the whole of the parliament is responsible for passing the law. If the government decides a law is needed, a bill is drawn up and presented to parliament.

Before a bill can become law, it must pass through both houses of parliament. It will go through a number of stages in each of the houses and must receive a majority vote from the members of each house.

Most bills are introduced into the lower house first. Bills (other than bills raising taxes or allocating funds) can also be introduced into the upper house and then proceed to the lower house.

Once a bill has been passed by both houses, it must be presented to the Queen's representative to receive **royal assent**. Following a certain period of time after royal assent, the bill becomes law.

Individual members of parliament, who are not members of the political party that forms government, may also introduce proposed laws (or bills) in the hope that they will be passed by

Stages of a bill through parliament

Introduction and first reading – the bill is introduced to the first house (usually the lower house)

↓

Second reading – the purpose of the bill is explained and it is debated and voted on. In Victoria, the bill is considered with respect to its compatibility with the Victorian Human Rights Charter

↓

Committee stage/consideration in detail – the bill is considered in detail, clause by clause. Amendments are most likely to occur at this stage

↓

Third reading – the bill is voted on in its final form

↓

The bill passes the first house

↓

Same procedure in the second house

↓

The bill passes the second house

↓

Royal assent – the Governor-General (federal) or the governor (state) approves the bill before it becomes law

↓

Proclamation – the Act comes into operation

↓

The Act becomes law

Source 1 The stages of the legislative (law-making) process

private member's bill
a bill introduced into parliament by a member of parliament who is not a government minister

the parliament and become law. However, it is unlikely that non-government proposals (or bills that do not have the support of the government) will pass both houses because the government has the majority of votes in the lower house, and will therefore likely vote against the bill. A bill introduced by a member of parliament who is not a government minister is referred to as a **private member's bill**.

Common law

A court's primary responsibility is to apply existing laws to the facts in cases brought before it and to decide the cases based on those laws. The primary role of courts therefore is to apply the law to resolve the disputes at hand.

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

The secondary role of the courts is to make laws as part of their determination of cases. Court-made law is also known as **common law**, case law or judge-made law.

A court can make law in two situations or circumstances:

- by interpreting the meaning of the words in a statute (an Act of Parliament) when applying the statute to a case the court is hearing (this is known as **statutory interpretation**)
- by deciding on a new issue that is brought before the court in a case where there is no legislation in this area, or when a previous principle of law requires expansion to apply to a new situation.

statutory interpretation
the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. a statute) so it can be applied to resolve a case before the court

In each type of situation, because the court must still resolve the dispute, the judge will make a decision and provide reasons for the decision. Common law is created through the reasons for decisions of courts, which are then followed by courts in future cases where the facts are similar.

Statutory interpretation

A statute is often written in general terms to apply to all types of situations. Sometimes, an unusual situation arises and a court has to interpret words within a statute. This process, where a judge clarifies or interprets the laws written by parliament, is known as statutory interpretation. This interpretation then forms part of the law and can become binding on other courts as part of the doctrine of precedent (see further below).

Sometimes, in a criminal case, the interpretation supports the prosecutor's case. At other times, the interpretation helps the accused person, as in the case of *Deing v Tarola* below.

ACTUAL SCENARIO

Is a studded belt a weapon?

Deing v Tarola [1993] 2 VR 163

In this well-known case of statutory interpretation, a 20-year-old man, Deing, pleaded not guilty to possessing a regulated weapon under the *Control of Weapons Act 1990* (Vic). The weapon was alleged to be a black leather belt with raised silver studs, which Deing used to hold up his pants. The magistrate found Deing guilty of the crime. Deing appealed against the finding of guilt and the confiscation of his belt.

The appeal was heard by the Supreme Court, which had to decide what a regulated weapon was in the context of the *Control of Weapons Act* and the regulations made under the Act, to determine whether a studded belt used to hold up pants was in fact a regulated weapon.

The regulations contained a list of regulated weapons that included 'any article fitted with raised pointed studs, which is designed to be worn as an article of clothing'. However, Justice Beach decided that the studded belt was not a regulated weapon, as a regulated weapon should be defined as 'anything that is not in common use for any other purpose but that of a weapon'.

The decision of the Magistrates' Court was quashed and the confiscated belt was returned because Deing could not be found guilty of carrying 'a regulated weapon' when the article he was carrying was not a weapon.

The definition of a regulated weapon has now been removed from the *Control of Weapons Act*.

Precedent

When a court decides a case that is the first of its kind – and in doing so establishes or creates a legal principle – the court is said to be setting a **precedent**. Precedents can also be established when a court interprets a statute in a way that it hasn't been interpreted before. A precedent may be followed in similar cases that come before the courts in the future. These precedents become part of the law.

For example, imagine you were leaning back in your chair and your class teacher decided to punish you because your deliberate behaviour was unsafe and unacceptable. The teacher should, to be consistent, also punish other students who do the same thing in the future. However, if in a future case, another student accidentally trips another student in class, the teacher may decide that the two cases are different, and may choose not to punish the student in the second scenario in the same way. In such a case, the teacher is distinguishing between the facts of the case at hand and the facts of the earlier case, in which the behaviour was deliberately unsafe. The most important aspect of the teacher's decision is the reason given for the decision – that deliberate unsafe behaviour is unacceptable. The precedent created in the past should be a guide to teachers in similar situations.

Similarly, legal precedents are established through court decisions. The most important part of a judgment is the reason for the decision. This is known as the ***ratio decidendi***.

The operation of precedent means that lower courts in the same court hierarchy will follow the *ratio decidendi* in similar cases. This is known as ***stare decisis***, meaning to stand by what has been decided. This ensures that there is consistency in the way that similar cases are decided.

precedent
a principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

ratio decidendi
a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. *Ratio decidendi* forms the binding part of a precedent

stare decisis
a Latin term meaning 'let the decision stand'; the basic principle underlying the doctrine of precedent

Snail in the bottle

ACTUAL SCENARIO

Donoghue v Stevenson [1932] All ER 1

One of the most famous precedents in common law is the British case of *Donoghue v Stevenson*. It is commonly known as the 'snail in the bottle case'.

May Donoghue, the plaintiff, went to a cafe where she was given a ginger beer. The bottle of beer was bought by a friend and poured into a glass for her. After Donoghue had drunk half the contents of the bottle, a decomposed snail was poured out into her glass. The snail could not be seen before the ginger beer had been consumed because the bottle was opaque. Donoghue became ill as a result and later suffered from severe gastroenteritis.

Donoghue did not have a contract with the cafe or the manufacturer because she did not buy the bottle of ginger beer herself. This meant she could not sue for breach of contract. Instead, Donoghue claimed the manufacturer of the ginger beer, David Stevenson, had been negligent in the washing of the bottles before filling them with ginger beer. She sued Stevenson, alleging he had failed in two ways:

- It was the duty of the manufacturer to provide a system that would stop snails from getting into his ginger beer bottles.
- It was the duty of the manufacturer to inspect the bottles before filling them with ginger beer and selling them to customers.

Donoghue's initial case failed. However, she was granted leave to appeal to the House of Lords, where it was found that the manufacturer had been negligent. Because the bottle was opaque, Donoghue did not have any opportunity to check the bottle's contents before drinking it.

The Court ruled that Stevenson failed to take reasonable care in supplying a product that he knew would be consumed with no reasonable opportunity for the distributor, retailer or consumer to inspect the goods before consumption.

This was the beginning of a series of cases that established various legal principles around when one person may be negligent towards another person, and in particular when one person may owe a duty of care to another person.

Precedent does not apply to a sanction (i.e. the sentence in a criminal case) or to a remedy (i.e. compensation in a civil dispute) handed down by a court. **The precedent is the reason given for the decision.** Using the example above, a teacher may set a precedent by deciding that deliberate unsafe behaviour is unacceptable when a student is leaning back on a chair, but students may be given different sentences or penalties depending on the circumstances of the case (e.g. one student may lean back in a much more deliberate and dangerous way than another, and therefore may get a harsher penalty).

Binding precedent

binding precedent
the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

A **binding precedent** is one that must be followed by courts that are lower in the same court hierarchy.

A precedent is considered to be binding on a new case when:

- the material facts of the precedent are similar to the material facts of the new case
- the precedent was set in a higher court that is in the same court hierarchy as the court hearing the new case.

Persuasive precedent

persuasive precedent
the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence) even though it is not binding (see binding precedent)

A **persuasive precedent** is one that does not have to be followed. That is, a court is not bound by this precedent and can choose to follow it (be persuaded by it). In Victorian courts, a precedent is persuasive (rather than binding) in the following circumstances:

- where a court in another state or country set the precedent (as this court is not in the same court hierarchy)
- where a lower court set the precedent; therefore, the High Court (which is the highest court in Australia) does not have to follow a precedent set in any other court in Australia
- where the same court set the precedent; therefore, the Supreme Court is persuaded by previous decisions made by that court.

obiter dictum
a Latin term meaning 'by the way'; comments made by the judge in a particular case that may be persuasive in future cases (even though they do not form a part of the reason for the decision and are not binding)

Sometimes, a judge will make a statement that is not part of the reason for their decision, but is an important statement relating to the main issue of the case. This statement, known as an ***obiter dictum*** – a statement made 'by the way', in passing – can influence decisions in the future. An *obiter dictum* is only ever persuasive, regardless of which court the judge made the statement in, as it does not form part of the reason for a decision.

Developing or avoiding earlier precedents

There are four main ways courts can develop or avoid earlier precedents:

- **Distinguishing a previous precedent** – If the material facts of a case are sufficiently different from the material facts in a binding precedent, a lower court may not have to follow the precedent. Instead it may distinguish the material facts in the present case from those in the previous case and make a different decision. For example, a person found in the front seat of a car, over the legal alcohol limit, with his keys in his hands was found guilty of being in control of a car while over the legal alcohol limit. The accused appeared to be about to drive the car. This case was distinguished from a previous case, where the accused was found asleep in the car with the engine running, trying to keep warm. He did not appear to be about to drive the car.
- **Overruling a previous precedent** – A precedent can be overruled by a higher court in a **different case**. For example, the High Court may overrule a decision of an earlier case decided in the Court of Appeal (which is lower than the High Court). When a precedent is overruled, it no longer applies.
- **Reversing a previous precedent** – A precedent can be reversed when the **same case** is taken to a higher court on appeal. For example, a case may have been decided in the Supreme Court

(Trial Division) and then appealed to the Court of Appeal (which is higher than the Trial Division), where the decision is changed. When a precedent is reversed, it no longer applies.

- **Disapproving a previous precedent** – In some instances, a court is bound by a precedent but expresses its disapproval of or disagreement with the precedent. This is known as **disapproving**. This does not change a precedent, but a higher court, when deciding a later case, may choose to agree with the court that disapproved of the precedent and decide to overrule it.

Source 2 If the material facts of a case are different from the material facts in a binding precedent, a lower court may not have to follow the precedent.

3.4 CHECK YOUR LEARNING

Define and explain

1 Define the term 'common law'. Give two other names for common law.
2 Explain what is meant by the term 'statute law'. Give two other names for a statute.
3 Explain what is meant by the term 'statutory interpretation'.
4 What is a precedent?
5 What is meant by the term 'royal assent'? At what stage of the legislative process does royal assent occur?

Synthesise and apply

6 Read the scenario *Donoghue v Stevenson*.
  a What incident occurred in this case and where did it occur?
  b Why could Donoghue not sue the cafe?
  c What was the *ratio decidendi* in this case and why is it still important today?
  d Devise a modern-day scenario where something like this happens, which might give rise to a civil dispute between you and a manufacturer.
7 Read the scenario *Deing v Tarola*.
  a Outline the key facts of the case.
  b What was the issue that needed to be decided in this case?
  c Identify the statute that needed to be interpreted, and the word or phrase in that statute that needed to be interpreted.
  d What was the decision of the Magistrates' Court?
  e Why was the case heard again in the Supreme Court? Who heard the case in the Supreme Court?
  f What was the Supreme Court's ruling on the issue, and what reasons did it give for the decision?
8 Classify each of the laws below based on their source. For the statutes, identify the parliament that passed them.
  a The *Migration Legislation Amendment (Cessation of Visa Labels) Act 2016* (Cth) has been a law since 2016.
  b The maximum term of imprisonment for committing the common law offence of kidnapping is 25 years.
  c The Family Violence Reform Implementation Monitor Bill 2016 (Vic) has just become law.
  d The *Public Health Act 2016* (WA) aims to promote and improve public health and wellbeing.

Analyse and evaluate

9 Identify and examine two strengths and two weaknesses of statutory interpretation (i.e. the process undertaken by judges when they are required to interpret the meaning of statutes in cases). If required, conduct some research on the internet to help you.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 3.4 Check your learning
- **Going further** Withholding royal assent
- **Worksheet** How a law is made
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

3.5 THE RELATIONSHIP BETWEEN PARLIAMENT AND THE COURTS

The parliament and the courts have a complementary relationship. While the main role of parliament is to make laws, and the main role of courts is to resolve disputes, parliament and the courts need to work together to ensure laws are workable and enforceable.

There are four main features of the relationship between parliament and courts: the interpretation of statutes by courts, the codification of common law, the abrogation of common law, and the ability of courts to influence parliament. Each of these is explored below.

secondary legislation rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) that are given the power to do so by parliament (also called delegated legislation)

Statutory interpretation

For legislation to be effective, courts must apply the statutes to the cases before them. To do this, it is sometimes necessary for a court to interpret the meaning of the words in a statute or in **secondary legislation** (which is made by bodies given their law-making power through an Act of Parliament).

Decisions by courts about the meaning of the words in statutes form precedents that become part of the law to be followed in the future, as illustrated in the scenario below.

ACTUAL SCENARIO

Is it bread or a biscuit?

Lansell House Pty Ltd v Commissioner of Taxation (2011) 190 FCR 354

Alfred Abbatangelo took the Australian Taxation Office (ATO) to court over an ATO ruling that his product – a mini ciabatta – was a biscuit or a cracker, not bread. If it was bread, then the law said that Goods and Services Tax (GST) did not apply to the item. If it was a biscuit, Abbatangelo should have been paying GST and he would owe $85 000 to the ATO. Examples of GST-free bakery items include plain bread and rolls, plain focaccia, tortillas, pita, Lebanese and lavash bread, grissini breadsticks and Italian bread.

During the hearing, the ciabatta was broken to see if it cracked like crackers. Justice Sunberg of the Federal Court said, 'In my view, the mini ciabatta is a cracker. Its ingredients are substantially the same as those of a cracker … I have concluded that the ratio of ingredients in the two products is substantially the same.' The Federal Court found in favour of the ATO. The mini ciabatta was treated as a biscuit and the plaintiff was therefore liable to pay GST. The plaintiff was not successful in his appeals.

Codification of common law

codify (codification) to collect all law on one topic together into a single statute

Because parliament is the supreme law-making body, it can make laws that confirm precedents. To codify a precedent, parliament passes an Act of Parliament that reinforces a principle established by a court. This is known as codification of common law, because the common law is **codified** or put into a statute.

ACTUAL SCENARIO

Codification of common law sex offences

Over time, different types of sex offences have been created by common law. Victoria has codified these common law sex offences so that they are now statutory crimes under the *Crimes Act 1958* (Vic). Sex offences contained in the *Crimes Act* include rape, incest, sexual servitude, and compelling another person to commit rape.

Abrogation of common law

Parliament, as the supreme law-making body, can change or override (i.e. **abrogate**) common law. Parliament abrogates common law by passing an Act of Parliament that specifically abolishes the particular common law principle.

abrogate (abrogation) to cancel or abolish a court-made law by passing an Act of Parliament

Parliament may decide to abrogate a common law for various reasons. On occasion, a court's interpretation of the meaning of a statute's words may differ from the meaning that parliament meant the words to convey. Alternatively, a court may interpret the words in a statute in a way that does not reflect the current meaning of the Act or the intention of parliament. Courts may also develop a precedent that parliament does not agree with. If this occurs, parliament can pass a statute that overrides the common law principles. The scenario below further explains the abrogation of common law.

Abrogation of common law of wilful exposure

ACTUAL SCENARIO

The offence of wilful exposure was created over the years by the courts. Essentially, it was an offence for a man to unlawfully, wilfully and publicly expose his naked body. Wilful exposure was a limited offence, in that it was limited to a man exposing his penis and not doing any sexually suggestive acts beyond exposing himself.

In 2016, the Victorian Parliament passed a law that amended the *Crimes Act*. A new section 54C was inserted into this Act, which states that 'the offence of wilful exposure at common law is abolished'. In addition, new sexual offences were created as part of the amendments, including a new offence prohibiting sexual exposure.

Ability of courts to influence parliament

Courts can also influence changes in the law made by parliament through the comments judges make during court cases. For example, they may indicate in a judgment that they think a law should be changed by parliament.

Courts might want to do this for a number of reasons. They may be reluctant to change the law themselves. This could be because a judge thinks parliament is in a better position to look at a wider area of law. Parliament can carry out investigations that courts cannot. Even so, a statement made by a judge within a court decision may influence parliament to change a law.

This occurred in the case of *State Government Insurance Commission (SA) v Trigwell*, discussed below.

High Court reluctant to change old common law

ACTUAL SCENARIO

State Government Insurance Commission (SA) v Trigwell (1979) 142 CLR 617

Mr and Mrs Trigwell were injured when a vehicle collided with their car after it hit two sheep. They sued the driver of the other car and the sheeps' owner for damages. The High Court followed an old common law that stated a landowner did not owe a duty of care in the event of their stock straying from their land onto a highway. This followed an old British common law principle that allowed animals to roam free. Justice Mason said:

> Even though there have been changes in conditions and circumstances, there are powerful reasons for the court to be reluctant to engage in changing the rule; such law-making should be left to parliament.

The Victorian Parliament subsequently passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic), which abolished the common law immunity and made owners of land liable for damage negligently caused by their animals straying on highways.

3.5 CHECK YOUR LEARNING

Define and explain

1 Describe two ways that courts and parliament work together in law-making.
2 How might courts fill in the gaps in legislation left by parliament?
3 Copy the following table in your notebook and fill in the blanks.

RELATIONSHIP BETWEEN PARLIAMENT AND THE COURTS			
FEATURE	**DESCRIPTION**	**WHEN MIGHT THIS HAPPEN?**	**EXAMPLE**
Statutory interpretation			
		If parliament agrees with the common law	
			The common law offence of wilful exposure was abolished in 2016.
	Courts can highlight the need for parliament to change the law.		

Synthesise and apply

4 'The main role of the courts is to make laws.' Is this statement correct? Justify your answer.
5 Create a mind map starting with the word 'courts' as the central word. In your mind map, cover each of the four features of the relationship between courts and parliament in law-making.
6 Read the scenario *Lansell House Pty Ltd v Commissioner of Taxation*.
   a What was the main issue in this case?
   b Describe the outcome that Abbatangelo wanted in this case. Describe the outcome that the ATO was seeking.
   c How does this case show the relationship between parliament and the courts?
   d How could parliament potentially change the law so that the law would work in favour of Abbatangelo?
7 Read the scenario *State Government Insurance Commission (SA) v Trigwell*.
   a What was the common law before parliament changed the law?
   b Do you think this is an appropriate law for 100 years ago? What about now?
   c What was the outcome of the case, and why do you think it might be seen to be unfair?
   d What is the law now that parliament has passed a statute?

Analyse and evaluate

8 Conduct some research on the common law offence of embracery.
   a What is the nature of this offence?
   b Do you think that this offence should be codified or abrogated? Justify your answer.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 3.5 Check your learning
- **Video tutorial** How to respond to a 'justify' question
- **Going further** The baseline sentencing regime
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

3.6 TYPES OF LAW

criminal law
an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

Other than classifying laws by their source, laws can also be classified by the behaviour they are trying to regulate and by the possible consequences of breaking them.

There are two main types of law in Australia that regulate behaviour: criminal law and civil law.

Criminal law

Criminal law is a body of law that protects the community by establishing **crimes** and setting **sanctions** for people who commit crimes. A crime is an act or omission that breaks an existing law, is harmful to an individual or to society as a whole, and is punishable by law. Examples of crimes include murder, theft and assault.

crime
an act or omission that is (1) against an existing law, (2) harmful to an individual or to society as a whole, and (3) punishable by law

One of the distinct features of criminal law is the consequences of committing a crime. If a crime is committed, and a person is guilty of that offence, a sanction may be imposed on that person. Sanctions can be minor (e.g. paying a small fine) or they can be severe (e.g. imprisonment).

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

In a case involving criminal law, there are two parties: **the state**, which brings the action against the person alleged to have committed the crime (represented by the prosecution), and **the accused**. The scenario below provides an example of a criminal case (***DPP*** *v Webster*). In this case, the County Court handed down a sentence for a crime involving a young person.

ACTUAL SCENARIO

Youth sentenced to detention at a youth justice centre

DPP v Webster [2019] VCC 2239 (19 December 2019)

Trae Webster pleaded guilty in the County Court to three charges of theft, one charge of aggravated burglary, and one charge of aggravated home invasion. He was sentenced to a total of two years and six months in detention at a youth justice centre (a detention centre just for youths). He was 18 and 19 years old at the time of offending, and 20 years old at the time of sentencing.

Director of Public Prosecutions (DPP)
the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

The offending occurred in early 2018 and 2019. Webster visited a store that sold alcohol in Sunshine and took two bottles of wine without paying for them. In a separate incident, Webster and his co-offenders opened an unlocked garage door of a private property. He took a number of items from the downstairs area including keys to cars, watches, mobile phones and motorbike keys. At the time, six residents were sleeping upstairs. Later on, Webster and his co-offenders entered another house and looked for items of value. He picked up a bottle of whiskey before leaving the premises. There were people sleeping in the house. Webster and his co-offenders entered the bedrooms and started jumping on the bed where a woman and her son were lying. They both started screaming. Webster was eventually caught and arrested. He pleaded guilty before his trial started.

The Judge took into account the fact that Webster had cooperated with the police, and had made a statement identifying his co-offenders. The Judge also took into account Webster's youth at the time of sentencing and the fact that he had not offended before. However, the Judge had to weigh these factors against the seriousness of Webster's offending. In particular, the Judge noted that the offending would have been a terrifying experience for the victims and will have a lasting effect on them.

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

tort
a term that literally means 'wrong'; a wrong that interferes with a person's legally protected interests

plaintiff
(in civil disputes) a party who makes a legal claim against another party (i.e. the defendant) in court

defendant
(in civil disputes) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

remedy
any order made by a court that is designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to the position they were in before they were wronged or their rights were breached

EXAMPLES OF CRIMES	WORDS COMMONLY USED IN CRIMINAL CASES
• **crimes against the person** – assault, rape, manslaughter, murder • **crimes against property** – theft, property damage, robbery, deception • **crimes against morality** – street prostitution, use of illegal drugs • **crimes against the legal system** – perjury, contempt of court • **crimes against the state** – treason	• **prosecution, the Crown, the state** – the party bringing the case on behalf of the state • **accused** – the person who has been charged with an offence • **suspect** – the person who is suspected of having committed a crime • **guilty or not guilty** – the person can be found guilty or not guilty • **charge** – when the police formally allege that a person has committed a crime • **sanction** – the penalty handed down by the court • **conviction** – when an offender has been found guilty, the court records a conviction (i.e. the guilty verdict); although in some instances, a court decides not to record a conviction so the offender does not have a criminal record

Source 1 Examples of crimes and words commonly used in criminal cases

Civil law

Civil law is an area of law that regulates disputes between individuals and groups, and seeks to enforce rights where harm has occurred. Examples of areas of civil law include **tort** law (negligence, defamation, trespass and nuisance) and contract law. Civil disputes are private disputes, and do not involve the police or the state (unless the state government is a party to a civil dispute, which can occur). The two parties to a civil dispute are the **plaintiff** (the party who makes a claim) and the **defendant** (whom the plaintiff alleges has infringed the plaintiff's rights).

The main aim of civil law is to **remedy** a civil wrong by returning the person whose rights have been infringed to their original position. This is done through civil remedies. The most common civil remedy is **damages**, which is a sum of money awarded to the person who has suffered harm.

The scenario below is a famous High Court case where the plaintiff sued a local council for negligence.

ACTUAL SCENARIO

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. The most common remedy in a civil claim

Water-skiing accident results in serious injury

Wyong Shire Council v Shirt (1980) 146 CLR 40

In January 1967, Brian Kenneth Shirt was water-skiing at Tuggerah Lakes in New South Wales. These lakes were regularly used by water-skiers.

Shirt fell and struck his head on the bed of a lake. As a result of the fall, he suffered quadriplegic paralysis. It was found that the water where he fell was shallow. Shirt thought it was safe to water-ski in that particular spot because there were signs that said 'deep water'.

Shirt sued Wyong Shire Council and the case went all the way to the High Court.

Wyong Council argued that 'deep water' meant before the signs, not around the signs. The High Court found that the Council had breached its duty of care to Shirt, because it should have foreseen that this sort of harm could occur in the lakes, and the harm was very serious.

The scenario below is a well-known case where the plaintiff (Hollywood actor Rebel Wilson) sued a magazine publisher for defamation, which is a type of civil law that aims to protect people's reputation and character from false statements.

ACTUAL SCENARIO

Jury finds Rebel Wilson defamed

Wilson v Bauer Media Pty Ltd [2017] VSC 521 (13 September 2017)

Rebel Wilson, an Australian actor who has starred in films such as *Pitch Perfect, Cats* and *JoJo Rabbit*, had a legal victory in the Supreme Court of Victoria in June 2017.

In 2015, Bauer Media, which publishes well-known magazines such as *Woman's Day*, *The Australian Women's Weekly* and *Harper's Bazaar*, published articles about Wilson, which she claimed contained false statements about her. In particular, the articles claimed that Wilson had lied about her age and many aspects of her upbringing.

Wilson sued the publisher for defamation. Wilson claimed that as a result of the articles, she had lost the opportunity to earn income by acting in feature films during a period after the publication of the articles. Bauer Media denied the claim and the case went to trial before a jury, which lasted three weeks.

In June 2017, a jury found in favour of Wilson, deciding that she had been defamed in the articles. In September 2017, Justice Dixon awarded over $4.5 million in damages to Wilson. The defendants appealed, and the damages were reduced to $600 000 on appeal. Wilson tried to appeal the case in the High Court, but was unsuccessful.

Source 2 Rebel Wilson successfully sued Bauer Media after it published articles about her that negatively affected her reputation. She was awarded a record payment of over $4.5 million in damages, but the amount was reduced on appeal.

EXAMPLES OF CIVIL LAW	WORDS COMMONLY USED IN CIVIL DISPUTES
• **tort law** – negligence, trespass, nuisance, defamation • **family law** – marriage, divorce, adoption, de facto relationships • **industrial and workplace laws** – occupational health and safety, working conditions, work contracts, workplace agreements, union disputes • **consumer law** – tenancy agreements, sale of goods, advertising laws • **property law** – wills, planning laws, real estate purchases	• **plaintiff** – the person bringing the civil dispute • **defendant** – the person defending the civil dispute • **sue** – taking civil action against another • **compensation** – what the plaintiff seeks • **damages** – a civil remedy • **civil wrong** – a tort • **defamation** – a civil law, under which a person can claim their reputation has been damaged • **negligence** – a civil law (also a criminal law) under which a person can claim that they have been injured as a result of someone acting negligently towards them

Source 3 Examples of civil law and words commonly used in civil disputes

3.6 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by criminal law.
2 Which area of law deals with private disputes between individuals?
3 Provide two examples of crimes, and two examples of civil law.

Synthesise and apply

4 Read the scenario *DPP v Webster*.
   - **a** Identify the key words that indicate that this is a criminal case.
   - **b** Describe the key facts of the case, including the charges that Webster pleaded guilty to.
   - **c** Do you agree with the sentence given in this case? Give reasons for your answer.

5 Read the scenario *Wilson v Bauer Media Pty Ltd*.
   - **a** Who was the plaintiff in this case, and who was the defendant?
   - **b** What was the main issue in dispute in this case?
   - **c** How was this dispute resolved?
   - **d** What was the outcome in this case, and who decided the outcome?
   - **e** Conduct some research to find out why it was the judge and not the jury who awarded damages in this case.
   - **f** Do you agree with the outcome of the case? Give reasons for your answer.

6 Collect four articles about criminal cases or civil disputes. For each article, highlight the key terms that identify the case as a criminal or civil matter. Then prepare a short summary of each article.

Analyse and evaluate

7 Find a criminal judgment from this year from the County Court of Victoria that has been published on the AustLII website. A link is provided on your obook assess.
   - **a** How do you know this is a criminal case?
   - **b** Who are the parties in this case?
   - **c** What were the charges? Did the accused plead guilty?
   - **d** Describe the facts that gave rise to the charges.
   - **e** What factors did the judge take into account when sentencing the accused?
   - **f** What sentence was imposed on the accused?
   - **g** Do you agree with the sentence? If not, why not? What sentence would you impose?

Check your Student obook assess for these additional resources and more:

- **Student book questions** – 3.6 Check your learning
- **Weblink** – Australasian Legal Information Institute (AustLII)
- **Weblink** – Types of law
- **assess quiz** – Test your knowledge on this topic with an auto-correcting multiple-choice quiz

3.7 THE DISTINCTION AND RELATIONSHIP BETWEEN CRIMINAL LAW AND CIVIL LAW

Study tip

'Distinguishing' between two things means you are showing how they are different. To do this, you should use words such as 'whereas', 'on the other hand', 'in contrast' or 'this is different to' when pointing out their differences.

The distinction between criminal law and civil law

There are a number of differences between criminal law and civil law. The main differences are:

- the **aim** of each area of law
- the **consequences** if a law is not followed.

The main aims of criminal law are to protect society and to sanction offenders who have committed a crime. On the other hand, the aims of civil law are to regulate the conduct between parties to a dispute, and to remedy a wrong that has occurred.

In a criminal case, if an accused is guilty of committing a crime, then the consequence is a sanction (e.g. a fine or imprisonment). In a civil dispute, if a defendant is found liable, then the possible consequence is a remedy (e.g. damages).

Source 1 below sets out the main differences between criminal law and civil law. You will learn more about these concepts in Unit 2.

	CRIMINAL LAW	CIVIL LAW
Aim of the law	To protect society and to sanction offenders	To regulate the conduct between parties to a dispute, and to remedy a wrong that has occurred
Examples of crimes and laws	• Crimes against the person: homicide offences, assault, sexual offences • Crimes against property: theft, arson, fraud • Crimes against the state: treason, sedition • Crimes against the legal system: perjury, contempt	• Tort law: negligence, defamation, nuisance, trespass • Contract law • Family law • Consumer law
Possible consequences	Sanction	Remedy
Person bringing an action under the law	Prosecution, on behalf of the state	Plaintiff
Person who has the responsibility (burden) of proving the case	Prosecution	Plaintiff
Person defending the action	Accused	Defendant
Police involvement in an action	Yes	No
Common words used in cases	Accused, prosecution, crime, victim, arrest, police, bail, remand, guilty, innocent, sentence, punishment	Sue, plaintiff, compensation, damages, dispute, negligence, remedy, litigation

Source 1 The main differences between criminal law and civil law

The relationship between criminal law and civil law

The same behaviour can give rise to both a civil dispute and a criminal case. For example, a person who hits another person can be charged by the police with the crime of assault. If the accused is found guilty by a court, they will probably be sanctioned. The victim of the assault (as the plaintiff) may also sue the

person who hit them (the defendant). If the plaintiff is successful, the defendant may have to pay damages to compensate the plaintiff for any injury suffered as a result of the assault.

In other circumstances, a victim may sue someone else who they believe is responsible for a crime. In the scenario below, a mother sued the state of Victoria in relation to a crime committed against her daughter.

ACTUAL SCENARIO

Mother sues Victoria after teenage daughter allowed to work as sex predator's cleaner

Tom Cowie and Nino Bucci, *The Age*, 15 June 2016

A convicted paedophile was moved from a sex-offender facility into the same crisis housing as a 15-year-old girl, who the man then preyed on after he hired her as a cleaner.

The girl's mother is suing the state of Victoria after the paedophile had regular access to her daughter, despite the offender himself believing he did not have 'the ability to cope' outside custody.

The man had been convicted of having sex with two 14-year-old girls.

The legal action forms part of an explosive series of lawsuits launched by the families of victims of sex offenders, rapists and murderers, including five people killed by offenders released on parole.

The family of one homicide victim is also taking Telstra to court, alleging that the company's triple-0 operators failed to put the desperate calls of a mother through to police on the day she was murdered.

The state's beleaguered parole system is set to come under increased scrutiny as part of the proceedings, which could cost taxpayers millions of dollars if the plaintiffs are successful.

The County Court civil action brings together the victims of five parolee killers – Joanne Wicking, Evan Rudd, Raechel Betts, Sarah Cafferkey and Douglas Phillips – as well as two victims of sex offenders, including the 15-year-old girl.

The recently released paedophile, who had been angry to leave sex-offender facility Corella Place because he believed he wasn't ready, was moved to a block of flats in regional Victoria in 2013.

Soon after, he offered a 15-year-old girl who lived with her mother in the same block of flats $10 an hour to clean his flat.

The girl was soon attending the flat regularly, once visiting when the man and another convicted sex offender were present.

Over three months, from February to April 2013, the man gave the girl a key to his flat, touched her leg, tried to hug her and touch her hair and encouraged her to come over to play Xbox.

He was jailed for eight months in November 2014 for 13 charges of breaching his supervision order.

The girl's mother is suing the state of Victoria, claiming that the registered sex offender had not been properly monitored, despite being on a supervision order.

...

compensation order an order made by a court for an offender to pay money to a person who has suffered loss or damage as a result of the offence

The court that hears a criminal matter can order the offender – after they have been found guilty or have been convicted – to pay compensation to the victim. This is known as a **compensation order**. The scenario on the next page – *DPP v Djokovic* – provides an example of when a court has made a compensation order.

Guilty plea for theft

ACTUAL SCENARIO

DPP v Djokovic [2019] VCC 1848 (12 November 2019)

Daniel Djokovic pleaded guilty to one charge of armed robbery and one charge of possession of heroin. In November 2018, the offender (Djokovic) robbed two unarmed operators of a business at Melbourne Central Shopping Centre. He approached the victims demanding they give him $500, while holding a pair of scissors. They gave him $200 and tried to push him away, which was when one of the victims received a minor cut from the scissors. The offender fled the scene, but one of the victims saw him on a tram about six days later. She called the police and he was arrested. At the time, he was found in possession of three small rocks of heroin plus other items he had bought with the $200 he stole.

The offending was carried out to finance the offender's long-existing addiction to heroin. Djokovic was sentenced to three years' imprisonment and is required to serve 18 months before being eligible for release.

The County Court also ordered Djokovic to pay compensation of $732 to the victims, which comprised the $200 he stole, plus the victims' ambulance costs.

3.7 CHECK YOUR LEARNING

Define and explain

1 Describe two differences between criminal law and civil law.
2 Could the police be involved in a civil dispute? Explain your answer.
3 What is a compensation order and what is its purpose?

Synthesise and apply

4 Read the scenario 'Mother sues Victoria after teenage daughter allowed to work as sex predator's cleaner'.
   a Is this article describing a criminal case, or a civil dispute, or both? Give reasons for your answer.
   b Who are the parties in this matter?
   c Why is the offender not the defendant?
   d What are the allegations against the state of Victoria?
   e The article refers to a series of lawsuits launched by the families of other victims. Conduct some research and identify at least one of these other cases. Describe the facts of the case.
5 Read the scenario *DPP v Djokovic*.
   a Is this a criminal case or a civil dispute? Justify your answer.
   b What are the critical facts of this case? What sanction was imposed?
   c How does this case show the relationship between criminal law and civil law?
6 Create two other scenarios that might give rise to both a criminal case and a civil dispute.

Analyse and evaluate

7 Conduct some research on the case involving Sarah Cafferkey.
   a What are the allegations made by Cafferkey's mother?
   b Explain how the tragic circumstances of Cafferkey's murder is an example of the relationship between criminal law and civil law.
   c What is the current status of Cafferkey's mother's case?
   d Do you think that Cafferkey and her family were let down by the parole system? Discuss.

Check your Student obook assess for these additional resources and more:

Student book questions
3.7 Check your learning

Going further
Other cases in civil law and criminal law

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

3.8 THE VICTORIAN COURT HIERARCHY

Study tip

A practice assessment task for Unit 1 – Area of Study 1 is available on page 296.

The law provides individuals in society with guidelines for acceptable behaviour. Most people grow up with an understanding that for people to live in harmony, they must obey the law. However, in any society, there are people who break the law and infringe other people's rights.

The court system provides a means of resolving disputes and enforcing the law peacefully and without resorting to violence. The court system includes a variety of courts that have different areas of expertise and are suitable for different types of cases.

As you have learnt the main Victorian courts are:

- the Magistrates' Court
- the County Court
- the Supreme Court, which is divided into two divisions: the Trial Division, and the Court of Appeal.

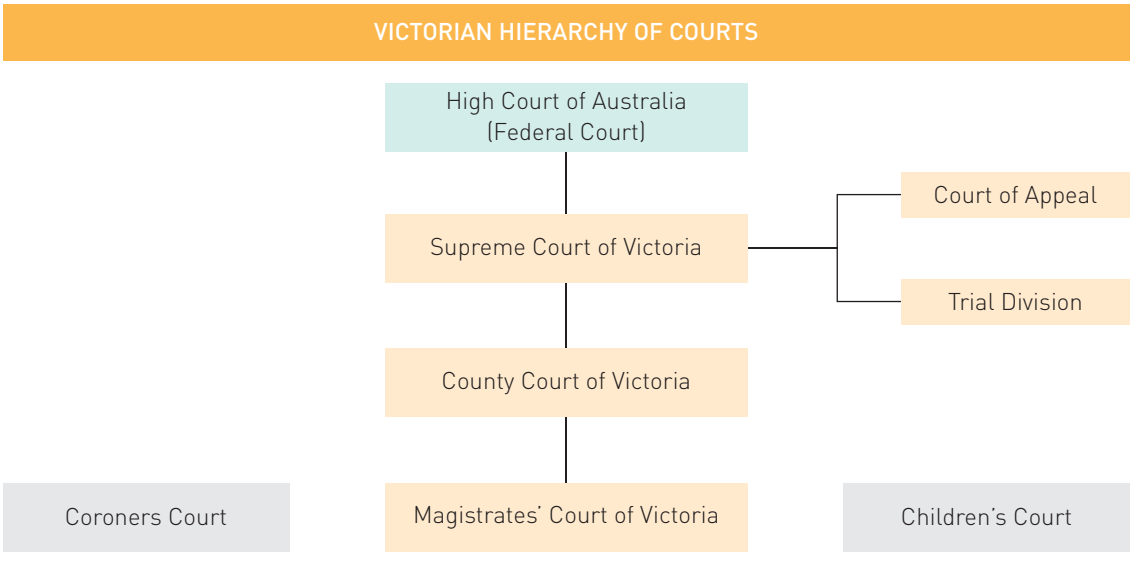
There are also two specialist courts in Victoria:

- the Coroners Court (which investigates suspicious deaths and fires)
- the Children's Court (which deals with criminal and family matters involving children).

The Victorian courts are ranked in a hierarchy; the higher courts hear the more serious and complicated cases, and the lower courts deal with less serious matters. The Victorian court hierarchy extends from the Magistrates' Court (the lowest state court) to the Supreme Court (the highest state court). The High Court is a federal court, but it can hear appeals from the Supreme Court (Court of Appeal). In fact, the High Court can hear appeals from courts in every Australian state and territory.

jurisdiction the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

Each of the courts has its own **jurisdiction**, which is the right or power of a court to hear or deal with particular cases. Most of the courts in Victoria have the jurisdiction to hear both criminal cases and civil disputes, and some courts have the power to hear appeals. For example, the Magistrates' Court can hear minor criminal offences (e.g. drink-driving), and the Supreme Court can hear serious offences (e.g. murder). You will learn more about the jurisdiction of courts in Unit 2.



Source 1 The Victorian court hierarchy, which includes the High Court (a federal court)

Reasons for a court hierarchy

There are four main reasons for having a court hierarchy:

- First, the court hierarchy allows for **specialisation** or **expertise**, with courts developing expertise in dealing with the types of cases that come before them. For example, the Magistrates' Court hears minor offences (e.g. drink-driving), and so specialises in these less serious offences. The Supreme Court hears serious offences (e.g. murder), and so has developed expertise around the principles relating to indictable offences.
- Second, the court hierarchy enables the parties to a court case to **appeal** to a higher court if they are not satisfied with a lower court's decision. This means that a person who believes that an error has been made in a lower court can appeal the case to a higher court for the higher court to review the decision.
- Third, the court hierarchy is a necessary part of the **doctrine of precedent** because the process of law-making through the courts depends on a decision being made in a higher court that is binding on lower courts. This enables individuals and lawyers to predict the likely outcome of a case. Judges and magistrates can be guided by the wisdom of the more experienced judges in the higher courts.
- Finally, the court hierarchy allows for **administrative convenience**. Because the courts have different jurisdictions to hear different matters, this allows smaller and minor cases (of which there are more) to be heard in the Magistrates' Court (of which there are a number in the state), and more complex and larger cases to be heard in the County Court and the Supreme Court. This allows for some efficiency or convenience with the way that cases are heard.

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

doctrine of precedent
the common law principle by which the reasons for the decisions of higher courts are binding on courts ranked lower in the same hierarchy in cases where the material facts are similar

3.8 CHECK YOUR LEARNING

Define and explain

1 Explain what is meant by a court hierarchy.
2 Identify two reasons for having a court hierarchy.
3 What is the highest court in Victoria? What is the lowest court?

Synthesise and apply

4 For each of the scenarios below, write down why you think the court hierarchy is important.
   a Samantha's civil dispute was heard in the Magistrates' Court, and she was found liable for $60 000. She does not agree with the magistrate's decision.
   b Hanna has been charged with murder. She is concerned about getting a judge who knows what they are doing.
   c Anil is suing Jessica for $20 000. He knows it's a small claim and doesn't want to wait for years to have his case heard.
   d Harriet is suing her employer. She has been told by her lawyers that her case is strong because of past decisions that are similar to her case.
5 Conduct some research on the Magistrates' Court of Victoria. Identify the closest Magistrates' Court to where you live. Explain the benefits of this court having many locations throughout Victoria.

Analyse and evaluate

6 'The court hierarchy system is just way too confusing. There are courts everywhere, and nobody knows where their case should be heard. They should just create one court for all cases.' Discuss the extent to which you agree with this statement.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 3.8 Check your learning
- **Weblink** Court Services Victoria
- **Weblink** High Court of Australia
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

CHAPTER 3

REVIEW

TOP TIPS FROM CHAPTER 3

1 There are five characteristics of an effective law. You need to know all five of them, and it's a good idea to have examples of laws that demonstrate each characteristic.

2 The doctrine of precedent is one of the most difficult areas of the Legal Studies course to understand, so don't worry if you don't understand it the first time. Although, it's a good idea to start working on your understanding of this topic now, as it comes up again in this unit, as well as in Units 2, 3 and 4.

3 Practise using legal terms. For example, incorporate legal terms into your answers and identify legal terms in articles and online material. You'll be surprised to discover how much of the information you read in newspapers and online is relevant to what you are studying in Legal Studies. But make sure you're reading from good sources!

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Classify** each of the following laws according to its source and type.
   - **a** The *Crimes Act 1958* (Vic) makes rape an offence.
   - **b** The sanction for common law kidnapping is set out in the *Crimes Act 1958* (Vic).
   - **c** Vince is required to pay $50 000 after being found liable under the common law tort of negligence.
   - **d** In Victoria, intentional murder is not defined in the *Crimes Act 1958* (Vic) but by case law.

(4 marks)

Difficulty: medium

2 In your view, what are the two most important characteristics of an effective law? **Justify** your answer.

(6 marks)

Difficulty: high

3 'The Victorian court hierarchy is critical to ensuring that cases are decided efficiently.' Do you agree with this statement? **Give reasons** for your answer.

(6 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Part 1 (20 marks)

1 Collect two newspaper articles. One of the articles must relate to a criminal case, and one of the articles must relate to a civil dispute.

For each of the articles:

a Identify and define the legal terms used in the newspaper article.

(6 marks)

b Identify the crime that is alleged to have been committed, or the area of civil law that is alleged to have been breached. Explain how making that act or omission a crime, or how that area of civil law, aims to achieve social cohesion.

(8 marks)

c In relation to the article about a criminal case, explain how the crime could also give rise to a civil dispute.

(6 marks)

Part 2 (30 marks)

2 You have been asked to write an article that is to be published in a newsletter for Year 6 students. The purpose of the article is to provide information about parliament and the courts, and their relationship. Write the newspaper article. You can use a variety of multimedia tools if you wish. You will need to use appropriate language for Year 6 students. Your article needs to include information about:

a The role of parliament and the courts.

(5 marks)

b The main sources of law and how to distinguish between the sources.

(5 marks)

c The Victorian court hierarchy, and two reasons for having a hierarchy of courts.

(6 marks)

d Two features of the relationship between parliament and courts, using examples.

(6 marks)

e How a person could assess whether a law is effective. At least two examples must be included.

(8 marks)

Total: 50 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 3

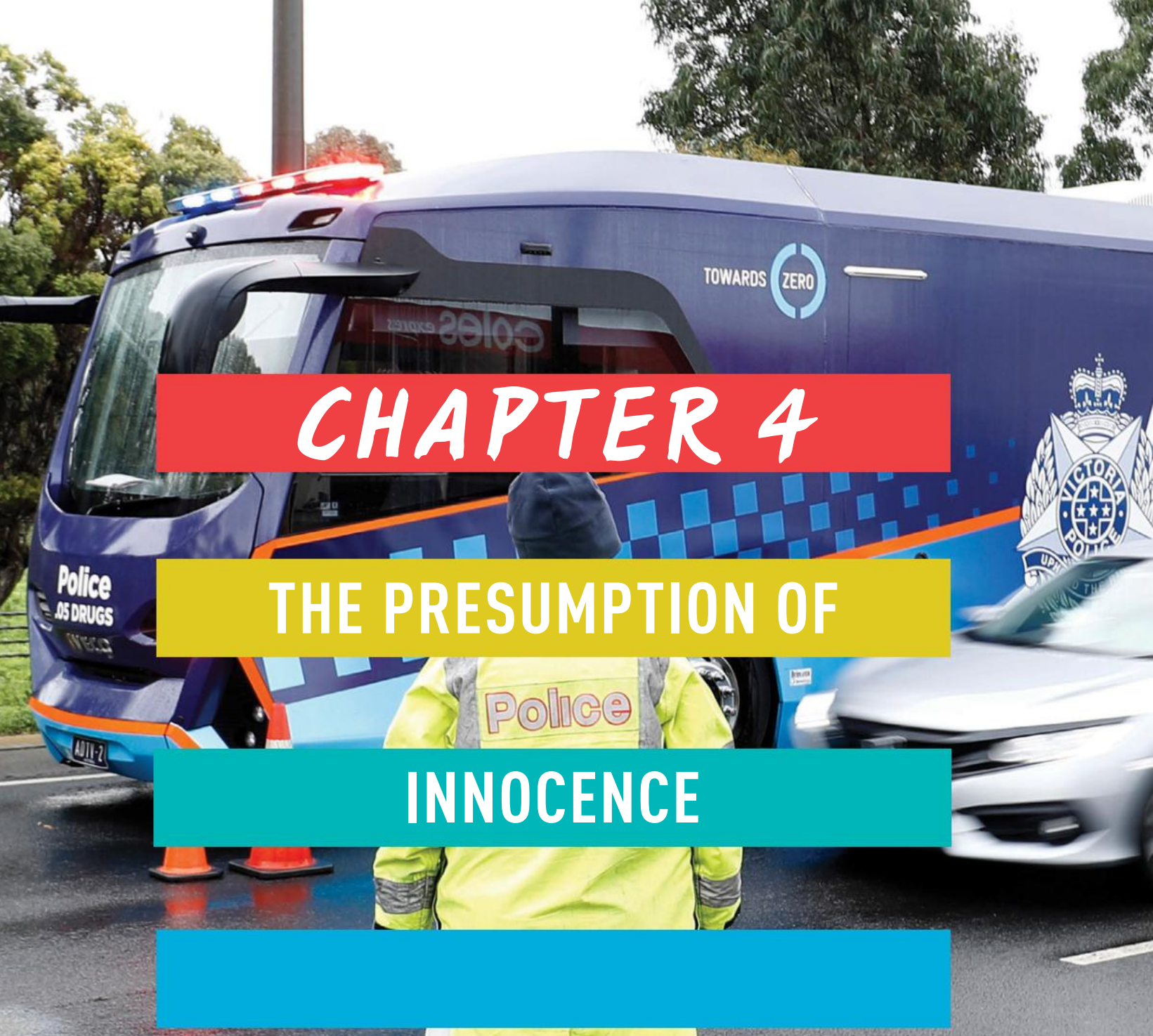
Revision notes
Revision notes for Chapter 3

assess quiz
Chapter 3
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 4

THE PRESUMPTION OF INNOCENCE



Source 1 The presumption of innocence is a fundamental legal principle in our criminal justice system. This principle means that an accused is entitled to be treated as not guilty until proven otherwise. This chapter looks at the presumption of innocence and other key concepts of criminal law.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6) you should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

KEY KNOWLEDGE

In the chapter, you will learn about:

- the purposes of criminal law
- the presumption of innocence
- key concepts of criminal law, including:
  - the elements of a crime: *actus reus* and *mens rea*
  - strict liability
  - the age of criminal responsibility
  - the burden of proof
  - the standard of proof
- types of crime such as crimes against the person and crimes against property
- the distinction between summary offences and indictable offences
- possible participants in a crime such as principal offenders and accessories.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research and analyse relevant information about criminal law and offences
- explain the purposes and key concepts of criminal law
- distinguish between types of crime, and indictable offences and summary offences, using examples.

KEY LEGAL TERMS

accessory a person who knowingly assists another person who has committed a serious indictable offence to avoid being apprehended, prosecuted, convicted or punished

accused a person charged with a criminal offence

actus reus a Latin term meaning 'a guilty act'; the physical element of a crime (i.e. the act itself). See also *mens rea*

balance of probabilities the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

beyond reasonable doubt the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

burden of proof the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

common law law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

crime an act or omission that is (1) against an existing law, (2) harmful to an individual or to society as a whole, and (3) punishable by law

criminal law an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

indictable offence a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

indictable offence heard and determined summarily a serious offence that can be heard and determined as a summary offence if the court and the accused agree

jury an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

mens rea a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

presumption of innocence the right of a person accused of a crime to be presumed not guilty unless proven otherwise

principal offender a person who has carried out the *actus reus* (guilty act) and has therefore directly committed the offence

standard of proof the degree or extent to which a case must be proved in court

strict liability where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

summary offence a minor offence generally heard in the Magistrates' Court of Victoria

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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4.1 THE PURPOSES OF CRIMINAL LAW

laws
legal rules made by a legal authority (i.e. the parliament or courts) that are enforceable by the police and other law enforcement agencies

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

criminal law
an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

crime
an act or omission that is (1) against an existing law, (2) harmful to an individual or to society as a whole, and (3) punishable by law

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

victimless crime
an offence that only involves the offender(s) and where no direct harm is suffered by a victim. The offence also goes against what society considers to be acceptable and can indirectly harm individuals and the wider community

Laws help people live together in a harmonious way by establishing boundaries of acceptable behaviour. In other words, laws help achieve **social cohesion**. **Criminal law** assists this because it defines and prohibits the types of behaviours and conduct that are unacceptable (referred to as **crimes**) and outlines penalties (referred to as **sanctions**) for people who undertake these prohibited behaviours.

What is a crime?

Before looking at the purposes of criminal law, it is useful to know what a crime is. A crime is an act (i.e. undertaking an action) or omission (i.e. failing to undertake an action) that is against an existing law, harmful to an individual or to society, and punishable by law (by the state).

Against an existing law

For a person to commit a crime, they must undertake an action (or fail to undertake an action) that is prohibited (i.e. not allowed) by a current law. The **parliament** and the courts establish laws that define which actions (or inactions) are prohibited and are therefore considered to be crimes. For example, in 2016 the Victorian Parliament passed the *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic) to establish the offences of aggravated home invasion and aggravated carjacking. These new crimes are targeted at people who violently and aggressively invade or enter homes or steal cars.

Harmful to an individual or to society

A criminal act or omission has an impact on both the victim and the wider community. Crimes can impact a victim by causing physical, financial or psychological harm (or a combination of these). Crimes can also negatively impact the whole of society by decreasing the community's sense of wellbeing and safety, and increasing the need for expensive resources like the police, courts, prison and hospitals.

A **victimless crime** is also harmful to society, even though the offender perceives their actions to only cause harm to themselves. For example, while consuming illegal drugs might be considered to be a victimless crime, it impacts other individuals such as the offender's family and friends. Consuming illegal drugs can also impact the broader community by leading to an escalation in theft and violent crimes, and by leading to an assumption in the community that this behaviour is acceptable.

Punishable by law

Crimes are punishable by the state. This means a person who is guilty of committing a crime can have a penalty (i.e. sanction) imposed on them. In Victoria, penalties for criminal offences are typically imposed by the courts, but they can also be imposed by other authorities that are given the power to do so (e.g. local councils, VicRoads, and the Victoria Police for traffic offences). Examples of sanctions include a fine or imprisonment.

Purposes of criminal law

Criminal law has several purposes. These include to:

- **protect individuals** – criminal law aims to protect individuals by establishing crimes and processes to deal with people who commit these crimes. For example, laws that make murder, theft, rape, arson and robberies crimes are aimed at protecting individuals from these types of behaviours
- **protect property** – criminal law aims to protect privately owned and public property. This includes protecting land and the environment, and personal property. For example, it is an offence to trespass on another person's property. It is also an offence to steal

- **protect society** – criminal law aims to protect the community as a whole by setting standards and making it clear what behaviour is not tolerated by the community and the legal system. This helps to maintain public order and community safety. For example, laws prohibiting drug offences and terrorism offences help to protect society
- **promote justice** – criminal law aims to promote justice by providing processes to deal with offenders and to enforce the law. Having the state enforce criminal law helps prevent victims of a crime, and their family and friends, from taking the law into their own hands and imposing their own punishment on an offender.

Source 1 The purpose of the law is to maintain a peaceful society. Through agencies like the courts and the police, criminal law aims to protect individuals and their property, safeguard individual's rights, and maintain order.

4.1 CHECK YOUR LEARNING

Define and explain

1 Define the term 'crime'.

2 Describe three purposes of criminal law.

Synthesise and apply

3 Discuss with your class whether the following actions (or failures to act) are crimes under Victorian law.
- **a** Keeping a purse found in the street containing $50.
- **b** Leaving rubbish on the beach after a picnic lunch.
- **c** Not using a designated crossing when walking across the road.
- **d** Using your mobile phone in a Year 12 VCAA exam.
- **e** Taking a lemon from a neighbour's tree without asking their permission.
- **f** Having an alcoholic drink at a licensed restaurant, aged 17, in the company of your parents.
- **g** Posting a nasty or cruel comment about another person on social media.

4 Why is the state (and not the victim) responsible for imposing a penalty (sanction) on a person who commits a crime?

5
- **a** Suggest one act or omission that you think should be a crime but is not. Justify your choice.
- **b** Suggest one act or omission that is currently a crime but you think should be decriminalised. Justify your choice.

Analyse and evaluate

6 What is considered to be a crime can differ between Australia's states and territories, and between countries. Conduct research online to help you complete the following questions.
- **a** Provide two examples of an act or omission that is a crime in one Australian state or territory but not in another. Suggest reasons for the difference.
- **b** Provide one example of an act or omission that is a crime in another country but not in Australia. Suggest reasons for the difference. Discuss whether you agree with the other country's approach.

Check your Student obook assess for these additional resources and more:

Student book questions
4.1 Check your learning

Video tutorial
Introduction to Chapter 4

4.2 THE PRESUMPTION OF INNOCENCE

presumption of innocence
the right of a person accused of a crime to be presumed not guilty unless proven otherwise

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

standard of proof
the degree or extent to which a case must be proved in court

prosecution
the lawyers who prepare a criminal case and take it to court on behalf of the state, the victim and society

accused
a person charged with a criminal offence

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

plaintiff
(in civil disputes) a party who makes a legal claim against another party (i.e. the defendant) in court

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

bail
the release of an accused person from custody on condition that they will attend a court hearing to answer the charges

The **presumption of innocence** is one of the most important legal principles on which the criminal justice system is based. It is a guarantee by the state to its citizens that if they are accused of a crime they will be treated, as far as possible, as being not guilty until the charge has been proved **beyond reasonable doubt**.

Beyond reasonable doubt is the **standard of proof** (i.e. the level of proof) required for the **prosecution** to succeed in a case. In a criminal case, the prosecution (i.e. the lawyers acting on behalf of the state or government) is required to prove that the **accused** is guilty beyond reasonable doubt rather than the accused being required to prove their innocence.

It is the responsibility of the magistrate (for minor crimes) and the jury (for serious crimes) to impartially consider the strength of the evidence presented to the court and decide whether an accused is guilty beyond reasonable doubt.

The presumption of innocence is protected as a human right in the *International Covenant on Civil and Political Rights* (1966), an international treaty that Australia has signed. It is also protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), a Victorian statute that protects fundamental human rights (this statute is also referred to as the Human Rights Charter or the Victorian Charter of Human Rights).

How is the presumption of innocence protected?

The presumption of innocence is protected and upheld by a number of criminal principles and processes. These are listed below.

- The **burden of proof** in a criminal case is on the prosecution – this means the prosecution must present evidence to the court to prove the guilt of the accused rather than the accused being required to prove their innocence.
- The **standard of proof** in a criminal case – to succeed in a criminal case, the prosecution is required to present sufficient evidence to the court to prove that the accused is guilty beyond reasonable doubt. This is a high standard of proof compared to that in civil disputes, where the party making the allegations (i.e. the **plaintiff**) is only required to prove that the defendant most likely (or on the **balance of probabilities**) breached their rights.
- Police officers are required to **reasonably believe a person has committed a crime** before arresting them – in essence, this means that the police must have a good reason to arrest a person.
- A person who has been arrested and charged has the right to apply for **bail** – unless there are good reasons why they should be denied their freedom and be held in custody while waiting for their court hearing, a person has the right to apply for and be granted bail.
- An accused has the **right to legal representation** in court – in some situations, where an accused has been charged with a serious offence, the court can adjourn the trial until the accused has obtained legal representation.
- An accused has the **right to silence** – this means an accused does not need to answer any questions, and is not required to give evidence in court, and this 'silence' is not to be interpreted as a sign of their guilt.
- As a general rule, the accused's **previous convictions** cannot be revealed in court until the sentencing process begins.
- A person who has been convicted, or found guilty, of a crime has the **right to appeal** a wrongful conviction.

While the presumption of innocence is a key feature of Australia's criminal justice system, in some circumstances, the application of the principle is limited. For example, in situations where an accused has committed a serious and violent offence, their right to be treated as innocent until proven otherwise may be limited to protect the community. The scenario below examines one way the law limits the presumption of innocence in cases involving suspected terrorists.

ACTUAL SCENARIO

Counter-terrorism laws limit the presumption of innocence

Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019 (Cth)

Over the last decade, the Commonwealth Parliament has introduced a number of counter-terrorism laws to improve national security. However, these counter-terrorism laws have been criticised for reversing the burden of proof and limiting the presumption of innocence.

For example, in 2019 the Commonwealth Parliament passed the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth) to make it more difficult for people charged with terrorist-related offences (e.g. suspected terrorists and those who are suspected of supporting terrorist organisations) to be granted bail.

Under the new law, any person who has previously been convicted of a terrorist offence and who is charged with a new terrorist-related offence does not have the right to apply for bail. This means that once a person has been charged with a terrorist offence, they are automatically held in custody until their court hearing, unless they can prove they are not a threat to the community. In effect, this reverses the burden of proof and, to some extent, treats the accused as being guilty until they can prove their innocence.

4.2 CHECK YOUR LEARNING

Define and explain

1 What is meant by the 'presumption of innocence'?

2 Describe three ways in which the presumption of innocence is upheld in Australia's criminal justice system.

Synthesise and apply

3 Read the scenario 'Counter-terrorism laws limit the presumption of innocence'.

a Explain how the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth) limits the presumption of innocence.

b As a class, discuss whether you believe the limit placed on the presumption of innocence by this Act is justified.

Analyse and evaluate

4 Do you think the presumption of innocence should be a key feature of the criminal justice system? In your answer, consider the point of view of society, the accused and the victim.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 4.2 Check your learning
- **Going further** The expunction of convictions for homosexuality
- **Weblink** Presumption of innocence
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

4.3 KEY CONCEPTS OF CRIMINAL LAW

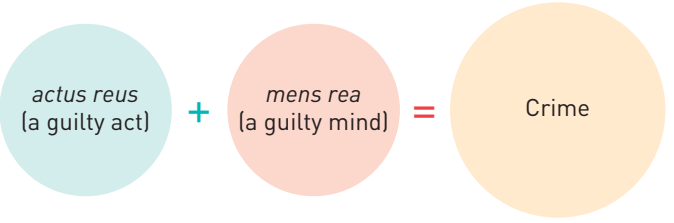
There are a number of key concepts in criminal law. These concepts include:

- the elements of a crime: *actus reus* and *mens rea*
- strict liability
- the age of criminal responsibility
- the burden of proof
- the standard of proof.

The elements of a crime: *actus reus* and *mens rea*

Generally, for a crime to have been committed, the following two elements of a crime need to exist **at the same time**:

- ***actus reus*** – a Latin term meaning 'guilty act' (i.e. the physical element of a crime). For a person to be found guilty of committing a crime, the prosecution must prove the person physically did the wrongful action (or inaction). For example, for a person to commit the offence of stalking, they must have physically done something, such as contacted or followed the victim against their wishes, and caused the victim to feel fear or be distressed. This may include stalking the victim on social media
- ***mens rea*** – a Latin term meaning 'guilty mind' (i.e. the mental element of a crime). For a person to be found guilty of committing a crime, the prosecution must also prove that the person knowingly or intentionally committed the wrongful action (or inaction). Therefore, ***mens rea* refers to the state of mind of the accused at the time of the offending**. For example, for a person to be convicted of importing illegal drugs into Australia, the prosecution must prove the person knowingly or intentionally brought the drugs into Australia. Other terms used to express the existence of *mens rea* include maliciously, recklessly, negligently and wilfully.



Source 1 There are two elements of a crime: *actus reus* and *mens rea*.

The following hypothetical scenario demonstrates the elements of *actus reus* and *mens rea*, and how they need to exist at the same time for a crime to be committed.

HYPOTHETICAL SCENARIO

Houli, a 21-year-old university student, took a laptop belonging to another student (Dee) without Dee's knowledge.

Under section 72 of the *Crimes Act 1958* (Vic), for a person to be found guilty of theft, they must dishonestly appropriate (i.e. take) property belonging to another with the intention of permanently depriving the other of it. This means that for Houli to be found guilty of theft, he must have appropriated (taken) Dee's property (*actus reus*), and done so dishonestly, with the intention of permanently depriving Dee of the laptop (*mens rea*).

Study tip

In assessment tasks, when you are asked questions about the key concepts of criminal law, make sure you use the correct legal terminology, such as *mens rea*, *actus reus* and strict liability.

actus reus
a Latin term meaning 'a guilty act'; the physical element of a crime (i.e. the act itself). See also *mens rea*

mens rea
a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

Did you know?

An accused does not need to be a human being. Companies can also be charged with crimes, such as taxation fraud or failing to maintain a safe workplace. This is because companies are considered to be 'entities' that are separate to the directors and the people who manage the company.

Houli could not be found guilty of theft if he had taken Dee's laptop (*actus reus*) but had no intention, at the time of taking it, to deprive Dee of the laptop permanently (*mens rea*). That is, if Houli borrowed the laptop with the intention of returning it to Dee, he cannot be found guilty of theft. In this instance, Houli committed the guilty act of keeping someone's property, but did not have a guilty mind at the time.

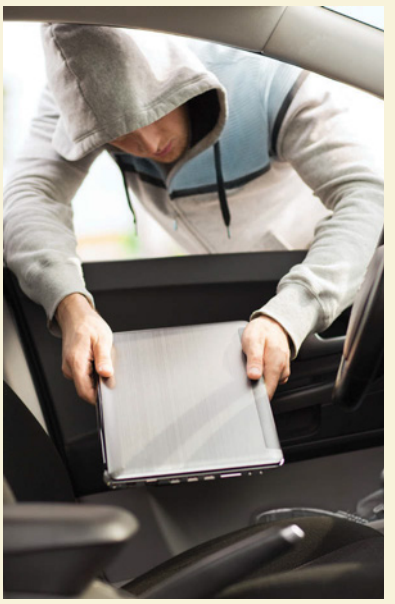
There are two elements of the crime of theft. The mental element (*mens rea*) for the crime is highlighted in orange to distinguish it from the physical element (*actus reus*), which is highlighted in blue.

Definition of theft:

A person ... dishonestly appropriates property belonging to another with the intention to permanently deprive the other of it.

A person ...

- dishonestly *(mental element, a guilty mind)*
- appropriates property *(physical element, a wrongful act)*
- belonging to another
- with the intention to permanently deprive the other of it *(mental element).*



Source 2 There are two elements of a crime of theft.

Many defences raised by accused persons are made on the basis that they were incapable of forming the intention to commit a crime (i.e. no guilty mind or *mens rea* existed) at the time of committing the wrongful action (or inaction). For example, an accused who was suffering from a mental impairment or having an epileptic seizure while undertaking an unlawful action is not guilty of a crime because there is no *mens rea* (that is, because the person was likely acting involuntarily, or had little understanding of the nature of their actions, at the time they committed the act).

Strict liability

While generally, for a crime to have been committed, the two elements of a crime – *actus reus* and *mens rea* – must both be present, this does not apply to crimes of **strict liability**.

Crimes of strict liability are offences that do not have a mental element. That is, they do not have the requirement of *mens rea* (a guilty mind). This means for strict liability crimes, the prosecution is not required to prove the accused had the intention to commit the crime to be found guilty. To establish that the accused is guilty, the prosecution is only required to prove the accused committed the wrongful action (or inaction) (i.e. the *actus reus*).

Many strict liability crimes are summary offences. Strict liability crimes include consuming intoxicating liquor (alcohol) while driving, fare evasion on public transport, and failing to display 'P plates' when driving on a probationary driver licence.

For some strict liability crimes, the accused may argue, in their defence, that the crime was committed due to a reasonable or honest mistake of fact.

Did you know?

Joyriding (i.e. taking a car without permission, driving it around for a while, and then returning or dumping it) became popular in the 1980s. The law was not equipped to treat joyriding as an offence because 'borrowing' a car in this way – without intending to permanently deprive the owner of it – did not contain all the elements necessary to establish the crime of 'theft of a motor vehicle'. Therefore, the law was changed. Section 73(14) of the *Crimes Act* now states that to take or use a motor vehicle in any manner is conclusive proof that the person intended to permanently deprive the owner of it.

strict liability where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

The age of criminal responsibility

The age of criminal responsibility is the minimum age a person must be to be charged with committing a crime.

Some people may not be held responsible for committing a crime because they are considered to be too young to form the intention (*mens rea*) to commit a crime. This was the case in *RP v The Queen*, which is explored in the scenario below. Whether a person is charged with committing an offence depends on their age:

- A person under 10 years of age cannot be charged with a crime.
- A person aged between 10–13 years can be charged with a crime if the prosecution can prove that the child knew, at the time of the crime, that their actions were wrong. This is known as rebutting the legal principle of ***doli incapax***. Whether a child is *doli incapax* (i.e. considered incapable of committing an action with criminal intent) depends on factors such as the child's age, upbringing, maturity, prior criminal history, and what the child said and did before, during and after committing the crime. Medical and psychological assessments can be undertaken to help determine whether a child has the intellectual or moral capacity to know their actions are criminally wrong.
- A person aged 14 years or older is considered to be criminally liable for their actions and can be charged with committing a crime.

doli incapax
a Latin term meaning 'incapable of evil'; the principle that a child aged between 10 and 13 years is presumed to be incapable of forming *mens rea* (a guilty mind) because they do not have the intellectual or moral capacity to know the difference between right and wrong

A child under 10 years of age
- Cannot be charged with a crime

A child 10 to 13 years of age
- Can be charged with a crime if the prosecution proves the child knew his or her actions were wrong at the time of the crime

A child 14 years of age or older
- Can be charged with a crime

Source 3 The age of criminal responsibility

ACTUAL SCENARIO

Sexual offences committed by 11-year-old boy

RP v The Queen [2016] HCA 53 (21 December 2016)

In 2014, a man in his early twenties named RP (a pseudonym) was found guilty in the New South Wales District Court of three sexual assault-related offences committed when he was 11 years old. The victim was his younger brother and the attacks occurred when the boys were not supervised by an adult. RP was sentenced to two years and five months in prison, with a non-parole period of 10 months.

On appeal to the New South Wales Court of Criminal Appeal, RP's lawyer argued RP was *doli incapax* when he committed the offences. In its ruling, while the Court agreed that RP was *doli incapax* at the time of one of the offences, it upheld the convictions for the two other sexual assault charges. RP's lawyer appealed to the High Court.

The High Court summarised the concept of *doli incapax* as 'the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*'.

The prosecution argued that RP's actions showed he knew that what he was doing was wrong. They argued that RP stopped the sexual act when he heard an adult nearby, held his brother so he could not draw attention to the situation, and then warned him not to tell. The High Court also heard other evidence about RP's 'very low intelligence', poor educational pathways, and dysfunctional upbringing. Also, RP was possibly a victim of sexual assault and had previously been exposed to violence.

The High Court allowed the appeal. In its judgment, the Court noted that the prosecution provided little evidence, other than the circumstances of the offence, to disprove *doli incapax*. There was no evidence of RP's moral development or that the boy understood his actions were wrong. It was not enough to show that RP knew the behaviour was rude or naughty. The High Court said it could not be assumed that the boy understood that hurting his younger brother was a serious moral wrong. The High Court acquitted RP of the crimes.

While the criminal age of responsibility in Australia is 10 years old, the scenario below illustrates the fact that not all Australians are happy with that age and would like it to be raised.

Raise the age

ACTUAL SCENARIO

Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019 (Cth)

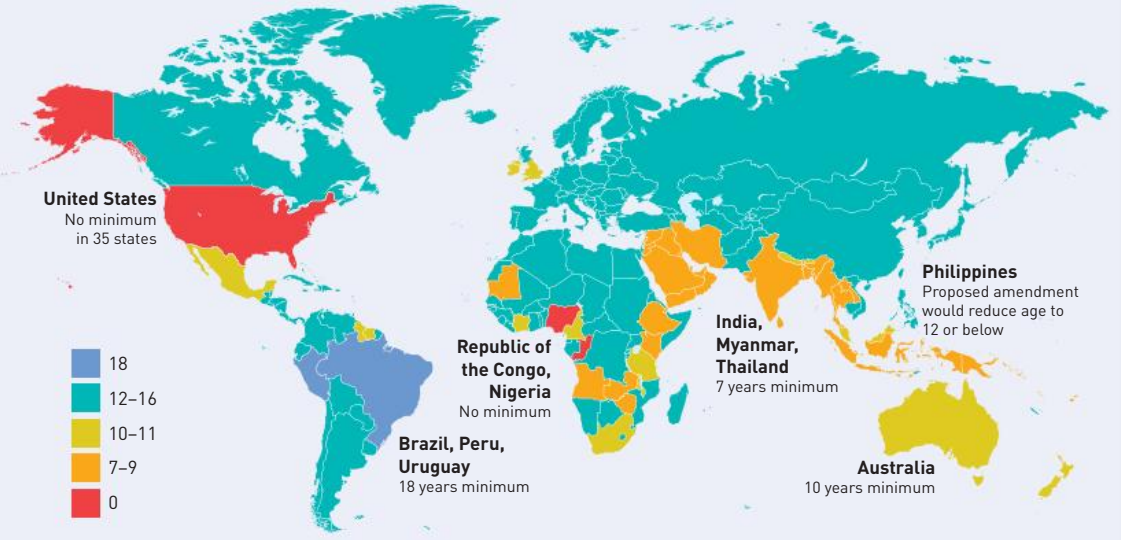
In 2019, a member of the Commonwealth Parliament, Rebekha Sharkie, introduced a proposal to change the law (i.e. a bill) to increase the age of criminal responsibility in Australia from 10 to 14 years of age.

Sharkie introduced the Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019 (Cth) in response to a growing concern in the community about the age of criminal responsibility in Australia. The primary concern is that the age can result in children as young as 10 years old being arrested and held in custody (in youth detention centres) while awaiting their trial and after being found guilty of committing a crime.

In 2017–2018, 600 children aged between 10–13 years were held in detention throughout Australia. Approximately 70 per cent of these children were Aboriginal and Torres Strait Islander people, suggesting that the age of criminal responsibility disproportionately affects Indigenous children.

Sharkie – and other people and organisations that support the age being raised in Australia, including Amnesty International (#raisetheage), the Human Rights Law Centre, and various legal and medical associations – has expressed concerns about Australia's age of criminal responsibility being below the minimum age of 12 years recommended by the United Nations Committee on the Rights of the Child.

Current research also suggests that children under the age of 14 years have not yet fully developed sufficient abstract reasoning skills to be capable of understanding the moral and criminal culpability of their actions. Evidence also suggests that holding children in detention can cause children severe, long-term mental harm.



Source 4 The minimum age of criminal responsibility around the world

The burden of proof

The burden of proof (also known as the onus of proof) is the responsibility to prove the allegations made in a case. In general, the burden of proof is held by the person or party who initiates or brings the case to court. This means, in a criminal case, the burden of proof is held by the prosecution. That is, the prosecution must present sufficient evidence to prove the guilt of the accused (beyond reasonable doubt).

As described in Topic 4.2, the burden of proof upholds the presumption of innocence because it requires the prosecution to prove the guilt of the accused rather than the accused being required to prove their innocence.

In some circumstances in criminal cases, the burden of proof can be reversed. This means the accused has the responsibility of proving that they are not guilty. For example, in cases where drugs have been found on the accused's property, the accused is assumed to be guilty of drug possession unless they can prove that the drugs were not in their possession. Likewise, in cases where the accused is pleading a certain defence (e.g. they had a mental impairment at the time of committing the offence) the accused has the responsibility to prove that defence.

The standard of proof

The standard of proof is the strength of evidence needed to prove a legal case. In criminal law, the prosecution must prove the case beyond reasonable doubt.

A reasonable doubt must be sensible and realistic, and not one that is imaginary or fanciful or an unrealistic possibility. It is not enough that the accused is probably guilty or very likely to be guilty.

4.3 CHECK YOUR LEARNING

Define and explain

1 Identify and explain the two elements of a crime.
2 Distinguish between the burden of proof and the standard of proof in a criminal case.

Synthesise and apply

3 'The offence of supplying alcohol to young people aged under 18 years on licensed premises is a strict liability offence.' Explain the meaning of this statement.
4 Do you think that parliament should be allowed to create crimes of strict liability? Give reasons for your response.
5 Read the scenario *RP v The Queen*.
   a What did the prosecution need to prove for RP to be found guilty?
   b How did the High Court summarise the criminal law principle of *doli incapax*?
   c Why was RP acquitted of the crimes?

Analyse and evaluate

6 Read the scenario 'Raise the age'.
   a Describe the age of criminal responsibility in Victoria.
   b Suggest two reasons why Rebekha Sharkie introduced a bill into the Commonwealth Parliament to raise the age of criminal responsibility in Australia.
   c Form small groups and discuss whether or not the age of criminal responsibility should be raised in Victoria. Prepare a summary of your discussions.

Check your Student obook assess for these additional resources and more:

- **Student book questions** — 4.3 Check your learning
- **Video tutorial** — How to identify the elements of a crime
- **Video** — Criminal intent
- **Actual scenario** — *Momcilovic v The Queen* (2011) 245 CLR 1

Source 5 For a person to be found guilty of committing a crime, the prosecution must prove the person physically did the wrongful action.

4.4 TYPES OF CRIME

There are many different types of crime. Crimes can be classified according to:

- the social purpose (or nature) of the offence
- the type of offender or victim
- the seriousness of the offence.

Classifying a crime according to the social purpose (or nature) of the offence

Classifying a crime according to its social purpose means categorising a crime according to whether it involved a wrongful action (or inaction) against a person, property, the wellbeing of society as a whole, or even the criminal justice system.

This type of classification is popular with law enforcement agencies (e.g. Victoria Police), government departments (e.g. the Australian Bureau of Statistics) and independent organisations (e.g. the Crime Statistics Agency) that track the level of crime in our community.

One organisation that classifies crimes according to their social purpose (or nature) is the Crime Statistics Agency, an independent organisation responsible for processing, analysing and publishing Victorian **crime statistics**. This agency classifies crimes into six broad divisions or categories. These divisions, together with some examples of the types of crimes in each division, are listed in Source 1 below.

crime statistics information (i.e. data) collected by authorities (e.g. the police) and analysed to track the level of crime or offending in the community. Crime statistics also track the types and levels of sentences given to convicted offenders

DIVISIONS OF CRIME	EXAMPLES OF THE TYPES OF CRIMES INCLUDED IN THIS DIVISION
Division A: Crimes against the person (i.e. protecting individuals)	Homicide (e.g. murder and manslaughter), assault, sexual offences, stalking, harassment, threatening behaviour
Division B: Property and deception offences (i.e. protecting property)	Arson, property damage, burglary or breaking and entering, theft
Division C: Drug offences (i.e. protecting society)	Dealing and trafficking drugs, manufacturing drugs, using drugs, possessing drugs
Division D: Public order and security offences (i.e. maintaining public order and security)	Weapons and explosives offences, public security offences (e.g. terrorism offences), disorderly and offensive conduct
Division E: Justice procedures offences (i.e. protecting justice and the rule of law)	Perjury (i.e. giving false evidence under oath), contempt of court
Division F: Other offences (i.e. protecting rights and cultures, and improving society)	Regulatory driving offences (e.g. dangerous driving and driving under the influence of drugs or alcohol), transport regulation offences (e.g. travelling without a valid ticket)

Source 1 The divisions of crime, as classified by the Crime Statistics Agency

Source 2 Aggravated carjacking is classified as a crime against a person.

Source 3 Arson is classified as a crime against property.

Source 4 Drink-driving is classified as a regulatory driving offence.

Classifying a crime according to the type of offender or victim

When criminal offences are committed by, or impact, a specific social group, these offences gain the attention of the media, law enforcement agencies, government and the general community. As a result, the illegal behaviour is often labelled as a specific category of crime that needs to be monitored and addressed. Some classifications of crime according to the type of offender or victim include:

- cyber-crime
- hate crime
- organised crime
- juvenile crime
- white-collar crime.

Cyber-crime

Cyber-crimes (also known as e-crimes) are criminal offences that are committed using computers or other electronic systems and devices. Common examples of cyber-crime include online fraud, the creation of malicious software (e.g. malware and viruses), and 'computer hacking' to dishonestly gain personal financial data.

cyber-crime
a criminal offence in which the use of computers or information communication technologies (ICT) is an essential and central part of the offending

Hate crime

Hate crimes are criminal offences motivated by prejudice and bias against another person or group based on a personal characteristic (e.g. a person's gender, age, race, religion or sexual orientation). Hate crimes not only have a devastating impact on individual victims but can also increase feelings of insecurity and fear within the wider community. The following scenario is an example of a religious hate crime.

hate crime
a criminal offence motivated by hostility and prejudice towards the victim (e.g. because of their race or religion)

Victorian man sentenced for racist hate crimes

ACTUAL SCENARIO

In August 2019, Jason Caudullo, a 46-year-old Victorian man, was sentenced to four months' imprisonment for harassing his Jewish neighbours. During the hearing in the Geelong Magistrates' Court, the Magistrate was informed the offender undertook a number of unlawful actions designed to intimidate and threaten his neighbours, including stalking, verbal abuse, and painting offensive graffiti.

Disturbingly, research undertaken by the University of Sydney has indicated there has been an increase in antisemitic offences (i.e. racist hate crimes conducted against people of the Jewish faith) over recent years.

Organised crime

organised crime
criminal offences undertaken in a planned and ongoing manner by organised syndicates or gangs

Organised crime refers to criminal offences undertaken in a planned and ongoing manner by organised criminal syndicates or gangs. Organised crime often involves illegal activities such as drug manufacturing and trafficking, money laundering, the sale of illegal firearms, and illegal prostitution and gambling, as illustrated in the scenario below. These criminal syndicates have their own rules, leadership structure and members, and may operate within a specific neighbourhood or country, or internationally.

ACTUAL SCENARIO

Drugs imported by criminal gang members

DPP (Cth) v Barbaro & Zirilli [2012] VSC 47 (23 February 2012)

Two farmers from Griffith in New South Wales, Pasquale Barbaro and Saverio Zirilli, were convicted of attempting to import 4.4 tonnes of ecstasy in cans of Italian peeled tomatoes. Barbaro and Zirilli pleaded guilty to three drug offences in the Supreme Court of Victoria. The two conspired to import the drugs, from Italy into Melbourne, with at least six other men. The estimated street value of the drugs was $122 million. It was the largest amount of ecstasy seized in Australia.

The Court heard that Barbaro was the head of a criminal gang and Zirilli was his 'right-hand man'. The Supreme Court Justice commented that the money used to pay for the drug deal indicated the gang had connections to an international crime organisation. Barbaro was sentenced to life imprisonment with a non-parole period of 30 years and Zirilli was sentenced to 26 years in prison with a non-parole period of 18 years.

Both Barbaro and Zirilli appealed the severity of their sentences in the Victorian Court of Appeal and then to the High Court of Australia. The High Court rejected their appeal. The other co-offenders were also convicted, in separate trials, and are also serving lengthy prison sentences.

In 2019, evidence was presented to a special government inquiry (the **Royal Commission** into the Management of Police Informants) that suggested Victoria Police used information secretly provided to them by a **police informant** (criminal defence barrister Nicola Gobbo, also known as 'Lawyer X') to assist their investigation and prosecution of Barbaro and Zirilli. As a result, Barbaro and Zirilli and their co-offenders are preparing to lodge appeals against their convictions on the basis that they did not receive fair trials because their lawyer (Gobbo) provided crucial information to the police, without their knowledge or permission, which assisted their prosecution.

Source 5 In 2008, ecstasy was discovered in cans of peeled tomatoes from Italy.

royal commission
the highest form of inquiry into matters of public concern and importance. Royal commissions are established by the government and are given wide powers to investigate and report on an important matter of public concern

police informant
a person who secretly gives information to police about criminal offending, including information about the people involved in criminal activity, which may be used during the investigation and prosecution of a crime

Juvenile crime

juvenile crime
a criminal offence undertaken by a young person aged between 10–18 years

Juvenile crimes are criminal offences undertaken by young people aged between 10 and 18 years. Common juvenile crimes include fare evasion, assault, property damage (e.g. graffiti, vandalism) and theft (e.g. shoplifting, theft of a bicycle, or theft of a motor vehicle).

White-collar crime

White-collar crimes are criminal offences undertaken by people who work in government, businesses or in the corporate world. These people, who are often well paid and hold trusted positions of employment, use their position and/or influence to gain financial advantage. Common white-collar crimes include theft, fraud, tax evasion and investment scams.

white-collar crime criminal offences undertaken by people who work in government, businesses or in the corporate world

Classifying a crime according to the seriousness of the offence

Crimes can also be classified according to the seriousness of the offence. Crimes are either:

- **indictable offences** – serious crimes generally heard and determined in the higher courts (i.e. the County Court and Supreme Court) before a judge and jury, or
- **summary offences** – minor crimes heard and determined in the Magistrates' Court by a magistrate.

More information about summary and indictable offences is provided in Topic 4.5.

indictable offence a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

summary offence a minor offence generally heard in the Magistrates' Court of Victoria

ACTUAL SCENARIO

Man sentenced for failing to provide assistance

DPP v Bankal [2018] VCC 1274 (7 August 2018)

In August 2018, a 28-year-old man was sentenced to three years and four months' imprisonment (with a minimum non-parole period of 22 months) and given a $200 fine after pleading guilty to failing to render assistance after a motor vehicle collision. He also pleaded guilty to the lesser charges of driving while disqualified and driving an unregistered motor vehicle on a highway. The collision resulted in the death of a 21-year-old motorcyclist.

The collision occurred after the offender merged his vehicle onto a highway along which the motorcyclist was travelling. The offender was driving his motor vehicle at an estimated speed of 112 kilometres per hour in an 80 kilometres per hour speed zone. After the offender merged his vehicle into the traffic, the motor vehicle and the motorbike collided, causing the motorbike to burst into flames.

The driver of the motor vehicle was not charged with any offences relating to the cause of the collision, such as dangerous driving. However, he was charged with failing to render assistance because he did not help the motorcyclist after the collision, despite seeing other people trying to put out the flames and offering first aid to the motorcyclist. In fact, CCTV footage of the incident showed the offender, and his passenger, leaving the scene of the accident by taxi, approximately 60–80 seconds after the collision.

Under section 61(3) of the *Road Safety Act 1986* (Vic), any driver of a motor vehicle who is involved in an accident where a person is injured, or where property is damaged, must immediately stop their vehicle and offer any assistance they can. The maximum penalty for failing to do so is 10 years' imprisonment.

At the time of the incident, the offender had been disqualified from driving and did not hold a valid driver licence. Also, he had been fined on a previous occasion for failing to give his name and address after a motor vehicle collision. The offender had prior convictions for offences relating to possession of cannabis, criminal damage, and breaching a family violence intervention order.

In July 2019, the offender's application to appeal against the severity of the sentence – on the basis that other people were able to provide more immediate assistance to the motorcyclist – was dismissed by the Court of Appeal.

4.4 CHECK YOUR LEARNING

Define and explain

1 What is the role of the Crime Statistics Agency?

2 Classify the following crimes according to the social purpose (or nature) of the offence:
   - **a** murder
   - **b** drug trafficking
   - **c** home invasion
   - **d** possessing a prohibited weapon
   - **e** fare evasion
   - **f** swearing in public.

Synthesise and apply

3 Read the scenario 'Victorian man sentenced for racist hate crimes'.
   - **a** What aspects of the case indicate that the man's actions were hate crimes?
   - **b** Classify the offences of stalking and graffiti according to their social purpose (or nature), the type of offender or victim, and the seriousness of the offence.

4 Read the scenario *DPP (Cth) v Barbaro & Zirilli*.
   - **a** What aspects of this case indicate that Barbaro and Zirilli's actions are examples of organised crime?
   - **b** Classify the offences committed in this case according to their social purpose (or nature), the type of offender or victim, and the seriousness of the offence.

5 Read the scenario *DPP v Bankal*.
   - **a** The offender was charged with three offences. Identify these three offences. Classify each offence according to its social purpose (or nature) and the seriousness of the offence. Justify your choices.
   - **b** With reference to the case, distinguish between the two elements of a crime.
   - **c** Explain whether the main crime committed by the offender was a strict liability crime.
   - **d** Describe one way the presumption of innocence was upheld in this case.
   - **e** Based on the facts provided, discuss whether you agree with the sentence imposed on the offender.

6 Research a recent legal case and classify the type of crime committed according to its social purpose (or nature) (according to the divisions used by the Crime Statistics Agency), the type of offender or victim, and the seriousness of the offence. Justify your selections.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 4.4 Check your learning
- **Summary table** Crime division classification with examples
- **Actual scenario** *Kamay v The Queen* [2015] VSCA 296 (13 November 2015)
- **Weblink** Crime Statistics Agency

Source 6 There are many different types of crime. You will learn more about how to distinguish between them in the next topic.

4.5 THE DISTINCTION BETWEEN SUMMARY OFFENCES AND INDICTABLE OFFENCES

Study tip

You are required to distinguish between summary offences and indictable offences using examples. 'Distinguish' means to identify differences between concepts, features and processes. To distinguish between these two types of offences, use words and phrases such as 'on the other hand', 'whereas', 'in contrast' and 'this is different from'.

As you have already explored in this chapter, there are two types of offences: summary offences and indictable offences. The criminal justice system uses different procedures when it deals with summary offences (minor crimes) as opposed to indictable offences (serious crimes).

Summary offences

Summary offences are minor criminal offences generally heard in the Magistrates' Court. They are less serious types of crime. Summary offences include drink-driving, disorderly conduct, and minor assaults.

Many summary offences are contained in the *Summary Offences Act 1966* (Vic), but there are many other summary offences listed in various other Victorian statutes and regulations. Most crimes committed in Victoria are summary offences.

To hear a case summarily means to hear it without a jury. Therefore, summary offences are determined by a magistrate. The court procedures used for summary offences are less complex than those used for indictable offences.

Source 1 Tattooing a person aged under 18 years is a summary offence.

Source 2 Carjacking is an indictable offence.

Indictable offences

Indictable offences are serious criminal offences generally heard by a judge (and a jury if the accused pleads not guilty) in the County Court or the Supreme Court of Victoria. Indictable offences include homicide offences (murder and manslaughter), culpable driving causing death, and rape. As a general rule, an offence in the *Crimes Act* is an indictable offence unless the Act states it is a summary offence.

Indictable offences heard summarily

indictable offence heard and determined summarily
a serious offence that can be heard and determined as a summary offence if the court and the accused agree

The law allows some **indictable offences to be heard and determined summarily**. This means some indictable offences can be heard and determined as if they are minor offences in the Magistrates' Court by a magistrate, instead of in the County Court or the Supreme Court of Victoria by a judge and jury.

An indictable offence cannot be heard summarily in the Magistrates' Court:

- if it is punishable by more than 10 years' imprisonment or a fine greater than 1200 penalty units (which is approximately $200 000), and
- without the consent of the accused.

An accused may choose to have their charges heard summarily because a summary hearing is often quicker and cheaper than a trial. Also, an accused may receive a lesser punishment because the maximum term of imprisonment a magistrate can impose is capped at no more than two years for a single offence and five years for multiple offences.

The indictable offences that can be heard and determined summarily are listed in the *Criminal Procedure Act 2009* (Vic). Examples of these types of crimes include less serious assaults, causing criminal damage of less than $100 000, theft of less than $100 000, and computer offences such as unauthorised access.

The distinction between summary offences, indictable offences, and indictable offences heard summarily is outlined in Source 3 below.

TYPE OF OFFENCE	DISTINGUISHING FEATURES
Summary offences	• Minor crimes • Generally heard in the Magistrates' Court • The final hearing, at which both parties put their case before the court, is known as a hearing • A magistrate determines whether the person charged with a crime is guilty
Indictable offences	• Serious crimes • Tried in the County Court or Supreme Court • The final hearing, at which both parties put their case before the court, is known as a trial • When an accused pleads not guilty, a jury determines the verdict (i.e. whether or not the accused is guilty beyond reasonable doubt)
Indictable offences heard summarily	• Serious crimes that may be heard summarily (i.e. without a jury) • Heard in the Magistrates' Court if the court determines it is appropriate and the accused consents • A magistrate determines whether the person charged with a crime is guilty

Source 3 The distinction between summary offences and indictable offences and indictable offences heard summarily.

Source 4 Causing criminal damage of less than $100 000 is an indictable offence that can be heard summarily.

Source 5 Murder is an indictable offence, which means it is a serious offence tried in the Supreme Court.

4.5 CHECK YOUR LEARNING

Define and explain

1 Describe three differences between summary offences and indictable offences.

2 **a** Using an example, explain what is meant by the term 'indictable offence heard summarily'.

b Identify two conditions that must be satisfied before an indictable offence can be heard summarily.

Synthesise and apply

3 Classify the following crimes as a summary offence, an indictable offence, or an indictable offence heard summarily:

a criminal damage of property worth $80 000

b sexual exposure

c using offensive language in public

d rape

e growing a commercial quantity of marijuana

f using a firearm to resist arrest

g drink-driving

h home invasion.

4 Indicate whether the following statements are correct. Justify your choice.

a The County Court generally hears all offences.

b The Magistrates' Court can only hear summary offences.

c All indictable offences heard in the County Court are determined by a judge alone.

Analyse and evaluate

5 Explain whether you think it is appropriate that some indictable offences can be heard as if they were summary offences. Consider the perspectives of the accused, the prosecution and the victim, as well as issues such as court resources.

Check your Student obook assess for these additional resources and more:

Student book questions
4.5 Check your learning

Hypothetical scenario
'Freya, Benqt and Knut'

Weblink
Australasian Legal Information Institute (AustLII)

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

4.6 POSSIBLE PARTICIPANTS IN A CRIME

A crime can involve more than one offender. For example, one person may plan and organise a theft while another person may carry out the unlawful act of taking the goods. Both people are involved in the crime in different ways. The two main participants in a crime are the principal offender and the accessory.

Principal offender

principal offender
a person who has carried out the *actus reus* (guilty act) and has therefore directly committed the offence

A **principal offender** is a person who commits an offence and has carried out the *actus reus* (the act or omission that constitutes a crime).

Any person who is involved in a crime is also considered to be a principal offender. This includes any person who intentionally assists, encourages or directs another person to commit a crime. What it means to be 'involved in a crime' – as defined in section 323 of the *Crimes Act* – is outlined in Source 1.

PARTICIPANTS IN A CRIME
A person is 'involved in' a crime when he or she ...

Intentionally assists, encourages or directs another person to commit a crime	Makes an agreement with another person to commit a crime together
Intentionally assists, encourages or directs another person to commit a crime knowing it is highly likely that another crime may be the result	Makes an agreement with another person to commit a crime together knowing it is highly likely that another crime may be the result

Source 1 Participants involved in a crime are treated as principal offenders.

In simple terms, a person will be involved in a crime if they assist with the planning of a crime or encourage another person to commit a crime. A person involved in a crime can be found guilty whether or not other participants (including the principal offender who undertook the wrongful action) have also been prosecuted or convicted.

Accessory

accessory
a person who knowingly assists another person who has committed a serious indictable offence to avoid being apprehended, prosecuted, convicted or punished

An **accessory** is a person who, without lawful excuse, assists a principal offender after a crime has been committed. This assistance includes helping the principal offender avoid being arrested, prosecuted, convicted or punished for the crime.

To be an accessory, a person must believe or know that the offender has committed a serious indictable offence (i.e. an indictable offence with a punishment of five years or more in prison). An accessory can be found guilty of an offence regardless of whether the principal offender is found guilty.

Source 2 on the next page illustrates the different participants in a crime. The man who is robbing the store owner is the principal offender. His friend who has helped organise the robbery and is driving the getaway car is also considered to be a principal offender. The friend who owns the house where the principal offenders are hiding and who is intentionally helping the principal offenders avoid being arrested by the police is an accessory.

Source 2 Types of participants in a crime.

4.6 CHECK YOUR LEARNING

Define and explain

1 With reference to the participants in a crime, distinguish between the 'principal offender' and an 'accessory.'

Synthesise and apply

2 For each of the following scenarios, identify the principal offenders and accessories. Assume each person is over 18 years of age.

a Manuel goes into a jewellery store and commits an armed robbery. Yu keeps a lookout and waits for Manuel in a getaway car. Pete knows nothing about the crime until his friends ask him to hide the jewellery. He agrees and buries it in his backyard.

b Phil kills a man. He panics and calls his mate Walter. Walter agrees to help Phil dispose of the body.

c Georgia and her sister, Michaela, agree to go 'shopping' so they can steal clothing. Georgia is present when Michaela stuffs a shirt into her bag. Georgia does not discourage Michaela but she doesn't personally steal anything.

d Carl, the leader of a drug-trafficking gang, orders Benny to kidnap and injure Brody because he owes Carl money. Tony, who knew nothing about the kidnapping until Benny arrived at his house one day later, agrees to loan Benny his car so he can drive to another state.

e Ali works in an electrical appliance warehouse. She cuts the wires to the burglar alarm and deliberately leaves a fire door unlocked in preparation for Dan to steal items from the warehouse that night.

Check your Student obook assess for these additional resources and more:

Student book questions
4.6 Check your learning

Actual scenario
R v T, JJ [2012] SASCFC 61 (1 June 2012)

Worksheet
Principal offenders and accessories

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

CHAPTER 4

REVIEW

TOP TIPS FROM CHAPTER 4

1 You need to be able to classify crimes in the three ways described in this chapter. Remember that different organisations (e.g. the police, the courts, the Crime Statistics Agency and the media) classify crimes in different ways.

2 'Distinguishing' between crimes means to show the differences between them. When distinguishing between different types of crime you should provide examples to support your response. This includes being able to provide examples of indictable and summary offences.

3 The presumption of innocence, burden of proof and standard of proof are key concepts within our criminal justice system. These concepts are examined in both Unit 1 and Unit 3 of the Legal Studies course, so it's a good idea to start identifying these key concepts in scenarios now.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Distinguish** between the following concepts:
   - **a** burden of proof and standard of proof
   - **b** *mens rea* and *actus reus*
   - **c** indictable offence and summary offence.

(6 marks)

Difficulty: medium

2 **Explain** why the following statements are incorrect.
   - **a** The only purpose of criminal law is to compensate victims for their loss as a result of crimes.
   - **b** A person who assists to plan and organise a crime but does not directly commit the crime is known as an accessory.
   - **c** A person aged under 14 years old cannot be charged or convicted of a criminal offence in Victoria.

(6 marks)

Difficulty: high

3 **Explain** two processes that uphold the presumption of innocence in a criminal case. **Discuss** the extent to which these processes achieve fairness for the accused, for victims, and for society as a whole.

(8 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Use the stimulus material to answer the questions below. It is not intended that this material will provide you with all the information to fully answer the questions.

Evelyn caught in police blitz

Evelyn, 16, was caught during a police blitz at a licensed venue, using a proof-of-age card that suggested she was 18. Evelyn had used the proof-of-age card to gain entry to the venue.

Evelyn has been charged under section 83A(1) of the *Crimes Act 1958* (Vic). This section states that 'a person must not make a false document with the intention that he or she, or another person, shall use it to induce another person to accept it as genuine, and by reason of so accepting it do or not do some act to that other person's, or to another person's prejudice'. It is punishable by a maximum term of 10 years in prison.

The prosecution is seeking to rely on evidence that Evelyn used her friend's birth certificate and healthcare card to create the proof-of-age card.

Practice assessment task questions

1 Who has the burden of proof in this case? To what standard does it need to be proved?
(2 marks)

2 How would this crime be classified in terms of the nature of the behaviour? In your answer, refer to the Crime Statistics Agency's classifications of crime.
(4 marks)

3 Evelyn believes that she is an accessory to a crime. Explain to Evelyn why her belief is incorrect.
(4 marks)

4 Has Evelyn been charged with a summary offence or an indictable offence? In your answer, provide two differences between summary offences and indictable offences.
(5 marks)

5 Define the term 'presumption of innocence' Describe two ways that it will be protected in this case.
(5 marks)

6 Describe the elements of the crime that need to be proven before Evelyn can be found guilty of the crime of making a false document. Comment on whether you think that each of the elements will be proved.
(5 marks)

Total: 25 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 4

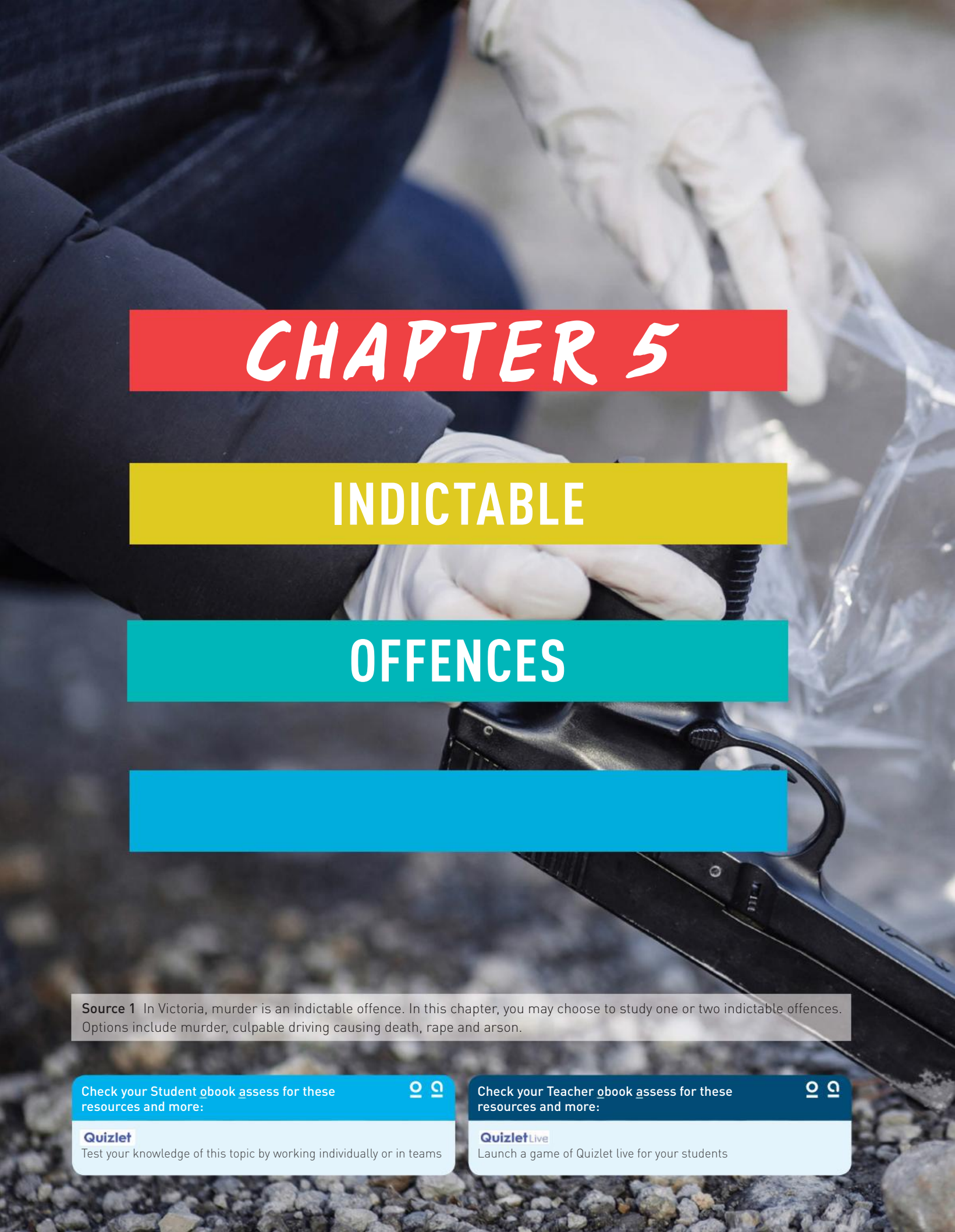
Revision notes
Revision notes for Chapter 4

assess quiz
Chapter 4
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 5

INDICTABLE OFFENCES



Source 1 In Victoria, murder is an indictable offence. In this chapter, you may choose to study one or two indictable offences. Options include murder, culpable driving causing death, rape and arson.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6), you should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

KEY KNOWLEDGE

In this chapter, you have the option of choosing two indictable offences. For each criminal offence, you will learn about:

- the elements of the offence
- possible defences
- the role of statute law and common law in developing the elements of the offence and the defences
- trends and statistics in relation to the offence in Victoria and in one other jurisdiction
- the possible impact of the offence on individuals and society.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research and analyse relevant information about criminal law and offences
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two offences
- use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios.

KEY LEGAL TERMS

arson intentionally and without lawful excuse destroying or damaging property by fire. Arson also includes intentionally and unlawfully destroying or damaging property by fire with the intention of endangering another person's life

culpable driving causing death the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or while under the influence of drugs or alcohol

dangerous driving causing death the act of causing the death of another person while driving a motor vehicle at a speed or in a way that is dangerous to the public, having regard to all the circumstances of the case

defence to a crime a justification or lawful 'excuse' for committing a crime

indictable offence a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

jury an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

murder the intentional unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (i.e. 10 years old or older) and of sound mind. Murder is the most serious homicide offence

rape the act of intentionally sexually penetrating another person without their consent

unlawful homicide the killing of another person without legal justification. Murder, manslaughter, infanticide (i.e. killing a baby), child homicide, and culpable driving causing death are unlawful homicide offences

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

ADVICE TO TEACHERS AND STUDENTS

In **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6) you are required to study **two criminal offences** in detail.

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• TWO indictable offences (from Chapter 5)	5.2 Murder	103
	5.3 Culpable driving causing death	112
	5.4 Rape	121
	5.5 Arson	131

OR

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• TWO summary offences (from Chapter 6)	6.2 Assault	150
	6.3 Minor theft	160
	6.4 Offensive behaviour	174
	6.5 Graffiti offences	186

OR

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• ONE indictable offence (from Chapter 5) • ONE summary offence (from Chapter 6)	See above	See above

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5.1 GENERAL DEFENCES TO CRIME

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

summary offence
a minor offence generally heard in the Magistrates' Court of Victoria

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

defence to a crime
a justification or lawful 'excuse' for committing a crime

In Unit 1 – Area of Study 2, you are required to examine two criminal offences in detail. As discussed in Chapter 4, criminal offences can be classified as either **indictable offences** or **summary offences**. Indictable offences are serious crimes that are generally heard in the County Court or Supreme Court. If a person accused of an indictable offence pleads not guilty, the case is heard before a judge and **jury**. In contrast, summary offences are minor crimes that are heard in the Magistrates' Court before a magistrate.

As part of your examination of these offences, you must consider possible **defences to a crime** that an accused can raise in response to a charge. A defence is a justification or lawful excuse for a crime. If successfully argued, a defence may lead to an accused being found not guilty of the crime with which they have been charged, or found guilty of a lesser offence.

Some of these defences, known as 'general defences', can be used to defend a variety of different offences. For example, 'self-defence' is a general defence that can be used as a defence to a number of crimes (e.g. murder, manslaughter and assault). However, self-defence cannot be used to defend offences such as theft.

In contrast, other defences can only be used to defend a specific offence. For example, the defence of 'right of claim' – where a person honestly believes they are the rightful owner of property – can only be used in property offences like theft.

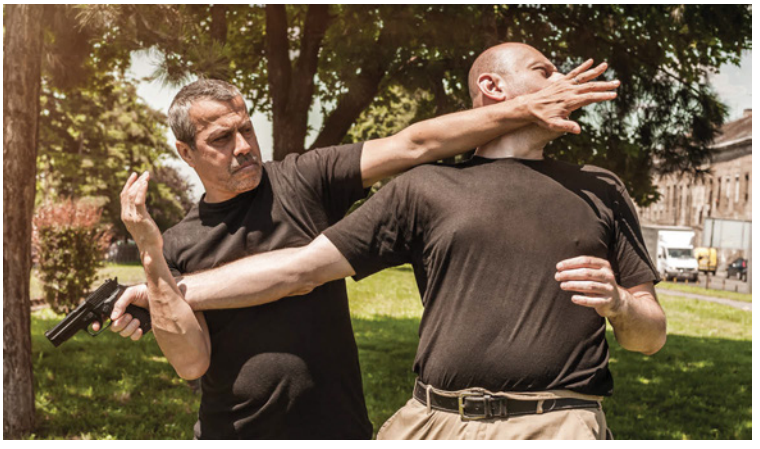
In this topic, you will examine the main general defences available to a person who has been accused of a crime. Then, in Topics 5.2 to 5.5, you will consider which of these general defences apply to the specific crimes of murder, culpable driving causing death, rape and arson, as well as any other defences that are specific to the crimes.

Defences to crime

In Victoria, the common (or general) defences to crime include:

- self-defence
- mental impairment
- duress
- sudden or extraordinary emergency
- automatism
- intoxication
- accident.

Each of these defences is examined in more detail below.



Source 1 The law allows people to take reasonable action (based on the circumstances) to protect themselves.

Defence 1 – Self-defence

Generally, an accused may use self-defence as a defence to a crime if they:

- believed that their actions were necessary to protect or defend themselves, and
- perceived their actions to be a reasonable response in the circumstances.

Once an accused raises self-defence (that is, presents evidence that suggests there was a reasonable possibility that they acted in self-defence when committing the alleged crime), the burden of proof falls on the prosecution to prove, beyond reasonable doubt, that the accused did not act in self-defence.

Defence 2 – Mental impairment

An accused may use the defence of **mental impairment** if, at the time of the offence, they were suffering from a mental illness and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions, and
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

mental impairment a condition of the mind that impacts on a person's ability to know the nature and quality of their conduct, or that the conduct was wrong

One important feature of the defence of mental impairment is that an accused is presumed to *not* be suffering a mental impairment (i.e. presumed to be sane) unless it can be proven otherwise. This means that, given mental impairment may be raised by either the prosecution or the defence at any time during a trial, the burden of proving the existence of mental impairment falls on the party who raises it. In most cases, the accused raises the defence of mental impairment and therefore the burden of proof is reversed, meaning the accused must prove this defence.

When mental impairment is successfully argued, it does not result in the accused being immediately released from custody. That is, the verdict is not an ordinary 'not guilty' verdict. Instead, it is a special verdict of 'not guilty by reason of mental impairment'. In such cases, the court may impose a **secure treatment order** that allows the accused to be compulsorily detained, and receive treatment, at a mental health service (e.g. a forensic mental health hospital).

secure treatment order a sanction that requires the accused to be compulsorily detained, and receive treatment, at a mental health service

In the scenario below, a woman was found not guilty of attempting to kill her ex-husband due to mental impairment.

Woman attempts to kill her ex-husband

ACTUAL SCENARIO

DPP v Brook (a Pseudonym) [2019] VSC 566 (22 August 2019)

In 2018, a 44-year-old woman – referred to in court as Jane Brook (not her real name) – was charged with attempting to murder her ex-husband. Brook had attempted to burn down the room in which he was sleeping. She was also charged with endangering the life of her 11-year-old son, who was in the house at the time of the offending.

After being arrested, Brook admitted to spreading a flammable liquid and starting the fire, but claimed she did so in an attempt to not only kill her ex-husband and her son, but also to kill herself. After her ex-husband awoke and ran from the room, Brook attempted to put out the fire with water and rang triple-0 (emergency) to request that an ambulance and the fire brigade attend the scene.

Subsequent investigations revealed Brook had suffered increasing anxiety, stress and chronic depression since being diagnosed with severe breast cancer in 2017.

In April 2019, a hearing was held in the Supreme Court (Trial Division) to determine whether Brook was suffering a mental impairment at the time of the offending. Interestingly, in accordance with Victorian law, the case was heard and determined by a judge alone, rather than a jury, because both the prosecution and defence agreed with expert evidence that Brook was suffering from a 'severe major depressive episode' at the time of the offence.

Ultimately, the Judge directed that Brook be found not guilty due to mental impairment. While she was not sentenced to a term of imprisonment, Brook was placed on a non-custodial supervision order. This order required her, among other conditions, to live in a place approved by an authorised psychiatrist and to undertake psychiatric treatment.

Defence 3 – Duress

duress
strong mental pressure on someone to overcome their independent will and force them to do something

reasonable belief
an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity) and in similar circumstances, to be sensible or correct

An accused may use **duress** as a defence to any criminal offence if, at the time of the offence, they had a **reasonable belief** that:

- a threat of harm existed
- the threat would have been carried out unless the offence was committed
- committing the offence was the only reasonable way to avoid the threatened harm, and
- their conduct was a reasonable response to the threat.

In cases involving family violence, evidence of family violence may be relevant in determining whether an accused committed an act under duress. For example, in cases where a person who has been the victim of family violence intentionally caused injury to their partner in the belief that their actions were the only reasonable way to avoid the threat of harm, evidence of the family violence may be relevant in determining whether the person has acted under duress.

Once the defence raises the issue of duress (i.e. presents evidence that suggests there was a reasonable possibility the accused acted under duress), the prosecution holds the burden of proving, beyond reasonable doubt, that the accused did not act under duress.

Defence 4 – Sudden or extraordinary emergency

An accused may use sudden or extraordinary emergency as a defence to any criminal offence if, at the time of the offence, they had a reasonable belief that:

- there was a sudden or extraordinary emergency
- their actions were the only reasonable way of dealing with the situation, and
- their actions were a reasonable response to the situation.

Once an accused raises the defence of sudden or extraordinary emergency (i.e. presents evidence that suggests there was a reasonable possibility their action arose due to a sudden or extraordinary emergency), the burden of proof falls on the prosecution to prove, beyond reasonable doubt, that the accused did not act in the circumstances of a sudden or extraordinary emergency.

Defence 5 – Automatism

automatism
a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

mens rea
a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

An accused may use **automatism** as a defence to any criminal offence if they committed the offence involuntarily due to having, at the time of the offence, a total loss of control over their bodily movements (i.e. the accused was not conscious or aware of what they are doing) and so could not form an intention to commit a crime (***mens rea***).

The defence of automatism may be raised in a case where an accused commits an offence:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure, or
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism is a defence that is extremely rare and difficult to prove. While the burden of proof varies according to the cause of the automatism, in general, the prosecution must prove, beyond reasonable doubt, that the accused acted voluntarily (i.e. was aware of their actions when committing the offence).

Source 2 The defence of automatism may be raised in a case where the accused commits an offence while sleepwalking.

The defence of automatism was used in the case of *R v Falconer*, which is discussed in the scenario below. This case is the primary example of the use of the defence of automatism in Australia.

History of violent abuse, sudden shock

ACTUAL SCENARIO

R v Falconer (1990) 171 CLR 30

In 1990, a Western Australian woman was convicted of murdering her husband after enduring 30 years of violent abuse at his hands. During the hearing, the accused claimed that there was a complete blank in her memory until she woke up with a gun and her deceased husband next to her.

After being convicted, the accused woman appealed on a point of law. The High Court held that if there was evidence of an external psychological factor (i.e. severe trauma and abuse), the accused could have acted in a dissociative state. This meant that although she was sane (i.e. not mentally ill), it was possible that her actions were not under her conscious control. A new trial was reordered.

Defence 6 – Intoxication

An accused may use intoxication as a defence to a criminal offence if, at the time of the offence, they acted involuntarily or without intent due to being in an intoxicated state as a result of consuming alcohol, taking drugs, or ingesting some other substance. However, in general, under the *Crimes Act 1958* (Vic), to successfully argue intoxication, the accused must prove that their state of intoxication was not self-induced. For example, they must prove that their intoxication was involuntary or due to fraud, a reasonable mistake, force, or the effects of the proper use of prescription or non-prescription medication.

Defence 7 – Accident

As examined in Chapter 4, with the exception of strict liability offences, for an accused to be found guilty of a crime, they must have committed the crime with intention (i.e. a guilty mind – *mens rea* – must have existed at the time of the offence). That is, the prosecution must prove, beyond reasonable doubt, that the actions of the accused were deliberate and intentional.

The accused may raise the defence that the actions were an accident. This would apply if the actions the accused took to commit the offence were involuntary, unintentional or reasonably unforeseeable by an ordinary person.

Unfit to stand trial

In addition to defences to crime, a person cannot be tried for a criminal offence if they are deemed to be 'unfit to stand trial'. A person may be considered to be unfit to stand trial if they are unable to undertake a number of tasks at the time of their trial, including being unable to:

- understand the nature of the charges laid against them
- enter a plea
- follow the course of the trial, and
- instruct their lawyer.

Being unfit to stand trial is different to the defence of mental impairment because it refers to the condition of the accused *at the time of the trial*, whereas the defence of mental impairment refers to the condition of the accused *when they committed the offence*.

Study tip

The Supreme Court of Victoria publishes a podcast called 'Gertie's Law', which provides insights into the Court's role, including in deciding criminal cases and in sentencing. The podcast can be listened to for free and is an excellent way to hear directly from judges about their role in hearing cases.

In Victoria, in cases where there is a valid question about the fitness of an accused to stand trial, an investigation will be held before the court where a jury will determine, on the balance of probabilities, whether the accused is most likely unfit to stand trial.

In March 2020, the Victorian Government introduced the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020 (Vic) into the lower house. One of the purposes of the Bill is to modernise and simplify the law relating to unfitness to stand trial, including removing the use of the jury to determine unfitness and allowing a single judge to make this decision. As at August 2020, the Bill had not been passed.

Interestingly, within weeks of the Bill being introduced, the Victorian Parliament passed the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) to allow for temporary changes to the Victorian justice system in response to the COVID-19 pandemic. In an attempt to maximise physical distancing to reduce the spread of COVID-19, the legislation temporarily required the outcome of fitness to stand trial investigations to be determined by a single judge rather than by a jury.

5.1 CHECK YOUR LEARNING

Define and explain

1 Define the term 'defence' and provide one example.
2 Identify two defences to murder.
3 Describe two possible circumstances that may enable an accused to raise the defence of automatism.

Synthesise and apply

4 Explain the difference between the defences of self-defence and duress. Prepare two hypothetical scenarios to illustrate your response.
5 Read the scenario *R v Falconer*.
   a What crime was the accused convicted of committing?
   b Identify and explain the defences the accused could have raised in her High Court appeal.
6 Read the scenario *DPP v Brook*.
   a What crime was the accused charged with committing?
   b Describe the accused's defence.
   c Explain why this case was heard and determined by judge alone rather than by a jury.
   d Outline the outcome of this case.
   e After this case concluded, the Supreme Court ordered that no person was permitted to publish any information that might enable the identification of the accused, her ex-husband or their son for two years. Suggest a possible reason for this court order.

Analyse and evaluate

7 **a** Explain what is meant by an accused being 'unfit to stand trial'.
   b Who determines whether or not an accused is fit to stand trial?
   c In a small group, discuss whether the issue of fitness to stand trial should be decided by a judge or by a jury.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 5.1 Check your learning
- **Video tutorial** Introduction to Chapter 5
- **Worksheet** Defences
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

5.2 MURDER

murder
the intentional unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (i.e. 10 years old or older) and of sound mind. Murder is the most serious homicide offence

malice aforethought
the intention to kill or cause serious injury to a person. This malicious intention is the mental element (i.e. an intention to inflict harm) necessary for murder

unlawful homicide
the killing of another person without legal justification. Murder, manslaughter, infanticide (i.e. killing a baby), child homicide and culpable driving causing death are unlawful homicide offences

manslaughter
the unlawful killing of a person due to a reckless, dangerous act or negligent behaviour

infanticide
the killing by a mother of a child under two years old while suffering a mental condition caused by the effects of that child's birth

child homicide
the killing of a child under six years of age in circumstances that would normally be manslaughter

culpable driving causing death
the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or while under the influence of drugs or alcohol

Murder is the unlawful killing of another person with **malice aforethought** (i.e. intention to kill or cause serious injury), by a person who is of the age of discretion (i.e. aged 10 years old or over) and of sound mind. It is part of a group of crimes known as **unlawful homicide**, which are all crimes that involve the killing of another person without legal justification. Examples of other types of unlawful homicide include:

- **manslaughter** – the unintentional killing of a person due to a reckless, dangerous act or negligent behaviour
- **infanticide** – the killing by a mother of a child under two years old while suffering a mental condition caused by the effects of that child's birth
- **child homicide** – the killing of a child under six years of age in circumstances that would normally be manslaughter
- **culpable driving causing death** – the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or under the influence of drugs or alcohol.

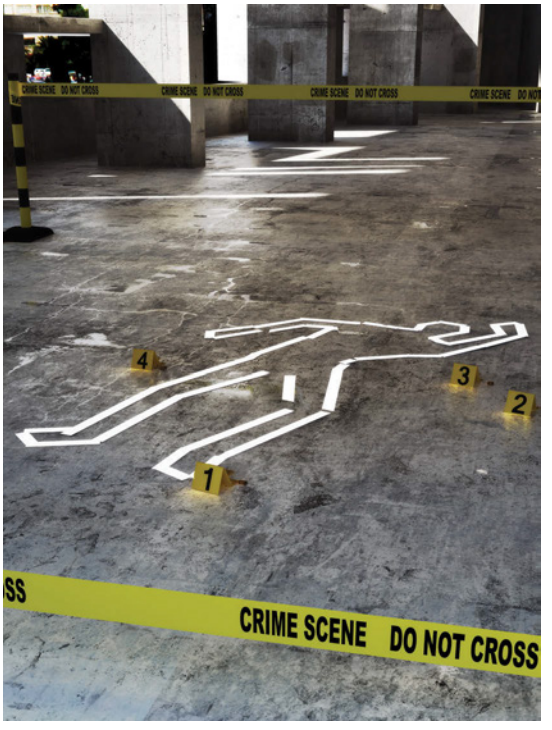
Murder is the most serious of unlawful homicide offences. On the scale of seriousness, murder is a 'category 1' offence and a person who has committed of murder must be given a prison sentence. The maximum penalty for murder is life imprisonment.

Elements of murder

For a person to be found guilty of murder, the prosecution must prove each of the following six elements beyond reasonable doubt:

- the killing was unlawful
- the victim was a human being
- the accused was a person over the age of discretion
- the accused caused the victim's death
- the accused was a person of sound mind
- there was malice aforethought.

These six elements of murder are further discussed below.



Source 1 Murder is the unlawful killing of another person with malice aforethought by a person who is of the age of discretion (i.e. aged 10 years old or over) and of sound mind.

Element 1 – The killing was unlawful

The prosecutor must prove the accused did not have a legal justification (or lawful reason) for causing the other person's death. Examples of a legal justification for killing another person include a soldier killing an enemy in battle, police acting in the course of their duties and a person acting in reasonable self-defence or under duress.

Element 2 – The victim was a human being

The victim must be a living person who has been born. That is, the victim must be in a living state, and not, for example, be an unborn baby or an animal. If the victim is not a living person, it may still be a crime but a different type of crime.

doli incapax
a Latin term meaning 'incapable of evil'; the principle that a child aged between 10 and 13 years is presumed to be incapable of forming *mens rea* (a guilty mind) because they do not have the intellectual or moral capacity to know the difference between right and wrong

Element 3 – The accused was a person over the age of discretion

The accused must be aged 10 years or over. As examined in Chapter 4, the law presumes a young person aged between 10 and 13 years is incapable of forming the intent to commit a crime (a legal principle referred to as ***doli incapax***), and such a person can only be found guilty of a criminal offence if the prosecution can prove that the child knew, at the time of the crime, that their actions were wrong.

Element 4 – The accused caused the victim's death

causation
the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

The prosecution must prove the accused's actions contributed significantly and substantially to the victim's death. More specifically, the prosecution must prove **causation**, meaning it must be proven that there was a direct and unbroken causal link between the accused's actions and the death of the victim. That is, if the death would not have occurred, when it did, without the accused's actions, it is likely the accused caused the victim's death. By contrast, if something intervenes to break the causal link between the accused's actions and the death, then the accused may not be guilty of murder.

The scenario below demonstrates a break in the causal link.

HYPOTHETICAL SCENARIO

A break in the causal link

Stefan and Damon had a disagreement and Stefan punched Damon. Stefan left Damon unconscious under a tree. Minutes later, a bolt of lightning struck the tree. A tree branch fell and killed Damon.

In this example, the lightning breaks the causal link between Stefan's actions and Damon's death. It is likely that the cause of Stefan's death was not the punch, but rather the lightning.

Source 2 A lightning strike broke the causal link. As a result, there was no longer a direct connection between Stefan punching Damon, and Damon's death.

Element 5 – The accused was a person of sound mind

mens rea
a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

The prosecution must establish that the accused was a person of sound mind (i.e. at the time of the offending, the accused was capable of understanding their actions were wrong) and therefore capable of forming the intention (***mens rea***) to commit a crime.

Element 6 – There was malice aforethought

The prosecution must prove the accused acted with malice aforethought (i.e. an intention to kill or cause serious injury to the victim).

Defences to murder

For a person to be found guilty of murder, the prosecution must prove each of the six elements of murder beyond reasonable doubt. If the prosecution fails to prove each of these elements, it will result in the accused being found not guilty of murder. The accused may therefore try to argue that one, or more, of the elements is missing. For example, the accused may argue that:

- they did not have malice aforethought
- there was a break in causation, and their actions did not significantly and substantially cause the victim's death
- they were not of sound mind at the time of the offence.

In some cases where one of the elements of murder is missing, the accused may be charged and found guilty of an alternative offence (provided that elements for the alternative offence are proven). For example, if all the elements of murder can be proven in a case, except malice aforethought (i.e. the intention to cause serious harm, or *mens rea*), the accused may be charged with manslaughter, which is the unintentional killing of a person due to a reckless, dangerous act or negligent behaviour.

Other than defending the charge for murder on the basis that one or more of the elements of murder have not been satisfied, the accused can also rely on a defence. Several defences to a charge of murder are available. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

Study tip

A question in an assessment task may require you to determine whether a crime has been committed. To maximise your chances of being awarded full marks, check whether each of the elements of the crime exist. For example, all the elements of murder must be proved for an accused to be found guilty of murder.

General defences to murder

The general defences to murder are listed below (more details on each of these are contained in Topic 5.1):

- **self-defence** – in murder cases, the accused must believe their actions were necessary to protect themselves or another person from death or significant serious injury
- **mental impairment**
- **duress** – in murder cases, the threat of harm placing the accused under duress must be a threat to inflict death or significant serious injury. Evidence of family violence may be used to prove a person acted under duress. Duress cannot be raised if the threat of harm comes from a person with whom the accused voluntarily associated to commit an act of violence
- **sudden or extraordinary emergency** – in murder cases, the sudden or extraordinary emergency must involve risk of death or serious injury
- **automatism**
- **intoxication**
- **accident**.

In the scenario below, the defence counsel argued the accused acted in self-defence.

ACTUAL SCENARIO

Chef stabs drunk customer

R v Dhakal [2018] VSC 295 (1 June 2018)

In 2018, a 51-year-old chef was found guilty of murder after fatally stabbing a customer. The incident occurred when the chef and the customer became involved in an argument.

Just prior to the argument, the customer – who was significantly intoxicated after consuming a large amount of alcohol that he had brought to the restaurant – approached a counter near the kitchen to order more food. Upon hearing the request, the accused chef approached the counter and told the customer that he had consumed too much alcohol. The customer lost his temper and began to verbally abuse the accused.

At first, the accused did not respond to the verbal abuse, believing the customer was too drunk to harm him. However, after the abuse continued, the two men began to get more aggressive and pushed one another. Ultimately, the accused lost his temper and stabbed the customer several times with a kitchen knife.

During the trial in the Supreme Court, the accused told the Court he acted spontaneously in fear the customer might attack him with a knife. However, at no stage during the incident did the customer have a knife, or any other kind of weapon, in his possession, or look like he was going to obtain one.

The jury unanimously found the accused guilty of murder. He was sentenced to 23 years' imprisonment with a minimum non-parole period of 17 years.

The role of the law in developing the elements of and defences to murder

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

The crime of murder has been developed over time through both **common law** and **statute law**. For example, while the definition, elements, and some defences to murder have been developed through common law, the penalty for murder, and some defences, have been established by statute law.

Common law

Murder is an old common law offence. The definition and elements of murder, and some of the defences to murder (including intoxication, automatism and accident), have been established throughout the years by the courts. In fact, to this day, the definition and elements of murder are not specified in Victorian statute law (i.e. the *Crimes Act*). That is, for somebody to find out what the definition of murder is, they would have to look through the cases over the years that have defined, developed and changed the definition and the legal principles in relation to each of the elements.

Statute law

supreme law-making body
the body (i.e. the parliament) that has the final law-making power, meaning it can make or change any law within its power and pass legislation to abrogate (cancel) common law

abrogate (abrogation)
to cancel or abolish a court-made law by passing an Act of Parliament

While the definition and elements of murder are contained in common law, the penalty for murder is established by parliament and set out in statute law (i.e. section 3 of the *Crimes Act*). This Act also sets out the defences available to murder, including those originally established by common law and some established by parliament.

In addition, being the **supreme law-making body**, the Victorian Parliament is able to pass legislation at any time to change the law relating to murder, including being able to **abrogate** (cancel) principles of murder that have been established by common law. For example, in 2014 the Victorian Parliament changed the law of self-defence to allow a defence for an accused person who has killed another person (e.g. their partner) following a prolonged period of family violence. The law was changed so that a person is now not guilty of murder if the person believes their conduct is necessary in self-defence and their behaviour is reasonable in the circumstances as they perceive them.

Trends and statistics

Australia and Victoria

The number of people sentenced for murder throughout Australia fluctuates from year to year. According to the Australian Bureau of Statistics, the trend in the number of murder offences decreased between 2014–2015 and 2017–2018 but then increased in the year ending 30 June 2019. The murder rate (i.e. the

number of murders per 100 000 persons aged 10 years and over) has fluctuated between 1.5 and 1.1 during the five-year period (as indicated in Source 3).

According to data from the Sentencing Advisory Council, while the number of people sentenced for murder fluctuates from year to year in Victoria, there is no general trend (as indicated in Source 4).

During the five-year period between 2013–2014 and 2017–2018, 132 people were sentenced for the offence of murder in the Supreme Court of Victoria. This represented approximately 1.5 per cent of all cases sentenced in Victoria's higher courts (i.e. the County Court and the Supreme Court).

YEAR	NUMBER OF MURDER OFFENCES THROUGHOUT AUSTRALIA	NUMBER OF MURDER OFFENCES PER 100 000 PERSONS AGED 10 YEARS AND OVER
2014–2015	304	1.5
2015–2016	276	1.3
2016–2017	245	1.2
2017–2018	234	1.1
2018–2019	321	1.5

Source 3 The number of murder offences in Australia and the 'murder rate' from the year ending 30 June 2015 to the year ending 30 June 2019, according to the Australian Bureau of Statistics

Data from the Sentencing Advisory Council also indicates that murder is predominantly committed by men. For example, in the five-year period from 1 July 2013 to 30 June 2018, 92 per cent of people convicted for murder were male. Further, approximately 60 per cent of those convicted for murder were aged between 25 and 44 years.

Of the 26 offenders sentenced to murder in the year ending 30 June 2018, all but one received an immediate term of imprisonment, with the average length of imprisonment imposed (excluding life) being 23 years and seven months.

YEAR	NUMBER OF OFFENDERS SENTENCED IN VICTORIA
2013–2014	21
2014–2015	15
2015–2016	34
2016–2017	36
2017–2018	26

Source 4 The number of people sentenced for murder in Victoria from the year ending 30 June 2013 to the year ending 30 June 2018, according to Sentencing Advisory Council statistics

United States

The number of people sentenced for murder in the United States fluctuates from year to year. According to World Bank statistics, the trend in the US murder rate increased between 2013 and 2017 (as indicated in Source 5 on the next page). The US murder rate (i.e. the number of murders committed each year per 100 000 people) is also approximately five times higher than Australia's.

According to the United States' Federal Bureau of Investigation statistics, 14 123 murders occurred in the United States in 2018. The majority of these murder victims (approximately 77 per cent) were male and 52 per cent were African American, despite African American people only making up approximately 12.5 per cent of the total population.

One particular difference between murder in the United States and Australia is that in the United States a gun is the most common weapon, used in approximately 72 per cent of murders. By contrast, the main weapon used in Australia is a knife, used in approximately 65 per cent of murders.

Many social commentators suggest the difference in gun-control laws and attitudes towards gun control in each country accounts for some of the difference between the US murder rate and the Australian murder rate. For example, Australia has relatively strict gun-control laws that generally ban the ownership of automatic and semi-automatic guns and require the owners of any firearm to obtain a licence. By contrast, the United States has a strong gun culture, where the right to own a gun is protected by law (that is, expressly protected in the American Constitution. You will learn more about this in Chapter 15). While gun-control laws do exist in the United States, they vary from state to state, and are not as strict as those in Australia. For example, only three of the 50 US states require their citizens to obtain a permit before being able to buy a shotgun or rifle, and only 12 states require their residents to have a permit before buying a handgun. By contrast, each Australian state and territory requires its residents to obtain a gun licence to purchase and own a gun.

After gun-control laws were implemented in Australia in 1996, the number of firearm-related deaths (including mass shootings, homicides and suicides) dramatically decreased. For example, firearm suicides fell from approximately 2.2 per cent in 1996 to 0.5 per cent in 2015.

YEAR	MURDER RATES IN AUSTRALIA	MURDER RATES IN THE UNITED STATES
2013	1.1	4.5
2014	1.0	4.5
2015	1.5	5.0
2016	1.3	5.4
2017	1.2	5.3

Source 5 A comparison of the murder rate (i.e. the number of murders per 100 000 people) in Australia and the United States, 2013–2017.

Possible impacts of murder

All crime has impacts on individuals and society. Being the most serious of crimes, murder significantly impacts:

- the victim (and their family and friends)
- the community
- the offender.

Impact on the victim (and their family and friends)

The most obvious impact of murder is the loss of a life. In addition, murder has a devastating and lasting impact on the victim's family and friends. It can result in shock, fear, grief, confusion, anger and emotional trauma. This trauma may be exacerbated (made worse) when family members witness the attack, discover the body or learn specific details about the physical cause and circumstances of the death.

The emotional trauma suffered by the family and friends of a murder victim is also likely to be long-lasting, particularly in cases that take many years to be resolved through the legal system or remain unresolved. Family members will also most likely feel stress long after the legal system has dealt with the case, especially on significant dates like the anniversary of the victim's death and their birthday.

To compound the stress and anxiety associated with the murder of a loved one, family members may also feel they have few rights when dealing with the legal system, although all victims of crime (including family members of a murder victim) have rights. For example, in Victoria, the *Victims' Charter Act 2006* (Vic) sets out the rights of victims of crime when dealing with the criminal justice system and victims' service agencies. These rights include:

- being treated with respect, courtesy and dignity
- being informed about the investigation, the prosecution of the accused, and the trial and sentencing process
- having an opportunity to provide a **victim impact statement** to the court so the sentencing judge or magistrate can understand how the crime has affected them and take this into consideration when sentencing
- having the opportunity to seek financial compensation for their loss.

victim impact statement
a statement filed with the court by a victim that is considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

The family and friends of a victim of crime may also be subject to unwanted media scrutiny, which can make their private lives public. Media reports, published images of the victim and speculation about the family member's death can cause great distress to a victim's family and friends.

One victim of crime, George Halvagis, has dedicated his life 'to [making] sure no one can feel my pain and [to] protect the innocent from criminals'. Mr Halvagis' story is outlined in the scenario below.

Victim of crime awarded Australia Day honours

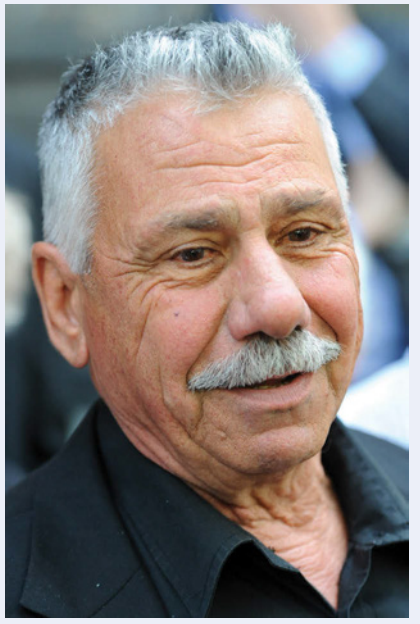
ACTUAL SCENARIO

On Australia Day in 2020, George Halvagis, aged 81 years, was awarded one of Australia's highest honours, the Order of Australia Medal, in recognition of his devotion to supporting victims of crime and their families and friends.

Halvagis became an advocate for victims of crime after his beloved daughter Mersina, aged 25 years, was murdered while visiting her grandmother's grave at the Fawkner Cemetery in 1997. Halvagis and his wife had great sympathy and compassion for other victims of crime as not only did they suffer the loss of their daughter, but they also had to endure two trials after the man who murdered their daughter, Peter Dupas, lodged a successful appeal against his first jury conviction and was granted a re-trial. Ultimately, in 2009, Dupas was found guilty and sentenced to life imprisonment with no parole. At the time of sentencing he was already in prison serving two life sentences for the murder of two other women in the 1990s. Dupas will never be released from prison.

Since the death of his daughter, Halvagis has spent more than 20 years supporting victims of crime and their families. He has worked tirelessly to promote and raise funds for victim support groups and Crime Stoppers Victoria, and has actively campaigned to achieve law reform to improve victims' rights. Over the years, he has also regularly voluntarily attended the Supreme Court of Victoria to offer support to victims of crime, and their families and friends, during the trial process.

Upon receiving his award, Halvagis was reported as saying his aim was to 'to make sure no one can feel my pain and [to] protect the innocent from criminals'.



Source 6 In 2020, George Halvagis was awarded the Order of Australia Medal for his services to victims of crime and their families and friends.

Impact on the community

Murder also impacts on the community as a whole by eroding (destroying) public confidence in the ability of the police and the criminal justice system to protect the community. People who live in close proximity to where a murder occurred may no longer feel safe. People in the broader community may also feel vulnerable and become cautious about where they go and with whom they interact. Sometimes, a particularly cruel or brutal murder spurs the community into action.

The scenario below provides examples of two brutal murders that shocked the community and prompted an outpouring of grief.

Brutal murders shock the nation

ACTUAL SCENARIO

DPP v Herrmann [2019] VSC 694 (29 October 2019)

In January 2019, a 21-year-old woman was murdered on her way home from an evening out in Melbourne. The brutal and unprovoked attack devastated her loving family and shocked the Victorian community and the nation.

Within hours of the attack, hundreds of Melburnians had laid floral tributes at the site where the young woman was killed. A few days later, hundreds of people gathered on the steps

Source 7 In recent years, a number of vigils have taken place throughout Melbourne to mourn the death of young women killed in unprovoked attacks.

of Victorian Parliament to pay tribute to the young victim, to seek comfort, and to display their willingness to stand together in the fight against violence. The Prime Minister, Scott Morrison, also visited the site of the murder to pay his respects.

In October 2019, Codey Herrmann, aged 20, was sentenced to 36 years imprisonment (with a non-parole period of 30 years) for the rape and murder of this young woman.

Sadly, her death occurred just months after 10 000 people had gathered at Princes Park in Carlton to mourn the death of another young woman who was the victim of a similar crime as she returned home from an evening out.

In November 2018, Jaymes Todd, aged 19, pleaded guilty to the charges laid against him and was later sentenced to life imprisonment with a minimum non-parole period of 35 years.

Impact on the offender

A person who is convicted of murder will suffer a number of negative impacts. Most obviously, offenders will generally be sentenced to a lengthy period of imprisonment, with the maximum sentence for murder being life imprisonment with no parole.

In addition, offenders may suffer shame and a sense of remorse. The offender's family and friends may also suffer great anxiety and stress, feelings of shame and guilt, and social isolation. The offender may incur significant legal costs, and their family may suffer financial hardship, especially in situations where the offender is the main income earner.

Upon release from prison, offenders may find it difficult to re-establish connections with their family and friends, and find employment and housing. The experience of being imprisoned may also have a direct impact on their emotional wellbeing.

Source 8 below summarises some of the possible impacts that murder can have on the victim and their family, on the community, and on the offender.

IMPACT ON THE VICTIM AND THEIR FAMILY	IMPACT ON THE COMMUNITY	IMPACT ON THE OFFENDER
• Loss of life • Disruption to family life • Trauma, grief and loss, and related medical issues (both in the immediate and longer term) • Funeral costs • Loss of household income • Loss of trust in law and order, and community values	• Cost of publicly funded medical treatment (if death was not immediate) • Need for coronial services • Increased need for police, fire and emergency services • Trauma to emergency services workers responding to incident • Loss of workplace productivity • Potential loss of confidence in the legal system and community values	• Guilt or shame in causing a death • Legal costs • Custodial sentence • Loss of household income if the offender is imprisoned • Diminishment of the family's social standing and wellbeing • Negative influences as a result of exposure to prison

Source 8 A summary of the impact of murder

5.2 CHECK YOUR LEARNING

Define and explain

1 Distinguish between:
   - **a** lawful homicide and unlawful homicide
   - **b** murder and manslaughter.

2 Describe two defences to murder.

3 With reference to the elements of murder, explain what is meant by a causal link and how it can be broken.

4 In which source of law is the crime of murder defined? Justify your response.

Synthesise and apply

5 Read the scenarios below and identify whether malice aforethought exists and, if so, the type of malice aforethought. Justify your answers.
   - **a** The parents of a two-year-old child punish the child by refusing to give the child food for long periods of time. The child dies.
   - **b** Poyser was intoxicated from taking the drug methamphetamine (known as 'ice'). He got into an argument with his friend Woody and struck a blow to his head. Woody died as a result of the head injury.
   - **c** Hendo was cleaning his rifle and the firearm discharged. Corrie, who was standing close by, was shot in the chest and died.

6 Consider the following scenarios. Prepare an argument for either the prosecution or the defence for each situation.
   - **a** Clarkson and Russell were fighting on a deserted beach. Both men struck each other several times. Russell's final punch caused Clarkson to fall unconscious on the sand. After Russell left Clarkson unconscious on the beach, the tide came in and Clarkson drowned.
   - **b** Tom killed his mother. He wrongly thought she was going to evict him from the family home. Tom's psychiatrist confirmed that Tom had recently stopped taking medication that helped to control his mental illness (which caused paranoia and violent tendencies). The doctor said, 'at the time of the killing, it was highly likely that Tom was in a psychotic state'.

7 Read the scenario *R v Dhakal*.
   - **a** Suggest at least one reason why this case was heard by a jury in the Supreme Court.
   - **b** Briefly describe the facts of the case.
   - **c** Explain whether the facts of the case meet each of the elements of murder.
   - **d** Imagine you are the legal counsel for the accused. Outline the arguments you would make in defence of your client (i.e. the arguments as to why the offence was not murder).
   - **e** Based on the limited facts provided, do you feel the sentence was fair? Justify your decision.

8 Conduct some research to find three murder statistics relating to murder in Victoria and murder in one other Australian state or territory.
   - **a** Which state or territory has the least amount of murders? Suggest at least one reason for this difference.
   - **b** As a class, discuss why males predominantly commit the crime of murder. Where possible, undertake further research to support your views.

Analyse and evaluate

9 Read the scenarios 'Victim of crime awarded Australia Day honours' and 'Brutal murders shock a nation'.
   - **a** Suggest how murder can impact a victim's family, friends and the wider community. Support your response with reference to the two scenarios.
   - **b** In your view, does a random and unprovoked crime have more or less impact on society than a crime where the victim knows their attacker? Discuss as a class.

10 Discuss the ability of courts to address the impacts that murder has on society when sentencing an offender.

Check your Student obook assess for these additional resources and more:

- **Student book questions**
  5.2 Check your learning
- **Video tutorial**
  How to argue criminal culpability
- **Weblinks**
  Murder (*Crimes Act 1958* (Vic))
  Sentencing Advisory Council
- **Weblinks**
  Crime Statistics Agency
  Victims of crime

5.3 CULPABLE DRIVING CAUSING DEATH

culpable driving causing death
the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or while under the influence of drugs or alcohol

dangerous driving causing death
the act of causing the death of another person while driving a motor vehicle at a speed or in a way that is dangerous to the public, having regard to all the circumstances of the case

dangerous driving causing serious injury
the act of causing serious injury (i.e. life-threatening injury or substantial and long-lasting injury) to another person while driving a motor vehicle at a speed or in way that is dangerous to the public, having regard to all the circumstances of the case

The crime of **culpable driving causing death** is an example of an unlawful homicide offence (i.e. the killing of another person without legal justification). Culpable driving causing death occurs when a person causes the death of another person by driving their motor vehicle in a negligent or reckless manner or while under the influence of drugs or alcohol.

Culpable driving causing death is one of a number of indictable (serious) driving offences (with others including **dangerous driving causing death** and **dangerous driving causing serious injury**), and the most serious. On the scale of seriousness, it is a 'category 2' offence, which must be given a prison sentence, unless special reasons or circumstances exist. The maximum penalty for culpable driving causing death is 20 years' imprisonment and/or a fine of 2400 penalty units (approximately $400 000).

Source 1 Section 318 of the *Crimes Act* states that a person can be found guilty of culpable driving causing death if they were responsible for the death of another person while driving a motor vehicle in a negligent or reckless manner, or while being under the influence of drugs or alcohol.

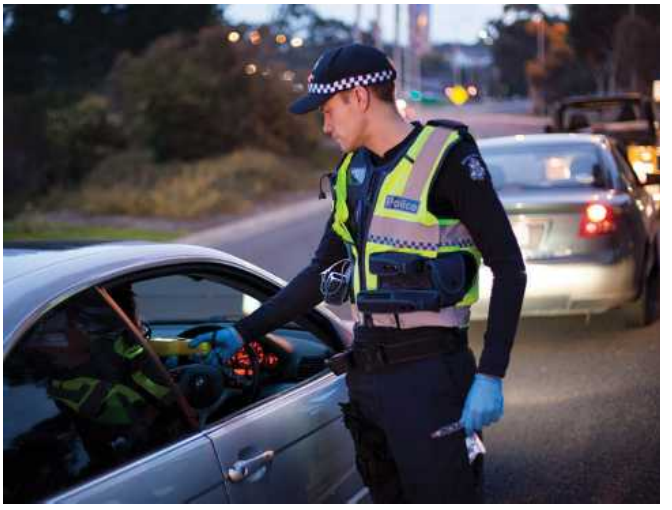
Elements of culpable driving causing death

For a person to be found guilty of culpable driving causing death, the prosecution must prove the following two elements existed beyond reasonable doubt:

- the accused was the driver of a motor vehicle
- the accused culpably caused a person's death while driving the motor vehicle.

These two elements of culpable driving causing death are further discussed on the next page.

Source 2 Culpable driving causing death includes driving negligently by being fatigued to such an extent that the driver ought to have known that there was a risk of falling asleep.



Source 3 Culpable driving causing death includes driving under the influence of alcohol or a drug to the extent of being incapable of properly controlling the vehicle.

Element 1 – The accused was the driver of a motor vehicle

To be found to be the driver of the motor vehicle the accused must have had substantial control over the movement of the motor vehicle. Motor vehicles are generally motorised vehicles intended to be driven on a highway (e.g. cars, trucks, buses or motorbikes). Vehicles that are not motor vehicles include those intended to be used on a railway or tramway, and motorised wheelchairs that cannot go at a speed of more than 10 kilometres per hour and which are used to carry an injured or disabled person.

Element 2 – The accused culpably caused a person's death while driving the motor vehicle

'Culpability' refers to the responsibility for a fault or wrongful action (or inaction). In relation to driving, it means that the accused must have been driving the motor vehicle in one of the following ways:

- **driving recklessly** – that is, driving in a way that consciously and unjustifiably disregards a substantial risk that another person could die or be seriously injured (e.g. driving at high speeds in bad weather)
- **driving negligently** – that is, driving in a way that fails (to an unacceptable degree) to observe a reasonable standard of care that a reasonable person would have observed in similar circumstances, and that others in the community have a right to expect (e.g. driving while fatigued to such an extent that the driver ought to have known that there was a risk of falling asleep)
- **driving under the influence of alcohol or a drug** – that is, driving in a condition where the consumption of alcohol or drugs makes the accused incapable of properly controlling the vehicle.

In the case *DPP v Huby*, discussed below, the offender caused his motor vehicle to crash into a tree after he fell asleep while driving. His four-year-old daughter tragically died as a result of the accident. He pleaded guilty to culpable driving causing death.

ACTUAL SCENARIO

Driver falls asleep with tragic consequences

DPP v Huby [2018] VCC 1621 (3 October 2018)

On 23 April 2016, a 24-year-old man was driving to his mother's house with his four-year-old daughter in the back of the car. The man fell asleep, causing the car to swerve off the road and collide with a large tree. While the man survived the collision, his daughter did not.

During the investigation into the accident, the police became aware that the accused had not had much sleep for three nights prior to the incident because he was caring for his other daughter who was waking up throughout the evening with 'night terrors'.

While it was also revealed that the accused had a small amount of the drug methamphetamine (or 'ice') in his system at the time of the incident, there was no way of confirming that this contributed to the incident. In fact, both the prosecution and defence agreed that the accident was caused solely by the accused's lack of sleep.

Despite the accident being caused by the accused's lack of sleep, he pleaded guilty to one count of culpable driving causing death because he was so distressed and overwhelmed with grief that he did not want the matter to proceed to trial.

When sentencing the offender, Judge Gaynor commented that the circumstances of the man's offending fell within the offence of *dangerous* driving causing death (which has a maximum penalty of 10 years' imprisonment), rather than the offence of *culpable* driving causing death (which has a maximum penalty of 20 years' imprisonment).

During the sentencing hearing, the County Court also heard that the accused, who was a devoted and loving father, had suffered post-traumatic stress disorder and severe anxiety since the incident. Since details of the accident were published in the media, the accused had also been the victim of intense and, in Judge Gaynor's view, 'extraordinarily cruel' abuse from members of the community, both in person and via social media.

In October 2018, the accused was sentenced to five years' imprisonment, with a minimum non-parole period of 12 months. When handing down the sentence, Judge Gaynor commented that had it not been for his guilty plea, the accused would have been sentenced to seven years' imprisonment with a non-parole period of five years. The accused's driver licence was also cancelled, and he was disqualified from driving for two-and-a-half years.

Did you know?

Using a mobile phone while driving is enough to justify charging a driver with culpable driving causing death if they cause a collision and someone dies as a result.

Defences to culpable driving causing death

For a person to be found guilty of culpable driving causing death, the prosecution must prove the two elements of culpable driving causing death beyond reasonable doubt. The accused may try to argue that one, or both, of these elements is missing. For example, the accused may argue that:

- they were not driving the vehicle
- their driving was not culpable (e.g. the motor vehicle collision and resulting death were not caused by their recklessness, gross negligence, intoxication or drugs, but by unexpected and unpredictable mechanical failure, or poor environmental or road conditions).

In the hypothetical scenario below, the accused may argue that he was not the driver of the vehicle.

HYPOTHETICAL SCENARIO

The accused was not driving the vehicle

A car carrying two men crashed at high speed and flipped over. Both men were ejected (i.e. thrown) from the car. One man suffered a brain injury, and the other died in the crash. The surviving man was charged with culpable driving causing death. He said he could not remember who was driving at the time of the incident.

An expert who was called in to advise on the case said there was a 75 per cent chance that the accused was ejected from the driver's side of the car, making him the driver. However, a text message the accused sent to a friend just before the collision indicated that he was not driving at the time of the crash.

unanimous verdict
a jury vote or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty). In a criminal case, this means all 12 jurors are in agreement

majority verdict
a jury vote or decision where all but one of the jury members agree with the decision. In a criminal trial, this means 11 of the 12 jurors are in agreement

As discussed in Topic 5.2, in cases where one of the elements of a crime is missing, the accused may be charged with and found guilty of an alternative offence (provided that the elements of the alternative offence are proven).

In the following scenario, the accused was charged with four counts of *culpable* driving causing death after her failure to brake caused the death of four women. In the original trial, the jury found the accused not guilty of four counts of *culpable* driving causing death. However, the jury was unable to return either a **unanimous** or **majority verdict** in relation to the charges of *dangerous* driving causing death.

Four women killed in a tragic collision

ACTUAL SCENARIO

In May 2018, 64-year-old Lorraine Nicholson was charged with four counts of culpable driving causing death after she failed to brake at an intersection in Navarre, in western Victoria. This caused a collision in which four women, travelling in another car, were killed. The deceased women, all aged between 64 and 74 years, were returning from a line-dancing function. The accused's vehicle collided with the women's vehicle at an approximate speed of 88 kilometres per hour in an 80 kilometres per hour speed zone.

The accused claimed she thought she had applied her brakes when approaching the intersection but must have inadvertently accelerated. While the prosecution argued the accused was negligent in her failure to brake, her defence counsel argued her actions were not sufficiently negligent for the jury to find her guilty of culpable driving causing death. For example, the accused was not driving while fatigued, under the influence of drugs or alcohol, or using her mobile phone at the time of the incident. The accused was also of exemplary good character who was genuinely distraught about, and sorry for, the consequences of her actions.

community correction order (CCO) a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

In October 2019, the County Court jury found the accused not guilty of four counts of *culpable* driving causing death. The jury was discharged after being unable to reach a majority verdict (i.e. 11 out of 12 jurors agree) on four counts of *dangerous* driving causing death. The case was adjourned. A re-trial, with the accused facing four counts of dangerous driving causing death, was scheduled for June 2020.

However, in February 2020, the accused pleaded guilty to four counts of *dangerous* driving causing death after being informed by the trial judge that, if she pleaded guilty, she would most likely not receive a term of imprisonment due to the exceptional circumstances of the case.

The accused received a four-year **community correction order** with the requirement that she undertake 500 hours of unpaid community service. Her driver licence was also cancelled for eight years.

Source 4 Lorraine Nicholson pleased guilty to four counts of dangerous driving causing death

Other than defending the charge for culpable driving causing death on the basis that one or more of the elements has not been satisfied, the accused can rely on a general defence. These defences generally show that the accused did not or could not form the intention (*mens rea*) to commit the offence.

General defences to culpable driving causing death

The general defences to culpable driving causing death are (more details on each of these are contained in Topic 5.1):

- duress
- sudden and extraordinary emergency
- automatism.

The scenario on the following page explores how the defence of duress can be used to defend a charge of culpable driving causing death.

HYPOTHETICAL SCENARIO

Duress as a defence in culpable driving causing death

After filling his car with petrol, Chuck was about to drive away when Nate, who had just stolen cash from the petrol station, banged on his car window and shouted, 'Get me out of here or I'll shoot!' Nate was armed with a gun. Terrified, and in fear of being shot, Chuck sped off and killed a pedestrian who was lawfully crossing an intersection.

If Chuck is charged with culpable driving causing death, he could raise the defence of duress.

Study tip

Whether someone has committed culpable driving causing death will be determined by checking the offender's actions against each element of the offence and then considering any defences applicable to the circumstances of the case.

The role of the law in developing the elements of and defences to culpable driving causing death

Common law

Unlike other offences related to unlawful homicide, the elements of culpable driving causing death do not have a history of long, slow development through **common law**. This is because the first petrol-driven motor car was not produced in Australia until 1901 and so there was no need for laws to be developed to regulate car use until the early 1900s. Given that state parliaments gradually started to implement driving laws from this time, the role of the courts in relation to driving laws has largely been to interpret and apply relevant legislation to resolve the cases brought before them. In undertaking this role, the courts have, over the years, assisted in clarifying driving laws including the statutory elements of culpable driving causing death. For example, what constitutes 'negligent' driving for the purpose of convicting an accused of culpable driving causing death has, over the years, been clarified by the courts in a number of cases.

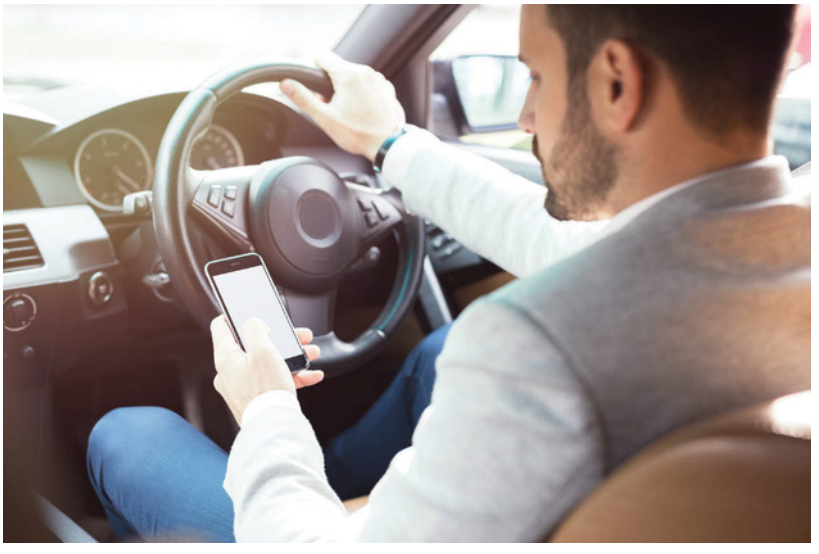
Automatism, a defence that can be raised to defend a culpable driving causing death, is also a common law defence, and therefore the common law principles still apply in cases where this defence is raised.

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

Statute law

Culpable driving causing death is a statutory offence under section 318 of the *Crimes Act*. The main indictable driving offences (including culpable driving causing death, dangerous driving causing death and dangerous driving causing serious injury) were initially defined in **statute law** (legislation) and have been refined by the courts through the process of statutory interpretation. These offences were developed over time in direct response to high road tolls and community concerns about irresponsible drivers who put other people's lives at risk.

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)



Source 5 Culpable driving causing dearth is a statutory offence.

For example, prior to 2004 there were only two main serious driving charges in Victoria, being culpable driving causing death (with a maximum penalty of 20 years' imprisonment) and dangerous driving (with a maximum penalty of two years' imprisonment). In 2004, the Victorian Parliament passed legislation to create the crime of dangerous driving causing death (with a maximum penalty, at the time, of five years' imprisonment) – an intermediate offence between culpable driving causing death and dangerous driving.

While some driving offences, like dangerous driving causing death, have been created to expand driving laws, most reform related to indictable driving offences has generally been limited to altering the maximum penalty for the offence to reflect changes in community attitudes. For example, the maximum penalty for culpable driving causing death has increased in the last two decades from 10 to 20 years' imprisonment. Similarly, in 2008, the maximum penalty for dangerous driving causing death was increased from five to 10 years' imprisonment.

This shows a significant change in people's attitudes. In the past, people were more sympathetic to those who killed while driving a motor vehicle. The community has slowly come to realise that driving causing death is a form of **manslaughter** and deserving of a similar penalty. The unnecessary carnage on our roads has led to the community wanting drivers whose actions are grossly negligent to be punished appropriately.

manslaughter
the unlawful killing of a person due to a reckless, dangerous act or negligent behaviour

Trends and statistics

Victoria

In Victoria, the number of people sentenced for culpable driving causing death fluctuates from year to year with no significant trend of increase or decrease. For example, statistics compiled by the Sentencing Advisory Council indicate that 15 people were sentenced for culpable driving causing death in the year ending in June 2018 (see Source 6 below).

YEAR	NUMBER OF PEOPLE SENTENCED FOR CULPABLE DRIVING CAUSING DEATH
2013–2014	16
2014–2015	7
2015–2016	6
2016–2017	15
2017–2018	15

Source 6 The number of people sentenced for culpable driving causing death in Victoria from 2013–2014 to 2017–2018, according to the Sentencing Advisory Council

Study tip

The Sentencing Advisory Council is a Victorian independent statutory body that aims to inform, educate and advise on sentencing issues. It is a useful source of information and provides statistics about crime and sentencing in Victoria. If you are researching an offence in depth, you will find good material on the Council's website.

Over the five-year period from 2013–2014 to 2017–2018, all but two of the total 59 offenders sentenced for culpable driving causing death (i.e. 97 per cent of offenders) received an immediate custodial sentence (i.e. a term of immediate imprisonment or detainment in a youth justice centre). In 2017–2018, the average length of imprisonment imposed upon offenders was seven years and eight months, compared to an average length of imprisonment in 2013–2014 of five years and 11 months. Part of the reason for this increase in the length of imprisonment was the passing of 'standard sentencing law' by the Victorian Parliament in 2018. In accordance with this law, the courts are now required to consider imposing a standard sentence (equivalent to 40 per cent of the maximum penalty) for a range of serious offences (including culpable driving causing death) considered to be in the mid-range of seriousness. Given the maximum sentence for culpable driving causing death is 20 years' imprisonment, this means a court must consider imposing sentence of eight years in cases thought to be in the 'middle of the range' in terms of their seriousness.

From 1 July 2013 to 30 June 2018, the Sentencing Advisory Council reported that in relation to culpable driving causing death:

- approximately 85 per cent of offenders were male
- approximately 60 per cent of offenders were aged between 20–34 years.

In more general terms, the trend in the number of people sentenced for driving causing death offences (including culpable and dangerous driving causing death) has slightly increased in recent years. For example, statistics compiled by the Crime Statistics Agency indicate that both the number of recorded driving causing death offences and the rate per 100 000 population slightly increased between 2015 and 2019 (see Source 7 below).

The rise in both statistics suggests that factors other than Victoria's increasing population have contributed to the increase in these offences. The Victorian Government cited a number of likely other causes for this increase. These included driving at an excessive speed, driving while under the influence of alcohol or drugs, and driving while fatigued or distracted (particularly by mobile phones).

YEAR	NUMBER OF RECORDED DRIVING CAUSING DEATH OFFENCES	NUMBER OF RECORDED DRIVING CAUSING DEATH OFFENCES PER 100 000 POPULATION
2015	78	1.3
2016	67	1.1
2017	89	1.4
2018	91	1.4
2019	101	1.5

Source 7 The number of people reported as driving causing death per 100 000 population 2015 to 2019 (for the year ending December), according to the Crime Statistics Agency.

South Africa

While it is difficult to compare culpable driving causing death statistics throughout the world due to differences in the definition and recording of serious driving offences, South Africa has the highest rate of road fatalities (deaths) due to alcohol-intoxicated (drunk) drivers in the world.

According to 2016 World Health Organization statistics, South Africa had approximately 26 deaths resulting from road accidents per 100 000 people, with 58 per cent of these deaths related to the consumption of alcohol. This was a high rate compared to Australia, and the United States, where approximately 30 per cent of road deaths were attributed to alcohol in the same period. It was also extremely high compared to countries like Germany, Russia and India, where alcohol-related road deaths accounted for nine per cent or less of road deaths.

One of the main reasons why South Africa has a significant 'drunk-driving' problem is the incapacity of the country to enforce its driving laws. For example, while drivers and passengers are required by law to wear seatbelts in South Africa, data suggests that only 33 per cent of drivers, and 31 per cent passengers in motor vehicles, actually wear seatbelts. While it is difficult to establish precise reasons why these rates are so low, some media commentators suggest one contributing factor is relatively low penalties for breaching the law (e.g. a person who is arrested for not wearing a seatbelt in a motor vehicle will generally receive a relatively low fine and with no loss of demerit points). Driver training, testing and licensing has also been identified as an area that needs to be improved to lower South Africa's high 'drunk-driving causing death' rate.

Possible impacts of culpable driving causing death

All crime impacts individuals and society. Being a serious unlawful homicide offence, culpable driving causing death, and other major indictable driving offences, significantly impact:

- the victim (and their family and friends)
- the community
- the offender.

Source 9 summarises some of the possible impacts that culpable driving causing death, and other major indictable driving offences, can have on the victim and their family, on the community, and on the offender.

Source 8 The Victorian Government's Towards Zero advertising campaign was part of a larger Road Safety Strategy to reduce the number of deaths and serious injuries on Victorian roads.

IMPACT ON THE VICTIM AND THEIR FAMILY	IMPACT ON THE COMMUNITY	IMPACT ON THE OFFENDER
• Loss of life • Disruption to family life • Trauma, grief and loss, and related medical issues • Funeral costs • Lost labour and income in the household • Continuing psychological issues • Loss of trust in law and order, and community values	• Cost of publicly funded medical treatment • Need for coronial services • Increased need for police, fire and emergency services • Trauma to emergency services workers responding to fatal collision • Increased insurance premiums for motor vehicles • Loss of workplace productivity • Damage to community property • Loss of trust in law and order, and community values	• Medical treatment and costs (if injured) • Guilt or shame in causing a death • Legal costs • Likelihood of a custodial sentence • Lost labour and income in the household • Impact on their family's social standing, finances, and health and wellbeing • Damage to, replacement or impounding of vehicle

Source 9 A summary of the impact of culpable driving causing death and other indictable driving offences

5.3 CHECK YOUR LEARNING

Define and explain

1 Describe the elements of the offence of culpable driving causing death.
2 Explain two possible defences for culpable driving causing death.
3 Explain whether culpable driving causing death is a common law or statute law offence.

Synthesise and apply

4 Create your own hypothetical scenario where a sudden or extreme emergency could be used as a defence to a charge of culpable driving causing death.
5 Read the scenario *DPP v Huby*.
   a Describe the facts of this case.
   b Distinguish between the offences of *culpable* driving causing death and *dangerous* driving causing death.
   c Suggest why the judge commented that the circumstances of the offending fell within the offence of dangerous driving causing death rather than culpable driving causing death.
   d Describe the impact of this crime on the accused.
   e Based on the limited facts provided, do you think the sentence imposed was appropriate? Give reasons for your response.
6 Read the scenario 'Four women killed in a tragic collision'.
   a Explain the elements of culpable driving causing death in relation to this case.
   b Imagine you are the defence counsel in this case. What arguments could you make to cast doubt on the prosecution's case?
   c Describe two possible impacts of this crime on the accused, the victims' families and the community.
   d Do you agree with the sentence imposed on the accused in this case? Give reasons for your response.
7 For each of the following scenarios, argue the case for either the prosecution or the defence.
   a It was a drizzly, wet day. It was estimated that Kurt was riding his motorbike at 95 kilometres per hour (in a 60 kilometres per hour zone) when he hit a pothole and lost control of his motorbike. The bike slid sideways into people standing at a tram stop. One person died.
   b Petrea was found in pyjamas, dazed and hurt on the side of the road at 3 am. She had driven through a red light and collided with another vehicle. The other driver was dead. When questioned, Petrea said she did not know what happened. It was later found that Petrea had taken new sleeping tablets after consuming two glasses of wine. Users of this medication are warned that it may cause 'potentially dangerous and complex sleep-related behaviours'.
8 Create an infographic that gives a quick overview of current trends for the offence of culpable driving causing death. Instructions to help you create an infographic are provided in your obook assess.
9 On the internet, search for a newspaper article about a case of culpable driving causing death.
   a Briefly explain the facts of the case.
   b Explain whether the facts of the case meet each element of the offence of culpable driving causing death.
   c Suggest any possible defences that might be relevant to the case.
   d If the case has concluded, state the verdict and any sentence imposed. Do you think the sentence fits the crime? Justify your response.

Analyse and evaluate

10 What do you consider to be the major causes of culpable driving causing death and other indictable driving offences (e.g. dangerous driving causing serious injury)? Discuss the extent to which you believe the Victorian Government has adequately responded to the incidence of these offences.
11 In your view, should the offence of culpable driving causing death be abolished as a crime and people charged with murder instead? Discuss as a class.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 5.3 Check your learning
- **Video tutorial** How to create an infographic
- **Weblink** Culpable driving causing death (*Crimes Act 1958* (Vic))
- **Weblink** Sentencing Advisory Council

5.4 RAPE

rape
the act of intentionally sexually penetrating another person without their consent

Rape is defined as the intentional sexual penetration of another person without their consent. Rape is a form of violence and on the scale of seriousness, it is a 'category 1' offence. This means a person found guilty of rape must be given a prison sentence. The maximum penalty for rape is 25 years' imprisonment. The legal definitions of rape and other sexual offences are set out in the *Crimes Act*.

Many victims of rape wrongly blame themselves rather than the offender. Some victims do not tell their families and many do not report the crime to the police. Rape is therefore underreported as a crime. Victims also do not report because they fear the criminal justice system and lack confidence in its ability to achieve justice in their case.

Source 1 Rape is defined as the intentional sexual penetration of another person without their consent. It is a form of violence.

Did you know?

The *Crimes Act* states that 'a person who intends and attempts to commit any serious crime [like rape] is guilty of the indictable offence of attempting to commit that offence'. This means that, like attempted murder, a person can be found guilty of attempted rape.

Elements of rape

To be found guilty of rape, the prosecution must prove beyond reasonable doubt that at the time of the offence there was:

- sexual penetration
- lack of consent
- lack of reasonable belief that consent was given.

These three elements of rape are further discussed below.

Element 1 – Sexual penetration

For a person to be found guilty of rape, the prosecution must prove that the accused intentionally sexually penetrated another person (i.e. the victim) either with the accused's penis, another body part (e.g. a finger) or an object.

Sexual penetration occurs when the accused undertakes any of the following acts:

- introduces (to any extent) a part of their body or an object into the victim's vagina (which is defined to include external genitalia or a surgically constructed vagina)
- introduces (to any extent) a part of their body or an object into the victim's anus
- introduces (to any extent) their penis into the victim's mouth
- having undertaken any of these actions, continues to keep a part of their body, an object or their penis, there (in the vagina, anus or mouth).

Sections 35A(3), (4) and (5) of the *Crimes Act* contain similar provisions that apply to sexually penetrating animals or being sexually penetrated by animals.

A person does not commit rape if the sexual penetration is done in good faith *and* for medical or hygienic purposes.

Did you know?

It is an offence for a person to have sex with their spouse (husband or wife), partner, girlfriend or boyfriend without their consent. The fact that they are married or in a relationship makes no difference to consent, which is required every time.

Element 2 – Lack of consent

The prosecution must also prove that the other person did not consent (i.e. give their permission) to the sexual penetration. Section 36 of the *Crimes Act* sets out a number of circumstances in which it is considered that a person has not given consent, including (but not limited to) the person:

- submitting to the act because of force or the fear of force, whether to themselves or someone else
- submitting to the act because of the fear of harm of any type, whether to themselves, someone else or an animal
- submitting to the act because they are unlawfully detained
- being asleep or unconscious
- being so affected by alcohol or another drug as to be incapable of consenting to the act
- being so affected by alcohol or another drug as to be incapable of withdrawing consent to the act (this may apply in situation where a person gave consent when they were not affected by alcohol or another drug)
- being incapable of understanding the sexual nature of the act
- being mistaken about the sexual nature of the act
- being mistaken about the identity of any other person involved in the act.

Element 3 – Lack of reasonable belief that consent was given

reasonable belief an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity) and in similar circumstances, to be sensible or correct

The prosecution must also prove that the accused did not *reasonably believe* that the other person (i.e. the victim) consented to the sexual penetration. A person is said to have a **reasonable belief** if an ordinary person with similar characteristics to the accused (e.g. age and maturity) would have formed the same belief in similar circumstances. In rape cases, whether an accused *reasonably believes* the other person is consenting will depend on the circumstances of each case. The court will consider any steps the accused took to determine the victim's consent. The accused's belief will be judged against the belief of a '*reasonable person*' in similar circumstances. In general, an accused's belief will not be 'reasonable' if they knew the victim was not consenting, gave no thought to it, or the accused's belief was unreasonable in the circumstances.

If more than one act of rape is committed, each act is charged as a separate offence.

The following scenario illustrates how the element of lack of consent can be present in a case involving an intoxicated victim under the age of 16.

HYPOTHETICAL SCENARIO

Two men found guilty of rape

In the early hours of the morning, two men in their early twenties were driving along a suburban street in Melbourne. The men, Paul and John, spotted a young girl walking alone on the side of the road and stopped to offer her a lift. The girl, aged 15, was visibly intoxicated and told them that she was walking home from a friend's party.

She accepted the lift from Paul and John, but when she got in the car, she told them that she was worried about arriving home to her parents drunk. The two men then decided to drive to a service station to buy some water for the girl and some snacks for themselves.

After buying the items, Paul and John drove the girl to a local park, where they took advantage of her intoxicated state and raped her. After the attack, the men dropped the girl off at a bus stop close to where they had first picked her up.

At the trial, Paul admitted to engaging in one act of oral penetration with the girl but said he thought the girl was over 16 years of age. John testified that he witnessed this sexual act. Both Paul and John denied the rape allegations.

A jury found Paul guilty of one count of rape and one charge of sexual penetration of a child under 16. He was initially sentenced to three years and six months' imprisonment. John was found guilty of two counts of rape and was sentenced to four years and three months' imprisonment.

The prosecution appealed the leniency of the sentence. The Court of Appeal increased Paul's sentence to four years and six months' imprisonment. John's sentence was increased to six years and three months' imprisonment.

Source 2 Rape of a child under 16 is a serious offence. Paul and John took advantage of the fact that a 15-year-old girl they picked up on the street was drunk.

Defences to rape

For a person to be found guilty of rape, the prosecution must prove each of the three elements of rape beyond reasonable doubt. If the prosecution fails to prove each of these elements, it will result in the accused being found not guilty of rape. The accused may therefore try to argue that one, or more, of the elements is missing. For example, the accused may argue that:

- there was no sexual penetration
- the victim consented
- they reasonably believed the victim was consenting.

In rape cases, the issue of 'consent' is most often raised to justify the accused's behaviour, as the following scenario exemplifies. Where consent is an issue, the *definition* of consent is used to determine whether the victim consented and whether the accused *reasonably believed* the victim was consenting. It is important to note that a victim does not have to say anything, protest, physically resist or sustain physical injury to show that they did not consent. It is also not a defence to say that the victim had agreed to a sexual act with the accused on a previous occasion.

DPP challenges ruling in sleep rape case

ACTUAL SCENARIO

R v Getachew (2012) 248 CLR 22

In 2009, a Melbourne man was found guilty of one count of rape after intentionally sexually penetrating a woman while she lay asleep beside him. The incident occurred in the early hours of the morning, after the accused and the complainant returned to a house from a night out drinking with two other people. The accused and the complainant decided to share a mattress on the floor while the two other people shared the bed in the same room.

During the trial in the County Court, the complainant informed the Court that before falling asleep, the accused touched her leg twice and on both occasions she asked him to stop. After falling asleep, the complainant awoke to find the accused penetrating her. By contrast, in his defence, the accused's lawyers argued that he had not penetrated the complainant.

Source 3 A High Court appeal in the *Getachew* case led to a change in rape law.

Before the jury retired to determine the verdict, the trial judge gave directions (or instructions) to the jury that if the accused was aware that the complainant was, or might be, asleep at the time of penetration, he would have also been aware that the complainant was not, or might not be, consenting to the penetration.

The jury found the accused guilty of rape and he was sentenced to four years and nine months' imprisonment with a minimum non-parole period of two years and nine months.

However, in 2011, the accused successfully appealed the jury's decision in the Court of Appeal. The grounds of the successful appeal were that the trial judge had misdirected the jury by instructing them that the prosecution had established intention (*mens rea*).

In 2012, the prosecution successfully appealed the Court of Appeal's decision in the High Court. The High Court upheld the original guilty verdict determined by the County Court jury. Essentially, the High Court ruling confirmed the prosecution's argument that, in a rape case, the awareness of the accused that the person they penetrate might be asleep is enough to demonstrate that the person may *not be consenting* to the penetration.

Other than defending the charge of rape on the basis that one or more of the elements has not been satisfied, the accused can rely on a particular defence. Several defences to a charge of rape are available. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

General defences to rape

The general defences to rape are (more details on each of these are contained in Topic 5.1):

- mental impairment
- duress
- automatism.

The following scenario illustrates circumstances in which the defence of duress could be used to defend a charge of rape.

ACTUAL SCENARIO

Child soldiers forced to rape

In 2003 in war-torn Sudan in Africa, children as young as 13 were allegedly abducted and conscripted by force into the Sudanese army. These child soldiers were ordered by superior officers to commit offences, including rape. The children were tortured if they did not obey. This occurrence was described by Kajabier – who deserted the Sudanese army when he was a child – in a media interview when he was 34 years old. Kajabier described what happened just before Sudanese army troops stormed a village in southern Darfur. The officer in charge, Colonel Jaja, commanded his troops to 'rape the women, kill the children. Leave nothing'. Kajabier refused to take part in any more raids and deserted.

The conduct of child soldiers, and whether or not the defence of duress applies, have been called into question.

The role of the law in developing the elements of and defences to rape

Common law

Rape laws have their origin in common law. For example, the definition and elements of rape were established over time by the courts. Under common law, the definition of rape was very narrow, as it only consisted of unlawful carnal knowledge (penetration of a vagina by a penis). Other forms of penetration were treated as the lesser offence of indecent assault rather than rape. The term *unlawful* was also vague and, until legislation was passed in Victoria in 1991, included *outside a marriage*. This meant, under old common law, that a man generally could not be charged with the rape of his wife even if the penetration was against her will.

Source 4 In defending a rape charge, the accused may deny that sexual penetration occurred. In such cases, the results of medical tests are often provided to the court as evidence.

Over time, however, the Victorian Parliament began to pass legislation to clarify the definition and elements of rape and other sexual offences. All sexual offences in Victoria are now governed by statute law, namely the *Crimes Act*. However, common law defences can be used to defend a rape charge. These include the defence of automatism, which is a defence found in the principles established by the courts over the years.

Statute law

Although the definition and elements of rape were originally established in common law, the laws relating to rape and other sexual offences are now set out in statute law (e.g. sections 37, 38 and 39 of the *Crimes Act*). In fact, over the years, this Act has been amended (altered) many times to ensure that rape and other sexual offences laws uphold and protect the basic right of every person to make decisions about their sexual behaviour and choose not to engage in sexual activity.

One of the most significant changes to rape law was made in 1991, when the Victorian Parliament passed the *Crimes (Sexual Offences) Act 1991* (Vic). Under this statute, rape law was changed so the prosecution no longer had to prove that an accused was aware that consent might be absent. It was enough to demonstrate that an accused did not give thought to whether the complainant was not consenting (or might not be consenting). The directions that judges gave to a jury were also regulated by the amendments.

The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) was also a significant statutory change which, among other changes, introduced six distinct rape and rape-related sexual offences, each with its own clearly stated definition and elements. These newly defined offences are rape, rape by compelling sexual penetration, sexual assault, sexual assault by compelling sexual touching, assault with intent to commit a sexual offence, and threat to commit a sexual offence.

The *Crimes Amendment (Sexual Offences and Other Matters) Act* also introduced a new fault element in rape and sexual assault, being that the accused did not reasonably believe that the other person consented. Determining whether or not the accused reasonably believed that the other person (i.e. the victim) was consenting to an act will depend on the circumstances including, for example, the steps the accused took

to find out whether the other person consented.

Over the years, some other important statutory amendments (changes) to rape laws have included:

- the criminalisation of rape in marriage
- the use of gender-neutral language in the definition of rape
- the creation of a statutory definition of sexual penetration and a broadening of this statutory definition to include all forms of sexual penetration
- the creation of a statutory definition of consent, which specifies that consent means free agreement and outlines the circumstances in which a person does not consent
- the simplification of the fault element in rape. To be found guilty the prosecution must prove the accused did not reasonably believe the other person consented to the penetration
- the restriction of the admission of the victim's sexual history as evidence.

These changes aimed to clarify the definition of rape, the concept of consent and the mental element of rape.

Since 2004, many of the changes to Victoria's rape and other sexual offences laws have reflected recommendations made by the Victorian Law Reform Commission (VLRC). The VLRC is Victoria's leading independent **law reform** organisation. The VLRC reviews, researches and makes recommendations to the Victorian Parliament about possible changes to Victoria's laws that would improve the laws and to ensure the law reflects changing community values and expectations. Statutory changes have also been made to encourage more victims to report sexual abuse, address low prosecution rates and restore victims' faith in the legal system. However, despite these changes, the law relating to rape and sexual offences can still be complex and difficult for juries to understand and apply to specific cases.

law reform
the process of constantly updating and changing the law so it remains relevant and effective

Trends and statistics

Historically, many incidents of rape are not reported to police. Some victims will not report for fear of the legal system. Personal factors, such as cultural constraints and having a close personal relationship with the offender (in marital or date rape cases), may impact on reporting rates. Victims may fear retaliation, social stigma or the negative impact on their privacy and family relationships. Underreporting could also be due to victims' perceptions that they will not be believed, or that the victim rather than the offender will be blamed for what happened.

Victoria

According to data from the Crime Statistics Agency, the trend in the number of criminal rape incidents identified by Victoria Police has increased over the last decade. For example, as indicated in Source 5 on the next page, the rape incidents increased between 2015 and 2019 (for the year ending December) from just under 40 rape incidents per 100 000 people to just under 50 per 100 000 people. However, while this increase in criminal rape incidents is concerning, part of the increase may be due to some victims being more willing to report the rape to the police after the *Crimes Amendment (Sexual Offences and Other Matters) Act*, which aimed to improve Victoria's rape and other sexual offences laws, became operational in 2015 (as indicated in Source 6 on the next page).

Over recent years, there has been a greater awareness and support in our community for victims of rape and sexual assault. Rape and other sexual offences are more openly discussed within the media and the community, and the legal system has implemented a series of reforms in an attempt to make it easier for victims to report. Nonetheless, the legal system is still failing some rape victims, and more can be done to improve the criminal processes surrounding the report and prosecution of rape and sexual assault cases.

YEAR	NUMBER OF RAPE INCIDENTS IDENTIFIED BY VICTORIA POLICE	NUMBER OF RAPE INCIDENTS PER 100 000 PEOPLE
2015	2395	39.8
2016	2652	43.0
2017	3056	48.3
2018	3189	49.4
2019	3252	49.3

Source 5 The number of rape incidents recorded by Victoria Police, according to data from the Crime Statistics Agency

YEAR	NUMBER OF VICTIM REPORTS OF RAPE TO VICTORIA POLICE	NUMBER OF VICTIM REPORTS OF RAPE PER 100 000 PEOPLE
2015	2451	46.2
2016	2781	51.3
2017	3167	53.2
2018	3518	54.5
2019	3557	53.9

Source 6 The number of victim reports of rape to Victoria Police, according to data from the Crime Statistics Agency

Data from the Sentencing Advisory Council also provides an insight into the incidence of rape over recent years. For example, between the year ending June 2014 and the year ending June 2018:

- 216 people were sentenced for the principle offence of rape in the higher courts (generally the County Court, which hears most rape cases)
- 58.4 per cent of the people who were sentenced for rape were aged between 25 and 44 years
- 99.5 per cent of the offenders were male
- 95.4 per cent of the offenders received a term of imprisonment, with a median term of five years. The maximum term given for a rape crime during that time was no more than 13 years.

Research indicates that progression rates (how far the case progresses through to conviction and sentencing) tend to be better in cases where the victim reports to police within a short time of the incident, when the victim was injured, or when the offender used a weapon or had committed other crimes. Conversely, progression rates are not as good when the victim is affected by alcohol or drugs, or when the victim withdraws from the legal process due to legal uncertainty and delays.

Sweden

While many countries gather statistics on rape and other sexual offences, it is difficult to accurately compare the incidence of rape throughout the world because there are no international standards for the production and presentation of rape statistics. This means many countries have different definitions of rape, different rates of reporting and enforcement, and different methods of compiling statistics. For example, some countries do not recognise rape in marriage, while others do not have a statutory minimum age for marriage, meaning that the rape of a child within a marriage will not be recognised or prosecuted.

According to World Population Review 2020 statistics, Sweden has one of the highest rates of rape in the world, and the highest in Europe, with 63.5 rapes per 100 000 people. By comparison Australia's rape rate was recorded as being 28.6 per 100 000 people.

Data from the Swedish Crime Survey (released by Swedish National Council for Crime Prevention, known as Bra) also indicates that Sweden has a high rate of reported rape offences (as indicated in Source 7 on the next page). The 2018 figure equates to 68 reported rapes per 100 000, an increase of 13 per cent compared to 2015.

YEAR	NUMBER OF REPORTED RAPES
2014	6697
2015	5918
2016	6715
2017	7369
2018	7958

Source 7 The number of rapes reported by victims in Sweden, according to Swedish Crime Survey data

While, at first glance, the incidence of rape appears to be alarmingly high in Sweden, there are a number of reasons for this, including differences in the way Sweden reports and records crime. For example, Swedish statistics record all reported incidents as crime regardless of whether it is later discovered that these incidents did not constitute a criminal offence. Also, in cases where a number of offences of the same kind have been committed against one victim, Swedish statistics record every offence separately. This means if a person makes a report to the police claiming they have been raped within marriage 100 times or more, the statistics will record 100 reported rapes by that person. By contrast, many other countries record the number of offences committed against one single victim as one offence, or only record the principle offence.

Swedish statistics also generally include attempted crimes with completed crimes, whereas other countries, like Australia, record attempted offences separately.

Sweden states that its criminal processes are designed to encourage the reporting of rape and other sexual offences to the police, and changing attitudes towards what constitutes rape and sexual assault; and less tolerance of certain types of sexual behaviour has contributed to the increase in reported rapes and other sexual offences over recent years. The definition of rape was also expanded in 2013 to include cases where the 'victim reacts passively'.

Possible impacts of rape

All crime has impacts on individuals and society. Rape significantly impacts:

- the victim (and their family and friends)
- the community
- the offender.

Source 8 In recent years, a number of vigils have taken place throughout Melbourne to mourn the death of young women killed in unprovoked attacks.

Impact on the victim (and their family and friends)

Victims suffer both physical and psychological trauma following a rape. A victim may suffer physical injuries such as bruising, bleeding or broken bones, depending on the force used during the sexual attack. The victim may worry about the risk of sexually transmitted diseases or an unwanted pregnancy. Victims also suffer emotionally. They may feel anger, guilt or self-blame. They may be in shock or feel disoriented, and they may in live in fear of future attack. Long-term psychological effects include the onset of depression or post-traumatic stress disorder.

The victim's partner, parents and other family members may become secondary victims. They may also experience emotional and psychological trauma ranging from anger to feelings of helplessness and depression.

The degree of impact on the victim depends on a number of factors, such as:

- the severity of the assault and any physical injuries sustained
- the support from family members and/or friends
- the professional support available to the victim
- whether the offender is a family member or known to the victim prior to the attack
- the response of police, medical practitioners and the legal system
- the level of uncertainty and delays in the investigation or prosecution of their case
- their treatment in court and whether they are satisfied with the legal outcome in their case.

Many of these are discussed in a fact sheet on the impact of sexual assault on women produced by the Australian Institute of Family Studies. In it, researcher Cameron Boyd points out that victims may experience:

> none, some or many of the possible impacts of sexual assault at different times; there are likely to be impacts of sexual assault that researchers have yet to identify; there is no single way a sexual assault victim should look and act; impacts are not signs of illness, deficiencies or weakness, nor are they characteristics of the individual – rather, they are normal responses to traumatic events.

Source 9 below summarises some of the possible impacts that rape can have on the victim and their family, on the community, and on the offender.

IMPACT ON THE VICTIM AND THEIR FAMILY	IMPACT ON THE COMMUNITY	IMPACT ON THE OFFENDER
• Loss of freedom from fear • Disruption to family life • Trauma, grief and loss, and related medical issues • Lost time and income in the household • Physical injuries • Continuing psychological issues (e.g. post-traumatic stress, and avoiding social settings and consensual sex) • Loss of trust in law and order, and community values • Risk of sexually transmitted disease	• Cost of publicly funded medical treatment • Increased need for police, and counselling services • Loss of workplace productivity • Loss of community security and freedom to walk the streets in safety • Loss of trust in law and order, and community values	• Medical treatment and costs (if injured) • Guilt or shame • Legal costs • Likelihood of a custodial sentence • Lost labour and income in the household • Impact on their family's social standing, finances, and health and wellbeing

Source 9 A summary of the impact of rape

Source 10 Each year people around the world participate in demonstrations to raise awareness of the need to treat victims of sexual assault with compassion and dignity.

5.4 CHECK YOUR LEARNING

Define and explain

1 Define the crime of rape.
2 Explain one defence to rape.
3 Suggest reasons why the offence of rape is often underreported.
4 Explain whether the elements of the crime of rape are found in common law or statute law.
5 Describe two impacts of rape on both the victim and the general community.

Synthesise and apply

6 For each of the following situations, decide if you think there is consent and whether the offender is likely to be charged with rape. Give reasons for your responses.
   a Jaya has a stomach complaint. Her doctor insists on carrying out a vaginal examination. She feels uncomfortable about the way the examination takes place. She later finds out from another doctor that the examination was an unconventional medical procedure and was totally unnecessary.
   b Simon knocked Miriam out with a punch to the jaw. While she was unconscious, he had sex with her.
   c Teresa visited her new boyfriend at his flat. He would not let her go home. He tied her to the bed and held her for three days. He said he would only let her go if she had sex with him. She did so because she believed it was the only way to secure her freedom.
7 What is meant by the term 'consent'? In groups, discuss whether the following acts constitute consent:
   a The victim did not protest or physically resist the sexual act.
   b The victim did not sustain any physical injury.
   c The victim had previously engaged in sexual conduct with the accused.

Analyse and evaluate

8 Read the scenario *R v Getachew*.
   a Describe the key facts of this case.
   b Explain whether the elements of rape were met in the case.
   c Do you think the sentence imposed on the accused was fair? Give reasons for your response.
9 'The impact of rape on society is just as much as the impact of murder, and so the penalties should reflect that impact.' Discuss the extent to which you agree with this statement.
10 Discuss why you believe that the vast majority of rape offenders are male.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 5.4 Check your learning
- **Weblink** Crime Statistics Agency
- **Weblink** Sentencing Advisory Council
- **Weblink** Rape (*Crimes Act 1958* (Vic))

5.5 ARSON

arson
intentionally and without lawful excuse destroying or damaging property by fire. Arson also includes intentionally and unlawfully destroying or damaging property by fire with the intention of endangering another person's life

The offence of **arson** is defined as the intentional and unlawful use of fire to destroy or damage another person's property. This includes using fire to destroy or damage property with the intention to endanger life or with the intent to gain. The offence of arson carries a maximum penalty of 15 years' imprisonment and/or a fine of 1800 penalty units (approximately $300 000).

A number of other arson-related offences exist, including arson causing death and intentionally or recklessly causing a bushfire:

Source 1 Section 201A of the *Crimes Act* states that a person found guilty of intentionally or recklessly starting a bushfire can receive a maximum penalty of 15 years' imprisonment.

arson causing death
the intentional and unlawful use of fire to cause death

intentionally or recklessly causing a bushfire
intentionally or recklessly causing a fire that spreads to vegetation on property belonging to another person

- The offence of **arson causing death** is the intentional and unlawful use of fire to cause death. Arson causing death is a 'category 2' offence, which must be given a prison sentence, unless special reasons or circumstances exist. The maximum penalty for arson causing death is 25 years' imprisonment.
- The offence of **intentionally or recklessly causing a bushfire** is the intentional or reckless causing of a fire that spreads to vegetation on property belonging to another person. The maximum penalty for intentionally or recklessly causing a bushfire is 15 years' imprisonment.

Elements of arson

For a person to be found guilty of arson, the prosecution must prove the following four elements beyond reasonable doubt:

- the accused damaged or destroyed the property by fire
- the property belonged to another person
- the accused purposely (intentionally) damaged or destroyed the property by fire, or knew or believed that the damage or destruction by fire was the likely result of their actions
- the accused had no lawful excuse for damaging or destroying the property.

These four elements of arson are further discussed below.

Element 1 – The accused damaged or destroyed the property by fire

The prosecution must prove that the accused used fire to destroy or cause some change to the physical integrity of the property.

Element 2 – The property belonged to another person

The prosecution must prove that the property was not the accused's property.

Element 3 – The accused purposely damaged or destroyed the property by fire, or knew or believed that the damage or destruction by fire was the likely result of their actions

The prosecution must present evidence to prove that the accused caused the fire with the purpose (or one of the purposes being) to destroy or damage the property, or knew or believed that their conduct was more likely than not to result in the destruction of or damage to the property. It is not sufficient for the prosecution to merely establish that the accused thought about the possibility of damage or destruction.

Element 4 – The accused had no lawful excuse for damaging or destroying the property

Finally, the prosecution must prove that there was no justification or lawful excuse for the accused's actions. A lawful excuse for damaging or destroying the property may be the honest belief that the owner had consented to the damage or destruction of the property.

Elements of arson causing death

For a person to be found guilty of arson causing death, the prosecution must prove the following five elements beyond reasonable doubt:

- the accused damaged or destroyed property by fire (see above)
- the property belonged to another person (see above)
- the accused purposely (intentionally) damaged or destroyed the property by fire, or knew or believed that damage or destruction by fire was the likely result of their actions (see above)
- the accused's action caused the death of another person
- the accused had no lawful excuse for damaging or destroying the property (see above).

Elements of intentionally or recklessly causing a bushfire

For a person to be found guilty of intentionally or recklessly causing a bushfire, the prosecution must prove the following three elements beyond reasonable doubt:

- the accused caused a fire
- the accused caused the fire intentionally or recklessly
- the accused was reckless as to the spread of the fire to vegetation on the property belonging to another person.

These three elements of intentionally or recklessly causing a bushfire are further discussed below.

Source 2 The prosecution must prove the four elements of arson for an accused to be found guilty of this offence.

Element 1 – The accused caused a fire

Under the *Crimes Act*, a person causes a fire when they light a fire, maintain a fire, fail to control a fire lit by themselves, or fail to control a fire within their control.

Element 2 – The accused caused the fire intentionally or recklessly

To prove this element, the prosecution must present evidence to prove the accused was aware that their actions would probably cause a fire. It is not enough for the accused to have known that it was possible that their actions would cause a fire.

Element 3 – The accused was reckless as to the spread of the fire to vegetation on the property belonging to another person

To prove this element, the prosecution must present evidence to prove that at the time of lighting the fire the accused actually knew of the probability of the fire spreading to vegetation on property belonging to another person, and that they would be unable to stop it. It is not enough for the accused to have recognised that it was likely the fire might spread to vegetation on property belonging to another person.

In *Davies v The Queen*, the offender appealed his conviction and sentence after being found guilty of five counts of arson (i.e. destroying and damaging property by use of fire). This is explained further in the scenario below.

ACTUAL SCENARIO

Arsonist has sentence reduced on appeal

Davies v The Queen [2019] VSCA 66 (28 March 2019)

In 2017, a 38-year-old man was sentenced to 14 years and six months' imprisonment – with a non-parole period of 12 years and three months – after being found guilty of five counts of arson. The accused had deliberately set fire to a police station, two churches, a cafe and a childcare centre over a two-week period in 2011. While no one was killed as a result of the offences, the accused caused significant damage and affected the lives of those who owned, worked and visited the destroyed properties.

During the County Court trial, the jury heard that the accused – who had committed more than 40 offences since he was 18 years old – had posted videos on the internet indicating his 'hatred for society'. In one post, the accused claimed that 'arsonists are not evil, they actually have every right to attack society'.

The accused lodged an appeal against his conviction and sentence in the Court of Appeal. The appeal was based on a number of grounds including that the trial Judge had imposed an excessive sentence in light of the accused having an autism spectrum disorder that, his legal counsel argued, reduced his culpability for the crime.

The appeal judges accepted that the accused's moral culpability for his actions was reduced to a moderate degree by his cognitive condition. However, the appeal judges found the accused was fully aware of his actions at the time of committing the offences and knew they were unlawful.

The judges found the accused's actions were pre-meditated and intentional, and were designed to destroy various institutions that the accused considered symbolised the 'wrongs that society had done to him'.

While maintaining his conviction, the Court of Appeal slightly reduced his sentence to 12 years and three months' imprisonment with a minimum non-parole period of 10 years and three months.

The scenario below looks at the case of *R v Sokaluk*. Sokaluk was found guilty of 10 counts of arson causing death after he deliberately started two bushfires on Black Saturday in 2010.

ACTUAL SCENARIO

Black Saturday arsonist found guilty of arson causing death

R v Sokaluk [2012] VSC 167 (27 April 2012)

In March 2012, a Supreme Court jury found Brendan Sokaluk, aged 42 years, guilty of 10 counts of arson causing death. Sokaluk had deliberately started two bushfires in Churchill in Victoria, in which 10 people were killed. Sokaluk – who had volunteered as a firefighter for the Country Fire Authority in the late 1980s – started the fires on a total fire ban day when extremely strong winds raged and temperatures soared to over 43°C.

In his defence, Sokaluk's legal counsel told the Supreme Court that Sokaluk – who suffered from autism and had a mild intellectual disability – was unaware at the time of his offending that his actions would cause a fire. While Sokaluk admitted throwing cigarette ash out of his car window while driving through a eucalypt plantation, in a statement given to police he claimed that he thought the ash was 'dead' and 'didn't know it had lit up …'.

By contrast, the prosecution claimed Sokaluk's explanation was a 'furphy' (i.e. a lie) because expert evidence indicated the fire was deliberately started at two different locations. The prosecution also argued that Sokaluk had demonstrated he had an intellectual 'level of functioning' that was at the very least 'reasonable' when he lodged an insurance policy claim for his car (which was destroyed in the fire) the morning after the fire. After the incident, Sokaluk also made a report to Crime Stoppers falsely claiming he saw a State Emergency Service firefighter deliberately lighting the fire.

Sokaluk was sentenced to 17 years' imprisonment with a minimum non-parole period of 14 years. During sentencing, Justice Coghlan stated that although he accepted Sokaluk was remorseful (sorry) for his actions and did not intend to kill anyone, such intention to cause death is not a necessary element for a person to be found guilty of arson causing death.

Defences to arson

For a person to be found guilty of arson and arson-related offences (e.g. arson causing death and intentionally or recklessly causing a bushfire), the prosecution must prove the relevant elements of each offence beyond reasonable doubt. The accused may try to argue that one, or more, of these relevant elements is missing. For example, the accused may argue that:

- the property belonged solely to himself or herself
- the person who owned the property gave their consent to the damage or destruction of the property or would have given their consent had they known the circumstances of the damage or destruction.

In some cases where one of the elements of a crime is missing, the accused may be charged and found guilty of an alternative offence (provided that elements for the alternative offence are proven). This principle applies to arson. For example, if the prosecution cannot prove each of the elements of arson causing death the accused may still be charged with arson (i.e. damaging and destroying property by use of fire).

Other than defending the charge of arson or arson-related offences on the basis that one or more of the elements has not been satisfied, the accused can rely on a general defence. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

General defences to arson

The general defences to arson are (more details on each of these are contained in Topic 5.1):

- mental impairment
- duress
- sudden and extraordinary emergency
- automatism.

The following scenario demonstrates how the defence of automatism can be used to defend a charge of arson.

Study tip

Whether someone has committed arson will be determined by checking the offender's actions against each element of the offence and then considering any defences applicable to the circumstances of the case.

Automatism as a defence in arson

HYPOTHETICAL SCENARIO

Lachlan was charged with arson after setting fire to a shed on his neighbour's property. The shed and its contents, including some farming equipment, were destroyed in the fire. While security system footage captured Lachlan entering his neighbour's property at 2:15 am, spreading fuel and lighting the fire, Lachlan claims he has no memory of his actions and that he must have been sleepwalking at the time of the offending.

The role of the law in developing the elements of and defences to arson

The crime of arson has been developed over time through both the **common law** and **statute law**. For example, while the definition, elements, and some defences to arson were originally developed by common law, the common law crime of arson has been abolished, meaning the definition and elements of arson are now set out in statute law.

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

Common law

The crime of arson dates back to British law in the early 1800s, when it was an offence to deliberately set fire to another person's property, including any 'stack of corn, grain, straw, hay or wood'.

In Victoria, the definition, elements and defences for arson have largely developed through the courts until the Victorian Parliament began to pass legislation clarifying the definition and elements of arson and arson-related offences.

Being the **supreme law-making body**, the Victorian Parliament is able to pass legislation at any time to change the law, including being able to **abrogate** (cancel) common law. In 1978, the Victorian Parliament passed the *Crimes (Criminal Damage) Act 1978* (Vic), which abolished the common law crime of arson. This means that arson and arson-related offences, like arson causing death and intentionally and recklessly starting a bushfire, are now governed by statute law, namely the *Crimes Act*.

supreme law-making body
the body (i.e. the parliament) that has the final law-making power, meaning it can make or change any law within its power and pass legislation to abrogate (cancel) common law

abrogate (abrogation)
to cancel or abolish a court-made law by passing an Act of Parliament

Statute law

Although the definition and elements of arson were originally established by common law, the laws relating to arson and arson-related offences are now set out in statute law (e.g. sections 197, 197A and 201A of the *Crimes Act*). In fact, over the years this Act has been amended (altered) a number of times to expand and clarify arson laws.

One of the most significant changes to arson law was made in 2003, when the Victorian Parliament passed the *Crimes (Property Damage and Computer Offences) Act 2003* (Vic) to create the crime of intentionally or recklessly starting a bushfire, including outlining the elements of the crime and the maximum penalty

to be imposed on people who are found guilty of the offence (being 15 years' imprisonment). This Act also amended the *Bail Act 1977* (Vic) to include the offence of arson causing death as a crime in which there is a presumption against an accused being granted bail.

Section 197A was also added to the *Crimes Act* to create the specific crime of arson causing death and to outline the maximum penalty for the offence, being 25 years' imprisonment.

Trends and statistics

Victoria

Despite common perceptions, perhaps in part driven by the media, the trend in arson has generally slightly decreased over recent years. For example, according to statistics compiled by the Crime Statistics Agency from 2015 to 2019, with the exception of 2016, the number of arson incidents decreased from 3099 to 2871 (as indicated in Source 3 below).

More specifically, with the exception of 2016, the number of 'damage caused by fire' offences decreased from 45.8 per 100 000 people to 35.7 in 2019 (as indicated in Source 3). Likewise, with the exception of 2016, the trend in the number of intentionally and recklessly causing a bushfire offence also slightly decreased.

YEAR	NUMBER OF REPORTED ARSON INCIDENTS	NUMBER OF 'DAMAGE CAUSED BY FIRE' OFFENCES PER 100 000 PEOPLE	NUMBER OF 'CAUSING A BUSHFIRE' OFFENCES PER 100 000 PEOPLE
2015	3099	45.8	1.6
2016	3983	56.6	3.7
2017	3049	42.8	0.9
2018	3063	38.8	0.9
2019	2871	35.7	0.7

Source 3 The number of arson and related offences per 100 000 people between 2015 and 2019 (for the year ending December), according to the Crime Statistics Agency

According to data provided by the Sentencing Advisory Council, over the five-year period from 2013–2014 to 2017–2018, 124 people were sentenced in the higher courts (generally the County Court) for arson. Of these people sentenced, 93 (i.e. 75 per cent of offenders) received an immediate custodial sentence (i.e. a term of immediate imprisonment or detainment in a youth justice centre) while 22 (i.e. 18 per cent of offenders) received a community correction order.

In 2017–2018, the average length of imprisonment imposed upon offenders was two years and six months, compared to an average length of imprisonment in 2013–2014 of two years and seven months.

From 1 July 2013 to 30 June 2018, the Sentencing Advisory Council reported that in relation to arson (i.e. destroying or damaging property by arson):

- approximately 80 per cent of offenders were male
- approximately 58.6 per cent of offenders were aged between 20 and 34 years.

United States

While it is difficult to compare arson statistics throughout the world due to differences in the definition and recording of these offences, the United States has one of the highest rates of arson in the world.

According to the United States Federal Bureau of Investigation statistics, United States (US) law enforcement agencies reported that over 41 171 arsons occurred in the United States in 2017. This represented a national arson rate of 13.3 offences per 100 000 people. The average damage and destruction caused by each arson offence was US$15 573 (approximately AU$22 000).

In 2015, statistics from the US Bomb Data Center suggested that 48 per cent of property damage or destruction arising from arson offences involved residential premises (i.e. homes), while 20 per cent involved vehicles. Other types of property involved in arson offences included storage places, businesses and offices, crops, forests, timber and fencing, religious structures (e.g. churches), schools and open areas.

While there are many reasons why the United States has high rates of arson, some experts and social commentators suggest vandalism and revenge are major causes. Revenge includes people setting fire to property to demonstrate their dissatisfaction with the way they perceive they have been treated by another person, group or society in general. People may also undertake arson in an attempt to make a false claim against an insurance company. On rare occasions offenders may be people who have an obsession with lighting fires (referred to as pyromaniacs or serial arsonists).

Source 4 An abandoned high school auditorium after an arson attack in Michigan, USA.

Possible impacts of arson

All crime has impacts on individuals and society. Arson and arson-related offences – like arson causing death and intentionally or recklessly causing a bushfire – are no exception. For example, as demonstrated in the 2010 Black Saturday and 2019–2020 national bushfires, damage and destruction to life, property and vegetation caused by fire can have devastating immediate and long-term consequences including:

- loss of human life, animals and wildlife
- destruction of property, vegetation, crops, forests and other features of the environment
- economic loss, including loss of businesses and income-earning capacity
- physical and emotional trauma on those individuals affected by the loss of life or property, and those who witness the destruction and damage caused by the fire
- loss of personal wellbeing
- a sense of shame and guilt for the offender and the likelihood of a custodial sentence.

Source 5 below summarises some of the possible impacts that arson can have on the victim and their family, on the community, and on the offender.

IMPACT ON THE VICTIM AND THEIR FAMILY	IMPACT ON THE COMMUNITY	IMPACT ON THE OFFENDER
• Loss of life and/or property, livestock and animals • Disruption to family life and work (if homes and businesses are destroyed or damaged) • Lost labour and income in the household and loss of income-earning capacity (if a business is destroyed or damaged) • Cost of re-building or re-establishing property • Trauma, grief and loss, and related physical and mental health issues	• Loss of public property and infrastructure (e.g. roads and power) and damage to the environment (including wildlife) • Cost of publicly funded medical treatment • Need for coronial services • Increased need for police, fire and emergency services • Trauma to emergency service workers and first responders • Increased insurance premiums • Loss of workplace productivity • Loss of trust	• Medical treatment and costs (if injured) • Guilt or shame in causing a death • Legal costs • Likelihood of a custodial sentence • Lost labour and income in the household • Impact on their family's social standing, finances, and health and wellbeing

Source 5 A summary of the impact of arson and arson-related offences

ACTUAL SCENARIO

Dissatisfied customer sets bank on fire

DPP v Islam [2019] VCC 217 (1 March 2019)

In March 2019, a 24-year-old man was sentenced to 11 years' imprisonment (with a minimum non-parole period of seven years) after pleading guilty to one charge of arson, four charges of causing serious injury recklessly, and 11 charges of causing injury recklessly. The accused had deliberately lit a fire inside the Springvale branch of the Commonwealth Bank in November 2016.

On the day of the incident, the accused visited the bank to withdraw some money and became dissatisfied with the service he received. He left the bank and returned 15 minutes later with petrol he had purchased from a local petrol station and a lighter. He then spread the petrol on the ground inside and outside the entrance to the bank and used his lighter to deliberately start the fire.

Fifteen of the 39 people who were in the bank at the time of the offending were injured by the fire, with four sustaining serious injuries. The accused was also seriously injured and sustained burns to approximately 60 per cent of his body. He spent five months recovering in hospital after the incident, prior to being held in custody pending his sentencing hearing.

In addition to causing the victims' physical injuries, the accused's actions had a significant impact on many other people, including bank employees, customers and other people who witnessed the crime, and emergency service workers. Indeed, during the sentencing hearing a number of victims gave statements outlining the effects of the crime on their mental wellbeing, including suffering from a range of conditions including post-traumatic stress disorder, depression, emotional stress and anxiety.

The County Court also heard that the damage caused to the bank exceeded $2.6 million. This figure did not include the loss of business while the bank was being repaired.

The accused pleaded guilty to the charges. The Judge considered a range of factors when determining the sentence, including the offender's relatively young age at the time of the offending and the fact that he was living in Australia with no family and very limited English after arriving as a refugee from Myanmar in 2013.

Source 6 Emergency service workers responding to an arson attack at the Commonwealth Bank in Springvale in 2017

5.5 CHECK YOUR LEARNING

Define and explain

1 Describe the elements of the offence of arson causing death.

2 Explain whether arson is a common law or a statute law offence.

Synthesise and apply

3 Create a hypothetical example of a situation where automatism could be used as a defence to an arson-related offence.

4 Read the scenario *Davies v The Queen*.
- **a** State the offence with which the accused was charged.
- **b** Describe the elements of the offence that must have been present for the accused to have been found guilty.
- **c** Suggest one possible defence the accused may have raised during the County Court trial. Give reasons for your response.
- **d** Describe two possible ways this crime impacts society.
- **e** Based on the limited facts provided, do you think the sentence imposed on the accused achieved the principles of justice and fairness? Give reasons for your response.

5 Read the scenario *DPP v Islam*.
- **a** Describe the basic facts of this case.
- **b** Explain how the elements of arson applied to this case.
- **c** Describe the possible impact this crime had on the accused, the victims, the witnesses, the first responders, the bank and the wider community.
- **d** Given the limited facts provided, do you think the sentenced imposed on the accused was fair? Give reasons for your response.

6 On the internet, search for the arson rates for Victoria and for one other Australian state or territory. The arson rates should be for the last five years.
- **a** Summarise your findings and explain which state or territory has the highest incidence of arson.
- **b** Suggest some possible reasons for any differences in your findings.

7 On the internet, search for a newspaper article about a case of arson or an arson-related offence.
- **a** Briefly explain the facts of the case.
- **b** Explain whether the facts of the case meet each element of the offence.
- **c** Suggest any possible defences that might be relevant to the case.
- **d** If the case has concluded, state the verdict and any sentence imposed. Do you think the sentence fits the crime? Justify your response.

Analyse and evaluate

8 What do you consider to be the major causes of intentionally or recklessly causing a bushfire? Discuss the extent to which you believe the Victorian Government has adequately responded to this offence. In your answer, explain whether or not you think the maximum penalty for this offence is appropriate.

9 In your view, should the offence of arson causing death be abolished as a crime? Should people be charged with murder instead? Discuss as a class.

Check your Student obook assess for these additional resources and more:

Student book questions
5.5 Check your learning

Weblink
Crime Statistics Agency

Weblink
Sentencing Advisory Council

Weblink
Arson (*Crimes Act 1958* (Vic))

TOP TIPS FROM CHAPTER 5

1 A number of different defences to crime exist in criminal law, but some defences are not available for some crimes. This means you must take care when examining possible defences to a particular indictable offence.

2 Examining trends and statistics allows you to practise your analysis and synthesis skills, which are important to master in the VCE Legal Studies course. Try to pull apart the data and make some conclusions as to what it means. For example, might there be particular reasons for a downward or upward trend? Is it an underreported crime?

3 The *VCE Legal Studies Study Design* requires you to use legal reasoning and principles to identify and argue the elements of an offence, possible defences, and culpability to two actual criminal scenarios or hypothetical scenarios. This means it is not enough to memorise the elements of, and defences to, a crime. You must be able to apply your knowledge to relevant cases or hypothetical scenarios. The practice assessment tasks at the end of this chapter will help you practise this skill.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Outline** two general defences in criminal law.

(4 marks)

Difficulty: medium

2 **Describe** the elements of one indictable offence you have studied. **Explain** the relevance of the elements in relation to arguments that may be raised by the prosecution and defence at trial.

(4 marks)

Difficulty: high

3 'Crime statistics are confusing and should not be relied on.' **Discuss** the extent to which you agree with this statement. Support your response with reference to at least two recent crime statistics.

(8 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Practice research activity

Use the internet and/or other sources to find two legal cases for *two* of the indictable offences covered in this chapter (i.e. one case for each offence). Make sure you find information that:

a focuses on each of your selected indictable offences rather than lots of different offences

b explains the circumstances of the offending (i.e. what the accused did) in detail

c states whether or not the accused was convicted and punished.

For the two cases you have selected, provide answers to the following questions.

Practice assessment task questions

1 Explain how prevalent this type of crime is in our community. Provide recent statistics and data to support your response.

(5 marks)

2 Identify who holds the burden of proof in the case and the standard of proof required in the case.

(2 marks)

3 Explain how each element of the crime was met (or not met).

(8 marks)

4 Describe any defences that were (or could have been) relied on in the case, and whether they were (or could have been) successful.

(4 marks)

5 What effect does this crime have on the victim, the offender and the community?

(6 marks)

Total: 25 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 5

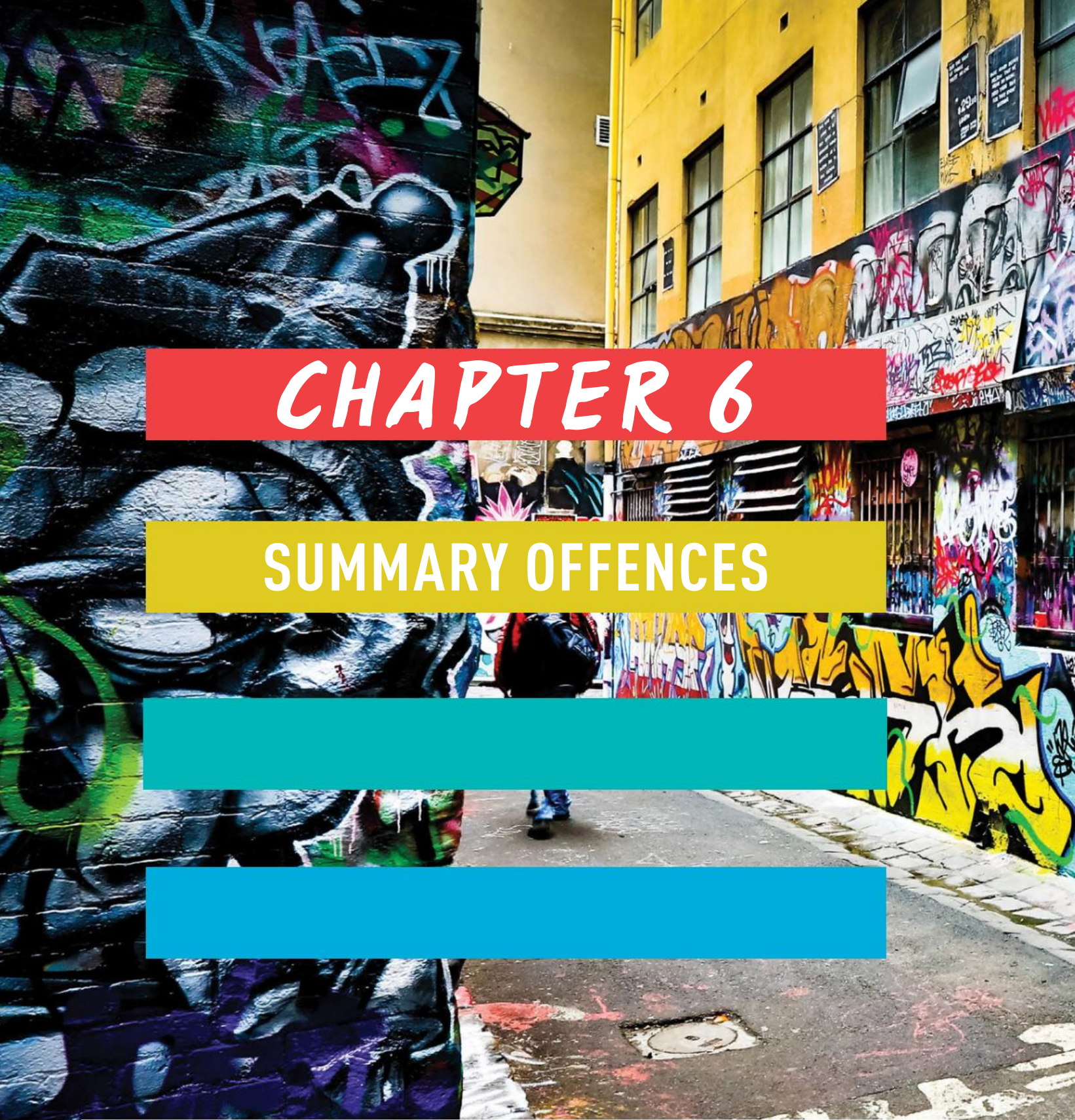
Revision notes
Revision notes for Chapter 5

assess quiz
Chapter 5
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 6

SUMMARY OFFENCES



Source 1 In Victoria, marking graffiti is a summary offence. In this chapter, you may choose to study one or two summary offences. The options are assault, minor theft, offensive behaviour, and graffiti offences.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6), you should be able to explain the purpose and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

KEY KNOWLEDGE

In this chapter, you have the option of choosing up to two criminal summary offences. For each offence, you will learn about:

- the elements of the offence
- possible defences
- the role of statute law and common law in developing the elements of the offence and the defences
- trends and statistics in relation to the offence in Victoria and in one other jurisdiction
- the possible impact of the offence on individuals and society.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research and analyse relevant information about criminal law and offences
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two offences
- use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios.

KEY LEGAL TERMS

actus reus a Latin term meaning 'a guilty act'; the physical element of a crime (i.e. the act itself). See also *mens rea*

assault the intentional or reckless use of force or the threat of force against another person without a lawful excuse

automatism a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

common law law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

defence to a crime a justification or lawful 'excuse' for committing a crime

duress strong mental pressure on someone to overcome their independent will and force them to do something

graffiti any illegal writing, drawing or scratching that defaces (i.e. damages) public property and cannot be removed with a dry cloth

marking graffiti the act of writing, drawing, scratching or defacing (i.e. damaging) public property in ways that cannot be removed with a dry cloth

mens rea a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

mental impairment a condition of the mind that impacts on a person's ability to know the nature and quality of their conduct, or that the conduct was wrong

offensive behaviour conduct that is calculated to wound feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person

statute law law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

strict liability where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

summary offence a minor offence generally heard in the Magistrates' Court of Victoria

theft the act of dishonestly taking property belonging to another person (without their consent) with the intention of permanently depriving that person of it

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

ADVICE TO TEACHERS AND STUDENTS

In **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6), you are required to study **two criminal offences** in detail.

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• TWO indictable offences (from Chapter 5)	5.2 Murder	103
	5.3 Culpable driving causing death	112
	5.4 Rape	121
	5.5 Arson	131

OR

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• TWO summary offences (from Chapter 6)	6.2 Assault	150
	6.3 Minor theft	160
	6.4 Offensive behaviour	174
	6.5 Graffiti offences	186

OR

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• ONE indictable offence (from Chapter 5) • ONE summary offence (from Chapter 6)	See above	See above

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6.1 GENERAL DEFENCES TO CRIME

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

summary offence
a minor offence generally heard in the Magistrates' Court of Victoria

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

defence to a crime
a justification or lawful 'excuse' for committing a crime

In Unit 1 – Area of Study 2, you are required to examine two criminal offences in detail. As discussed in Chapter 4, criminal offences can be classified as either **indictable offences** or **summary offences**. Indictable offences, as explained in Chapter 5, are serious crimes that are generally heard in the County Court or Supreme Court. If a person accused of an indictable offence pleads not guilty, the case is heard before a judge and **jury**. In contrast, summary offences, which are explained in this chapter, are minor crimes that are heard in the Magistrates' Court before a magistrate.

As part of your examination of these offences, you must consider possible **defences to a crime** that an accused can raise in response to a charge. A defence is a justification or lawful excuse for a crime. If successfully argued, a defence may lead to an accused being found not guilty of the crime with which they have been charged, or found guilty of a lesser offence.

Some of these defences, known as 'general defences', can be used to defend a variety of different offences. For example, 'self-defence' is a general defence that can be used as a defence to a number of crimes (e.g. murder, manslaughter and assault). However, self-defence cannot be used to defend offences such as theft.

In contrast, other defences can only be used in response to a specific offence. For example, the defence of 'right of claim' – where a person honestly believes they are the rightful owner of property – can only be used in property offences like theft.

In this topic, you will examine the main general defences available to a person who has been accused of a crime. Then, in Topics 6.2 to 6.5, you will consider which of these general defences apply to the specific crimes of assault, minor theft, offensive behaviour and graffiti, as well as any other defences that are specific to the crimes.

Source 1 The law allows people to take reasonable action (based on the circumstances) to protect themselves.

Defences to crime

In Victoria, the common (or general) defences to crime include:

- self-defence
- mental impairment
- duress
- sudden or extraordinary emergency
- automatism
- intoxication
- accident.

Each of these defences is examined in more detail below.

Defence 1 – Self-defence

Generally, an accused may use self-defence as a defence to a crime if they:

- believed that their actions were necessary to protect or defend themselves, and
- perceived their actions to be a reasonable response in the circumstances.

Once an accused raises self-defence (that is, presents evidence that suggests there was a reasonable possibility that they acted in self-defence when committing the alleged crime), the burden of proof falls on the prosecution to prove, beyond reasonable doubt, that the accused did not act in self-defence.

Policeman's claims of self-defence rejected by Judge

ACTUAL SCENARIO

In September 2017, Daniel Hornsby was arrested and detained at Moe police station after an argument with his then girlfriend.

While Hornsby was in custody, Senior Constable Dallas Howell entered Hornsby's cell to check on him. CCTV footage from the police station shows Senior Constable Howell entering the cell while Hornsby was lying on a bench inside the cell. Hornsby kicked his legs out towards Senior Constable Howell and struck him in the thigh. In response, Senior Constable Howell dragged Hornsby onto the ground and punched him in the head multiple times.

Senior Constable Howell also claimed that Hornsby spat at him, although CCTV footage and the other police officers present at the time of the incident could not confirm this claim.

In March 2019, a magistrate found the accused guilty of unlawfully assaulting Hornsby while he was in custody. Senior Constable Howell was placed on a 12-month good behaviour bond.

The offender appealed the conviction, claiming he had acted in self-defence. The appeal was heard in the County Court. In January 2020, the Court upheld the original conviction, finding that the evidence against Senior Constable Howell was 'overwhelming'. The Judge explained that 'it was Hornsby who appeared to perceive the need for self-defence' rather than the offender.

Defence 2 – Mental impairment

An accused may use the defence of **mental impairment** if, at the time of the offence, they were suffering from a mental illness and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions, and
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

One important feature of the defence of mental impairment is that an accused is presumed to *not* be suffering a mental impairment (i.e. presumed to be sane) unless it can be proven otherwise. This means that, given mental impairment may be raised by either the prosecution or the defence at any time during a trial, the burden of proving the existence of mental impairment falls on the party who raises it. In most cases, the accused raises the defence of mental impairment and therefore the burden of proof is reversed, meaning the accused must prove this defence.

When mental impairment is successfully argued, it does not result in the accused being immediately released from custody. That is, the verdict is not an ordinary 'not guilty' verdict. Instead, it is a special verdict of 'not guilty by reason of mental impairment'. In such cases, the court may impose a **secure treatment order** that allows the accused to be compulsorily detained, and receive treatment, at a mental health service (e.g. a forensic mental health hospital).

Defence 3 – Duress

An accused may use **duress** as a defence to any criminal offence if, at the time of the offence, they had a **reasonable belief** that:

- a threat of harm existed
- the threat would have been carried out unless the offence was committed

mental impairment
a condition of the mind that impacts on a person's ability to know the nature and quality of their conduct, or that the conduct was wrong

secure treatment order
a sanction that requires the accused to be compulsorily detained, and receive treatment, at a mental health service

duress
strong mental pressure on someone to overcome their independent will and force them to do something

reasonable belief
an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity) and in similar circumstances, to be sensible or correct

Study tip

The Supreme Court of Victoria publishes a podcast called 'Gertie's Law', which provides insights into the Court's role, including in deciding criminal cases and in sentencing. The podcast can be listened to for free and is an excellent way to hear directly from judges about their role in hearing cases.

- committing the offence was the only reasonable way to avoid the threatened harm, and
- their conduct was a reasonable response to the threat.

In cases involving family violence, evidence of family violence may be relevant in determining whether an accused committed an act under duress. For example, in cases where a person who has been the victim of family violence intentionally caused injury to their partner in the belief that their actions were the only reasonable way to avoid the threat of harm, evidence of the family violence may be relevant in determining whether the person has acted under duress.

Once the defence raises the issue of duress (that is, presents evidence that suggests there was a reasonable possibility the accused acted under duress), the prosecution holds the burden of proving, beyond reasonable doubt, that the accused did not act under duress.

Defence 4 – Sudden or extraordinary emergency

An accused may use sudden or extraordinary emergency as a defence to any criminal offence if, at the time of the offence, they had a reasonable belief that:

- there was a sudden or extraordinary emergency
- their actions were the only reasonable way of dealing with the situation, and
- their actions were a reasonable response to the situation.

Once an accused raises the defence of sudden or extraordinary emergency (that is, presents evidence that suggests there was a reasonable possibility their action arose due to a sudden or extraordinary emergency), the burden of proof falls on the prosecution to prove, beyond reasonable doubt, that the accused did not act in the circumstances of a sudden or extraordinary emergency.

Defence 5 – Automatism

automatism
a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

mens rea
a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

An accused may use **automatism** as a defence to any criminal offence if they committed the offence involuntarily due to having, at the time of the offence, a total loss of control over their bodily movements (i.e. the accused was not conscious or aware of what they are doing) and so could not form an intention to commit a crime (***mens rea***).

The defence of automatism may be raised in a case where an accused commits an offence:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism is a defence that is extremely rare and difficult to prove. While the burden of proof varies according to the cause of the automatism, in general, the prosecution must prove, beyond reasonable doubt, that the accused acted voluntarily (i.e. was aware of their actions when committing the offence).

The defence of automatism was used by a police officer in the case discussed in the scenario below.

ACTUAL SCENARIO

Police officer found not guilty of assault due to automatism

This case is a rare example of automatism succeeding as a defence. A police officer who assaulted a man after a high-speed car crash in New South Wales was found not guilty by reason of automatism.

Senior Constable Christopher Fullick had no memory of assaulting the man or the 10 minutes after the incident. As noted above, prior to the assault, Fullick and the victim had been involved in

a high-speed car chase. After their vehicles collided in a near-fatal crash, video footage shows Fullick assaulting the victim by kicking, punching and stomping on him.

Fullick argued that at the time of the incident he was experiencing automatism. Expert evidence was called by both parties. The prosecution's expert could not rule out that Fullick was acting with 'sane automatism' at the time. The defence relied on expert reports that suggested that Fullick was suffering from post-traumatic amnesia at the time of the assault and was therefore experiencing automatism.

Defence 6 – Intoxication

An accused may use intoxication as a defence to a criminal offence if, at the time of the offence, they acted involuntarily or without intent due to being in an intoxicated state as a result of consuming alcohol, taking drugs, or ingesting some other substance. However, in general, under the *Crimes Act 1958* (Vic), to successfully argue intoxication, the accused must prove that their state of intoxication was not self-induced. For example, they must prove that their intoxication was involuntary or due to fraud, a reasonable mistake, force, or the effects of the proper use of prescription or non-prescription medication.

Source 2 Intoxication can be used as a defence.

Defence 7 – Accident

As examined in Chapter 4, with the exception of strict liability offences, for an accused to be found guilty of a crime, they must have committed the crime with intention (i.e. a guilty mind – *mens rea* – must have existed at the time of the offence). That is, the prosecution must prove, beyond reasonable doubt, that the actions of the accused were deliberate and intentional.

The accused may raise the defence that the actions were an accident. This would apply if the actions the accused took to commit the offence were involuntary, unintentional or reasonably unforeseeable by an ordinary person.

Unfit to stand trial

In addition to defences to crime, a person cannot be tried for a criminal offence if they are deemed to be 'unfit to stand trial'. A person may be considered to be unfit to stand trial if they are unable to undertake a number of tasks at the time of their trial, including being unable to:

- understand the nature of the charges laid against them
- enter a plea
- follow the course of the trial, and
- instruct their lawyer.

Being unfit to stand trial is different to the defence of mental impairment because it refers to the condition of the accused *at the time of the trial*, whereas the defence of mental impairment refers to the condition of the accused *when they committed the offence*.

In Victoria, in cases where there is a valid question about the fitness of an accused to stand trial, an investigation will be held before the court where a jury will determine, on the balance of probabilities, whether the accused is most likely unfit to stand trial.

In March 2020, the Victorian Government introduced the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020 (Vic) into the lower house. One of the purposes of the Bill is to modernise and simplify the law relating to unfitness to stand trial, including removing the use of the jury to determine unfitness and allowing a single judge to make this decision. As at August 2020, the Bill had not been passed.

Interestingly, within weeks of the Bill being introduced, the Victorian Parliament passed the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) to allow for temporary changes to the Victorian justice system in response to the COVID-19 pandemic. In an attempt to maximise physical distancing to reduce the spread of COVID-19, the legislation temporarily required the outcome of fitness to stand trial investigations to be determined by a single judge rather than by a jury.

The scenario below provides three different examples of when accused people have been found unfit to stand trial.

ACTUAL SCENARIO

Unfit to stand trial

R v Fairest, Fields & Toohey (Rulings – Fitness to be tried) [2016] VSC 329 (1 July 2016)

In 2016, in three separate Supreme Court jury trials, three people were found to be unfit to stand trial. These cases involved the alleged murder of a 36-year-old deaf man, Robbie Wright. Wright died in January 2015 after falling 12 metres to his death from an apartment balcony in Ringwood.

Fairest was deemed to be unfit to stand trial. The Supreme Court was told that he had a moderate intellectual disability, as well as an acquired brain injury as a result of treatment for a brain tumour when he was seven years old. Fairest has been profoundly deaf since birth. In the hearing, two forensic psychologists gave evidence that Fairest did not understand the Court's process, the role of legal practitioners, or the rules of evidence. Professor Michael Daffern told the jury that Fairest also suffered from significant issues with his memory. The jury found Fairest was unfit to stand trial.

Fields was deemed to be unfit to stand trial because of her low intelligence. Her estimated IQ of 75 placed her in the lowest 0.03 per cent of the population. A Supreme Court jury found that Fields would not understand what was occurring if she went on trial for murder.

Source 3 Robert Wright died after falling from a balcony.

Toohey was also deemed to be unfit to stand trial. Toohey, who is hearing impaired, had the Supreme Court's proceedings translated to him in Auslan (Australian Sign Language). However, the Auslan interpreters who translated the Court's proceedings to Toohey did not believe that he understood Auslan to the extent required to understand the Court's proceedings. Both the prosecution and the defence arrived at the conclusion that it was not appropriate for Toohey to stand trial.

6.1 CHECK YOUR LEARNING

Define and explain

1 Outline two circumstances in which the defence of automatism may be raised by an accused.

2 When an accused person argues the defence of intoxication, the intoxication must not be self-induced. Identify two ways that intoxication can be deemed to be not self-induced.

Synthesise and apply

3 Explain how the defence of being unfit to stand trial is different to the defence of mental impairment. In your answer, refer to *R v Fairest, Fields & Toohey*.

4 Ahmed went to the football to watch a night match. The game was played at the MCG. After the match, there was a scuffle between opposing supporters of the competing teams. Punches were thrown between two men, Brendan and Neale. Ahmed was concerned that Neale appeared to be losing consciousness, so he grabbed Brendan in a headlock. Brendan fell to the ground because he was drunk, breaking his wrist in the fall. Ahmed called an ambulance to assist both men. Ahmed was charged with assaulting Brendan.

Imagine you are a lawyer representing Ahmed. Explain how you would argue self-defence.

Analyse and evaluate

5 Read the scenario 'Policeman's claims of self-defence rejected by Judge'.
- **a** Outline the key facts of the case.
- **b** Would a jury have been used in this case? Justify your answer.
- **c** What was the original decision made by the Magistrate?
- **d** Give reasons for why the Judge in the County Court appeal rejected Senior Constable Howell's claim of self-defence.

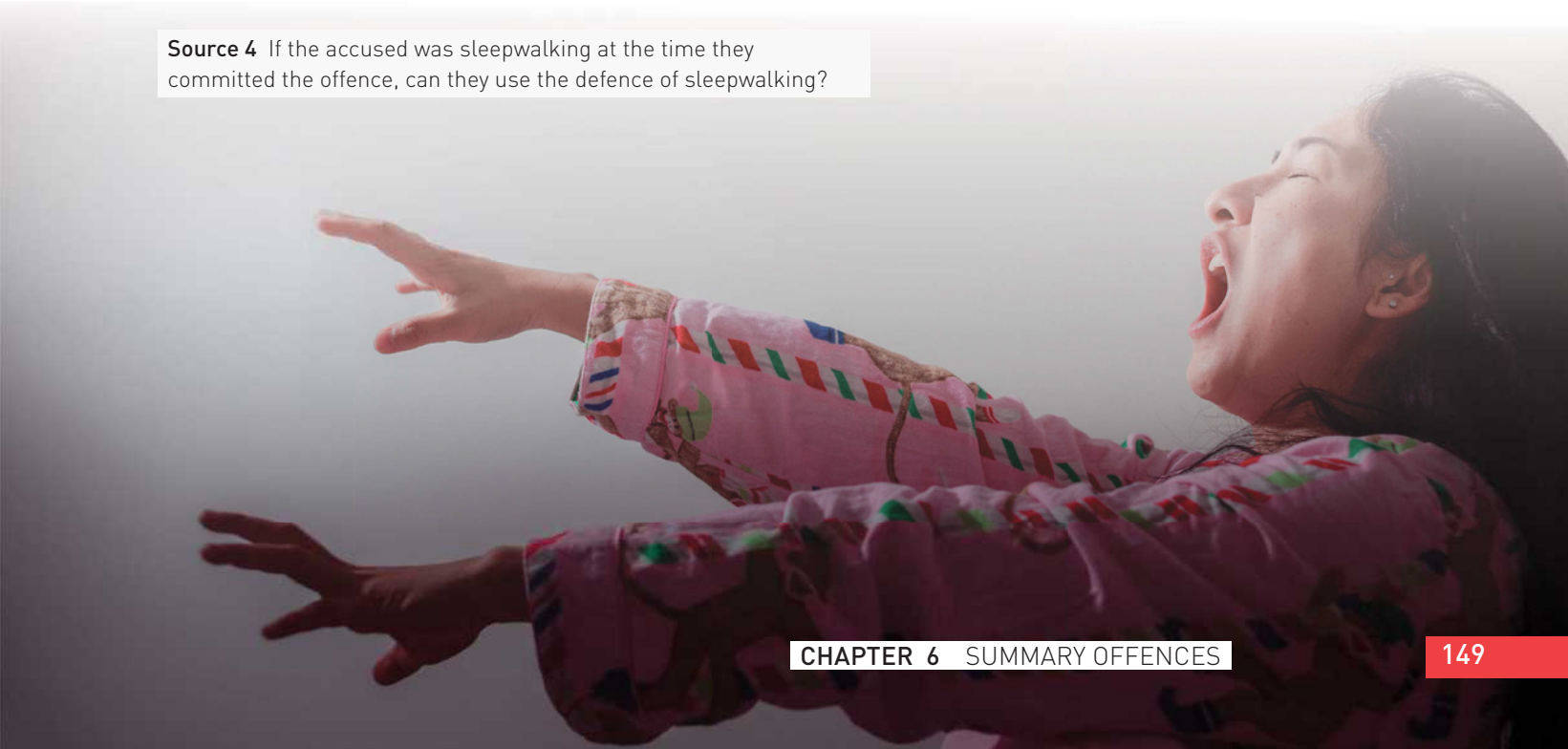
6 Read the scenario 'Police officer found not guilty of assault due to automatism'.
- **a** Explain how the defence of automatism can apply to this case.
- **b** In groups, discuss whether you agree with the final outcome of this case.

Check your Student obook assess for these additional resources and more:

Student book questions
6.1 Check your learning

Video tutorial
Introduction to Chapter 5

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz



Source 4 If the accused was sleepwalking at the time they committed the offence, can they use the defence of sleepwalking?

6.2 ASSAULT

assault
the intentional or reckless use of force or the threat of force against another person without a lawful excuse

In legal terms, an **assault** is the intentional or reckless use of force or the threat of force against another person without a lawful excuse. Depending on the severity of the offence, assault can be either a summary offence or an indictable offence. Where the victim suffers a serious injury (often requiring medical attention and hospitalisation) the assault is more likely to be an indictable offence. Less serious threats or minor assaults are dealt with as summary offences.

In this topic, you will explore common assault, an offence established by section 23 of the *Summary Offences Act 1966* (Vic). Section 23 makes it unlawful for someone to assault or beat another person. The maximum penalty is 15 penalty units or three months' imprisonment. Common assault is a summary offence tried in the Magistrates' Court.

Did you know?

According to the Crime Statistics Agency, assault is likely to be committed in conjunction with other offences such as property damage or stalking.

EXTRACT

Summary Offences Act 1966 (Vic) – section 23

Common assault

Any person who unlawfully assaults or beats another person shall be guilty of an offence.
Penalty: 15 penalty units or imprisonment for three months.

An example of an assault that resulted in a person being charged with a minor offence is provided in the scenario below.

ACTUAL SCENARIO

Drive-thru spat ends in aggravated assault charge

On 13 January 2016 at a McDonald's restaurant in Melbourne, 25-year-old Hassan Abdul-Rahim argued with staff and spat at a McDonald's 'drive-thru' attendant because he had to wait for his order. During the incident, the man honked his horn, refused to move his car and spat a large amount of saliva at the 19-year-old female attendant. The saliva landed on her face and in her mouth. The victim said she was traumatised by the event.

Abdul-Rahim was charged with unlawful assault, aggravated assault, and unlicensed driving. He pleaded guilty in the Magistrates' Court to aggravated assault (a summary offence similar to common assault).

In court, the man said he was frustrated at having to wait for his order, although the police said the delay was only 20 or 30 seconds. Abdul-Rahim admitted to clearing his throat and spitting in the woman's direction but said he had no intention of spitting at her. Lawyers said the man was remorseful and had handed himself in to police after seeing media reports about the incident. At the time, the man was on **bail** for other offences. Abdul-Rahim was sentenced to one month in prison.

Source 1 In 2016, a Melbourne man spat at a McDonald's drive-thru attendant. He was sentenced to one month in prison.

bail
the release of an accused person from custody on condition that they will attend a court hearing to answer the charges

Elements of assault

For a person to be found guilty of assault under section 23 of the *Summary Offences Act* (i.e. common assault), the prosecution must prove each of the following three elements beyond reasonable doubt:

- the accused applied force or threatened to apply force
- the application or threat of force was intentional or reckless
- there was no lawful justification or excuse.

These three elements of assault are further discussed below.

Did you know?

Under an old law that is no longer in force, a distinction was made between common assault (the threat to inflict force) and battery (the actual force). The concept of assault has developed and now it covers both a threat to inflict force and physical contact. This means the term 'battery' is obsolete in criminal law.

Element 1 – The accused applied force or threatened to apply force

The prosecution must prove that there was either a threat of force against another person, or actual physical force against another person. This force does not need to be violent, as even a slight touch can in some instances be considered assault. The following scenario demonstrates how violent force (e.g. physically punching and head-butting another) constitutes an assault.

HYPOTHETICAL SCENARIO

Night out leads to assault charge

Scenarios like this one are heard over and over again in every Magistrates' Court in Victoria.

A 22-year-old man was charged with unlawful assault for punching and head-butting a 21-year-old man at a nightclub. The pair got into an argument when the victim struck up a conversation with a girl who was also at the club. The victim was left with a bruised cheek and a bump on his forehead.

The accused pleaded guilty to assault in the Magistrates' Court. He was fined $1000 without **conviction** and placed on a **community correction order** for 12 months.

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

Element 2 – The application or threat of force was intentional or reckless

The prosecution must prove that, at the time of the assault, the accused **intended** to deprive the complainant of liberty, or cause discomfort, insult, damage, injury or pain. An accused's **reckless** conduct can also be used to prove that they acted with the intention to commit an assault offence. The element of recklessness involves acting with little regard for the consequences of the offender's behaviour.

community correction order (CCO)
a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

intentional
something deliberate; not an accident

reckless
acting, or not acting, with conscious awareness of the potential harm that is likely to be suffered

Element 3 – There was no lawful justification or excuse

The final element that needs to be proven is that there was no lawful justification or excuse for the force or threat of force. This means that the person who committed the assault did so without any authority, or beyond the level authorised by the law. An example of a lawful assault where a person is legally able to use force is when a police officer arrests a person, and when doing so, uses reasonable force. This use of reasonable force may also involve causing harm to another person that is in proportion, given the circumstances.

Some assault cases attract media attention, which may be just what the offender was after, as highlighted in the following case.

ACTUAL SCENARIO

Racecourse antics land woman in court

On Melbourne Cup Day in 2015, a 25-year-old woman, Sarah Finn, was charged with assaulting a police officer when she recklessly pushed Acting Superintendent Steven Cooper into bushes at the Flemington Racecourse in Melbourne. At the time of the incident, the police officer was in uniform and was waiting to address the media (see Source 2). He was on his phone when the woman pushed him, in full view of the media's cameras. Finn's motive was to 'get on the news'. She later admitted to being 'tipsy' and apologised for her behaviour.

In the Magistrates' Court, Finn pleaded guilty to assaulting a police officer. She was fined $800 and was ordered to pay an additional $117 in costs and $150 in compensation for the officer's broken glasses.

Source 2 Sarah Finn pushed Acting Superintendent Steven Cooper on Melbourne Cup Day in 2015.

Defences to assault

To be guilty of assault, the prosecution must prove each of the three elements of the offence beyond reasonable doubt. If the prosecution fails to establish all of these elements, the accused may be acquitted of the charge. The accused may argue that one or more of the elements do not exist. For example, the accused may argue that:

- the force applied by the accused was so minor or trivial that it was insufficient to warrant a charge of assault
- the contact made with the other person was unintentional
- the accused had lawful justification for their actions.

Other than defending the charge of assault on the basis that one or more of the elements has not been satisfied, the accused can also rely on a defence. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

General defences to assault

The general defences to assault are (more details on each of these are contained in Topic 6.1):

- self-defence
- mental impairment
- duress
- sudden or extraordinary emergency
- automatism
- intoxication
- accident.

Specific defences to assault

In addition to these general defences, the following defences to assault can be relied on by an accused.

Consent

A person cannot be convicted of assault if their actions were consensual. Consent is a partial defence, meaning that it does not completely absolve the accused of an assault charge. Whether the accused can rely on this defence depends on the circumstances in which the assault was committed and the degree of harm inflicted. In particular, generally a person cannot consent to an unlawful act or to the infliction of a serious injury or grievous bodily harm (serious physical injury).

Lawful arrest

A person may not be convicted of assault if they have the authority to carry out an arrest, such as a police officer, or are assisting a person who has this authority. If the arrest is lawful, they can arrest the person using reasonable force. Reasonable force depends on the circumstances. Little force would be required to detain a cooperative or compliant offender, but police may use more force when an offender is resisting arrest.

Lawful correction of a child

A person may be convicted of assault if they smack a child. However, it is not an assault as long as it is reasonable in all the circumstances and is genuinely intended for correction (not an angry beating). That is, parents (or their representatives) who smack a child as a form of discipline must do so within strict parameters. The physical act must not be unreasonable or excessive, and it must be appropriate to the child's age and physical or mental development.

The following legal case outlines an example of where a parent's discipline was questioned in the South Australian courts.

Smacking must be reasonable

ACTUAL SCENARIO

Police v G, DM [2016] SASC 39 (21 March 2016)

A divorced man, who was a pilot in the military, smacked his son three times in response to disrespectful behaviour. The boy reported the incident to police while staying with his mother. The father was found guilty of aggravated assault in the Magistrates' Court of South Australia.

The father appealed the Magistrate's decision. In the Supreme Court of South Australia, Justice Peek on appeal found that the man's actions were lawful. The Judge said three slaps to the boy's thigh, resulting in red marks but no bruising, were reasonable in the circumstances. The father had previously tried to reason with the boy and had given him time-out to consider his behaviour.

The role of the law in developing the elements of and defences to assault

The crime of assault has been developed over time through both the **common law** and **statute law**. For example, while the definition, elements and some defences to assault have been developed through common law, the penalty for assault, and some defences, have been established by statute law.

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

Common law

Act of Parliament
a law made by parliament; a bill that has passed through parliament and has received royal assent (also known as a statute)

The law of assault and the defences to assault have developed over time through judge-made law. The old common law offence of assault is still relevant in all cases of assault, even where an **Act of Parliament** deals with the offence specifically. That is because the word 'assault' is not defined in statute. This means the definition of 'assault' comes from common law and not from statute law. Assault is an offence that has developed through case law dating back hundreds of years in England.

Many of the defences that can be used to defend an assault charge are common law defences. These include intoxication, automatism and accident as involuntary acts. Other common law defences such as self-defence have been abolished and replaced by statute.

Statute law

The Victorian Parliament has created a range of assault-related crimes in statute law as the need arose. The parliament has established a number of serious assaults in the *Crimes Act 1958* (Vic). For example, it is a serious crime to either intentionally or recklessly cause injury or serious injury, and to threaten to kill or seriously injury another person.

The offence of common assault in the *Summary Offences Act* has remained relatively unchanged since the Act was passed in 1966, because the meaning of assault continues to evolve through case law.

A significant legislative change occurred in 2014 in relation to healthcare professionals. Section 51A was inserted in the *Summary Offences Act* specifically to protect health practitioners from assault. The law now protects all registered health practitioners from assault while they are working and providing care for patients. This became necessary after medical facilities and hospitals reported a major increase in violence against staff from patients affected by alcohol and drugs. The law was also broadened to protect all emergency services workers on duty – not just police officers – from summary and indictable assaults, and to increase the penalties that can be imposed for these offences.

ACTUAL SCENARIO

Assault in the Bendigo Magistrates' Court

In February 2020, Matthew John Morris was convicted and sentenced to three months' imprisonment for threatening to assault a female police prosecutor inside a Bendigo court building. The accused had pleaded guilty to seven charges related to the incident.

Source 3 Matthew Morris was convicted and sentenced for threatening to assault a female police prosecutor inside a Bendigo court building.

The incident occurred in May 2019 during an interview with a police prosecutor at the Bendigo Magistrates' Court. During the interview, Morris had become agitated and was asked to leave the building. In response, he said he would 'knock the glasses off' the police prosecutor's face and he threatened to bash her. Even when placed under arrest, Morris continued to threaten the police prosecutor.

In addition to sentencing Morris to three months' imprisonment, the Magistrates' Court placed him on a two-year community correction order, that is to start the day he is released from prison. The terms of this order aim to address Morris' abuse of alcohol and cannabis.

Trends and statistics

Victoria

According to the Crime Statistics Agency, the number of assaults over the period 2011 to 2020 has increased by nearly 60 per cent. The largest annual increase occurred in the year ending December 2016, when the number increased by 13 per cent. The following data from the agency tracks the increase in all assaults in Victoria across a 10-year time span. In 2019, common assault made up approximately 58 per cent of all recorded offences, followed by serious assault (35 per cent), and assault on police, emergency services or other authorised officers (seven per cent).

Source 4 below shows a clear trend of rising reported assault in Victoria each year since 2011. There are a number of factors that contribute to this increase, and these are discussed below.

TYPE OF ASSAULT	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
All assaults and related offences	**28 883**	**32 465**	**36 876**	**37 722**	**37 013**	**40 523**	**43 663**	**43 314**	**44 713**	**45 804**
Common assault (non-family violence)	7536	7462	7941	8153	7793	8550	9488	10 367	11 414	11 648
Common assault (family violence)	4452	6582	8558	9455	10 071	12 150	13 992	13 792	14 137	15 422
Serious assault (non-family violence)	10 380	9980	10 171	9508	8296	8473	8674	8606	8417	8046
Serious assault (family violence)	4271	6121	7660	7907	7969	8487	8390	7627	7727	7778
Assault on police and other officers	2244	2320	2546	2699	2884	2863	3119	2922	3018	2910

Source 4 Victorian assault statistics from the Crime Statistics Agency – recorded offences for the year ending March 2020

The data in Source 4 shows that over 50 per cent of the assaults in Victoria are related to family violence. There has been action taken by the Victorian Government to combat the prevalence of family violence-related assault, including the 12-year National Plan to Reduce Violence against Women and their Children 2010–2022 and in the 2015 Victorian **Royal Commission** into Family Violence.

The widespread abuse of alcohol and drugs in the community is a contributing factor to the upwards trend in recorded assault generally. According to the Noffs Foundation, alcohol is reportedly a key factor in half of all police-reported family violence incidents Australia-wide.

The increase in the use of crystal methamphetamine (street name 'ice') has also been shown to have a significant impact on violence in the community.

The Alcohol and Drug Foundation identifies violence as one of the key long-term impacts of ice use. Furthermore, frequent use of ice may lead to psychosis, which is characterised by paranoid delusions, hallucinations, and aggressive or violent behaviour. Police Association Secretary Wayne Gatt told the *Herald Sun*, 'Ice poses a danger to everyone, first and foremost our police who are called on to stop the erratic and violent behaviour of those users before it impacts on the community'.

royal commission the highest form of inquiry into matters of public concern and importance. Royal commissions are established by the government and are given wide powers to investigate and report on an important matter of public concern

New South Wales

New South Wales is the most populated of all the states and territories in Australia, with 7.7 million Australians living there. This is one reason why the data in Source 5 below from the NSW Bureau of Crime Statistics and Research includes figures almost double those of Victoria.

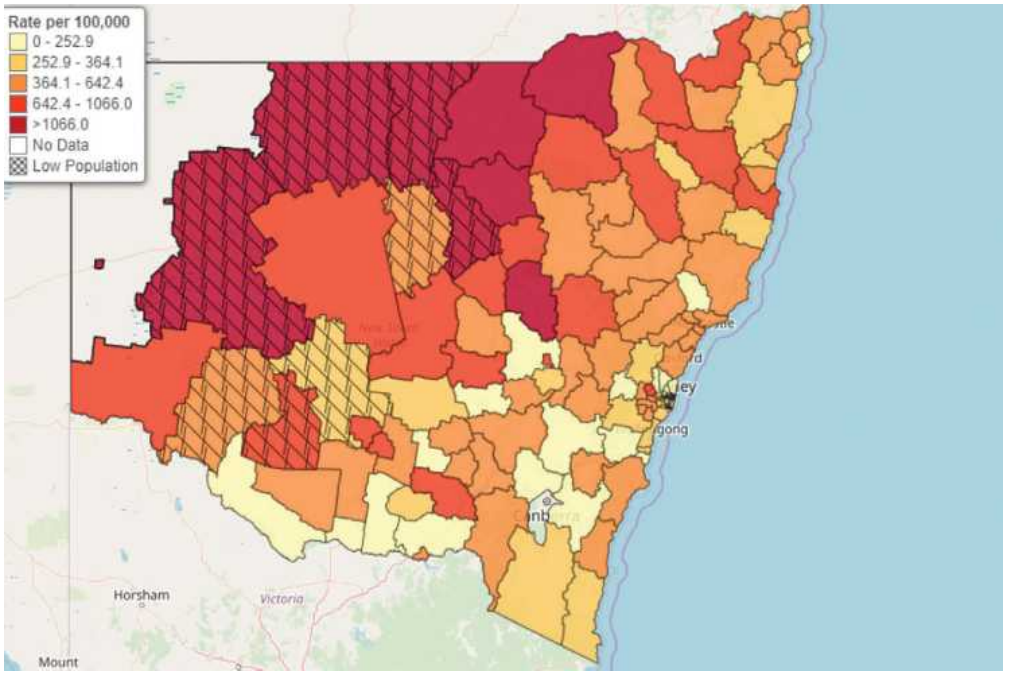
TYPE OF ASSAULT	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
All assaults	**68 394**	**66 771**	**65 371**	**65 175**	**63 483**	**62 443**	**63 245**	**63 032**	**64 097**	**65 867**
Domestic violence related	26 154	26 907	27 553	28 431	29 199	29 113	29 148	28 470	29 710	31 187
Non-domestic violence related	39 867	37 369	35 584	34 090	31 766	30 858	31 772	32 227	31 911	32 210
Assault on police officers	2373	2495	2234	2654	2518	2472	2325	2335	2476	2470

Source 5 New South Wales assault statistics from the NSW Bureau of Crime Statistics and Research

Unlike Victoria, recorded assaults in New South Wales do not have a clear trend in one direction. The highest number of assaults reported was 68 394 in 2010. Between 2010 and 2015, there was an eight per cent drop in recorded assault. At the time, Australian Institute of Criminology Deputy Director Dr Rick Brown attributed this drop to changes to bail laws, greater police budgets and more police than ever before (16 795).

However, since 2016 the data shows a slowly rising trend in reported assault. This upward trend can be attributed to similar reasons to Victoria.

As explained above, there has been an increase in family violence reports in Victoria over the last decade. Similar data from New South Wales shows the same trend. As of September 2019, the assault rate in New South Wales (specifically for family violence-related assault) was 393.7 per 100 000 people.



Source 6 Data from the NSW Bureau of Crime Statistics and Research shows that the rate of domestic violence-related assaults in western New South Wales is 3.6 times the state average.

The rate of family violence in New South Wales is higher in the more remote parts of the state. The map in Source 6 shows the alarming rate of family violence in western New South Wales. This can be linked to the lack of access to legal, medical and psychological support services in areas away from major urban centres. In 2020, there was only one domestic violence liaison officer stationed in Broken Hill, which is located 1143 kilometres from Sydney.

Furthermore, New South Wales is experiencing similar widespread use of alcohol and

drugs, including ice. As of December 2019, recorded possessions of ice in New South Wales were up 11.7 per cent compared to data from the previous two years.

In 2020, the New South Wales Government released a report, *The Special Commission of Inquiry into the Drug 'Ice'*. This report puts forward a range of recommendations about the use of ice and its impacts on health, social and criminal justice issues in the state. The New South Wales Government considered the recommendations in 2020 and prepared a response based on the advice received.

Possible impacts of assault

All crime has impacts on individuals and society. Assault significantly impacts:

- the victim (and their family and friends)
- the community
- the offender.

Impact on the victim (and their family and friends)

Assault-related crime has a range of impacts on the victim, from physical injuries to psychological effects. An assault may leave the victim with pain and suffering from bruises, tissue damage, cuts or broken bones. These injuries may be short-term or long-lasting. Long-term injuries may significantly alter a person's life and may interfere with the person's work or study, and social or sporting commitments. This includes the victim lacking confidence to go out in public and to be in crowds, especially if the assault occurred in a public place.

There may also be an impact on the victim's family in terms of assisting the victim in their recuperation. This may involve taking care of the victim's daily needs and taking them to medical appointments.

Source 7 A 19-year-old man was chased and bashed by youths in Werribee as he walked to a nightclub. In the attack, he sustained a fractured cheekbone, as well as bruising and cuts.

Impact on the community

The impact of violence in a community may also affect future generations. The use of violence is often learnt behaviour. Young people who witness or experience violence may suffer emotionally and psychologically. They are at risk of resorting to violence when faced with interpersonal issues. They may do so out of frustration, anger or retaliation but it is more likely that they resort to violence because they do not know any other way to handle conflict.

There may also be an impact on the community if a significant person such as a paramedic is assaulted, and that person is unable to continue working due to the trauma involved. In this situation, a valuable member of the community who assists in public safety is no longer able to fully engage in public life, at least in the short term.

Impact on the offender

While the offender deserves punishment for assaulting another person, there are consequences for that person that might exceed the sanction that was imposed by the criminal justice system. This especially affects people in positions of responsibility, such as teachers who might lose their job and their reputation through an assault on a student. The same loss of public standing could also affect a member of the police force who was disciplined for an assault on a member of the public, where it was found that excessive force was used.

Public figures, such as people in the world of business and sport, can also suffer lost income and even financial ruin if they are convicted of assault. Sporting clubs have strict codes of conduct and can impose their own punishments, which are separate from the courts. The scenario below shows that although an assault occurred in New South Wales, the impact was felt in the offender's home state of Victoria as a result of widespread publicity.

Source 8 below summarises some of the possible impacts that assault can have on the victim and their family, on the community, and on the offender.

IMPACT ON THE VICTIM AND THEIR FAMILY	IMPACT ON THE COMMUNITY	IMPACT ON THE OFFENDER
• Disruption to family life • Trauma, grief, loss and related medical issues • Lost income • The need for family members to take care of the victim as they recover • Continuing psychological issues • Loss of trust in law and order and community values	• Cost of publicly funded medical treatment • Increased need for police officers and emergency services workers • Loss of workplace productivity • Damage to community property • Loss of trust in law and order, and community values • Decreased level of community safety and feelings of wellbeing	• Medical treatment and costs (if injured) • Guilt or shame • Legal costs and the financial impact of sanctions (e.g. fines and imprisonment) • Lost income • Impact on the offender's family's social standing, finances, health and wellbeing

Source 8 A summary of the impact of assault

ACTUAL SCENARIO

The 'brain freeze' that cost $750 000

In 2018, prominent chef George Calombaris won his appeal against a conviction for punching a 19-year-old man at the 2017 A-League grand final, which was played between Melbourne Victory and Sydney FC. Mr Calombaris described his actions on that day as a 'brain freeze' and he was immediately remorseful.

The Judge hearing the appeal said that while the offence of assault had been proven, Calombaris had acted under provocation. The Judge also found that the blow inflicted by the accused was not forceful, and Calombaris was 'a person of exceptional character'. The provocation arose from Calombaris' restaurants underpaying their staff, which led to verbal abuse by other people at the match. The victim had also used an offensive word to describe Calombaris' mother.

Source 9 Prominent restaurateur, George Calombaris, won an appeal to overturn a conviction for a minor assault at the 2017 A-League Grand Final.

In evidence presented to the District Court of New South Wales, Calombaris said that the assault had cost him $750 000 in his role as a product ambassador for a major food brand and a luxury car dealership. He had also stepped down as Melbourne Victory's number-one ticket holder. The Judge dismissed the charge and imposed a 12-month good behaviour bond. While this offence occurred and was dealt with in New South Wales, it was reported in Calombaris' home state of Victoria, which caused him significant embarrassment.

6.2 CHECK YOUR LEARNING

Define and explain

1 Explain why assault can be classified as either a summary offence or an indictable offence.
2 Identify the elements that need to be proved for a person to be charged with common law assault.
3 Describe four possible impacts of assault on the community.
4 Explain how both common law and statute law have a role to play in developing the elements of assault.

Synthesise and apply

5 Are assaults in Australia increasing or decreasing? In your answer, give two reasons why the rate of family violence might spike during a pandemic or natural disaster.
6 Read the scenario 'Drive-thru spat ends in aggravated assault charge'. Explain why Abdul-Rahim's actions still constitute assault even though he may not have intended to commit the crime.
7 Read the scenario 'Racecourse antics land woman in court'. Apply the elements of the crime to explain why Finn's actions are an example of unlawful assault.
8 Read the scenario 'Smacking must be reasonable'.
   a Outline the key facts of this case.
   b To what extent does the outcome of this case send a clear message to other parents that corporal punishment is a serious offence? Explain your answer.
9 Consider each of the following scenarios. Argue whether a defence to assault applies in each circumstance.
   a A paramedic, Eric, is kicked by a patient who is having an epileptic fit.
   b A five-year-old child, Anouk, has a tantrum in a supermarket. The mother smacks the child's bottom twice with an open hand.
   c Emily willingly participates in martial arts and is often hit, punched and kicked by opponents during competitive bouts.
   d Jim is in an aged-care home and he has advanced dementia. He slaps another resident, Sam.
   e A woman, Marie, is scared of being abducted while she walks home alone at night. One night while walking home, a man, Daniel, touches her on the shoulder from behind. Marie responds by punching, biting and kicking Daniel. Daniel said later that he initially thought Marie was his sister.
   f A woman in Queensland, Margherita, is talking on the phone to her sister, Grace. They get into an argument and Margherita says to Grace, 'I'm so angry at you I could punch your lights out!' Grace lives in Victoria.

Analyse and evaluate

10 It has been suggested that all emergency workers should wear body-cameras. To what degree do you think this would prevent emergency workers being assaulted? Discuss this as a class.
11 Outline the extent to which assault is prevalent in the community. Discuss what steps could be taken to reduce the prevalence of assault. In your answer, refer to:
   a the trends in assault as a crime since 2011
   b the higher rate of family violence in rural and remote areas.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 6.2 Check your learning
- **Weblink** Assault offences in Victoria
- **Weblink** Assault (Victoria Legal Aid)
- **Weblink** Assault (*Crimes Act 1958* (Vic))

6.3 MINOR THEFT

theft
the act of dishonestly taking property belonging to another person (without their consent) with the intention of permanently depriving that person of it

According to the *Crimes Act*, a person is guilty of **theft** if they 'dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it'. In Victoria, the offence of theft is found in section 74 of the *Crimes Act*. This means that it is an indictable offence.

However, schedule 2 of the *Criminal Procedure Act 2009* (Vic) lists a number of indictable offences that may be heard and determined by a magistrate as a summary offence. One of these offences is theft where the amount or value of the property alleged to have been stolen does not exceed $100 000, or the property alleged to have been stolen is a motor vehicle. If the matter is heard in the Magistrates' Court, the maximum penalty that can be imposed is two years' imprisonment.

Did you know?

In South Australia, it's an offence to disturb another person by wilfully pulling or ringing the doorbell of a house. The maximum penalty that can be imposed for this offence is $250.

EXTRACT

Crimes Act 1958 (Vic) – section 72

Basic definition of theft

1 A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

2 A person who steals is guilty of theft; and 'thief' shall be construed accordingly.

Source 1 Sergeant Danny Brown, based in Terang, undertook to reduce theft in the area by fitting anti-theft screws to vehicles' registration plates. Offenders use stolen plates to avoid detection when committing offences such as 'petrol drive-offs' and burglaries. This type of offence is explored in this topic.

Elements of minor theft

To establish that theft occurred, the prosecution must prove each of the following three elements beyond reasonable doubt:

- the accused appropriated (took) property belonging to another
- the accused took the property with the intention of permanently depriving the other of it
- the accused acted dishonestly.

The first element is the ***actus reus*** of the crime, and the second two elements are the *mens rea* of the crime. These three elements of assault are further discussed below.

actus reus
a Latin term meaning 'a guilty act'; the physical element of a crime (i.e. the act itself). See also *mens rea*

Element 1 – The accused appropriated (took) property belonging to another

The prosecutor must prove that the accused 'appropriated' someone else's property, meaning that they took and assumed the rights to control and possess this property. 'Property' is a term defined by legislation. It includes money, physical (tangible) goods such as motor vehicles, jewellery, appliances, mobile phones and furniture, as well as intangible property such as electricity.

Pursuant to section 71(2) of the *Crimes Act*, property 'belongs' to anyone who has possession or control of it, or who has any other proprietary right or interest in it. The prosecution only needs to establish that someone other than the accused had property rights that were appropriated. There is no requirement that the prosecution prove who actually held those rights.

Did you know?

In Victoria, electricity companies share information about electricity usage with the police. This information can be used to pinpoint properties used to grow cannabis using illegal hydroponic methods of cultivation (these methods require a large amount of electricity). Many offenders are aware of this and so bypass the electricity meter to avoid detection and to steal energy from the grid. However, many offenders have been caught and ordered to repay the electricity companies for the electricity they have stolen.

Element 2 – The accused took the property with the intention of permanently depriving the other of it

The prosecution must establish that the offender intended to permanently deprive the owner of the property. If the accused only had an intention to *temporarily* deprive the owner of their property, this is unlikely to constitute theft. For example, if an accused person borrowed a pair of shoes, this element will not be met.

However, according to section 73 of the *Crimes Act*, a person may be regarded as having intended to permanently deprive the owner of the property if it was their intention to treat the property as their own to dispose of, regardless of the owner's rights, or if they borrowed or lent the property for a period of time and in circumstances which made it an outright taking or disposal.

If a person takes property and returns that property when it has been fundamentally changed, the accused is considered to have permanently deprived that owner of that property (e.g. if a person took a ticket to a concert at the MCG, and returned the ticket the day after the event had occurred).

Element 3 – The accused acted dishonestly

The prosecution must prove that the accused acted dishonestly. Section 73(2) of the *Crimes Act* states that a person's appropriation is not to be regarded as dishonest if the person believed that:

- they had a legal right to deprive the owner of the property, or
- the owner would have consented to the appropriation if they had known of the appropriation and the circumstances surrounding it, or
- the owner could not be discovered by taking reasonable steps. This applies in circumstances where a person finds property or receives property by mistake. As long as the recipient of the property genuinely believes that the owner could not be identified or located by taking reasonable steps, they are not guilty of theft.

If property has been abandoned, under the law it no longer belongs to the person who has intentionally relinquished all ownership rights. If a person were then to take that property that has been abandoned, then they would not be guilty of theft. However, if the person has merely lost rather than abandoned the property, they are still regarded as having ownership of those goods, and it cannot be appropriated by someone else. This is demonstrated in the hypothetical scenario on the next page.

HYPOTHETICAL SCENARIO

Theft allegation over school formal dress

Anna purchased a dress for $450, which she wore to her school formal. After the formal, Anna tried to sell the dress online for $300. Anna had no interest from potential buyers, except from her friend Charlotte, who offered Anna $50 for the dress. In frustration, Anna left the dress on the nature strip outside her house among the 'hard garbage' that the local council collects. Charlotte was walking past Anna's house and saw the dress lying among pruned tree branches. Thinking that the dress was being thrown out, Charlotte took the dress and went home.

Two months later, Anna saw Charlotte wearing the dress at a party, and accused her of stealing the dress. Charlotte explained that she had 'never stolen anything' in her life, and that Anna 'should have accepted my offer of 50 bucks'. Anna went to her local community legal centre where one of the lawyers, Isabella, explained that what Charlotte did was not really theft because the property had been abandoned.

While theft may sound like a serious criminal offence that most people would never encounter in their daily life, minor theft can occur in public places like supermarkets (note that stealing from a shop is called shoplifting). This is explained further in the scenario below.

ACTUAL SCENARIO

Shoplifters and swipers

Organised crime gangs are considered to be largely responsible for a 16 per cent increase in shoplifting in Australia in 2018–2019, which cost retailers over $2 billion.

An emerging form of theft is 'swiping'. This is where an offender passes through a self-serve checkout and, when requested to enter the item description for fruit and vegetables, nominates a much less expensive item than the one they are taking (e.g. they select peanuts when they are actually purchasing macadamia nuts, which are much more expensive).

Source 2 An emerging form of theft is 'swiping', where shoppers fail to act honestly when processing their items at self-serve checkouts.

In Victoria, an on-the-spot fine can be given to shoplifters where the value of the goods is less than $600. The fine is two penalty units. Payment of the fine is not seen as an admission of guilt and no conviction is recorded. For an on-the-spot fine to be given:

- it must be the person's first shoplifting offence
- the offender must make restitution (i.e. compensate for the loss), as required by the shop-owner
- the offence cannot occur in the offender's workplace.

Defences to minor theft

To be found guilty of minor theft the prosecution must prove each of the three elements of theft beyond reasonable doubt. If the prosecution fails to prove each of these elements, the accused will not be found guilty of theft. The accused may therefore try to argue that one, or more, of the elements is missing. For example, the accused may argue that:

- they did not take the property
- the property that they took did not belong to the person making the accusation
- they had no intention of permanently depriving the owner of the property.

Other than defending a minor theft charge on the basis that one or more of the elements of theft has not been satisfied, the accused can rely on a defence. Several defences to a charge of theft are available. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

General defences to minor theft

The general defences to minor theft are (more details on each of these are contained in Topic 6.1):

- mental impairment
- duress
- sudden or extraordinary emergency
- automatism
- intoxication.

Specific defences to minor theft

In addition to these general defences, the following defences to theft can be used by an accused.

Subjective belief

This is the main defence in minor theft cases. It is based on the argument that the appropriation of property was not dishonest because the accused believed that she or he had a legal right to deprive the other person of the property. This defence applies where the accused's belief was based on a genuine mistake of fact or a mistake of law that they had a legal claim of right over the property. This includes the accused's belief that they would have had the owner's consent if they knew the person was appropriating the property. For example, the accused may argue that they have been allowed to borrow a car in the past and took the same vehicle without first asking the owner of the vehicle.

Inability to obtain the permission of the owner

The accused might argue that the owner of the property that was taken cannot be discovered, even though reasonable steps were taken. This might include notifying the police. For example, imagine that a person found a diamond ring on the street and advised the police, who made a record of the item having been found. If the finder of the ring then sold it 12 months later, it could be argued that there was an assumption that the owner's permission could not be obtained, given the time between the finding of the ring and its sale.

Claim of right

This defence can be used when the accused genuinely believes that they have a *bona fide* (authentic) claim of right to the property they are accused of stealing from another person. This defence also extends to any person who takes property on behalf of another, or in collaboration with another, if they believe that another person has a genuine claim of right to the property in question.

The role of the law in developing the elements of and defences to minor theft

Common law

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

The courts, both in Australia and the United Kingdom, have developed **common law** principles related to theft. For example, the courts have had a significant role to play in explaining what is meant by the terms 'appropriate' and 'property', and what it means to 'permanently deprive' a person of their property.

The role of the courts is essential in creating legal principles from cases that arise in the community, especially as different trends emerge in theft that need to be addressed by the law. An example of this is explored in the scenario below.

ACTUAL SCENARIO

What happens if your friend gives you a stolen car to use?

Stein v Henshall [1976] VR 612

On 11 July 1975, the accused, Henshall, was found alone by police near a stolen car in a street in Kensington. He had been with a companion named Graham, who had left the scene before the police arrived. Henshall explained to police that he had been seated in the car and had not driven the vehicle.

In his interview with the police, Henshall stated that Graham had stolen the car on 8 July, and Henshall knew that the car had been stolen.

The following conversation is from the record of Henshall's interview with the police. During the interview, Henshall explained how on 8 July, Graham had picked him up in the stolen car and they went driving:

Police: What happened after Graham picked you up?
Henshall: We went around Footscray and Sunshine.
Police: What happened then?
Henshall: We went for a drive.
Police: What happened then?
Henshall: Then we took it to this old house. Then he said I could take the car home. I said, 'No'. Then he conned me into it. Then we just went to the Kensington flats and went home.
Police: What was the address in Kensington that you went to?
Henshall: Only went to the flats where I left the car, then I went home.

On 9 July 1975, the day after the car was stolen, Henshall went for a drive with some friends and returned the car to the flats in Kensington. On 11 July, Henshall once again drove the car and picked up passengers. One of the passengers was a 15-year-old known as Wormy. At one point, Wormy took over driving the car. It should be noted here that Wormy and Graham are different people.

The case was heard in the Magistrates' Court. During the hearing, the police prosecutor submitted that the original thief of the car was Wormy, and that he had left the car when the police arrived and found Henshall in Kensington. The police prosecutor asserted that in doing so, Wormy could be considered to have abandoned the car.

The Magistrate presiding over the case said that:

> there has been no abandonment, no break in possession by [Wormy]. [He] did give the accused permission to drive the car. I don't think that amounts to appropriation. The accused was driving the car with [Wormy's] permission. The defendant used the car without the owner's permission. The prosecution has failed to prove appropriation by this accused.

On this basis, the Magistrate dismissed the charge of theft (against Henshall). The prosecutor applied to appeal this decision on two grounds:

- that on the evidence, the Magistrate should have found that Henshall had stolen the car within the meaning of section 72 of the *Crimes Act*, and
- that on the evidence, the Magistrate should have found that Henshall had appropriated the car within the meaning of section 73 of the *Crimes Act*.

The appeal was heard by Justice Lush in the Supreme Court of Victoria. During the appeal, the prosecution argued that Henshall had taken possession of the car from the thief, Graham, and had driven and used it at will. There was no evidence 'that the thief was going to get the car back or wanted it back or had reserved any right to get it back'. The prosecution argued that Henshall's conduct amounted to appropriation because the accused had control of the car and was using the car for his own purposes.

Justice Lush said that:

> the assumption of the rights of an owner … involves the taking on one's self of the right to do something which the owner has the right to do by virtue of his ownership. I do not accept the argument that the conduct required to establish an assumption of the rights of an owner extends to establishing an intention to exclude all others.

His Honour continued:

> The question is – and is only – whether the defendant acted in relation to the car in a manner in which the owner would have the right to act. On Wednesday 9 July, and Friday 11 July, the defendant used the car for his own purposes – not for the original thief's purposes or for those of any other person but himself. To make such a use of it was one of the rights of ownership; and the defendant, in my opinion, assumed that right.

Justice Lush set aside the original decision of the Magistrates' Court. The case was remitted for re-hearing by the Magistrates' Court.

Source 3 In the case of *Stein v Henshall*, the Supreme Court decided that although an accused person may not have originally stolen a vehicle, they can later be found guilty of theft if they use that vehicle as if it were their own.

Statute law

The *Crimes Act* contains the main provisions relating to the offence of theft. Under the legislation, theft-related offences include:

- property that has been obtained by deception
- burglary, where the offender enters land or property as a trespasser, with the intention of stealing something, damaging property or assaulting another person

- robbery, which is theft with force or fear of force
- armed robbery, where the accused uses a weapon or creates the impression that they are carrying a weapon
- going equipped to steal
- handling stolen goods
- receiving stolen goods.

The Victorian Parliament continues to establish statutory theft offences in response to growing trends, as demonstrated by the introduction of the *Wage Theft Act 2020* (Vic).

ACTUAL SCENARIO

Combating wage theft

Wage Theft Act 2020 (Vic)

In response to the growing concern about the incidence of wage theft across Australia, the Victorian Government introduced legislation in 2020 to make wage theft a specific offence.

Wage theft is the dishonest underpayment or non-payment of employee entitlements. Wage theft includes not paying an employee what they are owed or failing to keep a proper record of an employee's leave entitlements.

The *Wage Theft Act 2020* (Vic) allows company directors and senior managers to be prosecuted for wage theft. This Act provides three specific wage theft offences:

- theft of an employee's entitlements
- falsification of an employee's record
- failure to keep a record of an employee's entitlements.

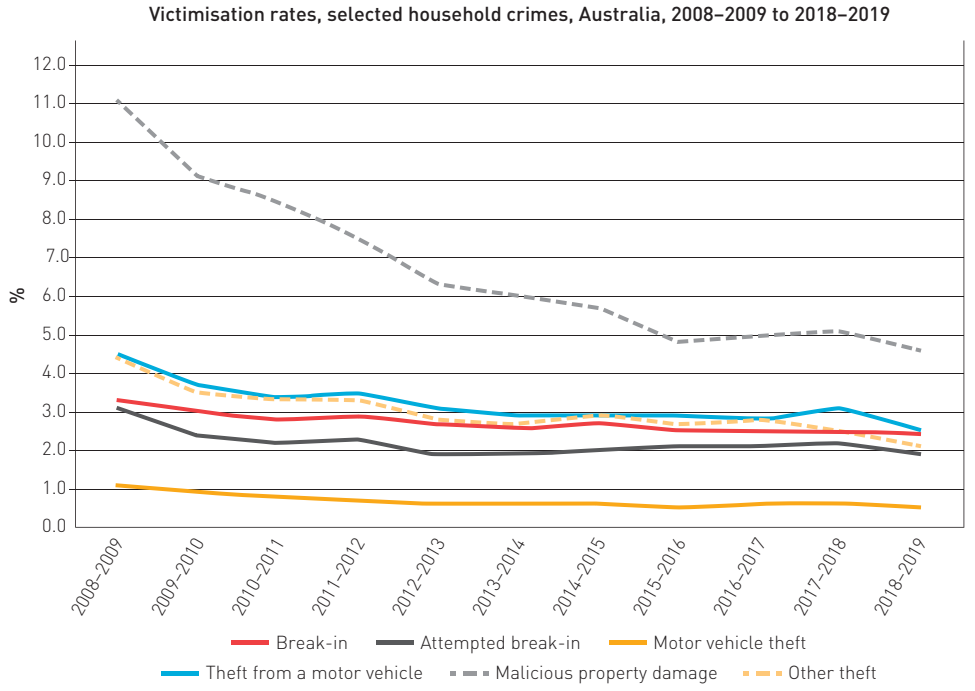
If found guilty, individuals and corporate managers face heavy fines and up to 10 years' imprisonment.

Source 4 Wage theft has become an increasing problem in Australia, with young people in casual and permanent part-time work being underpaid and not receiving leave entitlements. In 2020, the Victorian Government introduced legislation to create a specific wage theft offence.

Trends and statistics

The Australian Bureau of Statistics' (ABS) crime victimisation survey seeks information about both reported and unreported crimes. Data for victimisation rates is collected by the ABS to show national trends in crime over time. The term 'victimisation rate' refers to the total number of households that experienced a crime type, expressed as a percentage of all households in Australia.

During 2017–2018, it was estimated that 72 per cent of households that experienced a break-in had made a report to police. That figure rose to 95 per cent for motor vehicle theft.



Source 5 The victimisation rate in Australia across all property offences has declined over the decade to 2018–2019. This is due to greater household security and anti-theft technology on new cars.

Victoria

The following data from the Crime Statistics Agency shows the increase in theft over a 10-year time span in Victoria. These figures are for many types of theft (both indictable and summary offences). Some of the more serious cases would have been heard in the County Court and treated as indictable offences.

2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
138 160	142 227	146 048	148 716	147 687	172 945	189 071	164 645	170 333	190 532

Source 6 Recorded thefts in Victoria for the year ending March

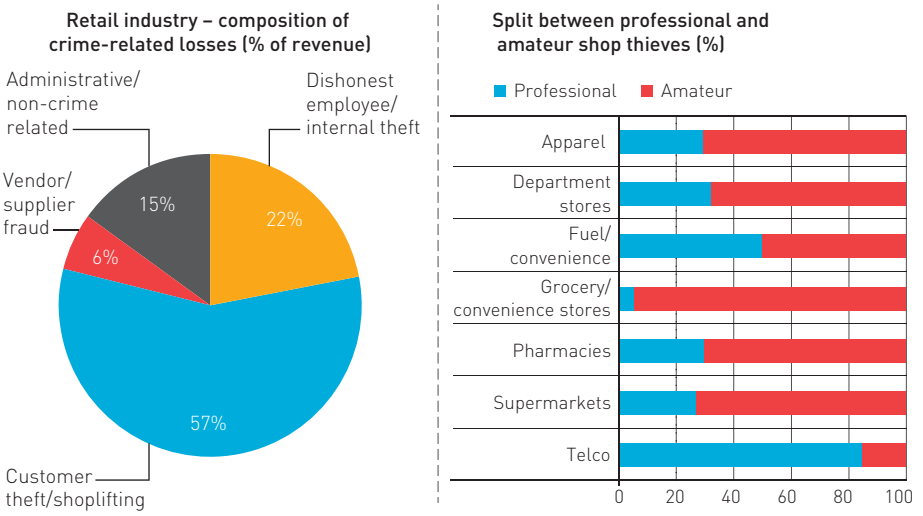
For a significant portion of the past decade, theft has generally increased in Victoria. Both theft of a motor vehicle and stealing from a shop (shoplifting) have steadily increased. Both are summary offences.

With the increase in self-serve shopping, retailers are seen as a soft target for shoplifting. Between 2018 and 2019, there was a 16 per cent rise in shoplifting in Australia. A survey conducted in 2018 of over 9000 retailers with annual sales of around $95 billion found that shoplifting accounted for 57 per cent of loss of stock. The estimated annual cost to the retail sector was $3.37 billion. Staff at some major clothing stores report often finding security tags behind mirrors and in the pockets of other garments. Retailers such as Coles and Woolworths have responded by installing cameras that film customers at each self-serve checkout, and employ security guards to monitor their stores. These strategies are meant to act as deterrents to potential offenders.

Did you know?

According to the ABS, in Australia in 2018–2019, the following reports were made to the police:

- 2.4 per cent (231 000) of Australians experienced a break-in
- 1.9 per cent (181 900) of Australians experienced an attempted break-in
- 0.5 per cent (46 100) of Australians experienced the theft of a motor vehicle
- 2.5 per cent (240 600) of Australians experienced theft from a motor vehicle.



Source: The Australian and New Zealand Retail Crime Survey

Source 7 This data was published by the *Australian Financial Review* in 2019 and is from the Australia and New Zealand Retail Crime Survey. It highlights the impact of shoplifting on the retail sector, and ultimately, on consumers who pay higher prices for goods to cover the losses.

The retail sector is not the only area heavily impacted by theft. As discussed in the scenario below, the theft of livestock in rural Victoria is a major issue.

ACTUAL SCENARIO

Livestock theft a serious issue in Victoria

The theft of livestock has become a major issue in Victoria. In this state alone, more than $1.5 million worth of livestock is stolen every year. According to the Crime Statistics Agency, in 2017 there was a 40 per cent increase in the theft of livestock from the year before. Between April 2017 and March 2018, there were 232 reported instances of livestock theft-related offences.

Source 8 In Victoria, livestock theft is a serious issue.

In September 2019, the Victoria Government Minister for Police and Emergency Services, Lisa Neville, joined Victoria Police and the Victorian Farmers Federation in announcing the creation of the Farm Crime Coordination Unit. The aim of the unit is to target crime by working with local police in rural areas, monitoring trends and patterns in farm crime, and working closely with the Victorian farming and agricultural community.

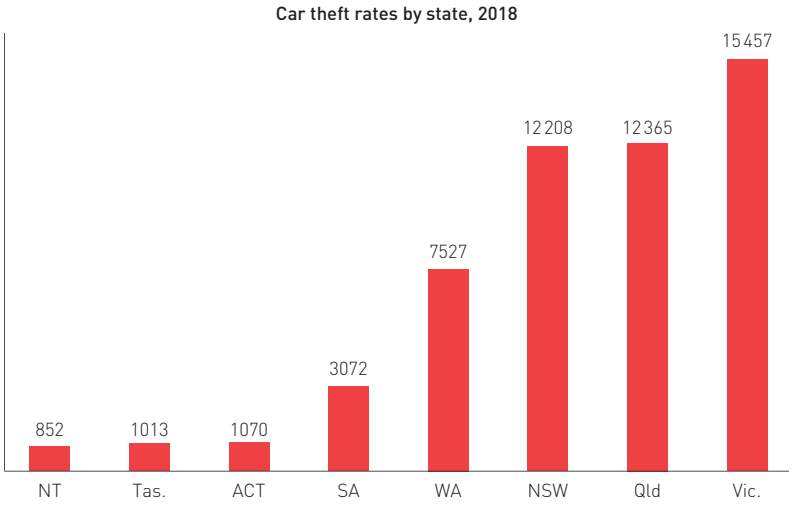
Neville told the public that the Victorian Government 'takes this type of offending very seriously', recognising that 'the theft of equipment or livestock can have a huge operational impact on our farmers, on top of the financial burden'.

Motor vehicles are among the most commonly stolen items in Australia. Statistics from the insurance company Budget Direct suggest that the rate of motor vehicle theft is declining due to the technological improvements in newer model vehicles. However, the rate of theft of older cars (manufactured before 2015), as well as motorcycles, has remained constant and is likely to increase as new motor vehicles become more difficult to steal.

As seen in Source 9 below, Victoria had the highest rate of motor vehicle theft in 2018 with 15 457 motor vehicles stolen. In total, there were 53 564 vehicles stolen in Australia in 2018, which equates to one vehicle being stolen every 10 minutes.

Did you know?

If a person uses a motor vehicle or an aircraft without the consent of the owner, this is evidence that there was an intention to permanently deprive the owner of that property.



Source 9 According to the insurance company, Budget Direct, there were 53 564 vehicles stolen in Australia in 2018.

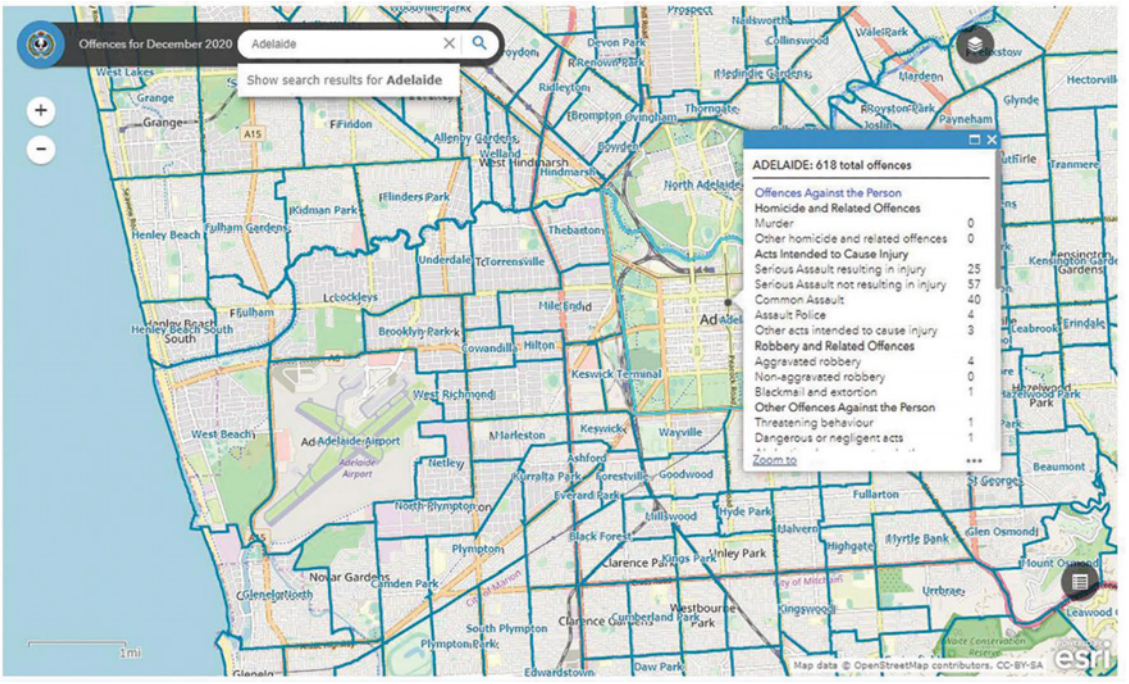
South Australia

Based on the data in Source 9 above, it may first appear that South Australia's car theft rate is significantly lower than Victoria's. In 2018, only 3072 motor vehicles were stolen, as opposed to the 15 457 motor vehicles in Victoria. However, South Australia's population is significantly smaller than Victoria's. According to the ABS, as of 2019 there are 1.7 million people living in South Australia, compared to 6.6 million people living in Victoria.

Data from South Australian police show that there has been an upwards trend in theft since 2018.

TYPE OF THEFT	2013–2014	2014–2015	2015–2016	2016–2017	2017–2018	2018–2019
Theft or illegal use of motor vehicle	3449	3215	3364	3348	3177	3837
Theft from motor vehicle	9611	9983	9678	8868	9129	10125
Theft from shop	6337	6699	7817	8176	9154	10546
Receive or handle proceeds of crime	1275	1222	1434	1405	1664	1634
Other theft	19 472	19 359	21 568	21 677	21 281	23 803
Total	**40 144**	**40 478**	**43 861**	**43 474**	**44 405**	**49 945**

Source 10 Theft and related offences in South Australia, 2013–2019



Source 11 South Australian police update this interactive map each month to help inform the public about crime in their area.

In October 2017, the South Australian police began releasing monthly crime statistics to the public online in an effort to increase public access to crime statistics. These include crimes against people and crimes against property, such as theft. Members of the public can use an interactive map online each month to see how their area has been impacted by crimes.

Similar to Victoria, the retail sector in South Australia has been impacted by theft. This is demonstrated by the scenario below.

ACTUAL SCENARIO

SA Police Commissioner blames retailers for surge in thefts over past year

ABC News, 4 June 2019

South Australian (SA) Police say lax security by retailers is behind a surge in thefts in the state over the past year, while the opposition says cuts to police funding is to blame.

New SA Police crime statistics show overall thefts were up 12 per cent to 48 678 across the state in the past 12 months to the end of March [2019], compared with the same period the year before.

Crimes in the 'other theft' category, which includes people stealing petrol, were up 12 per cent to 23 674 over the same period.

SA Police Commissioner Grant Stevens told ABC Radio Adelaide there appeared to

Source 12 In South Australia, petrol theft increased between March 2018 and March 2019.

be a 'continuing increase in other theft', while other crime fluctuations were not a 'significant concern'.

'One of the big challenges for us is the way retail outlets currently enable people to access their goods and services', Commissioner Stevens said.

'I think it's become an easier environment for people to steal things from shops – I think petrol theft is a classic example.'

...

Possible impacts of minor theft

All crime has impacts on individuals and society. Minor theft significantly impacts:

- the victim (and their family and friends)
- the community
- the offender.

Impact on the victim (and their family and friends)

While minor theft involves amounts of up to $100 000, which seems like a relatively small amount, it can still have catastrophic effects on the lives of victims. The impact would be greater if a precious item was stolen and destroyed. While its value may not be great, the object might be irreplaceable, such as a family heirloom or a football jumper signed by members of a premiership-winning team.

Impact on the community

Theft also reduces trust in others, especially if the person was the victim of theft by someone that they know, like a family member or a colleague in the workplace who might have stolen money or other property. Theft by a person's neighbours would have a similar effect.

Source 13 Many Victorians love Australian Rules Football. While an autographed premiership jumper might have a street value of only $1000, it would be priceless to a passionate fan who owned the item.

Impact on the offender

The offender can be exposed to the humiliation of a hearing in the Magistrates' Court. If the accused is a prominent person, the case might be widely reported, bringing further embarrassment to the person's family and friends. Theft can also expose a young person to media commentary that can affect their chances of future employment and study, such as in the scenario on the next page that was reported widely.

ACTUAL SCENARIO

Melbourne airport bag grab

In 2019, Michelle Kaye Mercieca avoided going to jail for stealing luggage at Melbourne Airport. Mercieca pleaded guilty in Broadmeadows Magistrates' Court to stealing more than $23 000 worth of luggage at Melbourne Airport. She was ordered to repay the money to Qantas, which had already paid compensation to victims of Mercieca's theft. She faced 10 charges relating to the theft of luggage at the airport on seven occasions between 7 October 2017 and 5 September 2018.

In evidence presented to the Magistrates' Court, Mercieca was seen on the airport's CCTV cameras removing luggage from the Qantas, Jetstar and Virgin terminals. The clothing she wore, along with some luggage, was later found at her home.

In sentencing Mercieca, Magistrate Timothy Hoare said her behaviour would have caused distress to members of the public who arrived at Melbourne Airport to find their luggage missing. However, as Mercieca had pleaded guilty and showed some remorse for her crimes, she avoided a jail term and was placed on a 12-month community correction order. As part of that order, she is required to complete 100 hours of volunteer work.

Source 14 Michelle Kaye Mercieca, aged 51, pleaded guilty to multiple thefts of luggage from Melbourne Airport over a period of 11 months. She avoided a prison term because she pleaded guilty and was sorry for her actions.

Source 15 below summarises some of the possible impacts that minor theft can have on the victim and their family, on the community, and on the offender.

IMPACT ON THE VICTIM AND THEIR FAMILY	IMPACT ON THE COMMUNITY	IMPACT ON THE OFFENDER
• Having belongings stolen is even more stressful when the items stolen are not recovered and they were of significance to the victim, such as a precious gift from a loved one • Insurance premiums payable by the victim can increase when items are not recovered and an insurance claim is made	• Increased need for police officers • Loss of income for retailers, which leads to an increase in the price of goods for all consumers • Distress for people who have lost items that cannot be replaced • Loss of trust in law and order and community values • Wage theft reduces the trust of people in companies over their treatment of often vulnerable workers	• Guilt or shame on the part of the offender • Legal costs • Compensation paid to the victim of the theft • If the offender is imprisoned, the hardship of incarceration on the offender and their family

Source 15 A summary of the impact of minor theft

6.3 CHECK YOUR LEARNING

Define and explain

1 Explain one purpose of the laws relating to theft.
2 Using examples, define the following terms (in your definitions, refer to *Stein v Henshall*):
   a appropriate
   b permanently deprive.
3 Explain what is meant by the term 'subjective belief'.
4 What roles do the courts play in theft-related offences?

Synthesise and apply

5 Outline two circumstances in which an on-the-spot fine can be given for shoplifting. Explain whether you think this is an effective way of dealing with theft.
6 Think about how people view shoplifting. Consider how this opinion could be changed. Explain two strategies for changing this opinion.
7 With reference to the elements of theft, explain whether each of the following actions are honest or dishonest. Explain your responses.
   a Damien borrowed James' leather jacket. Damien had been allowed to borrow the jacket on an earlier occasion. However, this time, Damien did not ask for James's permission.
   b Lucy went into her local cafe, Matilda's Muffin Hut, where she ordered a cafe latte and a slice of chocolate cake. The price was $8. Lucy handed Matilda a $10 note. At the time of this exchange, Matilda was distracted by a screaming baby. As a result, Lucy received $12 rather than $2 in change. Lucy left the shop, and only realised that she had been overpaid the next day. Lucy did not return the money.
   c Kiera works part time at her local pizza shop, where she usually earns $140 a week. On one occasion, Kiera received $14 000 in her back account. She immediately went out and bought a car. The next day, the owner of the shop, Florence, called Kiera and asked for the money to be returned. Kiera said, 'Sorry, I bought a car. I thought you had paid me a bonus this week!'
   d Jessica decided to make some baklava for her friends. She went to the self-serve nut section at her local supermarket. She scooped a kilogram of pistachios, which were $50 per kilogram, into a bag and placed the bag on the scales. She entered the product code for peanuts rather than pistachios and attached the price label to the plastic bag containing the nuts. Peanuts are only $12 per kilogram. Jessica then went through the self-service checkout.

Analyse and evaluate

8 Read the scenario 'Melbourne airport bag grab'.
   a Referring to each of the elements of the law of theft, explain why Mercieca was guilty.
   b How do the circumstances of this case make the offence especially serious?
   c Do you believe that Mercieca was punished sufficiently for committing these offences? Discuss as a class.
9 Read the scenario 'Combating wage theft'.
   a Outline the main purpose of the Act.
   b To what extent do you think the legislation could enhance the rights of young people in the workplace? Give reasons for your answer.

Check your Student obook assess for these additional resources and more:

Student book questions
6.3 Check your learning

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

Weblink
Minor theft (*Crimes Act 1958* (Vic))

6.4 OFFENSIVE BEHAVIOUR

In Victoria, there are laws prohibiting anti-social behaviour. Although this behaviour might be considered minor and inconsequential in nature, it can be contrary to community expectations about how people should behave in public and it can result in a lack of **social cohesion**.

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

In Victoria, **offensive behaviour** is a summary offence and includes conduct that is intended to hurt feelings or arouse anger, resentment, disgust, or outrage in another person. There is a lot of behaviour that occurs in Victoria that could potentially constitute offensive behaviour, but not all of it may be prosecuted by Victoria Police, or may not even be a clear case of offensive behaviour. For example, one type of offensive behaviour is singing an obscene song. But what might be obscene to one person may be viewed by another as lyrical or creative. As another example, the use of obscene language can also be offensive behaviour. Would it be possible or reasonable for the police to charge every person who used such language, and if they did, would everyone agree that it's obscene language?

offensive behaviour
conduct that is calculated to wound feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person

Elements of offensive behaviour

Section 17 of the *Summary Offences Act 1966* (Vic) prohibits offensive behaviour. Section 17(1)(d) specifically contains the offence of offensive behaviour. In this chapter we look more broadly at all of the types of conduct that could be contrary to section 17.

Did you know?

To discourage people from urinating in public, the German city of Hamburg is using a special paint on its walls. The hi-tech paint splashes back liquid applied at velocity with almost the same force. Walls are marked with signs that say, 'Don't pee here. We pee back.'

EXTRACT

Summary Offences Act 1966 (Vic) – section 17

Obscene, indecent, threatening language and behaviour, etc. in public

1 Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon:

- **a** sings an obscene song or ballad
- **b** writes or draws exhibits or displays an indecent or obscene word figure or representation
- **c** uses profane indecent or obscene language or threatening abusive or insulting words or
- **d** behaves in a riotous indecent offensive or insulting manner

shall be guilty of an offence.

Penalty: 10 penalty units or imprisonment for two months.

For a second offence: 15 penalty units or imprisonment for three months.

For a third or subsequent offence: 25 penalty units or imprisonment for six months.

1A For the purposes of subsection (1)(d), behaviour that is indecent, offensive or insulting includes behaviour that involves a person exposing (to any extent) the person's anal or genital region.

For a person to be convicted of offensive behaviour under section 17 of the *Summary Offences Act*, the prosecution must prove the following two elements:

- the accused's conduct was prohibited by section 17
- the accused's conduct occurred in a public place.

Element 1 – The accused's conduct was prohibited by section 17

The prosecution must establish that the accused's behaviour fell within one of the behaviours prohibited by section 17. Section 17 of the *Summary Offences Act* provides that the following behaviours constitute an offence:

- singing an obscene song or ballad
- writing or drawing, exhibiting or displaying an indecent or obscene word or image
- using profane, indecent or obscene language
- using threatening, abusive or insulting words
- behaving in a riotous, indecent, offensive or insulting manner.

However, what is 'indecent', 'obscene', 'profane', 'abusive' or 'insulting' is left to the courts to decide and depends on the circumstances, including community standards. In some circumstances, it may be clear that the conduct is offensive – such as urinating on someone else – as was evident in the below scenario.

ACTUAL SCENARIO

Urinating on Spiderbait fan's leg

In February 2016, the rock band Spiderbait played at a popular live music venue in Melbourne. During the performance, Joel Ryan Morrison – a 25-year-old man from New Gisborne in Victoria – urinated on fellow concertgoer, 33-year-old Belle Nolan.

In August 2016, police released CCTV footage of the incident and asked the public to help find the man. They were able to identify Morrison, and in November 2016, he was charged with unlawful assault, offensive behaviour, and behaving in a disorderly manner in a public place. Members of Spiderbait described the act as 'awful and disgusting'.

Morrison appeared in the Melbourne Magistrates' Court on 18 April 2017, where he denied the charges, saying he was drunk at the time of the offence. He was convicted, fined $800, and placed on a 12-month good behaviour bond.

Source 1 The members of Spiderbait were disgusted at the treatment of Belle Nolan who was urinated on during one of their concerts.

As another example, using obscene language and offensive behaviour towards police officers may also result in a charge of offensive behaviour, as described in the scenario below.

ACTUAL SCENARIO

Good Samaritans 'threatened' after witnessing 'choking' incident on Wollongong street

Shannon Tonkin, *Illawarra Mercury*, 9 April 2019

Two Good Samaritans who witnessed a man trying to choke a woman on a Wollongong street on Monday night were accosted and threatened when they attempted to intervene from the balcony of their apartment, a court has heard.

The two women reported seeing the man, who police allege is Brendan Guy Honeysett, grab the woman around the throat with his right hand and begin yelling at her as the pair stood on Smith Street about 10:35 pm.

...

Honeysett left the scene while the woman was on the phone however the description was passed on to patrolling police, who discovered Honeysett standing on the corner of Keira and Victoria streets about half an hour later.

It is alleged he was using his hands in 'karate-type movements' indicating he wanted to fight and began to swear at police when they approached him. He was eventually arrested and put inside a caged police vehicle.

However, police claim he continued his offensive behaviour while in custody at Wollongong Police Station, allegedly spitting saliva in the cells and threatening to infect the officers with Hepatitis C.

Court documents said Honeysett was seen to put his hand down the back of his pants before saying, 'I've got some shit here, I'm gonna give you Hep C, do you want Hep C?'

It is alleged Honeysett then stripped naked and began masturbating in the cell while trying to attract the attention of female officers.

He was eventually charged with offensive behaviour, property damage and intimidation and refused bail to front court on Tuesday.

...

Source 2 This crime took place in Wollongong, New South Wales.

Element 2 – The accused's conduct occurred in a public place

Offensive behaviour is committed if the accused's conduct took place *in* or *near* a **public place** or *can be seen or heard by people passing in* a public place. Therefore, a person can be on private property and still commit this offence if what they are saying or doing can be heard or seen by people who are in a public place.

public place
an area or location considered to be open to the public (i.e. anyone in the community has a right to go there)

The extract on the next page defines 'public place'. It includes places like the street, sporting grounds, shopping centres, railway stations and government schools. The definition also includes any place that is open to the public.

EXTRACT

Summary Offences Act 1966 (Vic) – section 3

Definitions

In this Act unless consistent with the context or subject matter . . . 'public place' includes and applies to:

- **a** any public highway, road, street, bridge, footway, footpath, court, alley, passage or thoroughfare notwithstanding that it may be formed on private property
- **b** any park, garden, reserve or other place of public recreation or resort
- **c** any railway station platform or carriage
- **d** any wharf, pier or jetty
- **e** any passenger ship or boat plying for hire
- **f** any public vehicle plying for hire
- **g** any church or chapel open to the public or any other building where divine service is being publicly held
- **h** any government school or the land or premises in connexion therewith
- **i** any public hall, theatre or room while members of the public are in attendance at, or are assembling for or departing from, a public entertainment or meeting therein
- **j** any market
- **k** any auction room or mart or place while a sale by auction is there proceeding
- **l** any licensed premises or authorised premises within the meaning of the *Liquor Control Reform Act 1998* (Vic)
- **m** any race-course, cricket ground, football ground or other such place while members of the public are present or are permitted to have access thereto whether with or without payment for admission
- **n** any place of public resort
- **o** any open place to which the public whether upon or without payment for admittance have or are permitted to have access or
- **p** any public place within the meaning of the words 'public place' whether by virtue of this Act or otherwise.

The scenario on the next page provides an example of what can be considered to be offensive behaviour. Notably, although the flying of the flag was on private property, it was within view of a person passing in a public place (e.g. a footpath) and so arguably it falls within the definition of being in a public place.

ACTUAL SCENARIO

Flying of Nazi flag sparks calls for stronger offensive behaviour laws

In 2020, a resident of Beulah in Victoria displayed a flag prominently over their home. The flag featured the swastika and other Nazi symbols. In response, politicians and human rights groups condemned this flying of a Nazi flag as 'disgusting' and called for the laws relating to offensive behaviour to be strengthened in Victoria.

Source 3 In 2020, the Beulah Historic Learning and Progress Association held a barbecue to show that the local community is generous in their welcome of all people. The people attending the event brought a multitude of different flags to demonstrate their inclusiveness.

The Chief Executive of Yarriambiack Shire Council, Jessie Holmes, said that the Council could not force the resident to take down the flag. After negotiations with the police, the resident took down the flag, stating that they weren't aware that it would be offensive to other people in the area.

Victoria's Equal Opportunity and Human Rights Commission said in a statement that the symbols on the flag caused harm to the Jewish community and 'they represent hate and trauma for so many people around the world, including the members of Victoria's Jewish community. To display that flag publicly is reprehensible – it runs counter to community values and the importance Victorians place on inclusion and diversity. It has no place in this state.'

Defences to offensive behaviour

To be found guilty of offensive behaviour, the prosecutor must prove the two elements of offensive behaviour beyond reasonable doubt. Failure to prove both elements results in the accused being found not guilty of the crime. Therefore, the accused may try to argue that one of the elements is missing. For example, the accused may argue that:

- their behaviour was not contrary to section 17 of the *Summary Offences Act*
- their behaviour did not occur in a public place.

Otherwise, there are a number of defences available to an offensive behaviour charge. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

General defences to offensive behaviour

The general defences to offensive behaviour are (more details on each of these are contained in Topic 6.1):

- **mental impairment** – for example, individuals with acquired brain injuries, who have suffered strokes or who are experiencing dementia, may experience coprolalia (compulsive swearing), which means they may be verbally aggressive without meaning to be

- **sudden or extraordinary emergency** – for example, a person may swear loudly out loud from stress in the event of an emergency, such as because of an accident on a tram
- **automatism** – for example, the person may act in a robotic manner that results them in acting obscenely.

Specific defences to offensive behaviour

In addition to these general defences, the following defences to offensive behaviour can be used by an accused.

The behaviour was an exercise of a political or human right

A person is not guilty of offensive behaviour if their behaviour can be considered to be an exercise of a political or human right. In democratic countries, behaviour is not ordinarily seen as offensive if it is a peaceful and appropriate expression of a human right or a political right. Conversely, a person's freedom of expression may be restricted if the manner of expression disturbs public decency and order.

One area in which this defence has been used in Victoria is in regard to the right to protest outside of abortion clinics, as explored further in the scenario below.

ACTUAL SCENARIO

Something 'offensive or disgusting' can be 'obscene'

Fraser v Walker [2015] VCC 1911 (19 November 2015)

On 5 August 2014, Michelle Fraser protested outside a Melbourne fertility clinic. She displayed posters of aborted foetuses while standing on a public footpath.

Police officers attended the scene following complaints from patients at the clinic. Fraser was charged with displaying an obscene figure in a public place. She was later convicted in the Magistrates' Court and fined $600.

Fraser appealed her conviction in the County Court of Victoria on the grounds that the images were not obscene and they did they contravene current community standards. Fraser also argued that being charged with displaying an obscene figure in a public place was contrary to her human rights because she was exercising her right to political protest at the time of the alleged offence.

In dismissing the appeal, the County Court Judge said that the word 'obscene' may relate to 'offensive or disgusting' representations and is not confined to images of a sexual nature. The Judge did not consider Fraser's protest to be political as it targeted patients and workers at the clinic rather than government representatives.

In this case, Fraser's actions were not considered to be an exercise of her political rights and were deemed to be offensive. Where the conduct is obviously 'political', the 'reasonable person test' applies (i.e. what would a reasonable person in the same position think of the behaviour?).

Honest and reasonable mistake

A person may not be convicted of offensive behaviour if they can prove that they made both an honest and a reasonable mistake of fact (not law). This could apply if a person charged with the offence genuinely believed they were not acting in a way that was offensive. The belief must also be reasonable. That is, would an ordinary person in similar circumstances have held the same belief? It is important to show that if the facts (as the accused believed them) were true, then the accused would not have committed an offence.

The role of the law in developing the elements of and defences to offensive behaviour

Common law

In Victoria, the meaning of words such as 'offensive', 'obscene', 'indecent' and 'insulting' has largely been left for judges to decide. In doing so, judges consider the facts of each case, the context in which the crime was committed, the legislation under which the offender is charged, and current social standards.

For example, in the 1951 case of *Worcester v Smith* [1951] VLR 316, the Judge commented that for behaviour to be offensive it 'must be calculated to wound the feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person'.

Sixty-two years later in the 2013 case of *Monis v The Queen*, the High Court commented that the definition of 'offensive' must keep pace with current social standards. These standards are determined by considering whether a reasonable person would consider the behaviour 'offensive' in the given circumstances. An extract from the case is below.

EXTRACT

Monis v The Queen (2013) 249 CLR 92

'Both "indecent" and "obscene" ... convey one idea, that of offending against recognised standards of propriety – indecent being at the lower end of the scale and obscene at the upper end ... Criminal law provisions concerned with obscenity fall into a category of laws which must necessarily keep pace with prevailing views of society and changing circumstances ... The application of a societal standard may be seen in the use ... of the objective standard of the reasonable person.'

Statute law

The provisions in the *Summary Offences Act* in relation to offensive behaviour have been left unchanged for more than 50 years.

There is no real general agreement on what constitutes offensive behaviour so, in the absence of a precise statutory definition, it is left to the discretion of police and then to the judgment of the courts to determine what is and what is not 'offensive' based on current social standards.

To decide whether behaviour is offensive, obscene, indecent and insulting, a judge may need to first determine the word's natural and ordinary meaning and then determine whether a reasonable person would consider the behaviour offensive given the context in which the behaviour occurred. Judges may also refer to the ordinary English definition of these words, and they may look to past cases for guidance.

In *Coleman v Power* (2004) 220 CLR 1, the High Court summarised past interpretations of 'insulting' to be 'language calculated to hurt the personal feelings of individuals' or 'scornful abuse of a person or the offering of any personal indignity or affront' or 'something provocative, something that would be offensive to some person to whose hearing the words would come'.

The scenario on the next page further explores cultural changes in relation to swearing.

ACTUAL SCENARIO

How pop culture is changing legal views on swearing

Elyse Methven, *The Age*, 13 April 2017

Warning: The following article contains explicit language.

The Wolf of Wall Street, one of the swweariest movies of all time, contains 506 'f-bombs'. This year's Triple J Hottest 100 countdown featured the word 'f–' 82 times in 32 songs. And a bedtime storybook urges children to 'Go the F– to Sleep!'.

So, should uttering the f-word in public be a crime? And what about the c-word?

In Australia, swearing is ubiquitous. Yet each year, thousands of Australians incur fines or criminal convictions for swearing. The use of offensive, indecent or obscene language in public is punishable in all Australian states and territories. Police typically punish people for saying the words 'f–' and/or 'c–' in their presence.

...

It is up to the individual police officer (when issuing an infringement notice) or magistrate (when hearing an offensive language charge) to determine community standards on offensive language. In doing so, decision-makers draw on their 'common sense' and everyday experience. Unsurprisingly, judicial opinions differ when assessing community standards.

In 2007, for instance, a Western Australian Supreme Court judge said that language which challenges police authority is likely to be criminally offensive. More recently, magistrates have held that the word 'prick' used to describe a police officer, and the expression 'f– Fred Nile' exclaimed at an anti-marriage equality rally, were not criminally offensive.

Is pop culture having an impact on attitudes to swearing in the courtroom? The answer is yes. In the 2003 New South Wales Local Court case, *Police v Butler*, Magistrate Heilpern referred to the prevalence of the f-word word on Triple J and its frequent occurrence on television shows *The Sopranos* and *Sex and the City*. He found the defendant not guilty of using offensive language, stating, 'The word f– is extremely commonplace now and has lost much of its punch.' Although only a Local Court judgment (therefore of limited precedential value), the magistrate's assessment of community standards *has* influenced the criminal law on offensive language.

...

Source 4 Leonardo DiCaprio stars in *The Wolf of Wall Street*, which contains 506 'f words' in just three hours. This is the equivalent of a swear word almost every 20 seconds.

Trends and statistics

Offensive behaviour is a type of public order offence. Public order offences are generally offences that cause disruption or offence to the broader public. Other than offensive behaviour, examples of public order offences are graffiti, obscene exposure, rioting, disorderly conduct and begging.

In Victoria, crimes are recorded by Victoria Police in the Police Law Enforcement Assistance Program (LEAP) database. The Crime Statistics Agency then uses the data in the LEAP database to track key movements in the number and rate of offences, and in trends associated with various offences.

Victoria

In Victoria, crimes are recorded based on their type. The Crime Statistics Agency records offensive behaviour under Category D (public order and security offences) and more specifically under Category D23 (offensive conduct) and Category D24 (offensive language).

Set out in Source 5 below is a record of the number of offences involving offensive conduct and offensive language for the years 2011–2020 from the Crime Statistics Agency. In 2011, there were 7338 recorded offences. In 2020, that number had dropped significantly to 3263 – less than half of those recorded in 2010. Some of the specific types of conduct in this category are set out in Source 4 below (note that Source 4 does not include all of the offences within this category).

OFFENCE	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Wilful and obscene exposure	336	282	57	42	54	76	130	169	40	38
Behave in indecent manner	41	59	78	144	116	89	115	117	143	119
Behave in offensive manner	834	756	818	801	763	765	708	630	581	504
Use of carriage service to offend	53	53	122	91	117	191	176	252	185	157
Use indecent language or abusive words	675	657	670	662	598	510	445	485	460	272
Behave in a riotous, indecent or offensive manner	4252	3265	3385	3187	3014	2183	1821	1934	1691	1224

Source 5 Disorderly and offensive conduct in Victoria – offences recorded. Data from the Crime Statistics Agency 2011–2020 for the year ending March

Source 6 Use of postal service to offend is a type of disorderly and offensive conduct in Victoria. As you can see from Source 4 above, this is not a common offence.

Interestingly, the most common type of offensive behaviour was recorded as behaving 'in a riotous indecent offensive manner', which makes up nearly half the offences in this category of offence. However, the statistics may depend on how Victoria Police are recording the offences in LEAP. By way of example, the police recorded some offences as 'behaving in a riotous manner in a rail vehicle' – with only two such offences recorded in the past 10 years. It is very possible that more riotous behaviour occurred on rail vehicles such as trains, but they may have been recorded in another way.

It is not clear why there has been such a reduction in the amount of offences involving offensive behaviour. It is possible that the police are charging fewer people for the offence and using other methods, such as warning people before formally charging them. It is also possible that the offensive behaviour occurs along with other more serious offences, and the person is charged with those serious offences and not the summary offence of offensive behaviour. Alternatively, it may be that people are not being caught out when they use such language and behaviour, and that people are only being charged when the behaviour or language takes place in front of the police.

The Sentencing Advisory Council's SACStat (a database that records sentences imposed in the courts for various offences) shows that from 1 July 2016 to 30 June 2019, 1612 people were sentenced for using indecent language in a public place. Of those:

- 1332 were male, and 280 were female
- 22.3 per cent were sentenced to a term of imprisonment, 31.5 per cent received a fine, 22.1 per cent received a **community correction order**, and 23.8 per cent of the cases were dismissed or discharged
- the age group that committed the most offences was the 24–35 age group, with 463 offences in this age group.

community correction order (CCO)
a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

In relation to behaving in a riotous, indecent or offensive manner in a public place, the Sentencing Advisory Council data records that from 1 July 2016 to 30 June 2019, 1521 people were sentenced. Of those:

- 1265 were male, and 256 were female
- 25.4 per cent were sentenced to a term of imprisonment, 29.3 per cent received a fine, 20.6 per cent received a community correction order, and 24.1 per cent of the cases were dismissed or discharged
- again, the age group that committed the most offences was the 24–35 age group, with 447 offences in this age group.

New South Wales

Like Victoria, New South Wales also has legislation governing summary offences. Section 4 of the *Summary Offences Act 1988* (NSW) states that a person must not conduct themselves in an offensive manner in or near, or within view or hearing from, a public place or a school. Section 4A states that a person must not use offensive language in or near, or within hearing from, a public place or a school.

In relation to how many offences were recorded of either using offensive language or behaving in an offensive manner in New South Wales, Source 8 on the next page shows that, similar to Victoria, the number of recorded offences is decreasing.

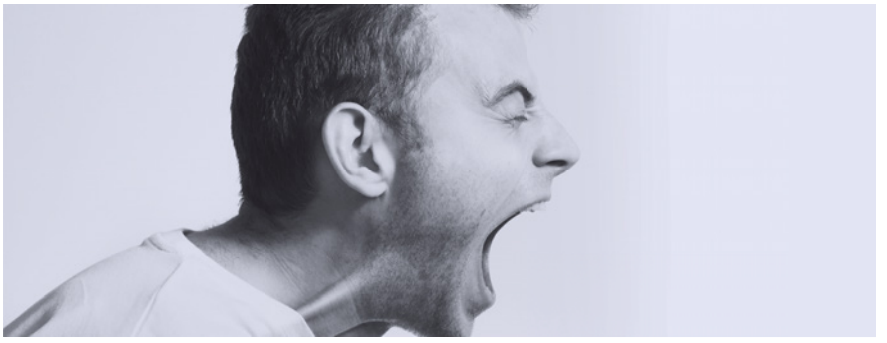
Source 7 In New South Wales, there is also legislation governing summary offences.

OFFENCE TYPE	2015	2016	2017	2018	2019
Offensive conduct	5917	5518	5146	4713	4445
Offensive language	4079	3744	3250	2738	2322
Total	**9996**	**9262**	**8396**	**7451**	**6767**

Source 8 Disorderly conduct in New South Wales – offences recorded. Data from the NSW Bureau of Crime Statistics and Research for the year ending December

Recorded offences were highest in 2015, with a significant reduction in the offensive language offences. The number of offences recorded in New South Wales was higher than that of Victoria, but that is likely due to the population of both states. The population of New South Wales was 7.2 million compared to Victoria's 6.6 million (ABS, December 2010).

The NSW Bureau of Crime Statistics and Research recorded that in 2017, the total number of people imprisoned for offensive language or offensive behaviour was four. The most common sanction given was a fine, with 420 people receiving a fine. A total of 191 people received a nominal penalty or were released on a bond without conviction.



Source 9 Offensive behaviour laws are in place to discourage antisocial behaviour and use of offensive language in public places.

Possible impacts of offensive behaviour

The main aim of offensive behaviour laws is to maintain public order. These laws aim to discourage anti-social, violent and abusive behaviour, and maintain a sense of public decorum. Most people in the community believe they should be able to visit public places or use these spaces without having to put up with unruly behaviour from others.

Being punished for swearing or urinating in public has the potential to cause public shame and embarrassment. A high incidence of anti-social behaviour in a community can ultimately impact on people's perception of others. They may think that their neighbourhood is unsafe or that this anti-social behaviour adversely impacts on their quality of life. Prospective employers also tend to favour people who are of good character and conform to social norms, which means that engaging in anti-social behaviour may impact on a person's job prospects.

Source 10 below summarises some of the possible impacts that offensive behaviour can have on the victim and their family, on the community, and on the offender.

IMPACT ON THE VICTIM AND THEIR FAMILY	IMPACT ON THE COMMUNITY	IMPACT ON THE OFFENDER
• Disruption to family life • Trauma, grief or fear • Continuing psychological issues, especially if the victim felt violated or at risk	• Loss of trust in law and order, and community values • Decreasing percentage of levels of community wellbeing	• Loss of reputation and employment prospects • Guilt or shame • Legal costs, including fines if imposed by a court

Source 10 A summary of the impact of offensive behaviour

6.4 CHECK YOUR LEARNING

Define and explain

1 Explain the relationship between the courts and parliament in relation to the offence of offensive behaviour.
2 Identify three actions or types of behaviour that are considered to be offensive under the *Summary Offences Act*.
3 How does a court decide whether behaviour is offensive?
4 Describe three possible impacts of offensive behaviour on the community.

Synthesise and apply

5 Read the scenario *Fraser v Walker*. Apply the elements of the crime to explain why this is a case of offensive behaviour.
6 Read the scenario 'Flying of Nazi flag sparks calls for stronger offensive behaviour laws'. Apply the elements of the crime to explain why this is a case of offensive behaviour.
7 For each of the following scenarios, identify whether the prosecutor is likely to succeed in establishing a charge under section 17 of the *Summary Offences Act*. To support your answers, you can refer to any cases you have learnt so far.
   a Liz parked at the front of a pharmacy to buy a heat pack because she had injured her ankle while dancing the previous night. While in the shop, Liz left her radio on and a Celine Dion song was blasting loudly across the street.
   b Stella was protesting outside a supermarket, arguing in favour of stricter laws regarding drunken behaviour at sporting events. Stella is an emotional person and she used abusive language when talking to a bystander, Anthony, who challenged her.
   c Catherine and Rebecca are sisters. They began fighting one day in the front room of their house while the windows and doors were open. Catherine started abusing Rebecca and then drew an offensive picture of her. Their neighbour, Lee, was walking past the house and he could see the image from the street.
   d Irena was swearing on her way home on the train one night. However, everyone on the train enjoyed her 'lively banter' and gave evidence that they were not offended.
   e Chris yelled loudly at her children to 'get back here you little devils'. An elderly woman, Annie, reported Chris to the police.
8 Using the trends and statistics in this topic, on the SACStat website, the Crime Statistics Agency's website and the NSW Bureau of Crime Statistics and Research's website, create a visual diagram (e.g. a graph) that shows the trends and statistics in Victoria and New South Wales in relation to offensive behaviour.
   a You may wish to split up this task across the class. Come together as a class and analyse the statistics.
   b Discuss the extent to which the statistics demonstrate a reduction in the number of incidents of offensive behaviour or language in the community.

Analyse and evaluate

9 To what extent do public order laws and their enforcement infringe on individual rights? Give reasons for your answer.
10 'What is offensive to one person is not offensive to another, and so it shouldn't be the role of the courts to decide what is offensive. It should be the role of parliaments.' Discuss whether you agree with this statement. In your answer, discuss whether an individual should be allowed to fly a Nazi flag from a private flagpole in their front garden.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 6.4 Check your learning
- **Weblinks** SACStat; Offensive behaviour (*Crimes Act 1958* (Vic))
- **Weblink** NSW Bureau of Crime Statistics and Research
- **Weblink** Crime Statistics Agency

6.5 GRAFFITI OFFENCES

graffiti
any illegal writing, drawing or scratching that defaces (i.e. damages) public property and cannot be removed with a dry cloth

Graffiti is illegal scribbling, writing or drawing that defaces public or private property. In law it is considered a form of vandalism because the community sees most graffiti as an 'eyesore' – not art. Street art is sometimes called 'legal graffiti' because it is often done with both property owner and local government permission.

Street art differs to graffiti in that it is an image or picture, often with symbolic meaning, rather than just stylised words. The City of Melbourne, in particular, has become internationally famous for the street art in its laneways. Many tourists view this 'art' on a daily basis. However, some say it attracts international graffiti artists, who come to the city on a 'spraycation'. These 'fly in and out' graffitists are difficult to catch.

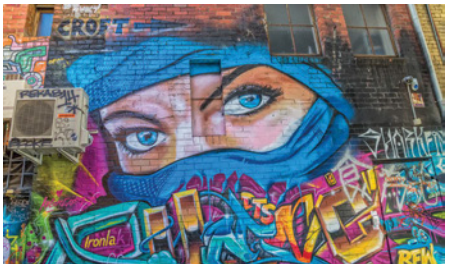
marking graffiti
the act of writing, drawing, scratching or defacing (i.e. damaging) public property in ways that cannot be removed with a dry cloth

The *Graffiti Prevention Act 2007* (Vic) outlines several graffiti offences, which are summary offences. The purpose of this Act is to stop people from **marking graffiti** and to control the possession and sale of aerosol paint. The Act gives police additional search powers so they can apprehend offenders and seize graffiti-related items. It also gives local councils the authority to remove graffiti from both public and private spaces.

In this topic, we focus on the offence of 'marking graffiti', an offence under section 5 of the *Graffiti Prevention Act*.

Source 1 These are graffiti tags. Tags are stylised signatures in one colour that are usually drawn quickly with a marker or with aerosol paint.

Source 2 This is a graffiti throw-up. It is large writing or stylised shapes in one or two colours that can be drawn or 'thrown-up' quickly.



Source 3 This is a graffiti piece. It is a large multi-coloured stylised writing or image often with shadowing or a three-dimensional effect.

Elements of graffiti

Section 5 of the *Graffiti Prevention Act* makes it an offence to mark graffiti on property if the graffiti is visible from a public place. 'Marking' graffiti means to write, draw, scratch or deface property in ways that cannot be removed with a dry cloth.

EXTRACT

Graffiti Prevention Act 2007 (Vic) – section 5

Marking graffiti

A person must not mark graffiti on property if the graffiti is visible from a public place unless the person has first obtained the express consent of the owner, or an agent of the owner, of the property to do so.

Penalty: Level 7 imprisonment.

For a person to be convicted of this offence, the prosecution must prove the following two elements:

- the accused marked publicly visible graffiti
- the accused did so without the owner's consent.

These two elements are further discussed below.

Element 1 – The accused marked publicly visible graffiti

A person can mark graffiti by writing, drawing, scratching or defacing property using any implement or substance, including stencil art and engraving. If the damage or marks cannot be removed easily, it is considered graffiti. The crime of marking graffiti can occur if the graffiti is done in a public place or any place where it can be seen from a public place. This is common, as graffiti artists often want their tags and pieces to be seen by others, and so they tend to mark graffiti either in a public place or nearby. For the definition of 'public place' in the *Summary Offences Act* see page 177 of this chapter.

Element 2 – The accused did so without the consent of the owner

The prosecution also needs to establish that the accused marked publicly visible graffiti without the owner's consent or the consent of an agent of the owner. This often occurs in public places, such as in Melbourne streets, including Hosier Lane (see the scenario below).

Did you know?

The word 'graffiti' dates back to 1851, when it was used to describe the ancient wall of inscriptions found in the ruins of Pompeii. 'Graffiti' comes from the Italian word *graffiti*, plural of *graffito*, that means scribbling, which is derived from *graffiare*, to scribble. In 1877, the sense was extended to mean any crude drawings and scribbling done in public places.

ACTUAL SCENARIO

Paint-bombing of Hosier Lane

In 2020, a group of people wearing masks 'paint-bombed' the iconic street art in Melbourne's Hosier Lane. The group used fire extinguishers to spray paint on the walls of Hosier Lane, thus covering large sections of the existing art and graffiti.

Hosier Lane is one of Melbourne's most iconic streets. Located in a prime position just off Flinders Street, Hosier Lane is known for its colourful graffiti. While graffiti is illegal in Victoria, tourists and locals visit Hosier Lane to see the street art. Much of the graffiti is politically charged.

The group of paint-bombers were committing an act of political and artistic protest regarding the hypocrisy of Melbourne City Council's attitude to the Hosier Lane street art in comparison to the other graffiti around the city.

Many Victorians were outraged by this paint-bombing and called for severe punishment for those who, they argued, had wilfully damaged property. However, other views were expressed, including by a noted Melbourne street artist, James Wilson, who said that street art is not designed to last forever. Even the Lord Mayor of Melbourne, Sally Capp, joined the debate via Twitter.

Source 4 The 'paint-bombing' of street art in Hosier Lane in Melbourne was condemned by the Lord Mayor of Melbourne, Sally Capp.

There are also related offences regarding the implements of graffiti, such as:

- possessing, without lawful excuse, a spray paint can while on or adjacent to public transport property or infrastructure, or where the person is trespassing on private property
- possessing a graffiti implement with the intention of marking graffiti.

Offenders may also be charged with property damage offences under the *Summary Offences Act*.

Defences to graffiti

To be found guilty of a graffiti offence, the prosecution must prove the two elements of graffiti. The accused may try to argue that one, or both, of these elements is missing. For example, the accused may argue that:

- the accused had the property owner's permission
- the graffiti could be easily removed with a dry cloth
- the graffiti is not visible from a public place.

Failure to prove all elements results in the accused being found not guilty of the crime, therefore the accused may try to argue that one of the elements is missing.

strict liability where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

Otherwise, the offence of marking graffiti in the *Graffiti Prevention Act* is a crime of **strict liability**. That means that the offender's mental state at the time of the crime is, for the most part, irrelevant. In very rare circumstances a person could argue that their actions were due to mental impairment, duress or an honest and reasonable mistake.

Accused persons, therefore, have little room to argue. This also means that there are few defences available other than contesting the offence on the basis that one of the elements of the crime cannot be proven.

General defences to graffiti offences

The general defences to graffiti offences are (more details on each of these are contained in Topic 6.1):

- mental impairment
- duress.

Specific defences to graffiti

In addition to these general defences, the following defence to graffiti offences can be used by an accused.

Honest and reasonable mistake

A person is not guilty of a graffiti offence if they can prove that they made both an honest and a reasonable mistake of fact (not law). This could apply if a person charged with marking graffiti genuinely believed they had the property owner's permission when in fact they did not. The belief must also be reasonable. That is, would an ordinary person in similar circumstances have held the same belief? It is important to show that if the facts (as the accused believed them) were true, then the accused would not have committed an offence.

The following scenario is an example of graffiti that resulted in serious charges. In this case, the accused used the defence of self-defence, which was dismissed.

Political prank ends in prison

ACTUAL SCENARIO

In March 2003, two 34-year-old men were sentenced to nine months in prison and ordered to pay $151 000 in compensation for writing 'no war' in red paint on the top of the Sydney Opera House. The incident – designed to protest against the Australian Government's decision to become involved in the Iraq War – resulted in a $9 million security upgrade to the Opera House precinct.

The men were charged with malicious (criminal) damage. They said they acted in self-defence because they were defending the lives of people who would die in war. They believed their actions were a peaceful protest against Australia's military involvement in Middle Eastern countries. An appeal to the New South Wales Court of Criminal Appeal was dismissed.

Source 5 Workers had to clean the anti-war slogan from the Opera House.

The role of the law in developing the elements of and defences to graffiti

Common law

Graffiti as we know it emerged as a global phenomenon in the 1980s as people began to see it as art rather than vandalism. It is in any event a crime that is contained in statute law and not in common law. However, the courts still have a role to play in deciding whether a crime has been committed within the meaning of the statute, including deciding what is a 'public place'.

Statute law

The offence of marking graffiti originates in statute law. In 2007, the Victorian Parliament passed the *Graffiti Prevention Act* to quell community concern about unsightly graffiti tags and pieces near railway lines and on the walls and fences of private properties.

This Act made it clear that unwanted or offensive graffiti is a crime, not art, and punishable by a maximum of two years in prison. As noted above, unlike wilful damage to property and criminal damage – that require proof of the offender's intent – the offence of marking graffiti is a crime of strict liability, making it easier for police to prosecute offenders. To help the police catch offenders, the Act gives them the authority to search a person, aged 14 years or over, without warrant if the police reasonably suspect that the person is carrying a spray paint can on or near public transport property or anywhere else as a trespasser. Any vehicle, bag or thing the person has with them can also be searched. Police can seize any graffiti items found. This often occurs if the person is in an area recently marked with graffiti or known for high levels of graffiti.

The Act also gives local councils permission to enter private property to remove or cover graffiti visible from a public place. Councils are required to seek the property owner's permission before taking action.

In the scenario on the next page, Frankston City Council was tasked with removing graffiti that popped up all over Frankston in mid-2019.

Did you know?

In 2006, police applied to destroy the paint pot and brushes used to paint 'no war' on the Opera House on the grounds that they might be sold for profit. The protesters went to court armed with letters from museums asking what would happen if we destroyed the Eureka Flag or Ned Kelly's armour. The letters argued that the paint pot and brushes should be regarded as 'rebellious relics'. Interestingly, the pot that was seized was later found to be an 'imposter pot'! The two protestors said that the 'real pot is safe and we think we have finally found a home for it'.

ACTUAL SCENARIO

Frankston graffiti goes viral

In mid-2019, graffiti popped up all over the Melbourne bayside suburb of Frankston. In purple spray paint, the same message was written in various public areas all over the town:

'Chris u need 2 talk 2 me before baby is born or don't bother after.'

Source 6 Photos of the purple graffiti were originally shared online on the Frankston Community Noticeboard Facebook page. The original post has been shared more than 10 000 times and there are over 24 000 comments on the post.

Amused and annoyed locals shared photos of the graffiti on social media, and before long these photos went viral.

'Chris should really just call, Frankston needs this before the whole city is destroyed – lord help us', wrote one Frankston local online.

After two days, the police located and arrested a 36-year-old woman. The woman was charged with criminal damage, wilful damage, marking graffiti, and committing an indictable offence while on bail.

Michael O'Reilley, the Mayor of Frankston, told the press in July 2019 that Frankston City Council had acted quickly to remove the graffiti. O'Reilley encouraged people to 'consider more constructive, and less illegal ways of communicating in the future'.

Trends and statistics

Graffiti is an underreported crime. Many offenders are hard to catch. Graffiti gangs take their work seriously, plan their operations carefully and work as a team to avoid detection. Graffiti artists often work at night, in secluded places, and dress so they can't be identified. Some victims may remove the graffiti, thinking it is too trivial to report to police, or they may report it to their local council instead. For these reasons, and because some incidents are prosecuted as general property crime rather than a graffiti offence, crime statistics may not accurately reflect the extent of graffiti-related crime in the community.

Graffiti is often underreported because many people consider it to be a valid form of street art. In this case, it is not reported to police or local councils. As seen in the scenario, 'Paint-bombing of Hosier Lane', there are different views in the community about what amounts to criminal damage; some people think graffiti is a valid form of political protest.

Victoria

Graffiti has long been attributed to younger age groups. According to the Crime Statistics Agency, males are five times more likely to commit property damage than females. The largest age group committing property damage (all offenders) is 15–19-year-olds, followed by 24–29-year-olds.

Graffiti is a type of property damage offence. The number of reported graffiti offences in Victoria steadily declined from 2011 to 2020 (refer to Source 7 on the next page) but not substantially so. This is partly due to greater surveillance of public areas by police and local councils, as well as limits placed by the Victorian Parliament on the sale of materials such as spray paint, which would typically be used in graffiti-related crime.

OFFENCE	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Mark graffiti on property	3103	3251	2765	3058	2904	2783	2889	2728	2392	2861
Possess graffiti implement	44	62	92	89	109	122	109	124	81	97

Source 7 Graffiti-related conduct in Victoria – offences recorded. Data from the Crime Statistics Agency for the year ending March

The Sentencing Advisory Council's SACStat shows that from 1 July 2016 to 30 June 2019, 332 people were sentenced in the courts for contravening section 5 of the *Graffiti Prevention Act*. Of those:

- 306 were male and 26 were female
- 21.7 per cent were sentenced to a term of imprisonment, 28 per cent received a fine, 21.7 per cent received a community correction order, and 28 per cent of the cases were dismissed or discharged
- the age group that committed the most graffiti offences was the 20–24 age group, with 123 offences in this age group. The next highest age group was the 25–34 age group, with 108 offences.

Local councils in Victoria can apply for graffiti prevention grants each year. These grants provide up to $30 000 funding to support effective graffiti management and prevention initiatives. When using these grants, councils partner with community groups such as police, local businesses and schools to help prevent graffiti in the community. The scenario below is an example of the successful use of this grant in Melton.

Graffiti prevention grant transforms Melton

ACTUAL SCENARIO

In a 2019 video, Justin Trevorrow of Melton City Council's graffiti and cleaning crew explained that Melton used to be covered in graffiti, 'telephone boxes, light boxes, shop walls – graffiti was pretty rampant [and] ugly'.

This began to change in 2015 when Melton City Council received a graffiti prevention grant of $25 000 from the Victorian Government to deliver a preventative and educational program about graffiti. Melton City Council also committed an additional $46 650 to help deliver the program. The program, named the Melton Graffiti Preventative Education and Street Art Activation Program, included graffiti education in schools and street art workshops.

The program not only focused on tidying up the existing graffiti in Melton but also on ensuring that it would not come back. The program reached community groups at all levels but focused on schools. This is because the most prevalent form of graffiti in Melton was tagging, which originated in schools with tags starting on desks, on lockers and on toilet doors before moving into the wider community.

The program encouraged young people to engage with positive street art. The Council commissioned street art murals by professional street artists to show young people how street art can be a career and a creative outlet, and not a criminal act.

This street art was met positively by the community, who reported a sense of community pride in the tidy and colourful neighbourhood that they now live in.

Trevorrow explained that in the 2018 calendar year, his team removed over 20 000 square metres of graffiti. With the success of the Preventative Education and Street Art Activation Program, this has changed significantly, 'We've only had one report of graffiti here in the last eight months'.

Source 8 Once a drab walkway in Melton, this area has been transformed by murals painted by professional street artists. This piece is by Lukas Kasper.

Western Australia

Similar to Victoria, the Western Australian Government has identified graffiti management as an important initiative to combat graffiti state-wide.

Over the past 30 years, the Western Australian Government has attempted to address graffiti using different methods, such as the establishment of a State Graffiti Taskforce and initiatives such as The Graffiti Vandalism Strategy Western Australia 2019–2021. Since 2011, actions of the Taskforce have led to over 5275 graffiti-related charges being laid.

Under the direction of the Taskforce, the Graffiti Vandalism Strategy provides a framework through which new and existing graffiti management initiatives can be implemented state-wide. The strategy has successfully adopted the following goals:

- to promote partnerships with private property owners to educate and support graffiti reporting and removal, including school education, private property support and community awareness
- to improve reporting and removing graffiti vandalism, including standardised reporting, rapid removal and monitoring of graffiti trends
- to prevent and police graffiti vandalism through youth diversion, intelligence-led policing and focusing on artistic graffiti hotspots.

The Goodbye Graffiti website, which provides community awareness and support to stakeholders about graffiti reporting, prevention and removal strategies, is free for all Western Australian residents to access and report graffiti.

Under the *Graffiti Vandalism Act 2016* (WA), specific conditions can be attached to community orders that are given for graffiti-related offences. Where an offender is sentenced to a community order, the court must impose a condition that a minimum of 10 hours' unpaid community work be carried out by the offender. This work is focused on graffiti removal, where practicable. The purpose of this law is not only to remove the graffiti, but also to deter offenders from committing future crimes of this nature. This legislation supports other community-based initiatives at the local level.

The data in Source 9 below shows the success of these initiatives, with a clear downwards trend in graffiti since 2010. Figures at the end of 2019 show a 79 per cent decrease in recorded graffiti offences since 2010.

2010–2011	2011–2012	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017	2017–2018	2018–2019
7469	4438	3649	2879	1933	2161	1954	1741	1566

Source 9 Data from the Western Australia Police Force shows a significant decline in the rate of graffiti offences between 2010 and 2018. This reduction has been achieved through a variety of methods that were implemented by the government over that period of time.

Source 10 Graffiti management is an important initiative in both Victoria and Western Australia.

Possible impacts of graffiti

All crime has impacts on individuals and society. Graffiti impacts:

- the victim (and their family and friends)
- the community
- the offender.

Impact on the victim (and their family and friends)

For private property owners, a graffiti attack is annoying and expensive to remove. It leaves victims angry. Unsightly graffiti on a property or in a neighbourhood can impact on property prices, and people generally feel unsafe in areas with a high incidence of graffiti. It can also impact on a business if the outer walls of the property are covered in tags that make the building look derelict.

Impact on the community

Lots of graffiti in a neighbourhood lowers the quality of the urban landscape and impacts on people's perception of law and order. While some see it as a harmless activity, graffiti-ridden public places and streets signal a degree of lawlessness and make others feel unsafe. The Australian Bureau of Statistics estimates that one in five people think that graffiti in an area is an indicator of social disorder.

By the twenty-first century, the graffiti problem in Australian towns and cities had become an important issue for law enforcement, local government and the community. Graffiti removal and prevention remains a major issue for government organisations and private companies. The cost of removing graffiti from public and private property is huge, and diverts financial and human resources from other projects.

Most local councils have graffiti management plans. They spend substantial amounts of money in graffiti removal and prevention. In 2016, it was estimated that the City of Melbourne spent $800 000 removing or painting over graffiti in the city. The estimated cost for removing graffiti from Metropolitan trains is $10 million per year, while the cost to VicRoads to remove graffiti from road signs, traffic lights and signal boxes is $380 000 per year. The hidden costs of preventative measures, like increased lighting, video surveillance, employing security guards and installing graffiti-resistant surfaces, are not included in these estimates.

Source 11 Graffiti removal is a costly business for local councils around Australia.

Impact on the offender

Writing graffiti can also be a dangerous activity. Some graffiti artists risk their lives to paint their tag or piece in a highly visible or inaccessible place. They may 'surf' trains, climb billboards, hang from buildings or bridges, or stand beside railway tracks and freeways. Some have fallen from or been hit by moving trains. Others have been electrocuted when they touched high-voltage overhead electrical wires. Graffiti artists not only expose themselves to serious injury but also to serious criminal charges – particularly if their activity is widespread, causes extensive damage or involves the commission of other crimes.

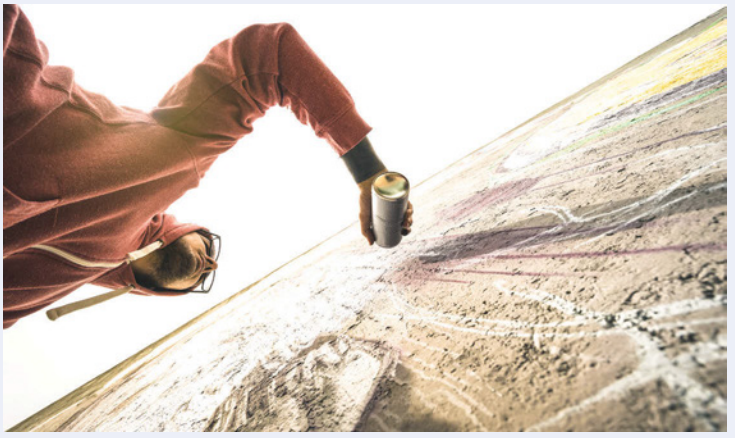
Did you know?

The Bondi Youth Centre in Sydney allows up to 50 graffiti artists to use its space as a second home. This has seen a reduction in 'paint-bombing' in favour of the creation of complete artworks. The young people also undertake a graffiti course, which teaches them art skills that are then used legally at sites donated by private and public contacts.

ACTUAL SCENARIO

The Addressing Graffiti in Diamond Village Shopping Centre project

Some local communities have taken a proactive approach to dealing with graffiti by implementing sustainable graffiti management strategies. The 'Addressing Graffiti in Diamond Village Shopping Centre project' is an example of such a strategy. The Diamond Village Shopping Centre is a retail precinct with 17 businesses. For many years, the brick walls around the centre had been popular places to graffiti. Each business in the precinct was paying around $3000 per year to remove this graffiti. The unsightly graffiti also discouraged shoppers, many of whom went elsewhere. The solution was found by engaging with Banyule City Council to develop a graffiti management strategy that was effective and efficient.



Source 12 Projects such as the Addressing Graffiti in Diamond Village Shopping Centre project help deter potential young offenders.

The project involved installing a street art mural to discourage graffiti, with the process being managed by community members, traders, Neighbourhood Watch, Greensborough Secondary School and the Council. An experienced street artist worked with students from Greensborough Secondary College to develop their sketching and painting skills. This resulted in a superb mural that local shoppers can enjoy and that deters graffiti. Banyule Youth Services also conducted an education and awareness campaign to explain the negative impact of graffiti and the criminal law that governs this behaviour.

Source 13 below summarises the possible impacts that graffiti can have on the victim and their family, on the community, and on the offender.

IMPACT ON THE VICTIM AND THEIR FAMILY	IMPACT ON THE COMMUNITY	IMPACT ON THE OFFENDER
• Reduced feelings of pride in the victim's property • Loss of trust in law and order • Cost of removal • Reduced feelings of safety • Lowers property prices	• Increased need for police officers • Loss of workplace productivity • Damage to community property such as public buildings • Increased council rates due to cost of removal • Loss of retail business if graffiti is outside shopping centres	• Legal costs for attendance at court • The payment of fines • Compensation payable to victims of crime • Risk of serious injury in acts such as marking graffiti on a train • The requirement in some states (e.g. Western Australia) to spend time removing graffiti as part of a sanction

Source 13 A summary of the impact of graffiti

6.5 CHECK YOUR LEARNING

Define and explain

1 Explain the difference between 'street art' and 'graffiti'.

2 Describe the elements that need to be established for a person to be convicted of an offence under section 5 of the *Graffiti Prevention Act*.

3 Describe two impacts of graffiti offences on each of the following:
   - **a** the offender
   - **b** the community.

Synthesise and apply

4 Apply the elements of the offence to explain why a crime has been committed in each scenario.
   - **a** Ethan uses a sharp tool to scratch a graffiti tag into the painted surface of a private property's front fence.
   - **b** Mimi has the owner's permission to spray a graffiti piece on the side wall of a property but neighbours complain it is 'ugly'.
   - **c** Jacob causes extensive damage by spraying large graffiti tags across 10 toilet doors in a school's toilet block.
   - **d** Dimitri is a frustrated artist and decides to 'paint-bomb' a mural outside his local Magistrates' Court as a protest against limits on free speech.

5 Create a scenario in which a person has marked graffiti but could raise one of the defences set out in this topic. Exchange your scenario with another class member and identify the elements and possible defences in the scenario. Share your findings.

Analyse and evaluate

6 To what extent do you think that requiring offenders to spend time removing graffiti (as is the law in Western Australia) would deter young offenders in Victoria from committing this offence? Give reasons for your answer.

7 'If we are to deal with graffiti effectively, we must work as a community in partnership with local councils, schools and community groups. Policing is only part of the answer.'

Discuss this statement. In your discussion, refer to the scenario, 'The Addressing Graffiti in Diamond Village Shopping Centre project' and the measures used in Western Australia to punish those who mark graffiti.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 6.5 Check your learning
- **Weblink** Laws of graffiti
- **Going further** Banksy
- **Weblinks** Graffiti (Victoria Legal Aid); Graffiti (*Crimes Act 1958* (Vic))

Source 14 Mural of a young Indigenous boy on the side of a building in Fitzroy, Melbourne. This piece is by the artist Adnate.

CHAPTER 6

REVIEW

TOP TIPS FROM CHAPTER 6

1 When you are given a scenario and asked to analyse whether the accused has committed an offence, work carefully through each element, and then address any defences that may apply. Use headings for each element, and apply the facts of the scenario to each element and any relevant defences.

2 The relationship between statute law and common law is a focus in Unit 4 of the Legal Studies course. If you are planning to study Legal Studies next year, it's good to start getting a sense of how statute law and common law interact with each other. You can do this when examining the development of the laws relating to the crimes you have chosen to study.

3 Look carefully at trends and statistics, and think about other factors that may impact on the data. For example, could it be an underreported crime? Could it be a crime that is not a priority for police?

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 Select one summary offence and **outline** the elements that need to be established by the prosecution in relation to that offence.

(6 marks)

Difficulty: medium

2 Select one summary offence. **Explain** the role of common law and statute law in developing that offence.

(6 marks)

Difficulty: high

3 Select one summary offence. **Describe** the possible impacts of that offence on the community. In your answer, **discuss** the extent to which the legal system could reduce the impact of that offence on individuals and on society.

(8 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Use the internet or other sources to find legal cases or news articles involving two summary offences covered in this chapter. Each case or article should:

- focus on one summary offence rather than lots of different offences
- explain what the offender did in detail
- state whether the offender was (or was not) punished.

For these two cases, provide answers to the following questions.

Practice assessment task questions

1 How prevalent is this type of crime in our community? Give reasons for your answer.
(5 marks)

2 Who must prove that the accused is guilty of committing this crime? To what standard must their guilt be proven?
(2 marks)

3 Explain how each element of the crime was met (or not met).
(8 marks)

4 Describe any defences that were relied on in this case, and whether they were or could be successful.
(5 marks)

5 What effect does this crime have on the victim, on the offender, and on the community?
(5 marks)

Total: 25 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 6

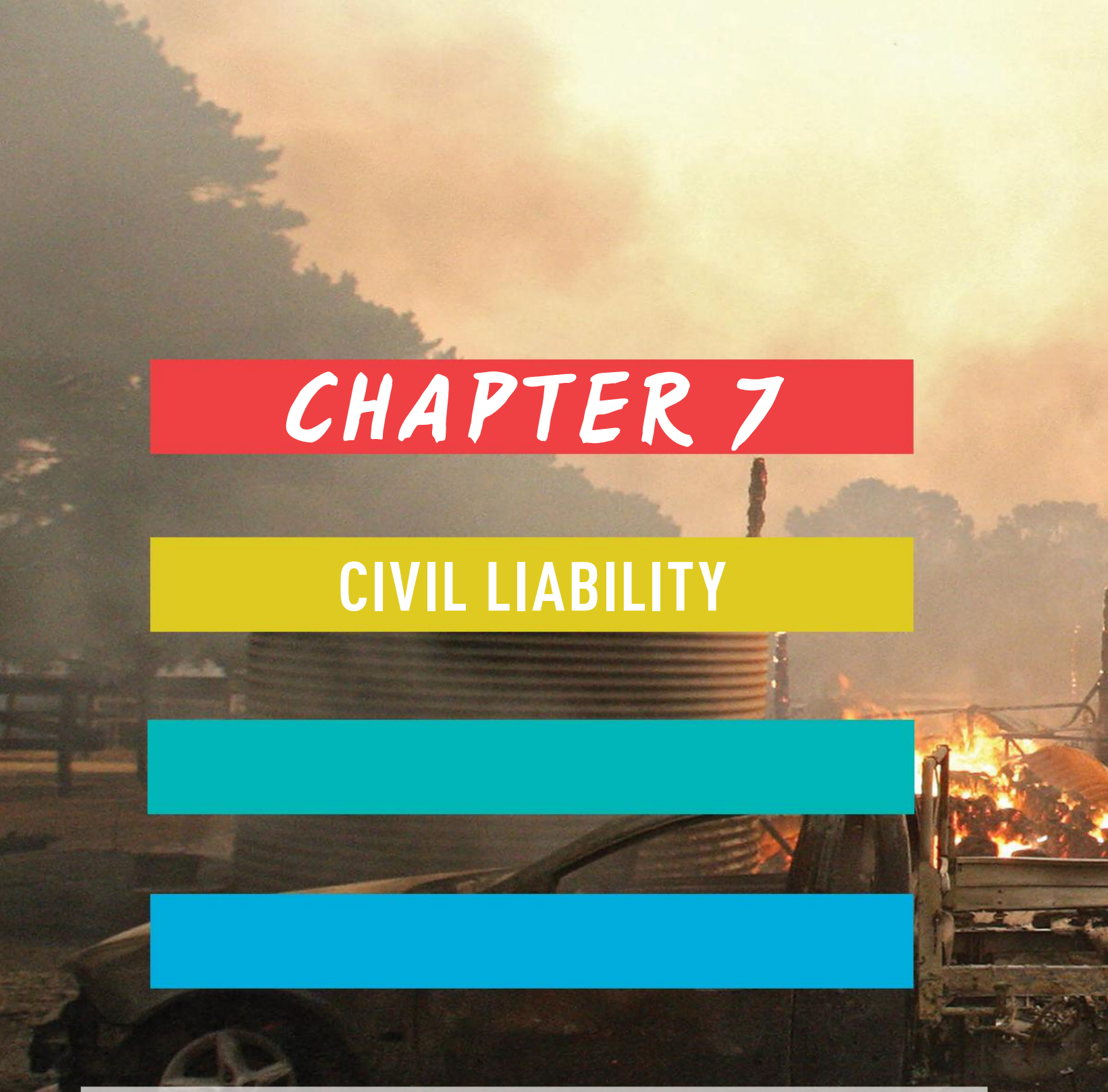
Revision notes
Revision notes for Chapter 6

assess quiz
Chapter 6
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 7

CIVIL LIABILITY



Source 1 Civil law is an area of law that governs disputes between individuals, groups and organisations. 'Civil liabilities' is a term used to describe the legal responsibilities of a party (i.e. a person or group) for any loss or harm caused to another party because of a breach of civil law. The Black Saturday bushfires class action was one of the most significant cases in Australia's civil law history. In this chapter, you will learn about the purposes and types of civil law and be introduced to the different parties involved in civil disputes.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

KEY KNOWLEDGE

In the chapter, you will learn about:

- the purposes and types of civil law
- key concepts of civil law, including breach, causation, loss, limitation of actions, the burden of proof and the standard of proof
- possible plaintiffs and defendants to a civil dispute.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research and analyse relevant information about civil law
- explain the purposes and key concepts of civil law
- classify civil law according to its type.

KEY LEGAL TERMS

accessorial liability the way in which a person can be responsible or liable for the loss or harm suffered by another person because they were directly or indirectly involved in causing the loss or harm (e.g. they encouraged another person to cause the harm)

balance of probabilities the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

causation the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

civil law an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

contract law an area of civil law governing the validity and enforceability of agreements made between two or more parties

counterclaim a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

damages an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

defamation a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

defendant (in civil disputes) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

group member a member of a group of people who is part of a representative proceeding (i.e. a class action)

insurers a person or company that is contracted to compensate another person in the event of damage or loss

limitation of actions the restriction on bringing a civil law claim after the allowed time

loss a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

negligence a type of tort that involves a breach of a duty of care, causing loss or harm

nuisance a type of tort that involves interference with a person's right to use and enjoy private and/or public property

plaintiff (in civil disputes) a party who makes a legal claim against another party (i.e. the defendant) in court

remedy any order made by a court that is designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to the position they were in before they were wronged or their rights were breached

representative proceeding a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person (also called a class action or a group proceeding)

right of subrogation the right to 'step into the shoes' of an insured person and act on their behalf – this includes taking legal actions in their name

sue to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

tort a term that literally means 'wrong'; a wrong that inteferes with a person's legally protected interests

trespass a type of tort involving the interference or intrusion of a person's body, property or goods without the consent of that person

vicarious liability the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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7.1 PURPOSES AND TYPES OF CIVIL LAW

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

civil liability
the legal responsibility of a party (i.e. an individual, group or organisation) for loss or harm caused to another party because of a breach of civil law

Some of the laws made by parliament and the courts are known as **civil law**. Civil law regulates disputes between individuals, groups and organisations. Civil law enables people to enforce their rights where harm has occurred.

Civil liability is a term used to describe the legal responsibility of a party (i.e. an individual, group or organisation) for loss or harm caused to another party because of a breach of civil law. In this topic, you will explore the purposes and types of civil law.

Source 1 Under Victorian law, at childcare centres, there must be one adult educator for every four children aged 0 to 35 months. A failure to follow this law may put children at risk, which could give rise to a civil dispute.

Purposes of civil law

Civil law has several specific purposes. Civil law aims to:

- **achieve social cohesion** – civil law provides guidelines for acceptable behaviour, so that people can live together in harmony. If these guidelines did not exist, some individuals might exploit or abuse the rights of others. For example, if there was no law regulating the standard and quality of toys, some toy manufacturers might make toys using the cheapest materials without concern for the safety of the children playing with them. Similarly, there are laws requiring schools and businesses that provide childcare to make sure they maintain processes and procedures to protect the children within their care
- **protect the rights of individuals** – key rights are enshrined in civil law, including the right to be protected from false statements that might damage your reputation, the right to a promise made under a contract, and the right not to be harmed
- **provide an avenue for people to seek compensation where a breach of civil law has occurred** – individuals can seek compensation for a breach of civil law through the courts, tribunals, complaints bodies and ombudsmen (you will explore these dispute resolution bodies in Unit 2). If there were no dispute resolution bodies, there would be no specialised bodies available to help people resolve their disputes, so disagreement would fester in the community. This would impact on social cohesion

- **provide a means to seek compensation** – when a person's rights have been infringed, civil law provides a way to return the harmed person, as far as possible, to the position they were in before the harm occurred. This is achieved through the awarding of civil **remedies**. The most common civil remedy is an amount of money paid as compensation (i.e. **damages**) to the **plaintiff** for the loss they suffered.

Certain types of civil law also have specific purposes. For example:

- **contract laws** aim to ensure that people who make promises under a contract (i.e. an agreement) stick to those promises, or else they may have to compensate the other party to the contract if they fail to comply with it
- laws relating to **negligence** aim to ensure that people who owe duties of care to each other do not breach those duties; if they do, they are responsible for any loss suffered
- laws relating to **wills** aim to provide a consistent set of rules about the way a person's will (i.e. their instructions about how to deal with their property after they die) must be carried out. If a deceased person did not leave a will, statute law sets out the way this must be done to provide a fair and equitable distribution of assets
- laws relating to **nuisance** recognise that people should have a right to enjoy and use their land, or public land, free from interferences or annoyance. The purpose of nuisance laws is to ensure that people can enjoy this right, by establishing guidelines on what counts as an interference or annoyance
- laws relating to **defamation** aim to ensure that a person's reputation is not harmed because of false statements that are made about that person.

The following scenario is an example of a civil law dispute involving asbestos.

Compensation for 42-year-old man after exposure to asbestos dust

ACTUAL SCENARIO

Werfel v AMACA v The State of South Australia [2019] SAET 159 (6 August 2019)

A terminally ill South Australian man, Matthew Werfel, was awarded $3 million after he was exposed to asbestos dust. Asbestos is a deadly chemical that can cause mesothelioma, a rare type of cancer that usually affects the lungs.

Werfel was exposed to asbestos while working for a fencing contractor as a teenager, and later on in life while he was renovating his home. He was unaware that his home was constructed from asbestos cement sheets. The Judge at the South Australian Employment Tribunal (SAET) found that Werfel was not warned of the risks posed by manufacturer James Hardie's asbestos products and awarded him compensation for pain and suffering, future economic loss, and medical expenses. The case is one of many cases in Australia where victims have been awarded compensation after being exposed to asbestos dust.

Source 2 Asbestos removal is highly dangerous.

remedy
any order made by a court that is designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to the position they were in before they were wronged or their rights were breached

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

plaintiff
(in civil disputes) a party who makes a legal claim against another party (i.e. the defendant) in court

contract law
an area of civil law governing the validity and enforceability of agreements made between two or more parties

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

will
a document that specifies how a person would like their assets to be distributed after they die, and who they would like to carry out their wishes

nuisance
a type of tort that involves interference with a person's right to use and enjoy private and/or public property

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

Study tip

Gather newspaper articles and social media references about the different types of civil law. Make note of the different legal terms used for each type of civil law. Learn these legal terms and definitions, and use them correctly to improve your performance in assessment tasks.

trespass
a type of tort involving the interference or intrusion of a person's body, property or goods without the consent of that person

Types of civil law

There are several types of civil law. These include:

- **negligence** – this occurs when someone owes a duty of care to another person and breaches that duty, causing harm or loss to the other person (e.g. a doctor is careless during a medical procedure and something goes wrong, causing physical injury and pain to the patient)
- **trespass** – this occurs when someone interferes with another person, their land or their goods, and that interference causes damage (e.g. destroying another person's car may give rise to a claim for trespass to goods)
- **defamation** – this relates to the publication of material that causes damage to another person's reputation. For example, the publication of a statement about another person – in a newspaper article or on social media platforms such as Facebook and Twitter – that is false and harmful to that person's reputation may lead to a defamation claim by the other person
- **nuisance laws** – these laws deal with an individual's right to use and enjoy both public and private property. A nuisance claim may be made by a person who is unable to enjoy their own home because of some sort of interference (e.g. a significant odour coming from a factory nearby)
- **wills and inheritance laws** – these laws regulate wills, including when they are valid. These laws give guidelines about the decisions made by a will-maker and how a person's estate is distributed if there is no will
- **contract laws** – these cover the validity of contracts (i.e. legal agreements) and the rights available to a person if a valid contract has been breached. A claim for breach of contract may involve a contracting party who has failed to do something, or has done something contrary to what they agreed to do as part of a contract. Many statutes regulate issues that may arise in contracts, such as unfair terms and guarantees (given by a seller when they sell goods)
- **family law** – this deals with disputes between family members that are of a family nature, such as disputes over the division of property between divorced parties and the parenting of children, as illustrated in the scenario below

Source 3 Sometimes children can be involved, directly or indirectly, in a civil dispute, such as where their rights need to be protected.

HYPOTHETICAL SCENARIO

Sam and Alice

Sam and Alice's parents separated in July 2020. A month later, their mother commenced proceedings in the Family Court of Australia seeking orders from the Court in relation to custody of Sam and Alice. The Family Court made orders in December 2020 that the children should live with their mother but that the children were to spend time with their father every second weekend, and each alternate week during the school holidays.

- **employment laws** – these laws deal with disputes between employers and employees. Disputes often arise in the workplace in relation to pay, conditions, harassment, discrimination and termination of employment

- **equal opportunity and discrimination laws** – these laws aim to protect individuals from bias, prejudice or vilification based on a personal attribute such as their sex, marital status, race or religion.

As part of this Area of Study, you will examine two areas of civil law. Some of the areas of law covered briefly above are explored further in Chapters 8 and 9.

The following scenario provides an example of a defamation payout to be paid by the state of Victoria to compensate the plaintiff for the conduct of Victoria Police officers.

ACTUAL SCENARIO

Inflation nightclub manager Martha Tsamis to get $90k defamation payout from Victoria Police

Karen Percy and Emilia Terzon, *ABC News*, 19 December 2017

Victoria Police has been ordered to pay $90 000 to a nightclub manager who won a defamation case over allegations that she was running a 'honeypot' for drug dealers.

Martha Tsamis sued the police over comments made to the media in 2014 by then-superintendent Brett Guerin, who said Ms Tsamis was running the Inflation nightclub in 'a manner that was conducive to drug trafficking, drunkenness and violence'.

The Supreme Court also found Mr Guerin conveyed to the *Herald Sun* newspaper and radio station 3AW that she had allowed minors into the venue and jeopardised the health of patrons.

Victoria Police was pushing to limit the CBD club's trading hours because of concerns about activities at the venue.

It had cited 59 incidents at the club in an application to the liquor regulation commission.

Ms Tsamis was also accused of improperly approaching witnesses who were taking part in commission hearings.

Ms Tsamis argued there were eight instances of defamation by police as part of a campaign to inflict 'maximum hurt' on her position before the commission.

In August, a jury found in her favour on four of those, but found the claims about drug activity use to be 'substantially true'.

Justice John Dixon acknowledged the personal hurt to Ms Tsamis and the damage to her reputation, in particular her integrity.

...

Source 4 Nightclub manager Martha Tsamis was awarded $90 000 in a defamation case against the state of Victoria in relation to conduct by Victoria Police.

7.1 CHECK YOUR LEARNING

Define and explain

1 Describe two purposes of civil law.
2 What is a remedy? What is the main purpose of a remedy?
3 Identify one purpose of the following types of civil law:
   a negligence laws
   b defamation laws
   c laws governing wills
   d laws governing contracts
   e nuisance laws.

Synthesise and apply

4 Read the scenario *Werfel v AMACA v State of South Australia*.
   a What type of civil law is this case about?
   b What happened to the plaintiff?
   c Conduct some research and identify at least three other cases involving asbestos and the damages awarded in each case.
5 Read the scenario 'Sam and Alice'.
   a What type of civil law is this case about?
   b What was the dispute between the parties?
   c What order did the Court make?
   d Conduct some research on the Family Court. What sort of disputes does the Family Court hear?
6 Look at Source 1 on page 200. Identify the type of civil law that the photo depicts and the purpose the law is trying to achieve.
7 Read the scenario 'Inflation nightclub manager Martha Tsamis to get $90k defamation payout from Victoria Police'.
   a Who was suing who?
   b Why was the state of Victoria involved in this case?
   c What type of civil law does this article refer to? What is the aim of this law?
   d What type of remedy was the plaintiff seeking?
   e Which dispute resolution body was used to resolve this dispute? Write down as much as you know about this body.
8 Collect two articles that refer to two different civil cases. Write a report about the two cases. Your report should include:
   - a description of the main issues of each case
   - a discussion about how the civil law referred to in each article aims to achieve two or more purposes.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 7.1 Check your learning
- **Video tutorial** Introduction to Chapter 7
- **Video** Civil justice
- **Video worksheet** Civil justice

Source 5 Many civil disputes arise in the centre of Melbourne, such as disputes that occur in nightclubs and bars.

7.2 KEY CONCEPTS OF CIVIL LAW

If there has been a breach of civil law, the person whose rights have been infringed is referred to as the aggrieved party, the wronged party, or the plaintiff (in court). The party alleged to be in the wrong is referred to as the wrongdoer or the **defendant** (in court).

The plaintiff may use a dispute resolution body such as a court or a tribunal to **sue** the defendant to try to obtain a remedy to compensate them for the loss they have suffered.

A number of key concepts of civil law are relevant when a party sues another party. These concepts include breach, causation, loss, limitation of actions, the burden of proof and the standard of proof. Each concept is discussed in detail in this topic.

defendant
(in civil disputes) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

sue
to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

Breach

In most types of civil law claims, the plaintiff has to prove that there has been a **breach** by the defendant. This means that the defendant has in some way failed to observe a law or obligation imposed on them. As the plaintiff has the responsibility, or onus, to prove their case, they need to establish that the defendant is in breach. The defendant may argue as a defence that there has been no breach.

breach
breaking or failing to fulfil a duty or obligation

The nature of the breach depends on the area of law. For example:

- In **contract law**, the plaintiff may allege that the defendant has breached an agreement that was reached between them – in other words, that the defendant has failed to fulfil an obligation or promise that they made to the plaintiff. For example, if a person hires a jumping castle for a birthday party, a contract is formed with the supplier that governs the supply of that castle. One of the terms of the contract may be that the castle is to be set up at the person's house by 11 am, in time for the party. If the supplier fails to complete the installation by that time, or if the castle never arrives, the contract has been breached.
- In **negligence**, the plaintiff may allege that the defendant breached their duty of care to the plaintiff. This means that the defendant had an obligation or duty to care for the plaintiff, and that duty was not complied with. For example, in schools, teachers supervise the grounds before, during and after school hours. If a school fails to roster teachers to supervise a particular area of the school before school starts each morning, and a student is injured in that area, it is possible that the school has breached its duty of care to its students.
- In a **sexual harassment claim**, the plaintiff may allege that the defendant breached the relevant laws that prohibit people from sexually harassing another person. For example, if a boss makes sexual comments to a worker in the workplace, the worker could make a claim against their employer for the loss suffered as a result.
- In a **discrimination claim**, the plaintiff may allege that the defendant breached the relevant laws that prohibit people and organisations from discriminating against a person on the basis of their sex, gender, race, religion or other characteristic. For example, a law in Victoria states that an educational authority (e.g. a school) must not discriminate against a person in deciding who should be admitted as a student. If a school chooses not to enrol students because of their race or religion, the school is likely to be in breach of that law (there are exceptions to this).

The scenario on the next page provides another example of a breach of contract law.

Study tip

You will examine breach, causation, loss, and limitation of actions more closely when you investigate two areas of civil law in Chapters 8 and 9. For now, you should at least understand the meaning of each of these key concepts and be able to list a few examples of each.

HYPOTHETICAL SCENARIO

Contract to provide editing services

Rakesh runs his own editing business from home. Two months ago, he was contracted by a small accounting firm to edit various reports that they were preparing for their clients. Rakesh and the accounting firm agreed that he would be paid a flat fee of $2000 per report, and that he would review six reports in total. Rakesh completed the job on time and issued an invoice for $12 000. The accounting firm has only paid $6000 of the invoice, and now says that the agreed rate was $1000 per report.

Causation

causation
the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

In civil law cases, another key element that a plaintiff normally needs to prove is **causation**. The plaintiff needs to prove that the defendant's actions caused or resulted in the harm suffered by the plaintiff, and that the harm would not have occurred if the defendant had not acted in the way they did. That is, there needs to be a causal link between the actions (or inactions) of the defendant, and the harm that the plaintiff suffered.

For example, imagine if a plaintiff alleges that the defendant has been playing loud music all night long for several months. The plaintiff may be able to bring a nuisance claim against the defendant, alleging that the defendant has disturbed their enjoyment of their property. If the plaintiff alleges that they no longer sleep at night, are suffering from anxiety, and have lost their job, the plaintiff needs to establish that the defendant's actions caused all of those things, and those things were not caused by something else. For example, is the plaintiff not sleeping for another reason, like a health condition? Or did the plaintiff lose their job not because they can't sleep and concentrate because of the defendant's actions, but because they are not very good in performing their duties at work? If it can be shown that the harm was too remote from the actions of the defendant, then the plaintiff is unlikely to be able to prove causation.

There can be an intervening event or a break in the chain of causation. This happens when something occurs after the defendant's actions, which may be considered to have actually caused the injury or loss, rather than the defendant's actions. For example, if Bill injures Babak in a fight, Babak might have a civil law claim against Bill. But what happens if Babak had surgery for his injuries, and the surgeon made the loss suffered by Babak worse? Did Bill cause the loss, or did the surgeon? It could be argued that the surgeon's actions broke the link between Bill's actions and Babak's loss or injury.

The scenario below is another example of a situation where there was a break in the chain of causation.

Break in the chain of causation

ACTUAL SCENARIO

State Rail Authority of New South Wales v Chu [2008] NSWCA 14 (6 March 2008)

A Sydney woman fell down the stairs at a railway station early in the morning after it had been raining. It was found that members of the relevant body who managed the railway station had applied paint to the edges of the steps that became dangerously slippery when wet.

The woman suffered physical injuries as a result of the fall, including a fractured left ankle and injury to her lower back. She also suffered psychological injuries (i.e. depression). The situation relating to her claim for psychological injury was complicated by the fact that some

weeks after the accident, she was sexually assaulted by a man who had been assisting her by helping her to get around and by speaking English with her.

The plaintiff sued the body that managed the railway station and argued that the sexual assault was a direct and foreseeable result of her fall at the station. The trial judge agreed and found that her reduced mobility made her more vulnerable, and that this was foreseeable by the defendant. The plaintiff was awarded damages of $239 405, which included damages for her psychological injury.

On **appeal**, the New South Wales Court of Appeal found that the sexual assault was an act that broke the chain of causation, and that the conduct of her assailant was a free, deliberate and informed act. Therefore, the Court found that there was a clear break in the causal link between the injuries suffered as a result of the fall and the injuries suffered as a result of the sexual assault some weeks later. The Court, after considering the grounds of appeal by both the plaintiff and the appellant (the defendant in the original case), reduced damages slightly to $217 324.

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

Loss

As a general rule, a plaintiff can only obtain a legal remedy, such as damages, if it can be proved that they have suffered **loss** or harm. 'Loss' in a civil claim can include:

- **economic or financial loss** – for example, loss of wages, loss of earning capacity, or loss of profits. For personal injury claims, loss may also include money spent on medical expenses
- **property damage** – for example, a car may have been damaged, or there might be damage to a house, clothing or goods
- **personal injury** – for example, the plaintiff might have suffered cuts, bruises, broken bones or loss of a limb
- **pain and suffering** – for example, mental anguish, anxiety or depression
- **loss of amenity** – for example, loss of enjoyment of life, loss of job satisfaction, loss of family life or loss of enjoyment of hobbies.

loss
a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

Source 1 'Loss' in a civil law claim can include property damage, personal injury or pain and suffering.

The scenario below provides an example of a civil law claim for damages by former rugby player, Israel Folau, for loss of income suffered.

ACTUAL SCENARIO

Israel Folau lodges claim seeking $10m damages and reinstatement by Rugby Australia

Australian Associated Press, 1 August 2019

Israel Folau has begun legal action against his former employers Rugby Australia (RA) and the NSW Waratahs for unfair dismissal. The decision comes after the former Wallaby and RA failed to reach an agreement at a mediation hearing at the Fair Work Commission on 28 June 2019.

RA terminated Folau's multimillion dollar contract over a social media post in which he paraphrased a Bible passage, saying 'drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters' would go to hell unless they repented.

Source 2 Israel Folau was involved in a dispute with Rugby Australia about its decision to terminate his contract.

The committed Christian argues he was unfairly dismissed on religious grounds. The 30-year-old is seeking $10m in damages from RA and wants his contract reinstated.

More than 20 000 people have donated about $2.2 million to help fund Folau's legal battle via a campaign page set up by the Australian Christian Lobby (ACL). The ACL effort replaced an earlier campaign on GoFundMe, which was taken down by the platform for breaching its service guidelines.

Note: In December 2019, Israel Folau and RA reached an out-of-court settlement. The settlement remains confidential.

Limitation of actions

limitation of actions the restriction on bringing a civil law claim after the allowed time

For almost all civil claims, there is a time period within which a wronged party can sue the wrongdoer. This is known as the **limitation of actions**. Once that time period has passed, then the defendant can use the defence that the plaintiff is too late to obtain any remedy.

A time limit within which a person must initiate a claim is imposed so that disputes can be resolved efficiently, and so that a defendant does not have to be subjected to a claim a significant time after the alleged acts (or omissions) occurred. A delay in issuing a claim can also risk the reliability of the evidence (e.g. the evidence of people who saw what happened), including physical evidence.

Each state in Australia has its own statute that sets out the time period within which a civil claim can be commenced. In Victoria, this statute is the *Limitation of Actions Act 1958* (Vic). Source 3 on the next page lists the time periods within which an action for certain types of civil claims can be commenced in Victoria.

TYPE OF CLAIM	TIME PERIOD
Breach of contract	Six years
Under tort law	Six years
Under tort law where there is personal injury consisting of a disease or a disorder	Three years
Defamation	One year
An action to recover arrears of rent	Six years

Source 3 The time periods within which a civil law action can be initiated for certain types of civil claims

Study tip

There are some useful online resources that provide summaries of the limitation periods for different types of civil law actions. Links to these websites are provided on your obook assess.

In some circumstances, the time period can be extended, depending on the nature of the case. For example, a person who believes they have a defamation claim may apply to a court for an order extending the limitation period (which is one year). If the court is satisfied that it is not reasonable for the plaintiff to commence an action within one year from the date of the publication of the defamatory material, then the court may extend the time period by up to three years.

There are some civil claims for which there is no limitation period. For example, for people who have a civil claim for physical or sexual abuse that they suffered as a minor, or psychological abuse that arose out of that abuse, there is no time period within which that claim might be issued. Victoria was one of the first states to amend its limitation periods for children who had suffered sexual abuse. Other states have followed, including Tasmania and Western Australia, which has seen a flood of compensation claims since its statute of limitations was lifted in relation to such cases in 2018.

ACTUAL SCENARIO

Tasmania and Western Australia lift their statute of limitations in relation to child abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse commenced in 2013 and concluded in December 2017. It was appointed to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters.

As part of its work, the Royal Commission looked at the limitation periods that applied to people who sought compensation for injuries caused by sexual abuse they had suffered as a child. One of the Royal Commission's recommendations (made in 2015, partway through the Commission's work) was that state and territory governments should remove any limitation period that applies to a claim for damages by a person where the person has suffered injury as a result of sexual abuse in an institutional context when the person was a child. One of the key issues with a limitation period in this context was that often survivors of child sexual abuse take many years to disclose their abuse, let alone seek legal advice and commence proceedings.

Governments are not obliged or compelled to accept any recommendations made by a royal commission. However, all state governments have now removed the limitation period for child sexual abuse cases, which means that people who have suffered child sexual abuse decades ago are now able to commence civil action to seek compensation for injuries they have suffered as a result of the abuse.

Tasmania and Western Australia were the last to abolish the relevant limitation periods, in 2018. It has been reported that there has been a flood of claims in Western Australia (WA) since the time limit was removed, with 369 cases commenced and 40 of them having already settled. It is estimated that the WA Government could end up paying between $500 million and $700 million in compensation in relation to claims made against it directly.

In Tasmania, claims have also been made against the state of Tasmania by children who were sexually abused while being in the care of the state. These cases could not have been commenced prior to the abolition of the limitation period for civil claims arising from child abuse.

The burden of proof

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

The **burden of proof** is the responsibility of proving the facts of a case. This is sometimes called the 'onus of proof'. In every court case, one party has this responsibility. In a civil case, the burden of proof lies with the plaintiff. This means that the plaintiff must present evidence to establish that the defendant is in the wrong (or liable for the harm that has been inflicted on the plaintiff). Placing the burden of proof on the plaintiff follows the idea or principle that it is only fair and just that if someone alleges that another person is liable for the loss or damage suffered by them, then they should prove those allegations.

It is not the defendant's responsibility to prove they are not liable. However, there are some situations where a defendant may need to prove an allegation. This includes where a defendant raises a **counterclaim**. This is a claim made by the defendant against the plaintiff in response to the plaintiff's claims in the same case.

Source 4 The burden of proof rests with the party who initiated the legal action.

The standard of proof

standard of proof
the degree or extent to which a case must be proved in court

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

The **standard of proof** is the degree or extent to which a case must be proven in court. In civil cases, the plaintiff must prove the case on the **balance of probabilities**. This means that the plaintiff must prove that they are most likely to be in the right, and the defendant is more likely to be in the wrong.

Source 5 A plaintiff can obtain a legal remedy for economic or financial loss.

7.2 CHECK YOUR LEARNING

Define and explain

1 What is a counterclaim? How is a counterclaim relevant to the burden of proof?

2 Define the following terms:
   - **a** breach
   - **b** causation
   - **c** balance of probabilities
   - **d** intervening event
   - **e** property damage.

   Now use each term in a sentence about a civil dispute (be as inventive as you like).

3 What is the justification for imposing a time period within which a civil claim can be initiated?

4 Identify and describe two types of loss. Provide an example of each type of loss.

Synthesise and apply

5 Read the scenario 'Contract to provide editing services'. What is the main issue in dispute in this case?

6 Read the scenario 'Israel Folau lodges claim seeking $10m damages and reinstatement by Rugby Australia'.
   - **a** What type of law is alleged to have been breached in this case?
   - **b** Who is the plaintiff? Who are the defendants?
   - **c** What loss is alleged to have been suffered?
   - **d** Conduct some research. Find out more about the comments that Folau made. Engage in a class discussion about whether the termination of Folau's contract was appropriate in light of his conduct.

7 Read the scenario *State Rail Authority of New South Wales v Chu*.
   - **a** What law did the plaintiff allege the defendant breached?
   - **b** Why was it the Rail Authority's responsibility to ensure the stairs were safe?
   - **c** What loss did the plaintiff suffer?
   - **d** Why were the plaintiff's damages reduced by the Court of Appeal?
   - **e** One of the key issues in this case was whether the Rail Authority could have reasonably foreseen that a fall could result in a criminal sexual assault. Do you agree with the trial judge's finding or the Court of Appeal's finding? Give reasons for your answer.

8 For each of the following civil claims, identify the time period within which the plaintiff must initiate their claim.
   - **a** Nalini is a landlord who is owed rent.
   - **b** On a website, Raja is described as a 'vampire who is out to get people's blood because he is so mean and awful'. The website has been viewed over 40 000 times.
   - **c** Xander and Yilong entered into a contract for the provision of services relating to Xander's business. Xander claims that Yilong has breached the contract by providing the services too late.
   - **d** Georgos is suing his former employer because he contracted a breathing disease as a result of his work conditions.

9 Read the scenario 'Tasmania and Western Australia lift their statute of limitations in relation to child abuse'.
   - **a** For what types of cases has the time limit been removed?
   - **b** Provide two arguments for and two arguments against removing the limitation period for these types of claims.
   - **c** Why would the Tasmanian or Western Australian Government be paying compensation? If you need to, conduct some research to find the answer.

Analyse and evaluate

10 'Limitation periods inhibit justice from being achieved. If a civil dispute arose years ago, a plaintiff should be able to pursue it.' Do you agree? Give reasons.

Check your Student obook assess for these additional resources and more:

- **Student book questions**
  7.2 Check your learning
- **Actual scenario**
  Rogers v Julius (Residential Tenancies) [2017] VCAT 55 (11 January 2017)
- **Weblink**
  The limitation periods for different types of civil law actions
- **assess quiz**
  Test your knowledge on this topic with an auto-correcting multiple-choice quiz

7.3 POSSIBLE PARTIES TO A CIVIL DISPUTE

Did you know?

Children aged under 18 years can be plaintiffs. Children can sue via a 'next friend' or 'litigation guardian', who can commence proceedings on their behalf.

In civil disputes, there can be more than one plaintiff and more than one defendant. When faced with a possible civil claim, the parties may need to consider:

- who the plaintiffs might be
- who the defendants might be.

Plaintiffs and defendants can be human beings, companies (which are separate legal entities from the directors and managers who run them), or other bodies such as government agencies.

Possible plaintiffs

The possible plaintiffs in a civil dispute include:

- the aggrieved party (i.e. the person who has suffered the loss)
- other victims (i.e. victims other than the aggrieved party)
- insurers.

Aggrieved party

The aggrieved party is the person whose rights have been infringed and who has suffered loss. For example, in a contract claim, the plaintiff is likely to be one of the parties to the contract who suffered loss because of a breach of contract. In a negligence claim, the plaintiff is the person to whom the defendant owed a duty of care, and who has suffered injuries as a direct result of the defendant breaching that duty.

It is possible for a civil action to include more than one aggrieved person. For example, in a nuisance claim, there might be two people whose use and enjoyment of their property might be infringed (as explained below).

HYPOTHETICAL SCENARIO

Property owners sue for trespass to land

Polly and Heather are joint owners of a property in Werribee. They built a fence around their property and created a sanctuary for a large number of animals. Barry, the next-door neighbour, takes his five dogs for a walk every Saturday morning. During his walk, Barry and his dogs cut across Polly and Heather's land and the dogs chase and scare the animals. Polly and Heather have told Barry several times that he does not have their consent to go onto their land, but Barry continues to do so. They have now commenced a civil claim against him.

representative proceeding
a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person (also called a class action or a group proceeding)

A **representative proceeding** – also known as a 'class action' or 'group proceeding' – is a particular type of civil proceeding, where seven or more people have claims against the same party, and those claims are in respect of, or arise out of, the same type of circumstances. The people who have the claims join together to form a 'class' and issue a proceeding against the party against whom they have a claim. One of the members of the class, known as the **lead plaintiff**, represents the group in the proceeding, and the people who are part of that group are the **group members**.

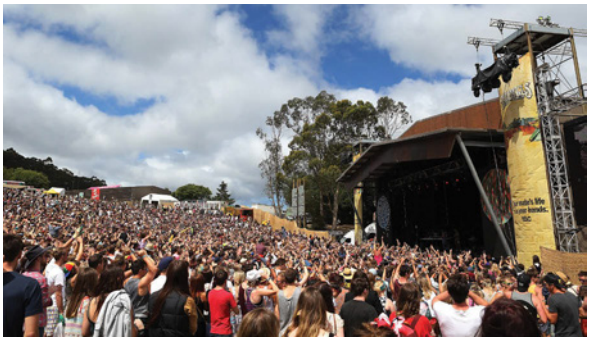
There have been a number of class actions in Australia and in Victoria, including class actions related to the Black Saturday bushfires that occurred in Victoria in 2009, and a class action in relation to losses

suffered by taxi drivers in relation to the introduction of Uber in Australia (for a further discussion of the Uber class action, see Chapter 14 of this student book).

Other victims

A plaintiff can be a person who has indirectly suffered loss or damage as a result of the actions of another party. For example:

- a person may suffer loss and damage as a result of the death of a family member, and may sue another person who they allege has caused that person's death
- a person who was close to an event may suffer loss and damage as a result. For example, a person who has seen people badly burnt by an electric explosion caused by another person, and has suffered **nervous shock** as a result, may be entitled to seek damages for loss and damage.



Source 1 In 2017, a class action was commenced in the Supreme Court of Victoria against the organisers of the Falls Festival. The class action related to an incident that took place in 2016 at the festival in which a 'stampede' left 19 people in hospital and dozens more injured.

lead plaintiff
the person named as the plaintiff in a representative proceeding (i.e. a class action) and who represents the group members

group member
a member of a group of people who is part of a representative proceeding (i.e. a class action)

nervous shock
a psychological reaction. It is psychological harm that is more serious than ordinary grief or stress

Insurers

Insurers are individuals or companies that enter into an insurance policy with a person (who is known as 'the insured'). Under the insurance policy, the insurer agrees to provide insurance (i.e. protection from financial loss) in certain circumstances.

Usually, an insurance policy provides the insurer with the **right of subrogation**, which is the right to 'step into the shoes' of the insured. That means that if the insured has suffered loss or damage caused by another, and the insurer has made a payment to the insured under the insurance policy, then the insurer may be entitled to recover what it has paid against the person who caused the loss.

insurers
a person or company that is contracted to compensate another person in the event of damage or loss

right of subrogation
the right to 'step into the shoes' of an insured person and act on their behalf – this includes taking legal actions in their name

Possible defendants

The possible defendants in a civil dispute include:

- the wrongdoer (i.e. the person or company that caused the loss or damage to the plaintiff)
- employers
- persons involved in the wrongdoing
- insurers.

Wrongdoer

It is often the case that a plaintiff will sue the person or company that has directly caused them loss or damage. In a claim for unpaid wages, this is likely to be the employer. In a nuisance claim, this is likely to be the person who is causing the interference (e.g. noise, odour or sight) that has resulted in the plaintiff losing the use or enjoyment of their own property or of public property.

Sometimes there may be two wrongdoers, and both of them may be liable for the loss or damage suffered by the plaintiff. For example, in the scenario on the next page, a hospital and the operators of the triple-0 emergency phone line were both sued.

Study tip

The best way to identify the possible plaintiffs and defendants in a civil dispute is to read as many actual and hypothetical scenarios as you can and to practice identifying the parties. You can write your own hypothetical scenarios, read articles about civil disputes, or work with a friend to develop and exchange scenarios.

ACTUAL

SCENARIO

Nurse's family sues state for failing to save their 'beautiful girl'

Miki Perkins, *The Age*, 3 February 2020

The family of a young nurse who died after setting herself on fire are suing Victoria claiming the state's health services failed to provide adequate mental healthcare despite numerous warnings and eight crisis presentations to emergency departments in the two years before she died.

Marlene Sako's mother, Tereza Sako, and her five sisters and brothers are suing the Northern Hospital in Epping, NorthWestern Mental Health and the operators of the triple-zero emergency phone line over Marlene's death in 2015. She was 25.

In their claim, filed in the Supreme Court of Victoria, Ms Sako's family say these bodies repeatedly failed to recognise Marlene had a serious mood disorder and did not provide her with appropriate mental healthcare.

The claim says Marlene's family members have suffered significantly, including developing major depression, post-traumatic stress disorder and anxiety after witnessing her death.

The family say they are haunted by her anguished final months and their repeated, failed attempts to get help for the young woman as her mental health disintegrated.

Over a two-year period, Marlene went to a hospital emergency department – often by ambulance and with police intervention – at least eight times while expressing suicidal thoughts and showing signs of significant alcohol abuse, the claim says.

On four other occasions, Marlene or a family member urgently sought help from one of the services.

...

The legal claim alleges the hospital should have recognised the relationship between Marlene's alcohol abuse, her mental state and the increased risk of self-harm. Marlene should have been admitted and referred for a psychiatric assessment, says the claim. Instead, she was discharged.

More emergency admissions followed, related to intoxication, seizures, suicidal behaviour, threats of self-harm and increasing aggression. The statement of claim lists a number of occasions where Marlene's family allege the hospital failed in its duty of care.

During one emergency admission, her sister asked to be notified when Marlene was discharged but was not told. Marlene walked 14 kilometres home. She arrived hours later, her feet cut and bloodied.

On 30 November 2015, Marlene's sister called triple-zero twice, saying Marlene was drunk and threatening to kill herself.

On both occasions, the operator should have designated the incident as a 'priority 1' and promptly dispatched police, the claim alleges – a category intended to treat serious, life-threatening cases. Instead, she was listed as 'priority 2', for an acute but non-time critical response. No police unit was dispatched.

...

Source 2 Over a two-year period, Marlene Sako went to a hospital emergency department at least eight times.

Employers

An employer of an employee who is the wrongdoer may become a defendant because of the principle of **vicarious liability**. Vicarious liability is when somebody becomes responsible for the actions of another. The reasoning behind the employer being liable instead of the employee is that the employer has a right, ability and duty to control the activities of the wrongdoer. Therefore, the employer should be responsible if the wrongdoer, in undertaking those activities, has caused harm. Vicarious liability generally arises in negligence claims.

vicarious liability the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

For an employer to be liable, the plaintiff needs to establish that the employee was acting in the course of their employment when the wrong occurred. This means that there must be a connection between the act and the employment. If the employee was acting in an unauthorised way, then the employer may not be found liable.

ACTUAL SCENARIO

Vic teacher sues after soccer ball in face

Amber Wilson, *The Canberra Times*, 26 August 2019

A former Melbourne teacher believes she may never work again after being struck in the face at school with a soccer ball, triggering brain and spinal cord conditions.

Jodie-Anne Gardam, 41, is suing the state of Victoria for economic damages and pain and suffering caused from the fallout of the 2014 schoolyard incident.

...

Ms Gardam now suffers chronic pain, 'massive' headaches, motor dysfunction, constant nausea, some memory loss, anxiety, depression and muscle twitches, the Supreme Court of Victoria heard on Monday.

While Ms Gardam had a pre-existing condition, a trauma – such as being hit in the side of the head – caused damage to her spinal cord, which triggered the conditions.

She married her partner the same year, but 'because of the symptoms, she is still waiting for her honeymoon'.

'When she left school in 2014 with high hopes of returning, it was the last time she taught, and she's been incapacitated in that time', her lawyer said.

Ms Gardam paid for surgery herself in 2017, financed with the help of fundraising, to prevent the condition from further deteriorating.

She is now being treated with ketamine infusions for chronic pain, but is unable to resume work and has a 'very poor' prognosis for ever being able to do so.

On Tuesday, the jury of six will visit the schoolyard to view where Ms Gardam was struck in the face before returning to court to hear her evidence.

Source 3 Jodie-Anne Gardam (right) is suing the state of Victoria for economic damages and pain and suffering caused by an incident at her workplace.

Persons involved in wrongdoing

A person who is involved in the wrongdoing of another may also be sued. A person may be involved in wrongdoing if they:

- aided, abetted (i.e. encouraged) or procured (i.e. organised) the wrongdoing
- induced, or encouraged, the wrongdoing
- were in any way, directly or indirectly, a party to the wrongdoing
- conspired with others to cause the wrongdoing.

accessorial liability the way in which a person can be responsible or liable for the loss or harm suffered by another person because they were directly or indirectly involved in causing the loss or harm (e.g. they encouraged another person to cause the harm)

Being involved in wrongdoing is known as **accessorial liability**. A plaintiff may sue a person involved in wrongdoing. For example, if a person was injured during an armed robbery, which was organised by someone who was not present at the robbery, then this other person may be considered to be involved in the wrongdoing and can be sued by the person injured during the robbery.

The following scenario further explores accessorial liability.

HYPOTHETICAL SCENARIO

Friend who 'egged on' a mate is sued

Vernon and his mate Harry went out on Saturday night. After a few drinks, they both started talking about how it would be really funny if they started tripping people up as they walked past them. They agreed that they would take turns to trip someone.

The men started walking down Domain Road in South Yarra. Harry tripped the first person, who fell over, and both men ran away laughing. They then approached 30-year-old Gina, who had a sore leg after playing soccer that day. As the men walked past her, Harry nudged Vernon and said, 'your turn'. Vernon tripped Gina, who stumbled, fell over and broke her ankle. Gina is suing both Harry and Vernon.

Source 4 The Victorian WorkCover Authority provides insurance to many employers in Victoria.

Insurers

In some instances, it may be possible for a plaintiff to sue the insurer of the person who has caused loss or damage. For example, many employers obtain insurance through the Victorian WorkCover Authority (i.e. WorkSafe Victoria). If an employee has been injured at work – and has made a proper claim for compensation for a serious injury, but that claim has been rejected – they may be able to commence proceedings against WorkSafe to seek compensation for the injury suffered at work. WorkSafe is often a defendant in civil proceedings involving claims for workplace injuries.

7.3 CHECK YOUR LEARNING

Define and explain

1 Generally, who is likely to be the plaintiff in a civil dispute? Who is likely to be the defendant?

2 Define the terms 'vicarious liability' and 'accessorial liability'. Provide one example of each type of liability.

3 Why is it possible for an insurer to be a plaintiff in a civil dispute even though it's not the insurer that directly experiences the harm or loss?

Synthesise and apply

4 Create a civil dispute in which there are two possible plaintiffs, and two possible defendants. Exchange your scenario with a member of your class and identify the parties to the dispute in your class member's scenario. Give reasons for your answer.

5 Write a newspaper article about a recent civil case in which a plaintiff has sued a defendant. In your newspaper article, provide a description of:

- **a** the type of civil law the dispute involves
- **b** the claim the plaintiff is making
- **c** the type of loss the plaintiff alleges to have suffered
- **d** who the plaintiff is suing and why
- **e** whether there are any other possible plaintiffs or defendants.

Swap newspaper articles with another class member. Assess whether the class member has correctly identified all of the points listed above.

6 Conduct some research on the internet and find:

- **a** one representative proceeding (i.e. a class action) that has been resolved and has resulted in a payment to the group members
- **b** one representative proceeding that is currently before a court
- **c** one representative proceeding that is about to start.

Choose one of these representative proceedings and write a brief summary about the case.

7 Read the scenario 'Nurse's family sues state for failing to save their "beautiful girl"'.

- **a** Who are the parties in this proceeding?
- **b** What allegations are the plaintiffs making?
- **c** What loss have the plaintiffs suffered?
- **d** Conduct some research. Have there been any developments in this case?

8 Read the scenario 'Vic teacher sues after soccer ball in face'.

- **a** What type of civil law did this case involve? Identify the terminology in the article that indicates the type of civil law involved in the case.
- **b** What loss did the plaintiff suffer?
- **c** How could this case involve vicarious liability?
- **d** Change the scenario so that it is a case where the plaintiff is suing somebody else.

Analyse and evaluate

9 Do you think that representative proceedings (i.e. class actions) provide greater access to justice? If so, how?

Check your Student obook assess for these additional resources and more:

Student book questions
7.3 Check your learning

Weblinks
Class actions
Right of subrogation (insurers)

Worksheet
Parties to a civil dispute

Going further
Criminal acts of employees

TOP TIPS FROM CHAPTER 7

1 The Study Design doesn't require you to know what the limitation period is for each type of civil claim. What you *do* need to understand is the concept of limitation of actions, what impact it could have on the parties, and why it is an important feature of civil law.
2 Start incorporating civil law terminology into your responses so you can become familiar with what all the terms mean. To help with this, keep your own glossary of key terms.
3 Read as widely as possible! The more you expose yourself to actual civil law scenarios, the better you will understand the terminology and concepts in this and other chapters. Aim to read one article about civil law per day.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 For each of the following scenarios, **identify** the likely plaintiff, the likely defendant, the area of civil law involved, and the loss suffered by the plaintiff.
   a Naimi was a passenger in a car travelling on a road in the centre of Melbourne. Without warning, a tram came off the tram tracks and rammed the car, killing the driver (who was Naimi's best friend) and injuring Naimi.
   b Mariana is employed in a local warehouse. For many months, Mariana was bullied and abused by a fellow employee. Despite her complaints, her boss has done nothing about the bullying. Mariana has been off work for 12 weeks suffering anxiety and depression.
   c Gordana's neighbour has been burning rubbish in his yard late at night for some time now. The fumes enter Gordana's home, causing her and her whole family to suffer significant respiratory issues. Gordana has recently found out that both her neighbour and her neighbour's best friend were involved in burning the rubbish.

(12 marks)

Difficulty: medium

2 **Justify** the imposition of a time period within which a plaintiff can bring a civil claim.

(4 marks)

Difficulty: high

3 In your view, **should** an employer be responsible for their employee's actions? In your answer, **provide** one argument for and one argument against the principle of vicarious liability.

(8 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Use the stimulus material to answer the questions in this section. It is not intended that this material will provide you with all the information you need to answer the questions.

Case study 1 – Luca's Facebook post

Luca has been in a fight with his former girlfriend, Steph, for months. Steph has blocked him on Facebook and ignores his regular attempts to contact her via social media. To get back at her, Luca wrote a public Facebook post that suggested that Steph had faked her exam results to get her current job, and that she had cheated her way through school to get good grades. To validate the post, Luca's friend Bernie responded to the post saying, 'Finally this is out in the open. That girl's been conning people for years.' Steph's colleagues and friends have seen the post. Ever since the post was written, she has been ignored by people at work. She has also been told by her boss that she will not get the promotion that she had previously been promised. Steph has been suffering from anxiety as a result.

Case study 2 – Andrew's courier run

Andrew worked for a large courier business that had important clients for whom it delivered goods. One afternoon, Andrew's boss told him that there was an urgent delivery for a very important client, and that the goods needed to be delivered no later than 3:30 pm. Andrew's boss told him that he needed to do 'whatever it takes' to get there by that time, even if it meant speeding and breaking the law.

Andrew left and sped all the way to the client. On the way, he lost control of his car and ran into a house, causing significant damage to the front of the house and three of its rooms. The house is now uninhabitable and the house owners have to live elsewhere. The house owners are insured and have sought compensation from their insurer.

Practice assessment task questions

Write a report that addresses the following for each of the case studies (marks allocated are per case study). You must give a justification for each of your answers:

- the area of law that the dispute involves (3 marks)
- the nature of the claim (4 marks)
- the possible plaintiff(s) (3 marks)
- the possible defendant(s) (3 marks)
- the type of breach involved (4 marks)
- whether causation is likely to be established (4 marks)
- the type of loss that is alleged to have been suffered. (4 marks)

Total: 25 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 7

Revision notes
Revision notes for Chapter 7

assess quiz
Chapter 7
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 8

TORT LAW

Source 1 One of the main areas of civil law is tort law. A tort is a type of civil wrong (i.e. an act that injures someone in some way, and for which the injured person may seek compensation). Sometimes, a duty of care is owed to other people to take care to avoid causing harm. This is called the tort of negligence. A good example of a duty of care is the one that a teacher owes to a student, including when taking students away on excursions or camping trips.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

KEY KNOWLEDGE

In the chapter, you will learn about:

- two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research and analyse relevant information about civil law
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to two actual and/or hypothetical scenarios.

KEY LEGAL TERMS

defamation a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

duty of care (in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

negligence a type of tort that involves a breach of a duty of care, causing loss or harm

nuisance a type of tort that involves interference with a person's right to use and enjoy private and/or public property

private nuisance a type of tort involving an act or omission that substantially and unreasonably interferes with the use and enjoyment of land

public nuisance a type of tort involving an act or omission that interferes with the comfort or convenience of a number of people to a considerable degree

tort a term that literally means 'wrong'; a wrong that interferes with a person's legally protected interests

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

ADVICE TO TEACHERS AND STUDENTS

In **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9) you are required to study **two areas of civil law** in detail.

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• **TWO** torts (from Chapter 8)	8.1 Negligence	222
	8.2 Defamation	232
	8.3 Nuisance	243

OR

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• **TWO** other areas of civil law (from Chapter 9)	9.1 Discrimination	256
	9.2 Void marriages	267
	9.3 Online shopping	276
	9.4 Workplace pay and conditions	285

OR

YOU MAY CHOOSE TO STUDY	OFFENCES	PAGE
• **ONE** tort (from Chapter 8) • **ONE** other area of civil law (from Chapter 9)	See above	See above

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8.1 NEGLIGENCE

In their everyday lives, people regularly come into contact with others, including strangers. This contact occurs at school, in shopping centres, in cafes, on public transport, in parks, and on school excursions. At times, a duty is owed to other people to take care to avoid causing harm. This is known as a duty of care.

For example, teachers and students owe each other a duty to take care:

- teachers owe a duty to their students to supervise them appropriately
- students owe a duty to each other and their teachers to behave reasonably.

The duty may change or expand when teachers take groups of students away on camping or hiking trips, where the risk of injury increases and dangers are readily foreseeable.

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

The law relating to duty of care is known as **negligence**. When a person is negligent in civil law, the person **has failed to take reasonable care that was due to another**. A person is obliged to take care when it is **reasonably foreseeable** that other people could be harmed by their actions or omissions.

Rights protected by negligence laws

The laws about negligent conduct have developed over many decades through common law and through statute law. The *Wrongs Act 1958* (Vic) is now the main piece of legislation that deals with negligence claims.

The main purpose of the law of negligence is to protect an individual's right to be safe from harm – harm to the person and harm to their property. This right exists in all circumstances in which we engage with others, including being taught by a driving instructor, preparing food in a retail store as a casual employee and, on a much more serious level, managing a large group of people – such as on a cruise ship – when passengers fall ill. It is expected that while engaging with others, we are aware of the potential for damage or harm that our actions could cause, and we take reasonable steps to avoid causing harm and damage.

The law of negligence also aims to:

- protect people from wrongful conduct by others, particularly where a person acts recklessly or with complete disregard for another person
- allow parties to seek compensation against those people who have acted contrary to those laws.

Elements required to establish liability for negligence

When claiming another person has been negligent, the plaintiff must prove that the following four elements exist:

- **duty of care** – the defendant owed a duty of care to the person injured
- **breach of duty of care** (**standard of care**) – the defendant breached the duty of care
- **causation** – the breach of duty of care caused the harm to the plaintiff
- **injury, loss or damage** – the wronged person has suffered injury, loss or damage.

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

If it can be proved that the person was owed a duty of care and that the duty of care was breached and harm was caused, then the wronged person may be entitled to a remedy, which will ordinarily be **damages**.

Element 1 – Duty of care

The plaintiff must first establish that the defendant owed them a **duty of care**.

duty of care
(in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

A person owes a duty of care if:

- the risk was foreseeable (i.e. the person knew or should have known about the risk of loss or harm)
- the risk was significant or not insignificant (i.e. not farfetched or fanciful)
- a reasonable person in the same circumstances would have taken precautions to eliminate any risk of harm.

Over time, the courts have established that certain categories of persons are presumed to owe a duty of care to another category of persons. For example:

- teachers and schools owe a duty of care to their students
- doctors and nurses owe a duty of care to their patients
- motorists who are driving their car owe a duty of care to other road users
- manufacturers owe a duty of care to consumers.

The following scenario explores the element of duty of care.

Child drowns in workers' trench

ACTUAL SCENARIO

Chester v Waverley Municipal Council (1939) 62 CLR 1

In 1939, workers of the Waverley Municipal Council in New South Wales dug a trench. They placed a railing around the trench (which was not childproof) and left for the day. Rain filled the trench with water. Chester's son, who was seven, fell into the trench and drowned. As a result of finding and seeing her son hours later, Chester suffered significant nervous shock and distress. She sued the Council for negligence, claiming that it owed her a duty of care.

On **appeal**, the High Court found that Waverley Municipal Council owed a duty of care to the child. However, the Court said that the Council did not owe a duty of care to the mother. The Court stated that it was not reasonably foreseeable that the Council's actions towards the child would so affect a mother seeing the dead body of her child. One judge of the High Court dissented (meaning he disagreed with the others).

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

Exceptions to the duty of care

There are some exceptions to the duty of care.

- When participating in a **risky recreational activity**, consumers can sign a waiver stating that they accept responsibility for any injuries suffered while participating in the activity. For example, a bungy-jump operator may ask patrons to sign a waiver that states the patron accepts the reasonable risks associated with the jump. However, if the operator has not maintained their equipment or has said the jump was safe when it was not, then the operator is still liable for a patron's injury.
- A **good Samaritan** is a person who gives care, help and advice in an emergency situation. 'Good Samaritans' are exempt from legal liability in negligence claims as long as they act in good faith, within their competence, and without payment.

Source 1 During the COVID-19 pandemic, all staff in medical facilities wore personal protective equipment to protect others and themselves from the highly contagious virus.

Study tip

When analysing a case study, apply the elements to the facts of the case. In assessment tasks, write a heading for each element and address whether it can be established or not, and why. Where you can, use cases or examples to justify your response.

standard of care
(in relation to negligence) the degree of caution required by a person who owes a duty of care to another

breach
breaking or failing to fulfil a duty or obligation

- A person who **donates food** in good faith for charitable purposes is protected from legal liability if a person is harmed from consuming the food. This only applies if the food was safe to consume at the time it left the possession or control of the person who donated it.
- **Volunteers** (people who do community work for a community organisation, association, local government or public authority) cannot be held to be personally liable if they cause damage or injury to another.

Element 2 – Breach of a duty of care (standard of care)

A **breach** of a duty of care occurs when a person does not take all the care they should. The duty is breached (i.e. broken) when a person fails to do what a reasonable person would have done. In determining whether a reasonable person would have taken precautions against a risk of harm, a court considers:

- the likely risk of harm
- the likely seriousness of the harm
- the burden of taking precautions to avoid the risk of harm
- the social utility (i.e. benefit or worth) of the activity that creates the risk of harm.

For example, in the case of *Wyong Shire Council v Shirt* (see Topic 3.6 in Chapter 3) – in which a water-skier suffered significant injuries – the Wyong Shire Council ought to have foreseen that this sort of serious harm could occur, and the burden of taking precautions would have been small. Another example of a case involving breach of a duty of care is outlined in the scenario below.

ACTUAL SCENARIO

Lack of supervision of an offender on parole

In May 2019, the family of murdered woman, Karen Chetcuti, sued the state of Victoria for her wrongful death. The claim was lodged in the Supreme Court of Victoria by Tony Chetcuti, Karen's husband. Their two children are also expected to file separate claims because they have lost financial support as a result of their mother's death.

At the time of Karen's murder, the offender, Michael Cardamone, was on parole, having been found guilty of another serious offence. Karen and Cardamone were neighbours in a town in regional Victoria. The lawyer representing the Chetcuti family, John Suta, told the ABC that:

> Mr Cardamone still had six months of his parole left. So what we say, he was basically left unsupervised, unmonitored, and to his own devices … he failed drug tests and the like, and what we say is that there was a complete and utter failure on behalf of the state of Victoria in order to monitor his movements and impose relevant restrictions on what he did on a daily basis.

Source 2 The family of murdered Victorian woman Karen Chetcuti (pictured) has sued the state of Victoria for its failure to monitor convicted rapist, Michael Cardamone, who murdered Karen while he was on parole.

In his claim against the state of Victoria, Tony Chetcuti is seeking damages for pain and suffering, medical expenses and other matters relating to the murder of his wife. The trial is listed to be heard in Wangaratta.

If this matter proceeds to trial, the Supreme Court may be asked to consider what duty of care was owed by the state of Victoria, whether that duty of care was breached, and if so whether the breach caused the loss and damage allegedly suffered by Tony Chetcuti. As part of the claim, the Supreme Court may consider the supervision of offenders on parole and what level of supervision may be required to ensure that offenders do not cause harm to others in the community, especially where an offender has prior convictions involving violence.

Element 3 – Causation

To succeed in a negligence claim, a plaintiff has to prove that the injury or loss was **caused** by a breach of a duty of care, and that the injury would not have occurred if the duty of care had not been breached.

If it can be shown that the harm was **too remote** from the breach of duty of care, the plaintiff will not be successful in claiming negligence. For example, a person may suffer nervous shock from hearing a car accident but they did not actually see the accident. This harm may be too remote from the actual event.

In other circumstances, there may be a **break in the chain of causation**. This is where some new act occurred between the tort happening and the loss or damage being claimed.

In the scenario below, the High Court found that a school was not liable in relation to an incident involving a flying fox during recess.

causation
the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

ACTUAL SCENARIO

School incident during recess results in negligence claim

Roman Catholic Church Trustees for the Diocese of Canberra & Goulburn v Hadba (2005) 221 CLR 161

In 1999 an eight-year-old girl, Farrah Hadba, fell from a flying fox in the playground of St Anthony's Primary School in the Australian Capital Territory. The incident occurred during morning recess.

According to evidence presented in the High Court, there were two teachers on duty in the area in which the child was injured. The school had developed a 'hands off' rule when others were using the play equipment. Despite this rule, one boy and one girl grabbed Farrah's legs while she was on the flying fox, and she fell and sustained injuries. The teacher on duty had momentarily looked away when the incident occurred.

A majority of High Court judges found that the school was not liable. The High Court stated that:

> it must be remembered that there was no evidence of any serious accident on the flying fox in the past, there was no evidence of pupils having pulled each other from the flying fox in the past, and there was a well-known and enforced school policy against this. The magnitude of the risk of injury was not high, and nor was the degree of probability of its occurrence.

The High Court also found that the incident may not have been prevented even if a teacher had been watching the flying fox. On this basis, the cause of the injury to the child was not the lack of supervision by the school, which the High Court ruled had behaved appropriately by having a clearly stated 'hands off' rule that had been communicated to the children.

Element 4 – Injury, loss or damage

As a general rule, a plaintiff can only seek a legal remedy through the law of negligence if it can be proved that they suffered injury, loss or damage, even if it is minor. The injury, loss or damage can be physical, mental, or damage to property.

Limitation of actions

The *Limitation of Actions Act 1958* (Vic) sets out the limitation periods for negligence claims. A limitation period is the time period within which a civil claim must be made. These are outlined in Source 3 on the next page and range from three years up to 12 years from the date of the act or omission that resulted in personal injury or death. In some circumstances, a court can extend a limitation period.

TYPE OF NEGLIGENCE CLAIM	LIMITATION PERIOD
General negligence claims (e.g. a claim for property damage)	6 years
An action for damages for negligence where personal injury includes a disease or disorder	3 years
An action for damages for negligence where the injury was death or personal injury	Either 3 or 12 years

Source 3 Limitation periods for negligence claims

Did you know?

The American Museum of Tort Law shows a history of cases. One exhibit is devoted to the McDonald's hot coffee case, where the plaintiff, Ms Liebeck, suffered third-degree burns over six per cent of her body when she spilt a cup of coffee in her lap. A court awarded Ms Liebeck $640 000 for her injuries on the basis that the coffee was served at an excessively high temperature.

Calculation of time

The start of limitation periods for negligence claims depends on the type of injury suffered by the plaintiff. For example:

- for general negligence claims, the limitation period starts from the date on which the cause of action occurred (i.e. the date the loss or damage was suffered by the plaintiff)
- for actions involving a disease or disorder, the limitation period starts from the date on which the plaintiff first knew they had the disease or disorder and that the disease or disorder was caused by the defendant.

Death or personal injury claims

The limitation period for death or personal injury claims is whichever of the following expires first:

- 12 years from the date of the conduct of the defendant that caused the death or injury (known as the 'long-stop limitation period') or
- three years from the date on which the cause of action was 'discoverable'. A 'discoverable' date is the date the plaintiff knew (or ought to have known) that the death or personal injury occurred, was caused by the defendant, and in relation to personal injury, was serious enough to justify bringing an action.

The above limitation periods do not apply to work injuries, transport accident injuries, or to injuries that occurred as a result of dust-related conditions.

Child abuse

In 2015, the Victorian Parliament passed legislation that amended the limitation period for certain actions involving child abuse. This amendment was in response to the publication of the *Betrayal of Trust* report, which was the written findings of a Victorian Government inquiry into the handling of child abuse by religious and other non-government organisations. The legislation removed limitation periods for child abuse to allow survivors to bring civil actions regardless of the time that had passed since the abuse occurred.

Defences to a negligence claim

A defendant can claim that the plaintiff has not established the four elements of negligence. That is, the defendant may try to prove that a duty was not owed, a duty was not breached, that the damage or injury was not caused by the defendant's act or omission, or that no loss or harm has been suffered.

The defendant may also rely on one of the following defences:

- contributory negligence
- assumption of risk (*volenti non fit injuria*).

These defences are discussed in more detail on the following pages.

Defence 1 – Contributory negligence

A defendant may try to prove that the plaintiff contributed to the harmful situation or is partly to blame for the harm done. For example, a person may make a claim that they suffered personal injury as a result of being pushed by the defendant. However, their claim, if proven, would be reduced if it were shown that the plaintiff was intoxicated at the time.

Contributory negligence generally reduces the amount of damages that a defendant is required to pay to the plaintiff to compensate them for their loss, damage or injury.

In determining contributory negligence, a court examines the conduct of the plaintiff and assesses how they might have contributed to their own loss, damage or injury. In cases where the plaintiff is found to have contributed very significantly to their own loss, the amount of damages awarded might be negligible.

The case of *Woolworths Ltd v Grimshaw* below is an example of the defence of contributory negligence being argued unsuccessfully. The case arose from injuries sustained by an employee of a supermarket who was trained in risk assessment.

contributory negligence
a formal defence to negligence that claims the plaintiff contributed to the harm caused by the defendant. If proved, this reduces the damages the defendant has to pay

The danger of slippery grapes

ACTUAL SCENARIO

Woolworths Ltd v Grimshaw [2016] QCA 274 (28 October 2016)

In this case, the plaintiff (June Grimshaw) was employed as a checkout operator at a Woolworths store in Townsville, Queensland. Grimshaw slipped on a grape on the floor adjacent to the grape display while on her way to the lunchroom. In the fall, she injured her back. Grimshaw brought a negligence claim against her employer, Woolworths.

Woolworths argued that if it was held to be liable under the tort of negligence, the plaintiff should be found to be 25–35 per cent contributorily negligent. This claim was made on the basis that Grimshaw was trained in risk assessment and knew of the risk; knew to keep a lookout for grapes, particularly in the produce department; was in a hurry and not keeping a proper lookout; and could have avoided walking in the area near the grapes.

The trial judge found that, in these circumstances, a reasonable employer would have foreseen that there was an increased risk of injury by not placing mats near the grape display in the produce department. Woolworths was expected to realise that people passing through the fresh produce area may be distracted. Also, Woolworths could not pass the responsibility to its employees to look out for grapes on the floor. The Judge concluded there was no basis for a finding of contributory negligence.

The Judge noted that mats were available and should have been used by Woolworths staff. A duty of care is owed by occupiers (e.g. retailers) to have procedures in place to ensure a safe environment for people who lawfully enter into retail or commercial premises. The plaintiff was awarded $491 037.26 in damages.

Woolworths appealed the decision to the Queensland Court of Appeal. The appeal was unanimously dismissed. However, the damages awarded to the plaintiff was decreased by $54 000 to $437 037.26, as the Court of Appeal found that future economic loss (particularly future loss of wages) was incorrectly assessed by the trial judge.

Source 4 Retailers are required to provide a safe environment for their customers and employees. Even where a sign has been placed in a store warning of a slip hazard, the owner of the supermarket may still be liable if a person falls and hurts themselves.

Defence 2 – Assumption of risk (*volenti non fit injuria*)

volenti non fit injuria
a Latin term meaning 'to a willing person, injury is not done'; a defence in which the defendant claims that the plaintiff accepted the dangers of a known and understood risk, either expressly or by implication

The defence of ***volenti non fit injuria*** is the voluntary acceptance of the risk of injury. In Latin, the term literally means 'to a willing person, injury is not done'. This means that the defendant must prove that the plaintiff was aware of an obvious risk and that they voluntarily chose to take the risk. For example, a person who knowingly accepts a ride with a drunken driver is accepting an obvious risk of being injured in a car accident, as it is well known that excessive alcohol consumption impairs driving ability.

Similarly, sportspeople accept the risk of suffering common injuries that may occur within their sport. For example, jockeys consent to injuries of the type reasonably expected in racing. However, the assumption of risk does not apply in cases involving the provision of professional or health services, as health providers have a legal responsibility to warn people of any inherent risk associated with their work.

In the following scenario, the defendant could defend a claim on the basis that Sam, the cricketer, accepted the risk of playing sport.

HYPOTHETICAL SCENARIO

Concussion in cricket

Sam was an aspiring cricketer who played in state-level cricket teams while she was at school. When she was 15, Sam was struck on her helmet and sustained a severe concussion.

After she left school, Sam was selected to play for a professional cricket team that participated in a national competition. She was 18 years old at the time. At the medical examination before the signing of the contract, Sam was asked whether she had ever been concussed. She was concerned that any revelation of her earlier concussion might jeopardise her contract, so she said no. Sam's doctor also wrote a report, as was required by the contract, stating that Sam 'was fit' to play cricket and there were 'no concerns' regarding any pre-existing conditions.

Two months later, Sam was injured during a training session when she was struck in the head by a ball thrown between teammates. She again sustained a concussion. As a result, Sam missed the entire season of cricket and lost $40 000 in match payments. To recover the money, Sam commenced legal action for negligence, claiming that the team's management had failed in their duty of care to provide a safe workplace. The team's management responded by arguing that being struck by a ball in cricket is an accepted risk of playing the sport.

The role of the law in developing the elements of and the defences to negligence

The law of negligence has been largely developed through common law. Australia's law of negligence was inherited from English common law. However, since around 2002, Victoria and other Australian states and territories have passed legislation that either adopts or amends the common law principles of negligence.

Common law

neighbour principle
(in relation to negligence) the common law rule that a person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their 'neighbours' (i.e. people who would be closely and directly affected by their acts or omissions)

As explored in Chapter 3, the landmark British case of *Donoghue v Stevenson* (the 'snail in the bottle case') firmly established the tort of negligence. The principles established in *Donoghue v Stevenson* were first adopted in Australia in the case of *Grant v Australian Knitting Mills*. These principles remain important today.

The common law principles established in *Donoghue v Stevenson* allow a plaintiff to take legal action on the grounds that a defendant did not act in a way to protect the interests of their 'neighbour' (under the **neighbour principle**).

Since the 1930s, the law of negligence has been significantly developed by Australian courts. However, common law has been modified and adopted by various Australian statutes, including those passed by the Victorian Parliament. In particular, a series of statutes were passed by states and territories in 2002

and 2003 after concerns were raised that the law of negligence was unclear and unpredictable, and it had become too easy for plaintiffs in personal injury cases to be successful in negligence claims.

Source 5 Both Victorian and Australian laws in relation to food handling and service can be traced back to the common law principles established in the case of *Donoghue v Stevenson*.

Statute law

In Victoria, Part X of the *Wrongs Act* is the main legislation that governs negligence claims. Part X was inserted into the *Wrongs Act* in 2003 in response to the findings of a committee that inquired into and made recommendations about negligence laws. This committee conducted its work in 2002 after the above concerns about the law of negligence were raised.

The *Wrongs Act* changes many common law principles relating to negligence. In other aspects, the common law principles of negligence continue to apply. For example, in section 54 of the *Wrongs Act* – which allows a defence of *volenti non fit injuria* to be raised – it states that the common law continues to apply in relation to this defence.

In addition to the *Wrongs Act*, other statutes also cover negligence claims in some areas. For example, the Australian Consumer Law (ACL), which commenced on 1 January 2011, is the national code for fair trading and consumer protection. Some parts of the ACL incorporate elements of negligence, such as imposing a duty on people who provide services to provide them with 'due care and skill'.

Possible impacts of a breach of duty of care

Impact of negligence on the plaintiff

The impact of negligence on the plaintiff varies depending on the nature of the claim. Some of the possible impacts of harm suffered by the plaintiff as a result of negligence are as follows:

- **Loss of life** – This could occur in a workplace setting. For example, an employer may fail to maintain machinery in good working order, causing a fatal accident.

- **Permanent physical incapacity** – This could require the use of personal carers for the remainder of the person's life. For example, a person may contract salmonella from eating poorly prepared food and permanently lose physical capacity as a result.
- **Serious physical injury** – This could require treatment such as surgery and physiotherapy. For example, a customer may trip on a slippery floor and break their leg.
- **Emotional impact of the breach** – This could manifest as fear of certain places or engaging in social situations. For example, a person may develop a fear of medical procedures after an experience involving medical negligence.
- **Loss of wages and livelihood** – This could be a consequence of requiring surgery or treatment. For example, a person may be unable to return to work for a certain time after surgery.
- **Unemployment** – This could be a consequence of physical injury or mental health issues. For example, an electrician may be unable to return to work after losing physical capacity.
- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person may develop mental health issues as a result of being unable to return to work.

Impact of negligence on the defendant

The impact of negligence on the defendant can also vary, depending on the extent to which the plaintiff contributed to their own loss, damages or injury. Some of the impacts on the defendant are as follows:

- **Loss of business** – This could be a consequence of the publicity of the claim. For example, a restaurant or cafe sued as a result of the death or injury of a customer from consuming contaminated food may be subject to media articles and lose customers as a result.
- **Public humiliation** – This could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of an adverse finding in court.
- **Physical injury** – This could occur in cases of contributory negligence or a **counterclaim**. For example, the defendant might also have suffered loss, injury or damage as a result of the conduct of the plaintiff.
- **Costs** – This could occur when the defendant loses the case. For example, the defendant might be ordered to pay the legal costs of the plaintiff, which could cause financial hardship.
- **Need to sell assets** – This could be a consequence of a high damages award. For example, the defendant might be forced to sell their home or business to meet the costs of the damages amount.

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

Source 6 below summarises some of the possible impacts that negligence can have on the plaintiff and on the defendant.

IMPACT ON THE PLAINTIFF	IMPACT ON THE DEFENDANT
• Loss of life • Permanent physical incapacity • Serious physical injury • Emotional impact of the breach • Loss of wages and livelihood • Unemployment • Effect on mental health	• Loss of business • Public humiliation • Physical injury • Costs • Need to sell assets

Source 6 A summary of the impacts of negligence

8.1 CHECK YOUR LEARNING

Define and explain

1 In a negligence case, what are key elements required to establish that the defendant owed the plaintiff a duty of care?
2 Using an example, explain what is meant by the term 'contributory negligence'.
3 How can the fact that the plaintiff accepted a risk impact on the liability of the defendant? In your response, refer to the scenario 'Concussion in cricket'.

Synthesise and apply

4 'For a duty of care to be breached, the consequence of the action must be reasonably foreseeable.' Explain the meaning of this statement. In your answer, refer to the legal action for negligence being taken by the Chetcuti family against the state of Victoria.
5 Explain whether teachers owe a duty of care to the groups of people listed below. For each group, suggest how you think teachers may carry out their duty of care.
   a students in their class during a regular lesson
   b students on a 250-kilometre bike ride through regional Victoria in November, with high temperatures forecast
   c students on a ski trip to Mt Buller
   d visitors to the school who have come to watch a concert in the school hall.
6 Read the scenario *Chester v Waverley Municipal Council*.
   a Why do you think Waverley Municipal Council was found to owe a duty of care to the child?
   b Why did the Council not have a duty of care to the mother?
   c Do you agree with the Court's decision? Why or why not?
7 Read the scenario *Woolworths v Grimshaw*. In what circumstances do you think a contributory negligence claim might be successful in relation to an employee who slips and is injured in a supermarket?

Analyse and evaluate

8 Read the scenario *Roman Catholic Church Trustees for the Diocese of Canberra & Goulburn v Hadba*.
   a Explain the key facts in this case.
   b What duty of care did the plaintiff claim had been breached?
   c Explain the decision made by the majority of the High Court judges.
   d Imagine you have been chosen to represent either the plaintiff or the defendant in this case. Write an opening or closing address. In your address, identify the key elements of the law of negligence and link these elements to the facts of the case.
   e Imagine that you are in court and the supervising teacher is giving evidence. Write five questions that you would like to ask the teacher. The focus of your questions depends on whether you are representing the plaintiff or the defendant.
9 Conduct a review of your school's yard duty policies and the areas of the school's grounds that are supervised by teachers. Now complete the following tasks.
   a In your opinion, are all areas of the school (interior and exterior) adequately supervised? Are there any 'blind spots' that could result in some students not being supervised at all times?
   b Justify one change to the current yard duty policies that might improve its operation.
   c To what extent is it reasonable to expect that every student will be closely supervised at all times before school while on the school's premises, and during recess and lunch? Justify your answer.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 8.1 Check your learning
- **Video tutorial** How to argue civil liability
- **Going further** Bernie Banton: Fighter for the rights of asbestos victims
- **Weblink** Changes to negligence

8.2 DEFAMATION

One of the purposes of laws and the legal system is to protect the rights of individuals. One of those rights is the right to freedom of expression. That right is protected in Victoria by the *Charter of Human Rights and Responsibilities Act 2006* (Vic), a state charter that aims to promote and protect human rights.

Although there is a right to freedom of expression, the right is subject to duties and responsibilities. That is, we do not have the right to say whatever we think about people, especially if what is being said cannot be proven and ruins the reputation of others. The law of **defamation** seeks to protect individuals against material that would harm their reputation.

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

Under the law in Australia, a person who has had defamatory material published about them can take legal action. Such action can be taken against authors, publishers, broadcasters, journalists and distributors, as well as members of the general public. In recent times, there has been an increase in defamation claims as a result of what people have said on social media pages or apps such as Facebook, Twitter, TikTok and Instagram. The law explained in this chapter was current as at September 2020. It is expected that Victoria will introduce legislation as a result of agreeing to uniform defamation laws in July 2020.

Rights protected by defamation laws

The tort of defamation is aimed at protecting the character and reputation of individuals against attempts to discredit them. A statement or other published material is regarded as defamatory if it is untrue and lowers the reputation of a person. A person's reputation is considered to be lowered when statements are made and the person's reputation is lowered in the estimation of others, or they are shunned, avoided or exposed to hatred, contempt or ridicule.

The rights that are protected by defamation laws include:

- the right to freedom of expression
- the right to be considered of good character and reputation
- the right to have that reputation protected by placing limits on freedom of expression (right to reputation)
- the right of people whose reputations have been harmed to seek effective and fair remedies
- the right to a quick and effective method of resolving a dispute in relation to defamation.

Defamation laws place reasonable limits on freedom of expression but aim to uphold that right by balancing it against the right to reputation. That is, defamation laws seek to balance the right to freedom of expression with the right to reputation.

Note that non-profit organisations and small private companies with fewer than 10 employees can use the law of defamation to protect their business reputations, but other companies cannot sue for defamation.

Elements required to establish liability for defamation

To establish defamation, the following four elements must be proven:

- the statement is defamatory
- the statement is untrue
- the statement refers to the plaintiff
- the statement has been published (i.e. communicated to people other than the person it refers to) by the defendant.

Element 1 – The statement is defamatory

The plaintiff must first establish that the statement made by the defendant is defamatory. A statement is defamatory if it lowers a person's reputation or standing in the community, exposing them to ridicule, contempt or hatred. The onus is on the plaintiff to prove that their reputation has been damaged by the publication of the material. It is not necessary to prove that the defendant had the intention to hurt the plaintiff.

In the case of *Mickle v Farley* (see the scenario below), Andrew Farley was found to have made defamatory statements about his former teacher via social media.

ACTUAL SCENARIO

Social media platforms used to make defamatory statements

Mickle v Farley [2013] NSWDC 295 (29 November 2013)

In 2013, the District Court of New South Wales ordered a former student to pay $105 000 in damages to a schoolteacher after making defamatory comments about the teacher on Twitter and Facebook.

The defendant, Andrew Farley, was 20 years old when he posted a series of defamatory comments about his former teacher on the two social media sites. The District Court found that the effect of the publication on the plaintiff was devastating. She took sick leave and later returned to work on a limited basis. Judge Michael Elkaim noted that, 'When defamatory publications are made on social media, it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication.'

Source 1 The tort of defamation has kept pace with developments in social media, especially the use of Twitter and Facebook.

More recently, a principal of a school in Mount Tamborine, Queensland, won a defamation case against parents of the school. The parents had posted derogatory comments about her on social media. The principal suffered fear and humiliation as a result of the parents' actions. Two of the parents were required to each pay $3000 in damages to the principal. The case against two other parents was dismissed, and other parents settled their case out of court.

Element 2 – The statement is untrue

The plaintiff must prove that the defamatory statement is untrue. A plaintiff cannot be defamed if the statement is substantially true.

Element 3 – The statement refers to the plaintiff

The plaintiff must establish that they were the person referred to in the statement. The person defamed does not need to be mentioned by name. It may be sufficient to prove that people reading, hearing or seeing the statement would reasonably conclude that it was about the plaintiff.

A plaintiff may also be defamed as part of a group. The group must be sufficiently small for it to be recognised that the plaintiff is part of that group and that their reputation is lowered by reference to the group.

The hypothetical scenario on the next page explores this element in relation to an open letter about a mayor.

HYPOTHETICAL SCENARIO

The 'corrupt' mayor

On Facebook, Andrew published an open letter to 'the current local mayor' of his municipality. In the letter, Andrew made derogatory and defamatory statements, including stating that the mayor was 'corrupt'. While the letter did not refer to the mayor by name, it was clear enough and could be reasonably assumed by people reading the letter to whom Andrew was referring.

Element 4 – The statement has been published by the defendant

The plaintiff must prove that the statement was communicated to a person other than the plaintiff. It is not defamation for a person to make untrue or derogatory comments directly to the person concerned if it is done in private. However, these comments become actionable (i.e. a person can sue in relation to the comments made) once a third person reads, hears or sees the defamatory material.

It does not matter whether the material is published to the general public or to a small group. In fact, what seems like harmless chat may be defamatory. For example, a case of defamation may exist where Jane tells Peter that Shaun is a convicted thief and Peter repeats this to Paul and Mary knowing that the information might be wrong.

Publications can either be verbal or in writing, though most defamation cases are in relation to written publications. These can include articles, letters and books, as well as online publications such as blogs, websites, articles and comments made on social media platforms such as Twitter and Facebook.

The following scenario explores a defamation case relating to newspaper articles published by Nationwide News.

ACTUAL SCENARIO

Defaming King Lear

Rush v Nationwide News Pty Ltd (No 7) [2019] FCA 496 (11 April 2019)

In 2019, actor Geoffrey Rush was awarded $2.87 million after succeeding in a defamation case against Nationwide News, the publishers of *The Daily Telegraph* newspaper. The case involved the publication of articles that claimed Rush had behaved inappropriately towards fellow actor, Eryn-Jean Norvill, during rehearsals for a production of *King Lear* by the Sydney Theatre Company in its 2015–2016 season.

While Nationwide News pursued a truth defence under the tort of defamation, this failed on the basis that the evidence was considered to be weak.

The articles in *The Daily Telegraph* also appeared, directly or indirectly, to link the accusations against Rush to other cases of prominent personalities who had been accused of sexual misbehaviour. For example, on 30 November 2017, an article about Rush was published alongside another article concerning allegations against a television personality, Don Burke. Furthermore, on 1 December 2017, an article was published that examined the claims against Rush as well as those against American film producer Harvey Weinstein and actor Kevin Spacey.

In April 2019, Justice Michael Wigney found that Nationwide News and journalist Jonathon Moran had been reckless regarding the truth when they reported Rush had been accused of inappropriate behaviour during the rehearsals for *King Lear*.

The Judge found that a poster and two articles published by *The Daily Telegraph* had contained several defamatory meanings. These articles formed the basis of the plaintiff's case. The articles

claimed that Rush was a pervert and a sexual predator, but the publisher had not been able to prove that these claims were true. The Judge found that there was no basis for this claim by the newspaper. In his claim against Nationwide News, Rush claimed that the articles had brought him into 'hatred, ridicule and contempt' and that he had been 'gravely injured in his character and reputation as an actor'.

Rush's barrister, Sue Chrysanthou, also told the Federal Court that they had offered to settle the matter for $50 000 and an apology to Rush. However, this offer had been rejected by Nationwide News, which instead pursued a truth defence.

In his initial claims, Rush sought more than $25 million in damages. He was ultimately awarded $850 000 in general and **aggravated damages**, more than $1 million for past economic loss, $919 678 for future economic loss, and $42 000 in interest. This $2.87 million payout is the highest defamation payout awarded in Australia to a single person.

aggravated damages in a civil case, additional compensation to take account of humiliation suffered by a person as a result of another's wrongdoing

The defendants appealed the decision. On 2 July 2020, the Full Court of the Federal Court found that it was reasonable for Justice Wigney to find that Rush had not behaved in an inappropriate manner. The appeal was dismissed.

Source 2 Geoffrey Rush successfully sued Nationwide News for defamation, receiving $2.87 million in damages. In July 2020, Nationwide News was unsuccessful in its appeal against the decision.

Limitation of actions

Under section 5(1AAA) of the *Limitation of Actions Act 1958* (Vic), an action for defamation must be brought within one year from the date of the publication of the defamatory material.

However, a person claiming to have a cause of action for defamation may apply to a court for an order extending the limitation period. A court may extend the limitation period by up to three years from the date of the publication of the allegedly defamatory material. The limitation period can only be extended if the court is satisfied that it was not reasonable for the plaintiff to have commenced an action within one year from the date of publication.

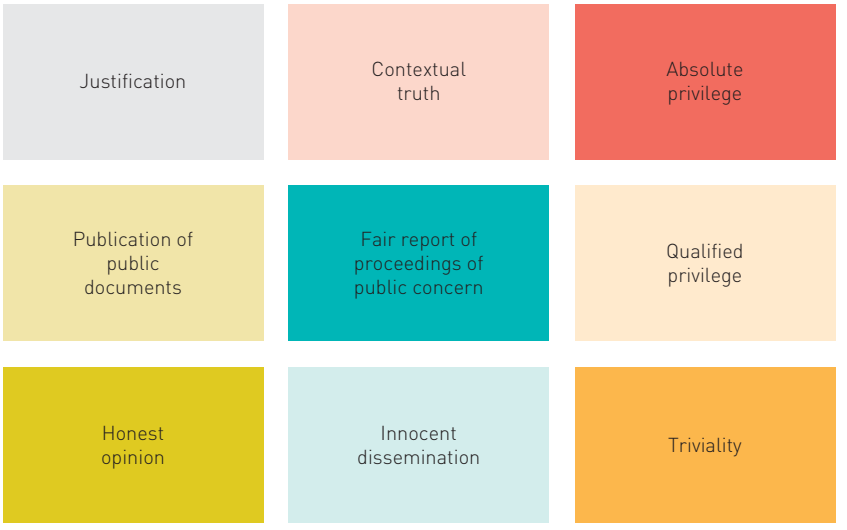
Study tip

Research and gather as many examples of defamation and the uses of these defences as you can. You may be asked to provide examples in your assessment tasks.

Defences to a defamation claim

The defendant may argue that any or all of the elements required to establish liability for defamation have not been proved. That is, the defendant may argue that the statement is not defamatory, or that the statement is true, or that the statement does not refer to the plaintiff, or that they did not publish the statement.

Otherwise, the defendant may be able to rely on one of the nine defences set out in Source 3 below.



Source 3 If all the elements required to establish liability for defamation are proven, the defendant may rely on any of these defences.

If Victoria passes legislation consistent with uniform defamation laws, the defence of triviality will be abolished and two new defences will be introduced. More information is provided on your obook assess.

Defence 1 – Justification

The defence of justification applies when a defamatory statement is **substantially true**. This means that the vast majority of the statement is true. For example, a person who commits an act of indecent exposure before a crowd of 50 people cannot claim defamation if a publication wrongly states the exposure occurred before a crowd of 30 people, as the substance (i.e. the core issue) of the statement is true (i.e. the fact that the person committed an act of indecent exposure).

Defence 2 – Contextual truth

The defence of contextual truth applies when defamatory statements are made within the same context as statements that are substantially true, and the defamatory statements do not further harm the reputation of the plaintiff.

An example of contextual truth is where a publication correctly states that a person caused a serious accident by riding a bike into oncoming traffic while intoxicated, but incorrectly states that the rider was not wearing a bike helmet. If the plaintiff claims that the incorrect statement is defamatory, then the defendant may argue contextual truth. This is because, when read in context, the statement is substantially true, and the claim that the plaintiff was without a helmet does not further harm the plaintiff's reputation. The truth of the more serious allegations overrides the falsehood in the less serious allegation, because the effect of the untrue statement on the plaintiff's reputation is insignificant.

The scenario on the next page arose from comments made on the television program, *Studio 10*. It is not yet known what defences will be raised by the defendant.

Accusations about protecting violent men

ACTUAL SCENARIO

In January 2020, former Australian Labor Party senator and Olympian, Nova Peris, sued Indigenous politician, Jacinta Price. Peris lodged a claim for defamation over comments made on the television program, *Studio 10*. The claim, filed in the Supreme Court of Victoria, centred on Peris' belief that Price stated that Peris had deliberately protected abusive men who had committed atrocities in Aboriginal communities.

Peris argued that the remarks by Price suggested that Peris had 'turned a blind eye to sexual violence against women' and that she 'supported rapists to achieve positions of power'.

Source 4 In January 2020, former Olympian and senator, Nova Peris, commenced an action for defamation over claims that she had protected men who committed violent acts in Aboriginal communities.

Defence 3 – Absolute privilege

Absolute privilege gives a defendant complete immunity from being sued in certain cases. A person may be able to use the defence of absolute privilege where they can prove that the defamatory statement was published in relation to proceedings of parliament, parliamentary bodies, courts or tribunals.

Defence 4 – Publication of public documents

A defence to a defamation claim is if the published statement was a fair copy, summary or extract of a public document, but only if the statement was published in the public interest or for educational purposes. A public document is one readily available from a parliamentary body, court, tribunal, local government or statutory authority.

Defence 5 – Fair report of proceedings of public concern

A defendant can argue that the statement is a fair report of proceedings, and that the report was published for the public's information or for educational purposes. 'Proceedings' of public concern are those involving:

- a parliamentary body, local government, court or tribunal, because their procedures are usually open to public scrutiny
- government inquiries, law reform bodies, the **ombudsman**, international organisations, and international conferences where governments are represented
- learned, professional, trade, sporting or recreational associations where membership or contractual issues are involved
- company shareholders or other meetings dealing with a matter of public interest.

ombudsman
an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

Defence 6 – Qualified privilege

Qualified privilege protects a person who has no malice in publishing information that is damaging to another person, and who published the information for various good reasons. This defence is based on public policy considerations and aims to strike a balance between competing interests. Qualified privilege gives a defendant immunity from being sued in certain cases.

The defence of qualified privilege is applicable where the defendant:

- believes that the person receiving the defamatory information has a moral or legal interest in receiving the information
- acts without malice or spite and acts reasonably in the circumstances.

In determining whether a defendant's actions were reasonable, a court considers various circumstances, including the seriousness of the allegations, and the steps taken to verify the information.

Defence 7 – Honest opinion

A defendant may claim that the defamatory material is an expression of their honest opinion (as a commentator) rather than a statement of fact. The matter must be of public interest and the opinion must be based on proper material. Proper material is a statement that is substantially true or relates to public documents or a fair report of proceedings of public concern.

Defence 8 – Innocent dissemination

The defence of innocent dissemination protects people who may unknowingly distribute defamatory information, such as printing companies, booksellers, libraries, and internet or email providers. For this defence to be successful, the defendant needs to establish that they:

- published the material as a subordinate distributor or as an employee or agent of one (a subordinate distributor is any person other than the author, primary distributor or editor of a publication)
- did not know (nor should have known) that the publication contained defamatory information
- did not have an obligation to check for defamatory material.

Source 5 The movie *Cats* opened in Australian cinemas in 2020 and received some harsh reviews. Such reviews declared that 'this movie is a dog' and claimed that it 'represents a career low' for its A-list cast. If a review is grossly exaggerated or untrue, or goes beyond what would reasonably be expected of a critic, then the honest opinion defence does not apply.

Defence 9 – Triviality

This defence applies where the publisher can show that the plaintiff is unlikely to be harmed by the publication of the defamatory material.

The role of the law in developing the elements of and the defences to defamation

Common law

Prior to 2006, the law of defamation in Victoria was governed by common law. That is, the elements of and the defences to defamation were developed through a series of court cases.

One of the key principles of defamation at common law was the distinction between libel and slander. Libel referred to defamation in a written form, and slander referred to defamation in spoken form. The relevance of the distinction between written and spoken forms of defamation was in relation to injury – in a slander claim, the plaintiff had to prove there was actual injury suffered (note that the *Defamation Act 2005* (Vic) abolished the distinction between slander and libel – see 'Statute law', below). Common law also allowed corporations to sue if the corporation's reputation had been attacked.

The courts continue to have a role in developing the principles related to defamation. For example, the High Court has found that there is an implied **freedom of political communication** in the **Australian Constitution**. This is not an absolute right to freedom of speech but it is a right to discuss political matters freely and openly without fear of being subjected to a defamation claim. Therefore, this implied freedom places restrictions on a person's right to claim defamation where a person is speaking freely about political matters.

There have also been developments in common law in relation to publication on social media pages. In June 2019, Justice Stephen Rothman of the Supreme Court of New South Wales found that Australian publishers are liable for defamatory comments published on their Facebook pages by members of the public. The decision was made in relation to Facebook pages where the public was invited to post comments about news stories, and where those comments were not moderated prior to publication. The decision by Justice Rothman led to calls for media organisations to only publish comments after they have been vetted to ensure they are not defamatory.

freedom of political communication
the right of the Australian people to freely discuss and debate political issues, subject to certain restrictions

Australian Constitution
a set of rules and principles that guide the way Australia is governed. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

ACTUAL SCENARIO

Comments on Facebook lead to defamation claim against major media organisations

Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd [2019] NSWSC 766 (24 June 2019)

Dylan Voller is a former detainee of the Don Dale Youth Detention Centre in the Northern Territory. In 2016, ABC program *Four Corners* obtained footage of six boys being held in isolation at this facility. Voller was one of them. In response to the footage, the ABC aired a *Four Corners* episode in July 2016 called 'Australia's shame'. The program exposed the 'shocking truth about the treatment of children behind bars, where young offenders have been stripped naked, assaulted and tear-gassed'.

In July 2016, at the time the *Four Corners* episode was first aired, articles about the content of the program were posted on multiple social media sites owned by major media organisations. These sites included the official Facebook pages of *The Sydney Morning Herald*, *The Australian*, *Sky News*, *The Bolt Report* and *The Centralian Advocate*. Members of the public were able to make public comments about these articles.

In 2019, Voller sued Nationwide News, Fairfax Media Publications, and the Australian News Channel (the owners of the above media outlets) for some of the posts published on those Facebook pages. The case was heard in the Supreme Court of New South Wales.

It was alleged that some of the posts were defamatory of the plaintiff, Voller. The preliminary question that the Supreme Court addressed was whether the defendants (the media organisations) were liable for the posts made by members of the public on their Facebook pages.

In his decision, Justice Stephen Rothman found that media publications could be considered to be publishers of comments made by third parties, and therefore were liable for them. In his judgment, Justice Rothman said:

Source 6 In his statement of claim, Voller argued that by inviting public comments in response to media articles, the defendants should have known there was a 'significant risk of defamatory observations' after placing the articles online.

> Each defendant was not merely a conduit of the comment … [they] provided the forum for its publication and encouraged, for its own commercial purposes, the publication of comments … A defendant cannot escape the likely consequences of its action by turning a blind eye to it … In conclusion, the Court, as presently constituted, is satisfied, on the balance of probabilities, that the defendant media company in each proceeding is a first or primary publisher, in relation to the general readership of the Facebook page it operates. As a consequence of that classification, the defence of innocent dissemination would not arise.

The media organisations unsuccessfully appealed the decision in the Court of Appeal in New South Wales, which in June 2020 upheld the decision of the trial judge. In dismissing the appeal, the NSW Court of Appeal said the media outlets were liable as publishers of readers' Facebook posts because they 'encouraged and facilitated' comments by setting up the Facebook pages. The media companies said that they would consider an appeal to the High Court.

Statute law

Defamation law in Australia underwent major reform in 2005 when uniform defamation legislation was introduced by the state and territory parliaments. Prior to 2005, the laws relating to defamation in states and territories had significant differences, and plaintiffs could choose in which state or territory they issued proceedings.

The introduction of the uniform defamation legislation involved each state and territory passing a statute – in Victoria, it was the *Defamation Act* – that was modelled on the proposed uniform defamation laws, which had been agreed upon by the Commonwealth and the states and territories.

In some instances, the uniform defamation legislation amended or abolished common law principles. For example, section 7 of the *Defamation Act* abolished the distinction between slander and libel. However, unless the *Defamation Act* specifies otherwise, it does not affect the operation of common law principles in relation to defamation.

In addition, under the *Defamation Act*, a corporation (other than those excluded) has no cause of action for defamation.

In 2018, the Council of Australian Governments (which is now called the National Cabinet) created a 'defamation working party' to undertake a review of Australia's defamation laws. and to determine to what extent the current defamation laws are valid. The final agreement on the uniform provisions was reached on 27 July 2020. The New South Wales Attorney-General, Mark Speakman, has previously said that he hoped the new laws will be 'fit for purpose in this digital age'.

Source 7 The National Cabinet (formerly the Council of Australian Governments) is the peak intergovernmental forum in Australia.

Possible impacts of a breach of defamation law

Impact of defamation on the plaintiff

The impact of a breach of defamation laws on the plaintiff depends on the nature of the statements that have been made about the plaintiff. Some of the typical impacts are as follows:

- **Loss of reputation** – This could include loss of status. For example, the plaintiff could be shunned by people with whom they once associated.
- **Emotional impact of the defamatory material** – This could be a consequence of the publicity of the claim. For example, a person could develop conditions such as depression and anxiety as a result of the defamation.
- **Loss of wages and livelihood** – This could be a consequence of loss of reputation. For example, the plaintiff might need to take time off work to attend court proceedings.
- **Unemployment** – This could be a consequence of loss of reputation. For example, an employee might lose their job if the defamatory statement negatively alters the reputation of their employer.

Impact of defamation on the defendant

Some of the possible impacts of a breach of defamation laws on the defendant include:

- **Costs** – This could occur when the defendant loses the case. For example, the defendant might be ordered to pay the plaintiff's legal costs, which could cause financial hardship.
- **Need to sell assets** – This could be a consequence of a high damages award. For example, the defendant might be forced to sell assets to meet the costs of the damages amount.
- **Public humiliation** – This could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of widely reported court proceedings.

Source 8 on the next page summarises some of the possible impacts that defamation can have on the plaintiff and on the defendant.

IMPACT ON THE PLAINTIFF	IMPACT ON THE DEFENDANT
• Loss of reputation • Emotional impact of the defamatory material • Loss of wages and livelihood • Unemployment	• Costs • Need to sell assets • Public humiliation

Source 8 A summary of the impacts of defamation

8.2 CHECK YOUR LEARNING

Define and explain

1 Can a person sue for defamation if they are not named in the defamatory material? Justify your response, using an example.

2 Why must defamatory material be published? Describe different ways that defamatory material can be published.

3 Provide two reasons why it is necessary to have uniform defamation laws throughout Australia.

Synthesise and apply

4 Distinguish between the defences of absolute privilege and qualified privilege.

5 Read the scenario *Mickle v Farley*.
- **a** Who were the parties in this case?
- **b** Where were the comments made? Conduct some further research to determine the nature of the comments.
- **c** Why do you think defamation was proved in this case?
- **d** What remedy did the teacher receive?
- **e** Do you agree with the District Court's decision? Explain your response.

6 Read the scenario 'Accusations about protecting violent men'.
- **a** Outline the key facts of this case.
- **b** With reference to the elements of the tort of defamation, explain the possible defence(s) that might be available to the defendant in this case.
- **c** Conduct research to find out whether this case was settled or resolved. Explain the nature of the outcome.

Analyse and evaluate

7 Read the scenario *Rush v Nationwide News Pty Ltd*.
- **a** Outline the basis of the claim made by Geoffrey Rush.
- **b** Explain the Federal Court's judgment. In your answer, refer to the nature of the defence relied on by the publisher. Suggest reasons why this defence was rejected by the Court and on appeal.
- **c** In what ways does the outcome of this case suggest that it is preferable, in a prominent case such as this, to settle the dispute before the trial? Discuss.

8 'The dissemination of defamatory material via social media is much more dangerous than via traditional media such as print and radio. For example, a person who did not create defamatory material but shares it by "retweeting" it can be liable under the tort of defamation. Damages awards should be higher for defamation via social media as a means of deterring behaviour that has the capacity to cause significant harm to others.'

Discuss the above statement. In your answer, refer to:
- **a** the recommendations from the Council of Australian Governments that were agreed to in 2020, and
- **b** the decision in the 2019 defamation case brought by Dylan Voller.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 8.2 Check your learning
- **Video tutorial** How to argue civil liability
- **Actual scenarios** Other defamation cases
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

8.3 NUISANCE

nuisance
a type of tort that involves interference with a person's right to use and enjoy private and/or public property

Nuisance deals with the violation of a person's right to reasonable convenience and comfort in life. In effect, this tort looks at competing land uses and which should take precedence over another. For example, if a new freeway is to be constructed, is it reasonable that people living in the area be inconvenienced for three years by dust, noise, vibrations and lack of access to public roads? In the event of a dispute, questions would be asked about whether this is a reasonable interference.

There are two types of nuisance:

- private nuisance
- public nuisance.

Private nuisance

private nuisance
a type of tort involving an act or omission that substantially and unreasonably interferes with the use and enjoyment of land

Private nuisance occurs where there is an act or omission that substantially and unreasonably interferes with a person's use and enjoyment of their own land. The law also covers activities that might cause people to fear for their safety, such as the aerial spraying of crops. Private nuisance cannot result in criminal charges against the wrongdoer.

If a person occupies land and they allow another person to cause nuisance on that land, then the occupier of that land can also be held legally responsible. For example, if a person owns a facility that is used for public events (e.g. weddings and twenty-first birthday parties), they are liable for any excessive noise or other interference to neighbours that occurs on that land. The owner of the facility cannot argue that they are not responsible because they were not present when the nuisance occurred.

Public nuisance

public nuisance
a type of tort involving an act or omission that interferes with the comfort or convenience of a number of people to a considerable degree

Public nuisance occurs where, to a considerable degree, there is an act or omission that interferes with the comfort or convenience of a number of people. This can involve the people's ability to access a public place such as a park, roadway or building. A public health nuisance can also include rubbish being left on a property. If a group of people decide to block a public road, this would affect a significant number of people, such as those going to work, students attending school, and children being taken to medical appointments by their parents.

To have an action for public nuisance, any affected person needs to show that they have suffered special damage that extends beyond what may have been experienced by other members of the public.

Under Australian law, public nuisance can also constitute a criminal offence.

Did you know?

In the British case of *Hussain v Lancaster City Council*, the plaintiffs, who owned a corner store, suffered racially motivated abuse. They undertook action against the local council for failing to deal with the alleged perpetrators, who were tenants of council properties nearby. One of the issues in the case was whether the council could be liable for the behaviour of their tenants. The Court ruled that although the tenants' behaviour was offensive, it did not relate to the use of the council's land, so a nuisance claim could not be made.

Rights protected by the law of nuisance

There is a difference between the word 'nuisance' that we use in everyday life and the tort of nuisance. If someone asks us to go to the shop to buy a bottle of milk, that might be 'a nuisance' (a bother) but it is not a legal nuisance. A legal nuisance is a serious impact on our enjoyment of property.

The tort of nuisance is designed to protect our rights to:

- **enjoy our own land**, which means that others cannot interfere with our access to or enjoyment of private land. The law is clear that we are to be protected from excessive interferences with our enjoyment of land from nuisances such as dust, noise and vibration

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify a wrong

- **freedom of movement**, such as movement along roads and waterways (rivers and creeks) unless, for example, there are public works being undertaken that are managed by a statutory authority
- **seek an appropriate remedy from the courts** where nuisance has occurred. A useful remedy in these cases can be an **injunction**, which is a court order that stops the defendant from engaging in the nuisance any further.

These rights are upheld through dispute resolution bodies, including the courts, where a range of remedies are available to restore a plaintiff's enjoyment of their land. The scenario below further illustrates how the right to enjoy your own land can be affected.

ACTUAL SCENARIO

Wild all-night parties at a Ripponlea mansion

Hallett v City of Port Phillip [2015] VSC 313 (30 June 2015)

In 2015, the Supreme Court of Victoria heard a case about wild parties being held at an old Ripponlea mansion, where music was played loudly and a skateboard ramp had been installed in the backyard. The mansion had been divided into three separate units.

Source 1 Wild parties at a Ripponlea mansion resulted in a nuisance claim.

The local council, the City of Port Phillip, had issued warning notices to the property owner over this excessive noise, which had caused great inconvenience to the property's neighbours. One of the residents had kept a diary of the nuisance caused by noise, and had recorded more than 70 incidents over a four-month period.

In the hearing, the property owner stated that he was away from the property for six months of the year and was unaware of the noise being caused by his tenants. When he became aware of this, he evicted them.

The case is a good example of how a local council will try and intervene where a neighbour is causing nuisance.

Elements required to establish liability for nuisance

To establish nuisance, the following elements must be proven:

- the plaintiff has a property right in or over the land
- there has been interference with the plaintiff's use and enjoyment of the land
- the plaintiff has suffered damage.

Element 1 – The plaintiff has a property right in or over the land

A plaintiff must establish that they have some property right in or over the land. This means they must have an interest in the land, usually as the owner of the property or as a tenant (i.e. someone who is renting the property). Individuals also have the right to access public property, and if there is interference with their right to enjoy public property, a person may be able to sue.

Element 2 – There has been interference with the plaintiff's use and enjoyment of the land

The plaintiff must establish that the defendant interfered with the plaintiff's use and enjoyment of the land. This interference can involve a range of actions on the part of the defendant, including noise, dust, vibration, water run-offs, and even objects (e.g. golf balls). The following scenario provides an example of the way nuisance can affect a plaintiff's ability to develop a property for commercial gain.

ACTUAL SCENARIO

Nuisance and the endangered froglet

Gales Holdings Pty Ltd v Tweed Shire Council [2011] NSWSC 1128 (21 September 2011)

In this case, the plaintiff (Gales Holdings) owned a 27-hectare parcel of undeveloped land in the suburb of Kingscliff in New South Wales. The land had been earmarked to be developed into a shopping centre.

The plaintiff claimed that this land had become undevelopable because the local council (Tweed Shire Council) had allowed polluted stormwater to run onto the property. This water lay in pools on the ground, which created an ideal habitat for the wallum froglet, an endangered species. The species breeds in swamps with permanent groundwater as well as in shallow pools and drainage ditches. Given the endangered nature of the froglet, the plaintiff was unable to develop the land, which it claimed amounted to an interference by the defendant with the plaintiff's use of its property.

The Supreme Court of News South Wales found that the local council had caused a nuisance in allowing stormwater to run onto the property. However, there was evidence that the froglet had existed on the land in the past, so the damages sought by the plaintiff were reduced. The Court found that the local council must contribute to the plaintiff's additional costs in developing the land to make it suitable for the froglet.

The Court awarded damages of $600 000, together with other orders to remove the nuisance that had been occurring since May 2004. The Court also ruled that compensation was not payable by the defendant for any loss of value of the land that was to be used for the wallum froglet habitat.

In her judgment, Justice Patricia Bergin said:

> If the defendant knew or ought to have known of the nuisance and the real risk of reasonably foreseeable consequential damage to the plaintiff, it had an obligation to take such positive action as a reasonable person in its position and circumstances would consider necessary to eliminate the nuisance.

To determine whether an interference is reasonable, a court examines:

- the nature of the interference (e.g. what the defendant did, and whether the defendant's behaviour is reasonable and necessary)
- the time of day in which the interference occurs
- the nature of the neighbourhood in which the plaintiff lives (e.g. whether the area is in the inner city, in an outer suburban or in a rural area)
- whether the nuisance or interference is necessary for the community
- whether the interference is ongoing or intermittent

- how long the nuisance or interference has been in existence (e.g. whether the nuisance was present in the area before the plaintiff moved into their property).

Element 3 – The plaintiff has suffered damage

The plaintiff must also establish that they have suffered some sort of damage that has a negative impact on their life. The damage can be material or non-material. Material damage includes physical damage (e.g. damage to crops). Non-material damage includes non-physical damage (e.g. loss of revenue). For a public nuisance claim, the plaintiff has to establish that the interference caused a much greater impact on them than on the wider public.

The following scenario is an example of how a company can suffer damage as a result of nuisance.

ACTUAL SCENARIO

Guns and silver foxes

Hollywood Silver Fox Farm Ltd v Emmett [1936] 2 KB 468

Hollywood Silver Fox Farm bred silver foxes which, if disturbed during breeding, may refuse to breed, or even kill their young. In this case, there was a dispute between the plaintiff (the owners of the Hollywood Silver Fox Farm) and the defendant (Emmett), which saw the defendant's son fire a gun on his land in a place that was close to the foxes' breeding pens. As a result, Hollywood Silver Fox Farm brought an action under the tort of nuisance, seeking an injunction to prevent this behaviour in future. The key legal issue in the case was whether a landowner has the absolute right to create noise on their property.

The Court granted an injunction on the grounds that where noise has been created, the motive behind the production of that noise must be taken into account. In this case, the primary motivation of the defendant's son when firing the gun was to cause interference with the plaintiff's use of their land.

Source 2 The breeding of silver foxes was the centre of a nuisance claim.

Study tip

When analysing a case of public nuisance, remember that for an individual to have an action for compensation for the inconvenience or interference, they must show that the impact caused them 'special damage'. The impact on the plaintiff must be shown to be greater than that suffered by the general public.

Limitation of actions

Under the *Limitation of Actions Act 1958* (Vic), an action for damages for nuisance must be brought:

- **for general nuisance claims (e.g. where there has been property damage)**: six years from the date on which the cause of the action occurred (i.e. when the damage occurred)
- **where the damages claimed by the plaintiff include damages for personal injuries consisting of a disease or disorder contracted by any person**: three years from the date the person first knew that they had suffered the injuries and that those injuries were caused by the defendant.

The *Limitation of Actions Act* allows plaintiffs to apply to a court to extend a limitation period to allow the issue of court proceedings. The extension must be considered 'just and reasonable'. In considering applications, the court takes into account factors such as the reasons for the plaintiff's delay in commencing the action.

Defences to a nuisance claim

The defendant may argue that any or all of the elements required to establish nuisance have not been proven. That is, the defendant may try to prove that the plaintiff did not have a right to the property, there was no interference with the plaintiff's use and enjoyment of the land, or the plaintiff did not suffer damage.

The defendant may also rely on one of the following three defences:

- statutory authorisation
- consent
- reasonable use.

Defence 1 – Statutory authorisation

In cases involving the tort of nuisance, a defendant can argue the defence of statutory authorisation. This means that legislation passed by the Victorian or Commonwealth Parliament allows the conduct that the plaintiff has claimed constitutes nuisance. Statutory authorisation also covers the conduct of post office staff, council officers, and gas, water and electricity meter readers. Police officers are also allowed to enter property if they have a warrant. At all times, property owners are responsible for the safety of visitors when they enter their premises.

The defence of statutory authorisation relies on how the courts view the intention of the relevant law-making body (i.e. legislature). It is presumed that because parliament intended a certain activity (e.g. a major infrastructure project), then parliament has authorised any consequences of that activity. The building of Melbourne's Metro Tunnel is an example of such a project.

A decade of disruption – Melbourne's Metro Tunnel

ACTUAL SCENARIO

In 2016, an Environment Effects Statement found that the impact on Victorians of the $11 billion Metro Tunnel would be 'substantial'. However, the Victorian Planning Minister argued that the inconvenience to the public could be limited with careful planning. The Minister said the tunnel was essential to meet future transport needs. The Minister declared that the short-term disruption was worth the long-term gain of two underground tunnels (nine kilometres each) connecting some of Melbourne's busiest train lines. The project would also create five new stations: Arden, Parkville, CBD North, CBD South, and Domain.

Earlier plans for the Metro Tunnel were amended to reduce the need to acquire property in Kensington. The revised plans also allowed the tunnel to run deeper underground to reduce the impact on Fawkner Park in South Yarra. In addition, the Victorian Government placed limits on the emission of vibrations and noise, and said it would provide alternative accommodation for affected residents.

As construction began, some Melbourne hospitals raised concerns about hospital buildings potentially being damaged by underground drilling. The Royal Melbourne Hospital was at particular risk. Also, the Anglican Archbishop of Melbourne raised concerns about the impact of tunnelling on St Paul's Cathedral. In response, the Victorian Government appointed an independent environmental auditor to monitor the tunnel's construction.

Source 3 Work on Melbourne's Metro Tunnel generates medium-level noise, with periods of high-level noise during excavation and work on retaining walls. Where possible, high-impact work is undertaken during the day, although this is not always possible. Tunnel works have also made parking severely limited in some areas.

Defence 2 – Consent

In nuisance claims, the defendant might argue that the plaintiff gave consent to the activity that is now being claimed as having caused damage, loss or injury.

Defence 3 – Reasonable use

Where the defendant can establish that their use of land is reasonable, the plaintiff will not succeed in their action. To determine what constitutes 'reasonable' use in a particular case, the court examines the nature of the alleged nuisance and whether the defendant's use of the property accords with existing standards and expectations for a property of that type and in that location.

The following scenario explores how a certain type of interference can be considered to be reasonable.

ACTUAL SCENARIO

Magistrates' Court hears neighbourhood noise complaint

Courtney & Jackson v Howell [2016] VMC011 (26 July 2016)

In 2012, a couple living in Eagle Point, a small town in Victoria, began using an electronic device to scare away birds that were making a mess on their property. The device, known as an acoustic bird deterrent (ABD), produced bird distress cries and predator calls to scare off unwanted birds. Shortly after the device was installed, their neighbours began complaining about the level of noise created by the ABD and claimed the device was a nuisance. This case is a good example of how a simple neighbourly dispute can escalate and require the intervention of the courts.

The plaintiffs (Thomas Courtney and Megan Jackson) lived on a semi-rural five-acre property at Eagle Point. They had lived there since 1996. The defendants (Peter and Sally Howell) had lived on the property next door since 2000. Initially, the plaintiffs and defendants got along well as neighbours, but over time minor disputes occurred between them.

In January 2012, the defendants installed the ABD on their property and began using it. The device contained eight different bird sounds and included a control unit with four speakers, which was mounted onto the defendants' machinery shed. The bird deterrent could be programmed and controlled by the defendants to change the number of sounds, the volume of the sounds, and the interval between the sounds.

Source 4 An acoustic bird deterrent was purchased by the defendants to protect their property from unwanted birds such as swallows. Their neighbours lodged a nuisance claim in the Magistrates' Court, which was dismissed.

In December 2012, one of the plaintiffs (Jackson) complained to the East Gippsland Shire Council about the noise created by the ABD. In response, the defendants re-programmed the operating times of the device. However, the plaintiffs made further complaints. Subsequently, in February 2013, the defendants reduced the volume of the ABD. On 5 September 2014, the plaintiffs issued a nuisance claim in the Magistrates' Court of Victoria. The plaintiffs alleged that the noise from the defendants' device constituted an interference.

The plaintiffs claimed that the ABD had a significant effect on them. Jackson claimed that her multiple sclerosis, which she was diagnosed with in 1993, had become worse as a result of the noise. She also claimed that she had become increasingly frustrated, annoyed and angry, and that she rarely invited people to her home. Courtney alleged that he was becoming increasingly

angry and irritated about the issue, which caused him to spend more time in his office rather than his house, even though his house used to be his favourite spot on the property.

Magistrate Simon Garnett dismissed the plaintiffs' claim. He found that Jackson had exaggerated the nature and extent of her symptoms to the Court, and described her evidence in the witness box as 'histrionic'. He also found that Jackson's 'annoyance' about the noise arose after a dispute between Courtney and Howell about the costs associated with a shared road. Magistrate Garnett also found that Howell was a credible and honest witness and that she was prepared to make adjustments to the device to satisfy the neighbours.

The role of the law in developing the elements of and the defences to a nuisance claim

Common law

Laws relating to nuisance have been developed through common law, and common law principles continue to apply.

The law relating to nuisance has existed since the thirteenth century and was based on protecting against the development of land.

In the nineteenth century, and following the rise of industrialisation, the tort of nuisance changed and different standards applied to individuals and companies. This period saw the development of statute law relating to town planning and zoning of land, so that competing interests for land could be addressed more readily. This has continued to the present day, where environmental laws have added another layer to nuisance laws, with strict controls placed on factories and other industries that have the potential to pollute surrounding areas. Governments have also imposed strict penalties for polluting the environment and impeding the free movement of others.

The scenario below highlights the development of the law to keep up with present-day issues.

Creating safe access zones for abortion clinics

ACTUAL SCENARIO

Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015 (Vic)

In 2015, the Victorian Parliament passed amendments to the *Public Health and Wellbeing Act 2008* (Vic) that established safe access zones of 150 metres around medical facilities providing abortions. The following types of behaviour are prohibited within the safe access zone:

- harassing and intimidating behaviour
- communicating about abortion, in a manner that could be seen or heard by a person accessing or leaving premises providing abortions, where the communication is reasonably likely to cause distress or anxiety
- impeding a footpath, road or vehicle without reasonable excuse, and
- intentionally recording a person accessing or leaving premises providing abortions, without the person's consent or without a reasonable excuse.

Source 5 In 2017, Kathleen Clubb, a mother of 13, was convicted and fined $5000 for handing a pamphlet to a couple outside an East Melbourne fertility clinic. The rules also apply to hospitals, doctors' clinics, and any health service that performs abortions.

Statute law

Although common law generally governs negligence claims, there are some significant pieces of legislation that aim to reduce the potential for nuisance in society. Many of these Acts establish offences where someone is interfering with property. For example:

- Under the *Summary Offences Act 1966* (Vic), individuals who light fires on their property that damage, destroy or endanger another property may be prosecuted under **criminal law**.
- Under the *Public Health and Wellbeing Act*, it is illegal for a person to allow a nuisance to emanate from any premises owned or occupied by that person. Local councils have the power to ensure that this legislation is observed.
- Under the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth), fines can be imposed on unions who blockade building sites.
- The *Public Health and Wellbeing Amendment (Safe Access Zones) Act* made amendments to the *Public Health and Wellbeing Act* to stop people harassing members of the public who are seeking to enter an abortion clinic.

criminal law
an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

Possible impacts of a breach of nuisance laws

Impact of nuisance on the plaintiff

The impact of a breach of the tort of nuisance can be significant. Possible impacts on the plaintiff include:

- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person may develop anxiety as a result of listening to a barking dog.
- **Quality of life** – This could be a consequence of the breach. For example, a malicious creation of noise or vibration can greatly affect a person's right to enjoy their property.
- **Costs** – This could occur as a result of the impact of the nuisance. For example, a person who is operating a business may suffer financially through loss of business, loss of productivity, or having to spend money to minimise the impact of the nuisance.

Impact of nuisance on the defendant

Possible impacts on the defendant of a nuisance claim are as follows:

- **Inconvenience** – This could require the defendant to attend hearings in an attempt to settle the dispute. For example, a neighbour may have to attend a **mediation** hearing.
- **Costs** – This could occur when the defendant loses the case. For example, the defendant might be ordered to pay the plaintiff's legal costs, which could cause financial hardship.
- **Business failure** – This could be a consequence of an injunction. For example, a business might suffer financially with an order to minimise the impact of the nuisance.

mediation
a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

Source 6 below summarises some of the possible impacts that nuisance can have on the plaintiff and on the defendant.

IMPACT ON THE PLAINTIFF	IMPACT ON THE DEFENDANT
• Effect on mental health • Quality of life • Costs	• Inconvenience • Costs • Business failure

Source 6 A summary of the impacts of nuisance

8.3 CHECK YOUR LEARNING

Define and explain

1 Explain the purpose of the tort of nuisance.

2 Describe two situations in which a person may breach the law relating to public nuisance.

Synthesise and apply

3 Under Victorian law, nuisance complaints can be made about the operation of a domestic air conditioner or evaporative cooler between 10 pm and 7 am on weekdays. Give reasons why:
   - **a** this law was made by the Victorian Parliament
   - **b** this law is rarely, if ever, enforced.

4 Read the scenario 'Creating safe access zones for abortion clinics'.
   - **a** Explain the elements of public nuisance.
   - **b** Provide two reasons why the Victorian Parliament passed the *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic).
   - **c** Outline the impact that this type of nuisance would have on people attending such clinics.
   - **d** Explain the remedies that could be sought in a civil action if this law is breached. To what extent would these remedies be an effective means of compensating the plaintiff for the nuisance caused? Give reasons for your answer.

5 Read the scenario *Hallett v City of Port Phillip*. Assume that the residents who live adjacent to the mansion launched legal action for nuisance against the landlord of the property. Draft a paper that could be presented at a hearing where you are representing the plaintiffs. In your address, outline the factors that an adjudicator would consider in a case such as this.

Analyse and evaluate

6 Read the scenario *Hollywood Silver Fox Farm Ltd v Emmett*.
   - **a** Outline the key facts of this case.
   - **b** Explain the judgment in this case. To what extent is the intention of the defendant a key issue in cases such as this? Explain your response.

7 'Over the past century, the tort of nuisance has become less available to plaintiffs because parliament has passed statutes that allow for nuisance to occur, with the result that legal action is not available to those affected.'
   - **a** In your own words, explain the defence of statutory authorisation. In your answer, refer to infrastructure projects such as Melbourne's Metro Tunnel.
   - **b** To what extent should governments cater for the needs of local residents and retailers when planning projects such as the Metro Tunnel? Does statutory authorisation allow for an unreasonable interference with a person's right to enjoy their land? Discuss.

8 Read the scenario *Gales Holdings Pty Ltd v Tweed Shire Council*.
   - **a** Outline the key facts of this case.
   - **b** What was the decision of the Supreme Court of News South Wales?
   - **c** Do you believe it is reasonable that a shopping centre development should be affected by an endangered species? Justify your response.
   - **d** In your opinion, what would be the impact of this judgment on local councils that are responsible for the management of stormwater in their municipalities?

Check your Student obook assess for these additional resources and more:

- **Student book questions** 8.3 Check your learning
- **Sample** Arguing liability response
- **Weblink** Nuisance
- **Video** How to argue civil liability

TOP TIPS FROM CHAPTER 8

1 One of the key skills you need to demonstrate in this area of law is to 'argue' the liability of a party. That means you need to be able to understand the facts of the case, the elements and defences of the area of law, and argue or convince someone else why a party should or should not be found liable. You can have a lot of fun with this – pretend you're a barrister in court!

2 When looking at the facts of the case, start by highlighting the elements that may be harder to prove for the plaintiff, and the elements that are easy to prove. Also, list the defences that are available to the defendant. Remember that a plaintiff needs to prove all of the elements, and a defendant needs to either disprove one or more elements, or establish a defence.

3 Developing your application skills is important. It's not enough to memorise and rewrite everything you know about a particular area of civil law. You need to show your understanding of the law by applying it to a particular set of circumstances. The best way to develop your application skills is to practise – ask your teacher for additional scenarios that you can work through.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Outline** two reasons why time limitations are imposed for actions under civil law.

(4 marks)

Difficulty: medium

2 **Explain** the key elements required to establish one tort you have studied in this chapter.

(6 marks)

Difficulty: high

3 Choose one tort you have studied in this chapter. **Write** two hypothetical scenarios as follows:
   a where there is doubt about whether a particular element can be established in one of the torts you have studied.
   b where there is one defence that can be raised in relation to one of the torts you have studied in this chapter.

(8 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Use the stimulus material to answer the questions in this section. It is not intended that this material will provide you with all the information you need to answer the questions.

Chaos at Seoul Survivor

Julia manages a taekwondo club, Seoul Survivor, every night except Sunday. The club is open until midnight, and Julia allows music from bands such as AC/DC and Metallica to be played loudly from speakers.

James, who lives in a flat above the taekwondo club, complains repeatedly to Julia, but she ignores his complaints. James owns the flat, which he purchased in August 2019. Things are made worse by the fact that James is in his final year of a Bachelor of Fine Arts degree and the music, combined with the noise made by the young people who gather outside the club, affects his ability to study. James claims the disturbance has led to an increase in his anxiety levels. Also, his enjoyment of the local area has been diminished by the young people who have been drawn to the area since the club opened.

In desperation, James posts a message on social media that says that Julia 'has criminal connections and in spite of her demure appearance, is actually a hired "hitman"'. Things become much worse for Julia when one of her regular trainers, Jessica, is away on holidays and can't take a class for beginners. In the absence of Jessica, Julia asks one of her friends, Charlotte, to take the class, even though the closest she has come to martial arts is playing computer games such as *Mortal Kombat XL*.

During a 'flying side kick' competition, Charlotte holds the board at the wrong angle and one of the students, Mimmi, falls and tears ligaments in her ankle.

Practice assessment task questions

1 Choose one of the torts that you have studied in this chapter.

a Identify a likely plaintiff and a likely defendant in the case study above for a dispute that could arise in relation to the tort.

(2 marks)

b Describe one right protected by that area of tort law.

(2 marks)

c Explain how long a plaintiff has to bring a claim. Can this time be extended? Give reasons for your answer.

(4 marks)

2 Summarise the role of both common law and statute law in developing the key legal principles of your chosen tort.

(5 marks)

3 Describe one impact the case study above might have on the plaintiff, and one impact it might have on the defendant you identified in question 1a.

(4 marks)

4 Imagine you are a lawyer assisting either the plaintiff or the defendant you identified in question 1a. Your client has asked you to prepare a paper that argues why the defendant is or is not liable (depending on who you are acting for). Prepare the paper. Make sure you address each of the elements that needs to be established for the chosen tort, and any possible defences.

(8 marks)

Total: 25 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 8

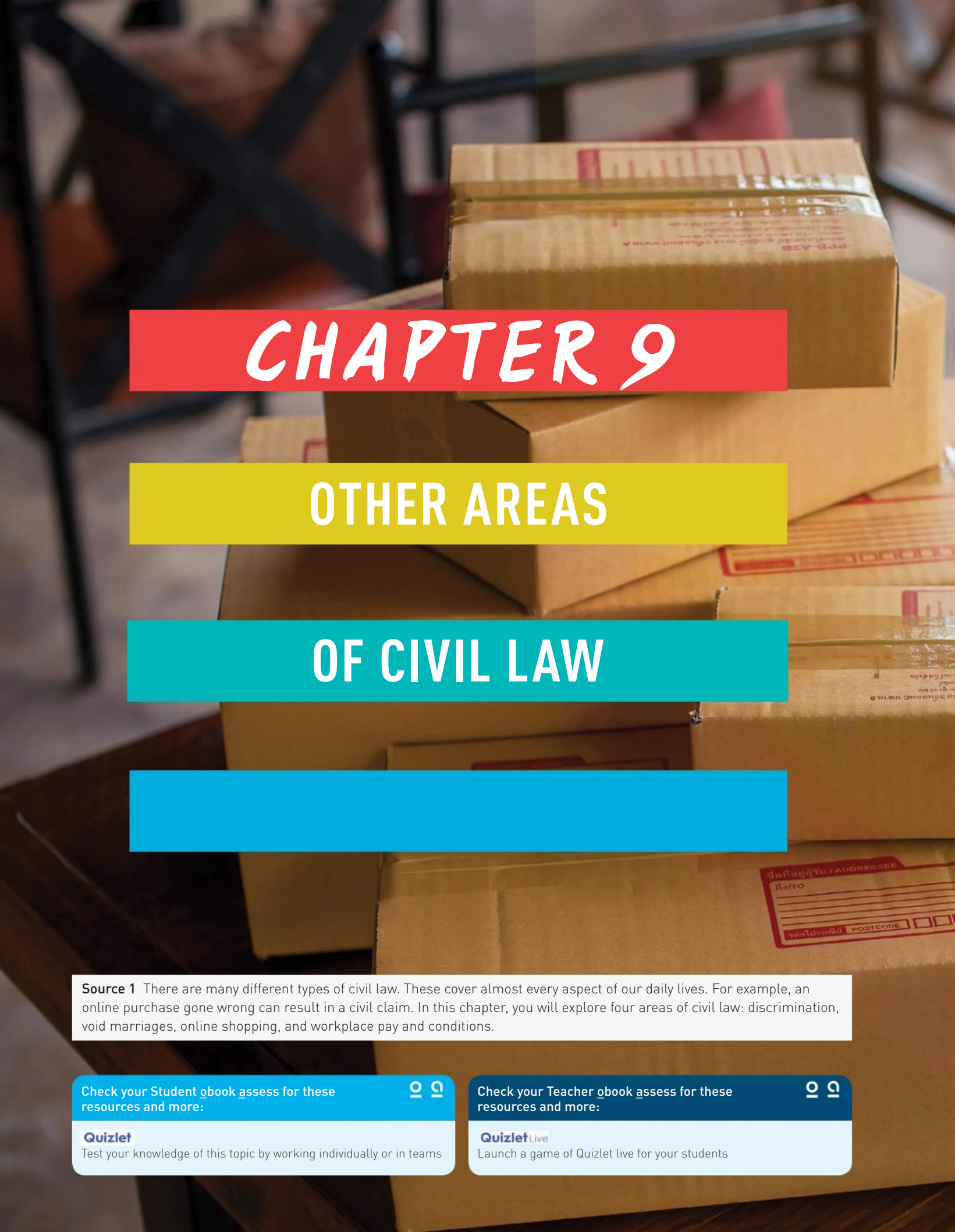
Revision notes
Revision notes for Chapter 8

assess quiz
Chapter 8
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 9

OTHER AREAS OF CIVIL LAW



Source 1 There are many different types of civil law. These cover almost every aspect of our daily lives. For example, an online purchase gone wrong can result in a civil claim. In this chapter, you will explore four areas of civil law: discrimination, void marriages, online shopping, and workplace pay and conditions.

Check your Student obook assess for these resources and more:

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OUTCOME

By the end of **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

KEY KNOWLEDGE

In this chapter, you will learn about:

- two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research and analyse relevant information about civil law
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to two actual and/or hypothetical scenarios.

KEY LEGAL TERMS

acceptance (in relation to contract law) a written or oral statement or act that indicates that the person agrees to the offer being made

attribute a quality, feature or characteristic of a person, such as race, gender or disability

award the minimum wages and conditions that an employer is legally required to pay a worker for a particular job or occupation

contract an agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced through the law

discrimination the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or gender identity). Discrimination can be direct or indirect

National Employment Standards (NES) a set of 10 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

offer (in relation to contract law) a written or oral statement or act that indicates the person is willing to buy or sell goods or services

solemnised the act of formalising a lawful marriage in accordance with the requirements of marriage laws in Australia

ADVICE TO TEACHERS AND STUDENTS

In **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9) you are required to study **two areas of civil law** in detail.

YOU MAY CHOOSE TO STUDY	OPTIONS INCLUDE	PAGE
• **TWO** torts (from Chapter 8)	8.1 Negligence	222
	8.2 Defamation	232
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OR

YOU MAY CHOOSE TO STUDY	OPTIONS INCLUDE	PAGE
• **TWO** other areas of civil law (from Chapter 9)	9.1 Discrimination	256
	9.2 Void marriages	267
	9.3 Online shopping	276
	9.4 Workplace pay and conditions	285

OR

YOU MAY CHOOSE TO STUDY	OPTIONS INCLUDE	PAGE
• **ONE** tort (from Chapter 8) • **ONE** other area of civil law (from Chapter 9)	See above	See above

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9.1 DISCRIMINATION

discrimination
the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or gender identity). Discrimination can be direct or indirect

attribute
a quality, feature or characteristic of a person, such as race, gender or disability

direct discrimination
a type of discrimination; when an assumption is made about what a person can or cannot do because of a personal characteristic or attribute

One right that individuals in Australia have is the right to be free from **discrimination**. Discrimination means treating someone less favourably than others based on **attributes** such as race, religious belief, disability, or age. Discrimination can be direct or indirect:

- **Direct discrimination** is when an assumption is made about what a person can or cannot do because of a personal characteristic or attribute. For example, if an older applicant is not considered for a job because it is assumed they cannot use new technologies, then this person is being directly discriminated against.
- **Indirect discrimination** is when there is a rule or policy that is the same for everyone, but it has an unfair effect on some people who share a particular attribute. For example, if a company policy states that all employees must work full-time, people who prefer to work part-time due to family responsibilities are being indirectly discriminated against.

Discrimination can occur in all aspects of life, such as in schools, in the workplace, in sporting clubs, in membership clubs, in places of accommodation, and when buying goods or services.

There are many laws that aim to protect people from discrimination. For example, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that every person has the right to enjoy their human rights without discrimination, and every person is equal before the law.

Unfortunately, sometimes situations arise where a person is discriminated against. This may be because of a person's attribute or characteristic (e.g. race). An example of such discrimination is provided in the scenario below.

ACTUAL SCENARIO

Hospital staff subjected to racist abuse amid COVID-19 fears

From 2020, Australia was faced with a health, economic and social crisis as a result of COVID-19.

COVID-19 first arose in a province in China in January 2020. The virus soon spread to countries across the world (including Australia). Worldwide, millions of people fell ill and hundreds of thousands of people died after contracting the virus. To contain the spread of COVID-19, Australia adopted strict measures including 'physical distancing', closing many public facilities such as parks and swimming pools, and banning large gatherings of people.

Source 1 In 2020, the Royal Children's Hospital in Melbourne reported that one of its doctors had been racially profiled as a result of COVID-19 fears.

In the midst of this global pandemic, staff members at the Royal Children's Hospital in Melbourne reported being racially profiled. In one instance, a family told a doctor they did not want her treating their child because of her race. The family said they were concerned the doctor could spread COVID-19 to their child. This was not the only instance of racially motivated conduct against people of Asian descent that occurred in relation to COVID-19 fears.

Rights protected by the law

indirect discrimination a type of discrimination; when there is a rule or policy that is the same for everyone, but it has an unfair effect on some people who share a particular attribute

Discrimination is prohibited in Victoria and in Australia under the statutes listed in Source 2 below. Some of these statutes are Victorian statutes, which means that they only apply to acts or omissions that occur in Victoria, whereas others are Commonwealth statutes, which means that they apply all over Australia.

The *Equal Opportunity Act 2010* (Vic) is the main piece of legislation in Victoria that makes discrimination unlawful. It prohibits discrimination based on attributes (these are listed in section 6 of the Act) such as age, breastfeeding, gender identity, disability, lawful sexual activity, marital status, pregnancy and race, in areas such as employment, education, goods and services, accommodation, membership and sport.

STATUTE	DESCRIPTION
Equal Opportunity Act 2010 (Vic)	This is the main piece of Victorian legislation that protects individuals from discrimination, sexual harassment, victimisation and unequal opportunity. This Act prohibits direct and indirect discrimination based on various attributes (race, religion, etc.) in various areas such as employment and sport.
Racial and Religious Tolerance Act 2001 (Vic)	This Act prohibits vilification on the grounds of race or religious belief or activity in Victoria.
Age Discrimination Act 2004 (Cth)	This Act makes it unlawful to discriminate against individuals on the grounds of their age.
Disability Discrimination Act 1992 (Cth)	This Act makes it unlawful to discriminate against individuals on the grounds of disability in areas such as work, education, accommodation, access to premises, clubs and sport, and the provision of goods and services.
Racial Discrimination Act 1975 (Cth)	This Act makes it unlawful for a person to make a distinction based on race, colour, descent or national or ethnic origin that has the effect of denying that person a human right or fundamental freedom.
Sex Discrimination Act 1984 (Cth)	This Act makes it unlawful to discriminate against a person on the grounds of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or whether they are breastfeeding in areas such as work, accommodation, education, and the provision of goods and services.
Fair Work Act 2009 (Cth)	This Act prohibits an award (being a document that sets out the minimum wages for a certain type of job) from including terms that discriminate against an employee because of certain attributes such as race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibility, or political opinion. This Act also prohibits employers from taking adverse action against an employee because of these attributes.

Source 2 Victorian and Commonwealth statutes that prohibit discrimination

The main purpose of anti-discrimination laws is to protect people against victimisation, unfair and unwarranted judgment, vilification and persecution. These laws also aim to protect people's rights to:

- feel safe in various social settings, including at work, at school and on the sporting field
- feel accepted and part of the community by making it unlawful to degrade someone or treat them differently because of a certain attribute
- equality, and in particular the right to equality, under the *Charter of Human Rights and Responsibilities Act*. The laws aim to ensure that everyone has the same rights to equality before the law, regardless of an irrelevant attribute
- seek retribution against a person who has engaged in unlawful conduct, by imposing penalties on people who engage in unlawful conduct. For example, in some circumstances, the laws make it an offence to engage in certain discriminatory conduct. These laws punish people for engaging in that conduct, and deter others from doing the same
- seek compensation for being discriminated against.

Did you know?

In 2015 in the United States, a baker was found to have discriminated against two males because he refused to bake a cake celebrating their wedding.

Elements required to establish liability for discrimination

Act of Parliament
a law made by parliament; a bill that has passed through parliament and has received royal assent (also known as a statute)

Although various **Acts of Parliament** (both federal and state) deal with discrimination, there are common elements that need to be established for a discrimination claim to succeed. To establish discrimination, the following elements must be proven:

- the discrimination was based on a certain attribute
- the discrimination took place in a particular area
- the discrimination caused harm or less favourable treatment.

Element 1 – The discrimination was based on a certain attribute

The person making the complaint must first establish that the discrimination they suffered was because of a certain attribute. The attributes are different in each statute and some statutes focus on very specific attributes. The attributes listed in the *Equal Opportunity Act* are in Source 4 below.

Source 3 In 2015, a campaign at Glasgow University in Scotland aimed to combat discrimination among staff and students by highlighting 'casual' comments that are discriminatory.

Age	Breastfeeding	Employment activity	Gender identity	Disability	Industrial activity
Lawful sexual activity	Marital status	Parental or carer status	Physical features	Political belief or activity	Pregnancy
Race	Religious belief or activity	Sex	Sexual orientation	An expunged homosexual conviction	Personal association with a person with any of these attributes

Source 4 Under the *Equal Opportunity Act*, a person cannot be discriminated against because of certain attributes.

If a person is hurtful to another simply because they do not like them, but the treatment is not based on any attribute, then it is unlikely to be discrimination.

The *Equal Opportunity Act* makes it unlawful to discriminate in relation to the attributes listed in Source 4 (on the previous page) on the basis that these attributes should not be relevant in certain circumstances. For example, if two people are applying for the same job as a lawyer, and one is female and one is male, then there should be no reason why their sex is a relevant factor when selecting which to employ. Similarly, if one person is Muslim and the other person is Bahá'í, and they are both members of the same football club, their religious belief should not be a factor in determining whether they are chosen to play a game.

The scenario below is an example of an applicant claiming he was discriminated against because of his race, marital status, disability, and sexual preference.

Did you know?

In 2016, the rules of the Federal Parliament were changed to allow children into the federal Houses of Parliament. This change has allowed members of parliament to breastfeed their children in the House of Representatives and in the Senate. In May 2017, Senator Larissa Waters made history by becoming the first politician to breastfeed in the Senate.

Complaint of discrimination on the basis of race, marital status, disability and sexual preference

ACTUAL SCENARIO

Jusrut v Ensure Recruitment Pty Ltd (Human Rights) [2020] VCAT 126 (7 February 2020)

Amrish Jusrut issued an application in the Victorian Civil and Administrative Tribunal (VCAT) against his former employer, Ensure Recruitment Pty Ltd ('Ensure'). Jusrut claimed that Ensure had subjected him to discrimination in employment on the basis of his race, marital status, disability, and sexual preference.

The applicant was employed as a recruitment consultant by Ensure. His employment was terminated while he was still on probation. In his VCAT application, Jusrut claimed that the respondent made derogatory remarks about his appearance, sexual preference and marital status. Jusrut also claimed that Ensure required him to remove his beard, required him to use a business photograph in which his skin tone had been lightened, denied him training opportunities, and treated him unfavourably in the allocation of work.

Jusrut claimed Ensure subjected him to this treatment because of his Indian descent, his dark olive-coloured skin, his religion (which requires him to maintain a beard), his gender and sexual orientation, his marital status, his hearing impairment, and his union membership. By way of an example, Jusrut claimed that Paul Murphy, the Managing Director of Ensure, expressed concerns about Jusrut having a beard, and requested him to remove his beard. Murphy denied asking that Jusrut do this. Jusrut sought loss of wages, an apology, damages for embarrassment, humiliation and stress, and costs.

VCAT heard the claim over two days. The employer had legal representation but the applicant was self-represented. The applicant gave evidence but did not call any other witnesses.

Ultimately, VCAT was not satisfied that there was any discriminatory conduct by Ensure. Jusrut's application was dismissed.

Source 5 A former employee made an unsuccessful discrimination claim in VCAT about his previous employer.

Study tip

A useful way to get an idea of the types of discrimination claims being made is to access the human rights websites provided in your obook assess. These websites provide reports on recent cases and examples of discriminatory conduct. This will help you develop your ability to apply the law of discrimination to particular cases.

Element 2 – The discrimination took place in a particular area or activity

The person making the complaint must establish that the discrimination they suffered occurred in a particular area or activity. The descriptions of these areas and activities vary in the different statutes. The areas and activities listed in the *Equal Opportunity Act* are summarised in Source 6 below.

Job applications	Employment	Membership of industrial organisations (e.g. unions)	Occupational qualifications (e.g. renewing qualification)	Education
Provision of goods and services	Sale of property	Provision of accommodation	Club membership	Sport

Source 6 The areas and activities listed in the *Equal Opportunity Act*

Even though the above areas or activities are broad, they do not cover discrimination in a private setting. For example, if one person is discriminated against by another in a private home (e.g. being served food last because of a certain attribute), then the person who is discriminated against will not be able to do much about it (other than complain loudly).

Element 3 – The discrimination caused harm or less favourable treatment

If a person has been discriminated against for a particular attribute and in a particular area or activity, they must also establish that the treatment caused them harm or resulted in them being treated less favourably.

A person may be treated less favourably, or may suffer harm, as a result of either direct or indirect discrimination. Examples of each are below:

- **Direct discrimination** – If a person in school is chosen for a public speaking competition, and another person is not because of their race, then this is direct discrimination. The harm may vary depending on the person, but can include anxiety and loss of opportunity.
- **Indirect discrimination** – If a sporting club made it a rule that every person who entered a building must first stand and walk up the stairs to say hello to the president of the club, this is likely to discriminate against people with physical disabilities who cannot stand or walk up the stairs. The harm may be a loss of membership because the person didn't comply with the rules.

Limitation of actions

There is no specific time period set out in the *Limitation of Actions Act 1958* (Vic) within which a discrimination claim must be made. However, there are some time limits that a plaintiff needs to be aware of.

Discrimination claim under a Victorian statute

Victorian statutes that prohibit discrimination state that the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) – which is the Victorian complaints body that provides dispute resolution services for discrimination claims – may decline to provide dispute resolution services if the discrimination occurred **more than 12 months** before the person complained. This limitation is set out in section 116 of the *Equal Opportunity Act*.

However, a person can apply to the Victorian Civil and Administrative Tribunal (VCAT) in relation to the discrimination, regardless of whether they have first complained to the VEOHRC.

Discrimination claim under a federal statute

The *Australian Human Rights Commission Act 1986* (Cth) states that a complaint lodged with the Australian Human Rights Commission (AHRC) – the federal complaints body that hears complaints in relation to discrimination that is contrary to federal statutes – may be terminated if it was lodged **more than six months** after the alleged acts, omissions or practices took place.

Defences to a discrimination claim

A person defending a discrimination claim may argue that the plaintiff has not satisfied all the elements of discrimination. For example, the defendant may argue that the treatment was not based on a certain attribute, or the treatment didn't take place in a particular area or activity, or that the treatment didn't cause the person harm or result in them being treated less favourably.

The person responding to the plaintiff's claim may also be able to rely on one of the following defences:

- an exception applied
- an exemption applied
- inherent requirements
- unjustifiable hardship.

Defence 1 – An exception applied

There are a few exceptions that apply to individuals or to companies that allow them to lawfully discriminate against a person. A person facing a discrimination claim may raise one or more of the exceptions as a defence.

Exceptions are usually specified in the relevant statute. For example:

- an **educational authority** can set and enforce reasonable standards of dress, behaviour and appearance for students. Therefore, if a school states that a certain standard of care must be taken in terms of a student's appearance, a school may be able to defend a discrimination claim on the basis that it is enforcing its uniform code
- a **club** can exclude from membership a person on the basis of that person's sex if membership of the club is available only to persons of the opposite sex. This exception allows female-only gyms to operate without being subjected to a discrimination claim by males
- a **sporting club** can exclude a person of another sex from participating in a competitive sporting activity if strength, stamina or physique is relevant.

The following scenario describes a situation where the exception defence could be used.

HYPOTHETICAL SCENARIO

Accommodation refused to children

Juliet runs the Romeo Hotel in an exclusive location in Daylesford, Victoria. The hotel is especially designed for couples and, because of its design and location, it is unsuitable and inappropriate for children. Juliet is likely to be able to defend a discrimination claim if one is brought by someone because she didn't let their children stay at the hotel. This is because of section 58A of the *Equal Opportunity Act*, which allows a person to refuse accommodation to children or people with children because of the design or location of the accommodation.

Defence 2 – An exemption applied

Some individuals and groups are exempted from discrimination laws. For example, a person can discriminate against another if that discrimination is necessary for the person to comply with their religion. As another example, a person can provide benefits to another person based on their age, but not providing benefits to a younger person does not amount to age discrimination (this is often the case for retired people who receive certain benefits).

An individual can apply for a temporary exemption (not exceeding five years) if that exemption is required to undertake a certain activity. In 2016, a temporary exemption was granted to Ivanhoe Grammar School in Melbourne, as the school wanted to target more female students to improve its gender balance. This particular exemption is detailed in the scenario below.

ACTUAL SCENARIO

VCAT green light will let Ivanhoe Grammar School offer more places to girls

Emily Woods, *The Age*, 11 August 2016

A Melbourne grammar school has been granted an exemption from Victoria's Equal Opportunity Act, allowing it to target female enrolments to improve its gender balance.

Ivanhoe Grammar School began as a boys' school in 1915, with female students introduced 13 years ago.

Source 7 Ivanhoe Grammar School in Melbourne obtained an exemption to allow it to target female students in its advertising.

However, the school has struggled to attract female students, and in June almost two-thirds of its students – 62 per cent – were boys.

On Wednesday [10 August 2016], the Victorian Civil and Administrative Tribunal granted an application by the school under two sections of the 2010 *Equal Opportunity Act*, giving it 'exemption from prohibitions on gender-based discrimination in relation to education and services'.

The decision will allow Ivanhoe Grammar to target female students in its advertising and to offer sweeteners to attract girls, including 'scholarship and bursary assistance'.

Principal Gerard Foley said the move would help the school provide a 'true coeducational experience for all students' and promote gender balance in the community.

Defence 3 – Inherent requirements

This defence only applies to allegations of discrimination in employment (and not in any other area or activity). An employer can argue that a person, because of their age or disability, cannot carry out the 'inherent requirements' – or the essential duties – of the job. For example, it is likely to be an inherent requirement of a baggage handler's job at an airport to be able to lift heavy items. If a person is unable to do this because of their age or disability, then this is unlikely to be discrimination because of the inherent requirements defence.

Defence 4 – Unjustifiable hardship

Study tip

See your obook assess for an example of a scenario that used the defence of inherent requirements – *Shizas v Commissioner of Police*.

This defence is only available to employers. If an employer is facing a discrimination claim by an employee, the employer could defend the claim on the basis that the working arrangement would cause 'unjustifiable hardship' to the employer. This means that it would be extremely difficult for the employer to accommodate the employee. For example, if the employer operates out of a particular building that is not accessible to people with disabilities, and adjusting it to allow accessibility would cost a significant amount of money that the employer does not have, the employer may be able to argue that adjusting the building for a disabled person would cause the employer unjustifiable hardship.

Whether this defence succeeds depends on an assessment of what is fair and reasonable for the employer to do to make adjustments for the employee. For example, if the adjustments are easy and inexpensive to make, then it is unlikely that the defence will succeed.

The role of the law in developing the elements of and the defences to discrimination

Victorian and Commonwealth statutes have largely developed the elements of and the defences to a discrimination claim.

Statute law

Victorian statute law

Compared to negligence laws, discrimination laws in Victoria are recent. It wasn't until 1977 that the Victorian Parliament introduced the *Equal Opportunity Act 1977* (Vic), which prohibited discrimination on the basis of marital status or gender in the areas of employment, accommodation, education, and in the provision of goods and services. That is, the Act only prohibited limited types of discrimination.

The main areas of development in Victorian statute law are set out in Source 8. Victorian statute law has developed to:

- expand the attributes on the basis of which a person may be discriminated against
- clarify the language in relation to couples (to include same-sex couples) and gender identity (to include those who identify with a particular gender), and
- prohibit discrimination against pregnant and breastfeeding women.

1982	• Disability was included as an attribute
1984	• *Equal Opportunity Act 1984* (Vic) was passed • Race, religion, ethnic origin, political belief and de-facto spouse status were added as attributes
1995	• *Equal Opportunity Act 1995* (Vic) was passed • Attributes were expanded • Areas or activities expanded to include sale of property, sport and clubs
2000	• Breastfeeding, sexual orientation and gender identity were added
2001	• To recognise same sex couples, 'de facto spouse' was changed to 'domestic partner' • *Racial and Religious Tolerance Act 2001* (Vic) was passed
2006	• The *Charter of Human Rights and Responsibilities Act 2006* (Vic) was passed to provide for certain rights such as equality before the law.
2010	• *Equal Opportunity Act 2010* (Vic) was passed • Direct and indirect discrimination were clarified

Source 8 The role of Victorian statutes in developing discrimination law

Commonwealth statute law

Similar to Victoria, it is only in the past 30 years or so that the Commonwealth Parliament has passed legislation prohibiting (i.e. banning) discrimination in certain areas. The legislation began with the introduction of the *Racial Discrimination Act 1975* (Cth). This came about at the end of the White Australia policy (a policy that aimed to prevent immigration by people from certain countries to Australia), when diversity was embraced more than it was before.

The *Racial Discrimination Act* was expanded in 1995 when the *Racial Hatred Act 1995* (Cth) amended that Act. The amendments were introduced to prevent offensive behaviour based on racial hatred or because of race, colour, or national or ethnic origin (and included the new section 18C, a section that has in the past been under scrutiny).

Did you know?

The Australian Human Rights Commission website states that a 2008 report claimed that one in 10 Australians believe that some races are 'inferior' or 'superior' to other races. It also states that a 2014 report found that 18 per cent of Australians said they had suffered discrimination because of skin colour, ethnic origin or religion.

After the *Racial Discrimination Act*, the following legislation was passed:

- the *Sex Discrimination Act 1984* (Cth)
- the *Disability Discrimination Act 1992* (Cth)
- the *Age Discrimination Act 2004* (Cth).

In 2012, a draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) was released. The Bill proposed to combine the Commonwealth anti-discrimination laws into a single Act of Parliament to make the laws clearer and more consistent. The Bill was never passed.

Following the passing of laws in 2017 that allowed for same-sex marriages in Australia, a Religious Discrimination Bill 2019 (Cth) was drafted that sought to prevent discrimination on the basis of religious belief or activity in key areas. If this Bill is passed, it will be unlawful to discriminate on the basis of religious belief or activity, including wearing religious dress and expressing religious beliefs. The Bill has been criticised because it provides far-reaching protections for people who say or do things because of their religious beliefs. For example, a single mother may be told by another person that she is sinful for denying her child a father, and there will be no consequences for the hurt, humiliation or suffering that the mother experiences as a result.

Common law

While discrimination laws are largely set out in statutes in Australia, it is the role of the courts to interpret that legislation. One of the main areas of interpretation by the courts is to determine whether certain exceptions, exemptions or defences apply. This occurred in the High Court case of *Maloney v The Queen*, which is discussed in the scenario below.

ACTUAL SCENARIO

Buying alcohol on Palm Island

Maloney v The Queen [2013] HCA 28 (19 June 2013)

The Queensland Parliament passed a law restricting the possession of alcohol on Palm Island. Palm Island's community was composed almost entirely of Indigenous people. On 31 May 2008, Joan Monica Maloney was charged with possession of more than the allowable amount of alcohol on Palm Island.

Source 9 Palm Island was the centre of a case involving the interpretation of anti-discrimination laws.

In response, Maloney challenged the Queensland law, claiming it was inconsistent with the *Racial Discrimination Act 1975* (Cth) because the Queensland law meant that she could not enjoy a right enjoyed by persons of another race.

The High Court dismissed the appeal, because it found that a law could be passed if it was a 'special measure' designed to protect a certain group of people – in this case, the Queensland law was passed to protect the Palm Island residents from the effects of alcohol abuse and violence.

However, the court's role in interpreting discrimination laws is much less significant than its role in interpreting laws such as those relating to negligence. This is because the Commonwealth and state human rights commissions resolve many discrimination cases, so very few discrimination cases go to court.

Possible impacts of a breach of discrimination laws

Discrimination based on a certain attribute can have wide-ranging consequences for the parties.

Source 10 Discrimination can have a negative effect on the mental health of the plaintiff.

Impact of discrimination on the plaintiff

The impact of a **breach** of discrimination laws can be significant. Possible impacts on the plaintiff are:

- **Public humiliation** – This could include degradation or vilification. For example, a person might tell an inappropriate joke in a workplace setting that discriminates against the plaintiff.
- **Loss of opportunity** – This could occur as a direct consequence of the discrimination. For example, a female could be denied a promotion based on her gender.
- **Inconvenience** – This could occur when accommodation, goods or services are denied to a person. For example, an accountant could deny their services to a person of a particular race.
- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person could develop depression as a result of suffering continued discrimination due to a particular attribute.

breach
breaking or failing to fulfil a duty or obligation

Impact of discrimination on the defendant

Possible impacts of a discrimination claim on the defendant are:

- **Public humiliation** – This could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of widely reported court proceedings.
- **Loss of business** – This could be a consequence of a loss of reputation. For example, a hotel may receive less business because people may not want to support an organisation that they think is being discriminatory.
- **Inconvenience** – This could require the defendant to attend hearings in an attempt to resolve the dispute; for example, an employer attending a court hearing.

Source 10 below summarises some of the possible impacts that discrimination can have on the plaintiff and on the defendant.

IMPACT ON THE PLAINTIFF	IMPACT ON THE DEFENDANT
• Public humiliation • Loss of opportunity • Inconvenience • Effect on mental health	• Public humiliation • Loss of business • Inconvenience

Source 11 A summary of the impacts of discrimination

9.1 CHECK YOUR LEARNING

Define and explain

1 Define the following terms and provide an example of each:
   - **a** direct discrimination
   - **b** attribute
   - **c** indirect discrimination
   - **d** breach.

2 Describe three rights protected by anti-discrimination laws.

3 Explain one defence that may be used in defending a discrimination claim.

4 Why have the courts played less of a role in developing anti-discrimination laws than parliament?

Synthesise and apply

5 Angela recently applied for a casual job at a local Chinese restaurant. Her interview went well, but she believes that it started going wrong when she mentioned a recent holiday to Italy to visit relatives. Angela has recently received a letter from the restaurant saying her job application was not successful. Angela believes she has been discriminated against. Advise Angela whether she can successfully claim she has been discriminated against.

6 Your friend Cindy is a member of a local sporting club. All members of the club have been invited to a fundraiser at which they are only allowed to bring a date of the opposite sex. As Cindy is gay, she has told the club that she will be bringing her girlfriend. She has been told this is against the rules and she will not be allowed to attend the fundraiser.
   - **a** Consider each of the elements of discrimination that Cindy needs to establish.
   - **b** Consider any defences the club might be able to raise.
   - **c** Write a summary about whether you think Cindy's discrimination claim will be successful.

7 Access the *Equal Opportunity Act 2010* (Vic). A link is provided in your obook assess.
   - **a** Choose one of the exceptions included in the Act (e.g. section 59).
   - **b** Write a scenario about a person who has been discriminated against, but make sure that the exception you have chosen applies.
   - **c** Exchange scenarios with another person in your class. Using the Act, see if you can identify the exception that applies to your classmate's scenario. Your classmate should do the same with your scenario.

Analyse and evaluate

8 Do you think that a school should be able to set and enforce reasonable standards of dress, appearance and behaviour for students, and therefore be exempt from discrimination laws? Discuss as a class.

9 As a class, conduct research on the Religious Discrimination Bill 2019 (Cth). Write down as many points as you can on separate Post-it Notes about what the Bill's purpose is, and what the consequences would be if the Bill is passed by parliament. As a class, put the Post-it Notes on a wall and group the notes in themes (e.g. one theme could be the protections the Bill provides). Together, discuss the advantages and disadvantages of the Bill.

Check your Student obook assess for these additional resources and more:

Student book questions
9.1 Check your learning

Video tutorial
Introduction to Chapter 9

Sample
Arguing liability response

Actual scenario
Shizas v Commissioner of Police [2017] FCA 61 (6 February 2017)

Weblinks
Victorian Equal Opportunity and Human Rights Commission
Equal Opportunity Act

9.2 VOID MARRIAGES

Source 1 Marriage was first defined in the English case of *Hyde v Hyde & Woodmansee*.

The Commonwealth Parliament makes laws in relation to marriage (and divorce), and its laws apply nationally. In particular, the *Marriage Act 1961* (Cth) provides guidelines for people who want to marry.

Marriage was first defined in the 1866 English case of *Hyde v Hyde and Woodmansee* as a 'voluntary union for life of one man and one woman to the exclusion of all others'. In Australia, the current definition of marriage is 'the union of two people to the exclusion of all others, voluntarily entered into for life'. The definition of marriage has been one of the most debated Australian legal definitions, in particular in relation to allowing same-sex marriages.

The *Marriage Act* sets out the requirements for a marriage to be valid. Sometimes, a dispute arises about whether a marriage is valid, which may require a court to consider whether the marriage is **null and void**. This is often called 'marriage annulment'. It is different to a divorce proceeding – if a marriage is annulled, then it is considered to have never existed in the first place. On the other hand, in a divorce proceeding, the marriage is recognised as being in existence, but one or both parties wish for that marriage to end.

Usually, two people who are married are the parties to a proceeding about whether or not a marriage is valid. In many cases, the proceeding is commenced by one party who seeks an annulment. This is not always disputed by the other party. The role of the court is to decide whether there are valid grounds for an annulment.

Rights protected by the law

The laws that establish whether a marriage is valid aim to protect the following rights:

- **the right of free will** – this means that marriage laws require the parties to have given voluntary and real consent to the marriage. This upholds the right to a person to choose whether they want to marry
- **the right to a marriage that is exclusive** – this means that marriages in Australia must be to the exclusion of others (i.e. **monogamous**)
- **the right to be old enough to marry** – this means that both parties must be 18 years of age when they marry, unless there are exceptional circumstances where the person can be 16 years of age
- **the right to seek the court's assistance to make a marriage null and void** – this means that marriage as an institution is protected, and that there are laws about which marriages are valid and which marriages are not.

monogamous
the state of being married to only one person at a time

Elements required to establish liability for a void marriage

In disputes involving void marriages, no liability is imposed on one party. That is, in general, one party is not ordered to pay compensation to the other party. Also, there is generally not even an order that somebody is in the wrong. Rather, a court usually makes an order declaring that a marriage is either valid, or it is null and void. Sometimes an order that a marriage is null and void is referred to as a 'decree of nullity'.

Did you know?

On 19 December 1922, Theresa Vaughn told a court in Sheffield, England, that since 1917, she had married 61 men in cities in Europe, South Africa and England, without ever having obtained a divorce from any of them.

Section 23B of the *Marriage Act* sets out when a marriage might be void. A marriage is void if one or more of the following five elements are established:

- one or both of the parties were lawfully married to someone else at the time
- the parties are within a prohibited relationship
- the marriage was not properly solemnised
- there was no real consent
- one or both of the parties were not of a marriageable age.

Element 1 – One or both of the parties were married to someone else at the time

For a marriage to be valid, the parties must prove that they are not married (that is, they are single, divorced or widowed) at the time of the marriage. If one or both of them are lawfully married to someone else at the time of the second marriage, then the second marriage is null and void, as illustrated in the scenario below.

ACTUAL SCENARIO

Migrant's marriage is annulled

Kirvan & Tomaras [2018] FamCA 171 (21 March 2018)

In this case, Ms K applied to the Family Court of Australia to seek a decree of nullity with regard to her marriage between herself and Mr T. Ms K and Mr T met in March 2017 and participated in a marriage ceremony in mid-2017.

In 2015, Ms K had married her first husband, Mr D, while they were both living overseas. In 2016, Ms K moved to Australia on a student visa. On her visa application form, Ms K declared Mr D to be her husband.

However, just one month after doing so, Ms K advised the Australian Government Department of Home Affairs (as it is now called) that she and Mr D had separated. Ms K commenced divorce proceedings. However, Mr D was living overseas and there were lengthy delays in adequately serving him with the divorce application. As a result, Ms K and Mr D were not granted a divorce until 22 October 2017.

In the meantime, Ms K met and married Mr T. The Family Court found that it was clear that at the time Ms K participated in the marriage ceremony with Mr T in mid-2017, she was 'lawfully married' to another person (Mr D). The Court was satisfied that Ms K and Mr T's marriage was a void marriage. Mr T did not oppose Ms K's application for an order that the marriage was void.

The Family Court then considered whether it ought to refer the case to the Attorney-General to decide whether criminal penalties should be imposed on Ms K and Mr T. Under the *Marriage Act*, it is an offence for a person who is married to go through a form or ceremony of marriage with any person. The penalty for this **strict liability** offence is imprisonment for five years. There are also penalties for giving or signing a notice to an authorised celebrant knowing it is false or contains an error.

In this case, the Family Court considered that Ms K did not have any doubt about the validity of her first marriage. The Court also took into consideration the fact that Mr T knew of Ms K's valid first marriage. As a result, the Court decided that the case should be referred to the appropriate authorities for consideration as to whether the parties ought to be subject to prosecution.

strict liability where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

Element 2 – The parties are within a prohibited relationship

Some relationships are prohibited in Australia, which means that these people cannot marry. A person cannot marry their:

- **ancestor or descendant** (including mother, father, grandmother, grandfather, son, daughter, granddaughter, grandson, uncle, aunt, niece or nephew)
- **brother or sister** (including adopted relations and half-relations, but not step-relations).

Marriage between cousins is not prohibited.

Source 2 In 1959 in the Northern Territory (NT), Mick Daley and Gladys Namagu were refused permission to marry because Gladys was a ward of the state (a person in the care of the state) and could not marry without the written consent of the NT Government.

Element 3 – The marriage was not properly solemnised

For a marriage to be valid, it must be properly **solemnised** (that is, the marriage ceremony must be properly performed). A person could argue that a marriage was not solemnised because it did not comply with the following requirements of the *Marriage Act*:

- notice must be given to the **marriage celebrant** at least one month before, and not earlier than 18 months before, the date of the intended marriage
- the parties must produce to the celebrant each person's birth certificate or other identity document showing their date and place of birth
- the parties must make a declaration in writing to the celebrant about their conjugal status (e.g. never married, divorced, widowed) and their belief that there was no legal impediment (barrier) to their marriage
- the marriage must be witnessed by at least two people over the age of 18 years
- the celebrant must explain to the parties the nature of marriage.

solemnised
the act of formalising a lawful marriage in accordance with the requirements of marriage laws in Australia

marriage celebrant
a person registered in Australia to perform marriage ceremonies

Source 3 A marriage ceremony must be properly performed for it to be legal.

Element 4 – There was no real consent

Consent to marry must be given voluntarily and knowingly. Consent is not real if:

- it was obtained by duress or fraud. **Duress** usually involves an element of force, constraint or threat of violence, but can include pressure from family
- one party was mistaken about the identity of the other party or about the nature of the ceremony that was to be performed (i.e. they did not know it was a marriage ceremony)
- one party was mentally incapable of understanding the nature and effect of a marriage ceremony.

duress
strong mental pressure on someone to overcome their independent will and force them to do something

The scenario below illustrates how a marriage can be declared null and void based on the element of real consent.

ACTUAL SCENARIO

Consent to marriage obtained by fraud

Chow & Zu; Fang & Hung [2019] FamCA 665 (18 September 2019)

In this case, two applications were made to the Family Court that had similar and intertwining facts. In both applications, orders were sought and granted to void both marriages on the basis of fraud.

Chow and Fang were both Chinese citizens. They had been friends in China and met up in Australia in late 2018. They discussed obtaining visas that would allow them to remain in Australia. They met a man named 'Mr B' through the internet. Chow, Fang and Mr B flew to Sydney to meet with a 'Mr D'. Mr D requested large sums of money to be transferred to him for application fees for visas that would give them residence in Australia. Chow transferred $100 000 and Fang transferred $70 000.

On 12 November 2018, both Chow and Fang were taken by Mr D to a shop in Sydney. They were told not to speak. At the shop were two men: one who spoke Mandarin, and another young man. Chow was asked to confirm that she was Chow, which she replied that she was, and then the young man produced a form and had Chow sign it. Two other men signed the form too. Chow and Fang did not have any time to read the document or look at any details, were told not to take photos, and were confused at the time.

Chow was not handed a copy of the marriage certificate at the time. No marriage ceremony was conducted. It was not until later that Chow found out that she was married to a complete stranger, when she was given an electronic screenshot of the marriage certificate, which showed she was married to a man named Zu. She knew nothing about him. When Zu was located, he said that his personal information had been stolen and he was not present at the shop at the time.

Fang had a similar experience in early December 2018. He was required to go to a shop, where there was a young Chinese woman. Fang thought he was signing visa documents. He did not understand the documents, and he did not say any words or vows to the young woman. He later found out that he was married to a woman named Hung.

When Chow and Fang found out, they immediately contacted the police and the relevant government department.

The Family Court was satisfied that the marriages were void because both Chow and Fang were mistaken as to the nature of the ceremony, had limited understanding of English, and had no intention of marrying the people they did. The Court made the orders, and noted that both Fang and Chow were no longer in Australia and had returned to China.

REGISTRATION NUMBER
1/2019

VICTORIA
AUSTRALIA
BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT 1996

MARRIAGE CERTIFICATE

Marriage was solemnised in accordance with the Marriage Act 1961 between the parties named below on the first day of January 2019 at Glen Waverley

	Bridegroom	Bride
1. Surname	ACITIZEN	CASSAR
2. Given Name(s)	George Richard	Florence Elspeth
3. Usual Place of Residence	100 Cerificate St Melbourne	100 Certificate St Melbourne
4. Conjugal Status	Never Validly Married	Never Validly Married
5. Date of Birth	15/08/1985	11/06/1970
6. Place of Birth	Carlton	Sale
7. Father's Name in Full	Ray ACITIZEN	Peter CASSAR
8. Mother's Maiden Name in Full	Paula SLACK	Frances JIRA
9. Witnesses to Marriage	Harley TROTTER Glen GRILT	
10. Celebrant Name Registration Number	Chris Tranter	
11. Date of Registration	7 February 2019	
12. Endorsement(s)	Not any	

THE BACK OF THIS DOCUMENT CONTAINS A HISTORY OF CHANGES OF NAME AND CORRECTIONS.
Before accepting copies, sight unaltered original. The original has a coloured background.

REGISTRY OF BIRTHS
DEATHS AND MARRIAGES
MELBOURNE

I hereby certify that this is a true copy of particulars recorded in a Register in the State of Victoria, in the Commonwealth of Australia.

07 Feb 2019

Registrar

Source 4 A certificate of marriage form, which contains details to show that the marriage has been properly solemnised in accordance with the law

Element 5 – One of the parties was not of a marriageable age

The marriageable age is the age at which individuals are free to marry without any restrictions and without needing their parents' consent. In Australia, the marriageable age is 18 years. In exceptional circumstances, a court may make an order authorising a person who is 16 or 17 years of age to marry a particular person.

If a person is not aged 18 years, and has not obtained such an order, then the marriage is null and void. In the scenario below, even though the wife was only 17 years old when she was married, the marriage was upheld because a magistrate had given consent for her to marry.

Marriage between cousins upheld as valid

ACTUAL SCENARIO

Chirag & Kanelka [2018] FamCA 476 (5 June 2018)

In 2018, Chirag (a pseudonym) filed an application in the Family Court seeking a decree of nullity for her marriage to Kanelka (also a pseudonym). The basis of Chirag's claim was that at the time of her marriage, she was a minor, she was under the influence of medication and drugs, that the marriage was prohibited by her religion because she and Kanelka are first cousins, and that the marriage occurred without her parents' consent. Her husband opposed the application.

The couple began living together in approximately August 2017 and were married later that year. They separated in late January 2018. At the time of their marriage, Chirag was 17 years old and Kanelka was 24 years old. They are first cousins.

In relation to the fact that the husband and wife are cousins, the Family Court did not find this ground to have any substance, noting that the *Marriage Act* does not prohibit a marriage between cousins.

Chirag claimed that the marriage was registered without her parents' consent, even though she was under 18 years of age at the time. This was found to be true. Chirag also said that she was not aware of what she was getting into by signing the marriage papers, and that Kanelka had only married her so he could immigrate to the country where she lived.

In relation to Chirag's age at the time of marriage (17 years old), as she was underage, Chirag would have had to have applied to a judge or magistrate for an order authorising her to be lawfully married. The Family Court found that Chirag had herself made the application to the Magistrates' Court, and the magistrate was satisfied that she could be permitted to get married. Given the consent of the magistrate, the Family Court found that it was not necessary, based on the *Marriage Act*, for Chirag's parents to consent to the marriage.

Chirag also said she was not of sound mind at the time of the marriage ceremony. She claimed Kanelka forced her to take some pills and that she was not in a proper state of mind. Chirag said she was experiencing deep depression, was suffering from heart palpitations, and was being blackmailed by Kanelka. She also claimed Kanelka had acted abusively towards her.

The Family Court did not accept that Chirag's mental faculties were compromised by medication or drugs on the day she went to the Magistrates' Court to obtain consent to marry or on the day of her marriage. The Family Court was satisfied that Chirag understood the implications of marriage and was unable to find that there was any duress.

The Family Court refused to make a decree of nullity and found that the marriage would exist until it was dissolved (i.e. the parties were to divorce).

Limitation of actions

There is no time limitation to seek an order from the Family Court that a marriage is null and void. This means that a claim for a marriage to be made null and void is not restricted by any time period.

Defences to a void marriage application

There are no defences that apply in response to a proceeding where a party is seeking an order that a marriage is null and void. However, a respondent could argue that all of the elements of a valid marriage were present, and therefore the court does not have the power to order that the marriage is null and void.

If the respondent is successful, then the applicant can still seek a divorce, but the marriage stands.

The role of the law in developing the elements of and the defences to a void marriage

Both common law and Commonwealth statute law have developed the legal principles relating to marriage.

Statute law

Before the introduction of the *Marriage Act*, each state and territory was responsible for passing laws in relation to marriage. This is because the power to make laws relating to marriage is shared between the Commonwealth and state parliaments (and still is). However, this meant that there was no consistency in marriage requirements across the country – for example, the marriageable age was different from state to state.

Did you know?

In Libya, men and women can only marry after they turn 20 years old. However, in Estonia, a 15- year-old can get married with a court's consent.

In 1961, the Commonwealth Parliament passed the *Marriage Act*. At the time, this Act did not include a definition of marriage. However, it did set out a requirement for the marriage celebrant to explain, at the ceremony, that marriage was the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. Therefore, a marriage could only occur between a man and a woman. In 2004, a formal definition of marriage was included in the *Marriage Act* to make it clear that the Act did not include same-sex marriages.

That changed in late 2017, when the Commonwealth Parliament passed legislation to allow same-sex marriages. A lawful marriage is now a marriage between two persons, not just between a man and a woman. The change came about after a long, drawn-out process that involved a public vote (known as a plebiscite). This vote made it clear that, overwhelmingly, the Australian public supported the change in the law. The Commonwealth Parliament then allowed a conscience vote (meaning politicians were allowed to vote as they saw fit, and not based on their political party's view).

Source 5 There was jubilation in the House of Representatives after the same-sex marriage laws were passed.

States have also passed laws that relate to relationships. For example, the Victorian Parliament has passed the *Relationships Act 2008* (Vic), which allows people to register domestic relationships. This includes relationships between two persons who are not married to each other but are living together as a couple (irrespective of gender).

If a state passes a marriage law that is inconsistent with the *Marriage Act*, then the state law is likely to be challenged and declared to be invalid because it is inconsistent with the federal *Marriage Act*. This is because under the **Australian Constitution**, Commonwealth laws prevail over state laws if they are inconsistent.

Australian Constitution a set of rules and principles that guide the way Australia is governed. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

Common law

The Family Court's role is to interpret the *Marriage Act* when resolving disputes or applications arising under that Act. For example, the Family Court determines whether a particular marriage meets the requirements of a valid marriage. This role of interpreting statutes is different from the role of the courts in other areas, such as negligence, where courts have greatly expanded the law.

The Family Court generally looks at previous cases when determining whether the requirements of a valid marriage have been met. For example, the Family Court has adopted old English law to determine whether there was 'real consent'. In *Hirani v Hirani*, the English Court of Appeal stated that the real question of whether there is consent in marriage is whether the threats or the pressure destroyed the consent of the individual, or overtook their will.

The case discussed in the scenario on the next page – *Attorney-General for the Commonwealth v Kevin & Jennifer* – is a landmark case. This case examined the validity of a marriage between a woman and a transgender man.

Study tip

The Family Court's judgments about the validity of marriages can provide you with useful ways to argue a case. Access the judgments on the Australasian Legal Information Institute (AustLII) website provided in your obook assess. Try to summarise one or two cases for your own learning.

ACTUAL SCENARIO

The *Kevin & Jennifer* case

Attorney-General for the Commonwealth v Kevin & Jennifer (2003) 172 FLR 300

In this case, the Full Court of the Family Court ruled that Kevin (a transgender male) and his female partner, Jennifer, were legally married.

Jennifer met Kevin in 1996. Kevin had presented as a male since 1994, was given hormone treatment in 1995 and had sex reassignment surgery in 1998. By the time the couple married in 1999, they had lived together for two years and Jennifer had become pregnant using donor sperm and IVF treatment. In 1999, the couple sought a declaration that their marriage was valid. The couple argued that they were not a same-sex couple and that at the time of the marriage, Kevin was a male. The Attorney-General argued that Kevin was not a male for the purpose of the marriage law.

The Family Court accepted that Kevin had presented as a male, was considered to be a male by family, friends and work colleagues, and had undergone hormonal treatment and surgical procedures to align his physical attributes with his psychological gender. The Court ruled that a person's gender is not linked to their sex at birth in relation to being able to enter a valid marriage under the *Marriage Act*. The Court accepted that psychological, social and cultural gender identity should be taken into account when determining such cases.

Possible impacts of a void marriage

Impact of a void marriage on the applicant

Possible impacts of a void marriage on an applicant are as follows:

- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person may develop depression if their marriage was obtained by duress or fraud.
- **Humiliation** – This could include feelings of shame and anguish. For example, a person may be embarrassed to discover their marriage is not legal.

Impact of a void marriage on the respondent

Possible impacts on a respondent are as follows:

- **Humiliation** – This could include feelings of shame and anguish. For example, a person may be ashamed of their actions in obtaining the marriage.
- **Costs** – This includes the costs of performing the marriage or the cost of court proceedings.

Source 6 below summarises some of the possible impacts that a void marriage can have on the applicant and on the respondent.

IMPACT ON THE APPLICANT	IMPACT ON THE RESPONDENT
• Effect on mental health • Humiliation	• Humiliation • Costs

Source 6 A summary of the impacts of a void marriage

9.2 CHECK YOUR LEARNING

Define and explain

1 What is the difference between a void marriage and a divorce?
2 Is there any time limitation to seek an order that a marriage is void?
3 Identify and describe the five elements of a valid marriage.
4 What are the requirements for a marriage to be properly solemnised?

Synthesise and apply

5 Read the scenario *Kirvan & Tomaras*.
   a Who was the applicant in this case?
   b What was the applicant seeking?
   c Explain how this case demonstrates an overlap between criminal law and civil law.
   d What impact would this situation have had on the applicant and the respondent?
6 Read the scenario *Chow & Zu; Fang & Hung*.
   a Who were the applicants in this case?
   b What element of a valid marriage did the applicants argue had not been satisfied?
   c What was the Family Court's decision?
   d What impact would this situation have had on the applicants?
7 Read the scenario *Chirag & Kanelka*.
   a Who was the applicant in this case?
   b What was the applicant seeking?
   c Describe each of the arguments the applicant made to say that the marriage was void. Outline the Family Court's response to each of these argument (you may do this in a table).
   d What impact would this situation have had on the respondent?

Analyse and evaluate

8 Visit the AustLII website. A link is provided in your obook assess. Choose one Family Court judgment about whether a marriage was null and void. (Hint: Search the site using the keyword '23B', which is the section of the *Marriage Act* that deals with valid marriages.)
   a Write a summary of the circumstances of the case you have chosen. Make sure you include the material facts of the case. In your summary, do not include the outcome of the case.
   b Exchange your summary with one of your classmates.
   c Read your classmate's summary and write a short (half- to one-page) argument that you would present to the Family Court as to why you believe that marriage is void.
   d Present your argument to the class. As a class, vote whether the Family Court should make the marriage null and void.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 9.2 Check your learning
- **Actual scenario** *Kreet & Sampir* [2011] FamCA 22 (18 January 2011)
- **Weblink** Australasian Legal Information Institute (AustLII)
- **Weblink** Getting married

9.3 ONLINE SHOPPING

Australians love online shopping. Today, more and more people in Australia are choosing to shop online rather than in traditional stores. More than 40 per cent of Australians buy one or more products over the internet in any four-week period. In 2019, online shopping was responsible for around nine per cent of Australia's total retail sales. The online stores of Amazon, eBay, Woolworths, Coles and Kogan are among the most popular in Australia. In fact, online shopping has become so popular that there is a concern that traditional 'bricks and mortar' stores (i.e. stores that do not have an online presence) are at real risk of not surviving. This is particularly so after the COVID-19 pandemic in 2020, which resulted in many physical stores closing and retailers relying on their online presence for sales.

Source 1 Online shopping continues to grow in popularity in Australia.

There are laws in place that aim to protect consumers (i.e. people who buy goods) and vendors (i.e. people who sell or supply goods and services) online. These include laws relating to contracts, and consumer laws that aim to ensure that the terms of contracts are fair. Although online shopping is a popular way of purchasing goods and services, it can sometimes go wrong, and a party may have a civil claim as a result.

Rights protected by the law

There are two main areas of law that govern online shopping:

- **contract law**, which governs agreements (oral or written) between two or more parties
- **consumer law**, which aims to protect consumers and vendors when buying or selling goods and services.

contract law
an area of civil law governing the validity and enforceability of agreements made between two or more parties

Contract law

A **contract** is an agreement or promise (or set of promises) between two or more individuals or groups that is intended to be legally binding and can be enforced by law. A contract can be written or oral, though online shopping contracts are normally in writing (as online shopping generally involves an electronic communication or exchange between the consumer and the vendor in which there is a record of the agreement to sell and purchase).

contract
an agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced through the law

Online shopping involves a contract between two people or companies. Each time a product or service is bought online, a contract is made. The contract normally starts operating when a consumer clicks the 'I agree' or 'purchase' button on a vendor's website. Once that happens, Australian contract law may apply to the purchase, just like a purchase that occurs in a shopping centre.

Consumer law

Once a purchase has been made, then the purchase may be subject to Australian consumer law. If it is, then the online consumer has the same protections as a consumer who has walked into a store to buy the product.

Various statutes in Australia govern the provision of goods and services. The main law is the Australian Consumer Law (ACL) (which is schedule 2 of the *Competition and Consumer Act 2010* (Cth)). The ACL promotes and encourages fair trading practices, protects consumers, and provides legal uniformity across Australia for the purchase of goods and services. The ACL applies to most domestic transactions (i.e. it applies to goods or services costing less than $40 000 that are purchased for personal or domestic use) where the consumer has purchased the goods or services in a commercial environment (e.g. where the vendor is a retailer of goods).

The ACL provides various guarantees to the consumer, and the vendor must comply with these guarantees. Some of the guarantees that a vendor gives to any consumer of goods and services are listed in Source 2 below.

GUARANTEES RELATING TO THE SUPPLY OF GOODS	GUARANTEES RELATING TO THE SUPPLY OF SERVICES
The goods are of an **acceptable quality**. Goods are of an acceptable quality if they: • are fit for purpose • are acceptable in appearance and finish • are free from defects • are safe and durable	The services will be performed with **care and skill**
The goods are **fit for any purpose** that was made known to the consumer	The services will be **fit for the purpose** for which the consumer purchased them
The goods match the **description** when purchased by the consumer	The services will be supplied within a **reasonable time**
If an express **warranty** is given, the supplier will comply with the express warranty	

Source 2 Types of guarantees that automatically apply to the purchase of goods and services

In relation to online shopping, the rights that are protected by contract law and consumer law are:

- the right of consumers and vendors to be protected in the purchase of goods and services
- the consumer's right to goods and services that have been paid for. These goods and services should meet the description and quality that a consumer expects
- the vendor has the right to the money for the goods and services
- the consumer's right to be protected from the unscrupulous business practices of some vendors
- the right to seek a remedy for any problems that may arise.

Source 3 A contract may be created with a single click on a 'buy now' button.

Elements required to establish liability

If an online shopping order goes wrong, it may give rise to a civil claim. Some of the things that can go wrong with an online shopping order are:

- the goods do not arrive, or the services purchased are not performed, even though the money has been paid
- the goods did arrive, but they were broken or faulty
- the goods did arrive, but they do not fit the description, are not fit for purpose, or are not of a good quality
- there was a significant delay in the goods arriving, or the services being performed.

If any one of these problems occurs, the consumer may have a contractual claim. To establish the vendor's liability, the consumer (the plaintiff) needs to establish the following four elements:

- a binding contract existed
- the contract was breached
- the breach caused loss
- loss or damage was suffered.

Element 1 – A binding contract existed

First, for a binding contract to exist, there must be a valid contract. For a valid contract to exist, the plaintiff must establish the following three elements:

- there was an **offer** – an offer is normally some sort of oral statement or act that indicates that an offer is being made. An offer must be clearly communicated, and can be withdrawn before acceptance as long as the withdrawal is clearly communicated
- there was **acceptance** – acceptance can also be in the form of an oral or written statement or an act (although in online shopping, the acceptance is normally written in some sort of electronic communication). The acceptance must be in the exact terms as the offer – if it differs, it is considered to be a counteroffer
- there was **consideration** – consideration is something of value that passes from one party to the other. In an online shopping context, the consideration from the vendor to the consumer is the goods or services, and the consideration from the consumer to the vendor is the money. For example, if Victor purchases an iPhone online for $1200, the consideration from Victor to the vendor is $1200, and the consideration from the vendor to Victor is the iPhone.

In addition, for a binding contract to exist:

- there must be **capacity to contract** – that is, the parties must be 18 years of age or older, although there are a number of exceptions (e.g. where a minor is buying necessities)
- there must be **real consent** – if there is a mistake or **duress**, or undue influence, the contract may be void (although this is unlikely to occur in most online shopping purchases, there have been occasions when there has been a mistake)
- the contract must be **legal** – for example, if the goods were stolen or illegal, the contract is not valid.

Consumers of online goods or services should be aware of the location of the vendor, as this can impact on whether Australian law applies.

offer
(in relation to contract law) a written or oral statement or act that indicates the person is willing to buy or sell goods or services

acceptance
(in relation to contract law) a written or oral statement or act that indicates that the person agrees to the offer being made

consideration
(in relation to contract law) something of value that passes from one party to the other at which time a contract is complete. Consideration can also be a promise to pay

duress
strong mental pressure on someone to overcome their independent will and force them to do something

breach
breaking or failing to fulfil a duty or obligation

Element 2 – The contract was breached

When a contract is made, an agreement is reached between the parties to carry out a service or supply goods for payment. If one of the parties fails to fulfil the agreement, then that party is in **breach** of the contract. For example, a breach of contract can occur when a consumer fails to pay for the goods or services, or when a vendor fails to deliver the goods or services on time.

Failure to fulfil any terms and conditions of a contract can lead to a breach of contract. Contract terms can include **express terms** as well as **implied terms**. Express terms are clearly set out in the contract. In an online shopping contract, express terms are often included in the 'terms and conditions' section of the purchase.

The scenario below illustrates how contract terms can be contested in court.

express terms
(in relation to contract law) provisions or conditions that are written in the contract or are clearly stated or discussed between the parties as forming part of the contract

It's a legal contract, so no refund

ACTUAL SCENARIO

Joyner v Intrepid Travel Pty Ltd (Civil Claims) [2017] VCAT 233 (17 February 2017)

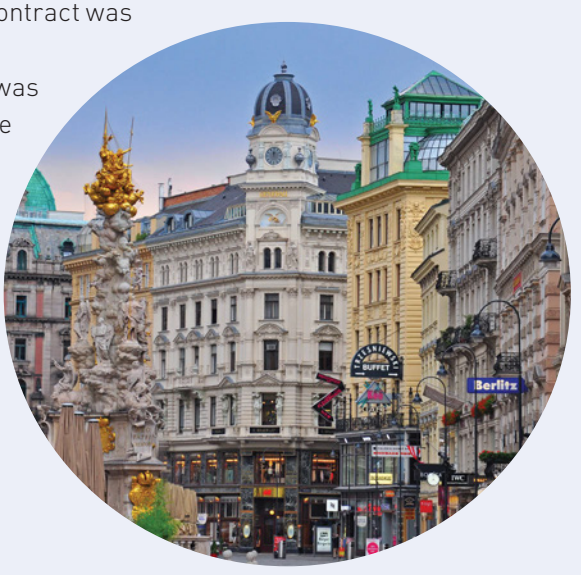
On 12 August 2016, Danielle Joyner paid $5390 via direct deposit to Intrepid Travel for a 29-day trip from Vienna to Dubrovnik that was due to commence on 3 September 2016. On 15 August 2016, Intrepid sent Joyner an email saying that the transport and accommodation for the trip had not yet been booked as this usually took three to four days.

After checking her finances and realising she could not afford the trip, Joyner emailed Intrepid to request a cancellation. However, she falsely stated that she needed to cancel the trip so she could attend a specialist appointment scheduled for during the trip. She telephoned Intrepid the next day and was told she would have to forfeit the entire amount she had paid. The trip was confirmed by email on 16 August 2016.

On 28 August 2016, Joyner requested that her trip be postponed. This was refused. Joyner felt that Intrepid's refusal to refund any money was in excess of any expenses that would have been incurred by Intrepid, and that the cancellation term in the contract was unfair. She sought a full refund or a postponement.

Intrepid argued that because Joyner booked online, she was aware of the terms and conditions of the contract when she booked. In particular, the terms and conditions stated that Intrepid would retain 100 per cent of the money paid if a trip was cancelled 30 days or less prior to departure. Intrepid stated it had suffered loss and damage because it had commenced booking accommodation and travel once Joyner had made the booking, and it therefore should retain the amount she had paid.

VCAT found that Intrepid was entitled to the money. It found that Joyner had entered into a contract, and that she had paid the full amount to Intrepid and it accepted this, and that she was not entitled to the money being returned because she changed her mind. VCAT found that the cancellation clauses were not harsh or unconscionable, and therefore the application was dismissed.



Source 4 Intrepid Travel was not required to repay money in a case that involved the applicant changing her mind.

Implied terms are implied at law or are implied by the parties' conduct. For example, if an online consumer tells a vendor that they need the goods before Christmas and the vendor acknowledges this, the consumer might argue that there was an implied term that the goods would be supplied before Christmas.

Implied terms at law include the guarantees that are set out in the ACL. These terms are not expressly agreed by the parties, but are assumed by the law to be operating in the background. For example, there is a guarantee that the goods will be fit for purpose. If they are not, then the consumer can argue that there has been a breach of contract.

implied terms
(in relation to contract law) provisions or conditions that are not expressed or written down but are assumed and intended to be included in the contract

Element 3 – The breach caused loss

causation
the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

To be successful in claiming damages, the plaintiff must prove that the breach of contract has **caused** loss. For example, if a consumer purchased a boxed set of *Game of Thrones* online, but it never arrived, the consumer has suffered the loss of the cost of the boxed set, and this financial loss was caused by the breach of contract by the vendor.

The defendant could argue that their conduct did not cause the loss or damage suffered by the plaintiff. Using the above situation, if the vendor did send the goods to the consumer, but the boxed set was stolen from the consumer's mailbox, then the vendor could argue that they did not cause the loss, but rather the thief did (the vendor could also argue that there was no breach, as the contract was fulfilled).

The person who has not fulfilled the contract is only liable for the financial loss that could be reasonably contemplated as likely to result from the failure to perform the contract. If the financial loss is too remote from the wrongful act, the defendant is not liable.

Parties to a contract cannot make a claim for the worry or anxiety caused by the failure to perform the contract. However, in some instances, they can claim loss of enjoyment; for example, when there is an online contract with a travel agency and the holiday goes horribly wrong.

Element 4 – Loss or damage was suffered

The party seeking compensation also needs to establish that they have suffered some form of loss or damage. In an online shopping context, this is normally the money (or part of the money) paid for the goods or services, or the goods and services that have been delivered but not paid for.

Limitation of actions

Under the *Limitation of Actions Act 1958* (Vic), a party must issue a claim under contract law within six years of the cause of action accruing (i.e. occurring). In contract law, the cause of action accrues at the time of the breach. Once the breach occurs (e.g. when the goods become faulty), the six years begins.

However, the time period can be extended in two circumstances:

- where there has been fraud or mistake (e.g. where the defendant has fraudulently concealed the breach)
- where the plaintiff has a disability.

For contract claims involving a death or personal injury, the time limit is either three years from the date on which the plaintiff discovered the cause of action, or 12 years from the date of the act or omission that caused the death or personal injury.

Defences to a breach of contract claim

Study tip

When you are required to argue liability and defences in relation to two areas of civil law, make sure that you look at the other party's perspective and rebut any arguments they might make. This shows that you have an objective view of all the possible arguments that could be made.

If a person is sued for breach of contract, then there are no standalone defences. Instead, the defendant could argue that one of the elements does not exist, and therefore the plaintiff cannot establish the claim.

The defendant could argue that:

- **there was no valid contract** – this means that one or more of the elements of a valid contract did not exist
- **they had not breached the contract** – this means that the conditions of the contract had been fulfilled.

A person could also argue that they did not have the capacity to form a contract, that consent was not freely given, or that the contract was not legal.

The role of the law in developing the elements of and the defences to a breach of contract claim

Both common law and statute law have developed the elements of and the defences to a breach of contract claim.

Common law

In Australia, the principles of contract law have been largely developed by, and are still found in, common law (i.e. law made by the courts). That is, the law relating to offer, acceptance and consideration has mostly been developed through cases and **precedent**. There is no single statute in Australia that governs contract law (although, as discussed in 'Statute law' on the next page, there are some statutes that establish laws relating to contracts). Therefore, if a person wants to understand the basic legal principles of contract law in Australia – such as when someone has accepted an offer, or when an offer is considered to be made – they need to look at case law rather than statute law to work out these principles.

precedent
a principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

Australian contract law is largely inherited from English contract law cases. Many of these cases and principles remain relevant today. An example is provided in the scenario below, which examines the case of *Carlill v Carbolic Smoke Ball Company*, an English contract law case from the late nineteenth century.

Breathe smoke for your health

ACTUAL SCENARIO

Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ 1

In 1891, in response to the 1889–1890 flu pandemic, a product called a 'carbolic smoke ball' was advertised in a newspaper. The manufacturer of the product, the Carbolic Smoke Ball Company, claimed that, if used correctly, the carbolic smoke ball would stop people getting the flu. In the advertisement, the company offered to pay £100 to anyone who used the carbolic smoke ball as instructed and was not protected from catching influenza.

A woman used the carbolic smoke ball as instructed and still caught influenza. She asked the company for £100. The company told the woman that the offer was merely advertising 'puff' (or hype) and was not intended as an actual promise.

The woman took her case to court and won. The Court decided that an offer can be made to the public at large. It also found that in this case, by using the carbolic smoke ball as instructed, the woman had accepted the offer.

For this offer to be revoked, the Carbolic Smoke Ball Company would have needed to communicate the revoking of the offer in the same manner as the offer was made; for example, by an advertisement.

After the judgment, the Carbolic Smoke Ball Company's attempts to appeal the decision were rejected. The company continued to aggressively advertise the Carbolic Smoke Ball with heavy restrictive conditions outlined in small print. However, the company soon fell on hard times and ceased trading in 1896.

THE ILLUSTRATED LONDON NEWS

CARBOLIC SMOKE BALL

WILL POSITIVELY CURE

COUGHS | COLD IN THE HEAD | COLD ON THE CHEST | CATARRH | ASTHMA | BRONCHITIS | HOARSENESS | LOSS OF VOICE | SORE THROAT | THROAT DEAFNESS | SNORING | SORE EYES | INFLUENZA | HAY FEVER | HEADACHE | CROUP | WHOOPING COUGH | NEURALGIA

As all the Diseases mentioned above proceed from one cause, they can be Cured by this Remedy

£100 REWARD

WILL BE PAID BY THE CARBOLIC SMOKE BALL CO.

INFLUENZA,

£1000 IS DEPOSITED

with the ALLIANCE BANK, Regent Street, showing our sincerity in the matter.

THE CARBOLIC SMOKE BALL,

TESTIMONIALS. | AS PRESCRIBED BY SIR MORELL MACKENZIE, M.D., HAS BEEN SUPPLIED TO H.I.M. THE GERMAN EMPRESS. | TESTIMONIALS.

The Originals of these Testimonials may be seen at our Consulting Rooms, with hundreds of others.

One CARBOLIC SMOKE BALL will last a family several months, making it the cheapest remedy in the world at the price—10s., post free.

The CARBOLIC SMOKE BALL can be refilled, when empty, at a cost of 5s., post free. Address:

CARBOLIC SMOKE BALL CO., 27, PRINCES ST., HANOVER SQ., LONDON, W.

Source 5 The offer made by the Carbolic Smoke Ball Company

The principles established in the case of *Carlill v Carbolic Smoke Ball Company* still apply today. For example, in an online shopping context, if a vendor's website promotes a product by saying the product helps people with a certain disease or illness, then this is considered to be an offer rather than advertising 'puff'.

Statute law

The ACL came into force in 2011. The ACL is part of a Commonwealth statute (as stated above, it is schedule 2 of the *Competition and Consumer Act*). Victoria has passed a law – the *Australian Consumer Law and Fair Trading Act 2012* (Vic) – that adopts the ACL so that it applies to goods and services supplied in Victoria.

The ACL replaced the *Trade Practices Act 1974* (Cth) as the law that provides consumers with protections. The ACL supplements or adds to the common law contract principles by:

- establishing consumer guarantees that a supplier must comply with when providing goods or services to a consumer
- creating bans on conduct such as misleading or deceptive conduct, and unconscionable conduct (a behaviour that is against general social standards)
- making unfair contract terms void (e.g. a term that creates significant imbalance between the parties)
- banning specific practices such as misrepresentation, harassment or coercion in the sale of goods or services
- providing consumers with the right to seek remedies for contract breaches.

These federal and state statutes operate alongside the common law principles of contract law. That is, they do not replace the common law principles, but rather add additional protections or principles that need to be considered when determining whether there has been a breach of contract. A person claiming breach of contract may rely on common law principles of contract law to sue the other party, or they may also claim that there have been breaches of the ACL.

Source 6 Financial loss is a possible impact of a breach on the consumer

Possible impacts of a breach

Impact of a breach on the consumer

Possible impacts of a breach of contract on the consumer are:

- **Financial loss** – This could include the loss of money used for the goods or services. The consumer may also indirectly suffer other financial loss. For example, if the consumer had bought various goods to make up a special hamper for a birthday present, and one of the key goods for the hamper doesn't arrive so that the hamper cannot be made up, then the consumer may suffer loss beyond the goods not arriving (although it may not be possible for the consumer to seek compensation from the vendor for all of this loss).
- **Loss of confidence** – This could include losing confidence in online shopping. For example, a person may have a bad experience with online shopping and this may deter them from shopping online in the future.
- **Effect on mental health** – This could include conditions such as stress or anxiety. For example, a consumer may suffer stress if the goods arrive late.
- **Inconvenience** – This could include the time and cost involved in making the claim. For example, a consumer may be inconvenienced by the time it takes for the dispute to be resolved.
- **Personal injury or death** – This could occur as a result of the breach of contract. For example, a consumer may buy a washing machine online that explodes, seriously injuring them.

Impact of a breach on the vendor

Possible impacts of a breach of contract on the vendor are:

- **Financial loss** – This could include loss of profit. For example, a vendor may suffer financially as a result of goods or services that have been delivered but for which payment has not been received.
- **Loss of reputation** – This could be as a result of bad reviews or negative feedback. For example, a vendor may receive adverse publicity as a result of failing to properly supply goods or services.

Source 7 below summarises some of the possible impacts that a breach of contract can have on the consumer and on the vendor.

IMPACT ON THE CONSUMER	IMPACT ON THE VENDOR
• Financial loss • Loss of confidence • Effect on mental health • Inconvenience • Personal injury or death	• Financial loss • Loss of reputation

Source 7 A summary of the impacts of a breach of contract

The scenario below illustrates how a contract claim can financially impact a vendor.

ACTUAL SCENARIO

Jeweller forced to sell $34 000 diamond ring for $1100

John Rolfe, *The Daily Telegraph*, 9 November 2016

Nicholas Buttle bought his [fiancée] a two-carat diamond engagement ring online for $1100 but the retailer wouldn't deliver it, saying the price was wrong. It should have been $34 000.

Mr Buttle took the matter to court and won. The retailer, Sydney-based Royal Diamonds Pty Ltd, appealed but lost again and must deliver a 'substitute ring' with a 'diamond of similar or higher grade' – plus pay Mr Buttle's legal costs as well as its own solicitor's bill of $15 000.

'This company is going to be closing down because of this', said a Royal Diamonds director, who asked not to be named.

'We are going to make the ring and close the company.'

The director said any person on the street would know a two-carat diamond ring does not cost $1100: 'I can't believe how the tribunal allowed for that.'

The director said he believed the NSW Civil and Administrative Tribunal (NCAT) was not aware Royal Diamonds does not sell 'off the shelf' products but custom-made rings, where a purchaser selects a setting then a diamond from a list based on size, clarity, cut – and price.

He said the NCAT decision would 'open the door – it will set the precedent' for other consumers to buy valuable goods advertised at incorrect prices.

Both sides in the case relied on contract law, not the Australian Consumer Law. The tribunal found there was an 'absolute contract of sale made between the parties … that payment for the ring had been accepted' and the retailer 'was unable to avoid the agreement by virtue of its claimed mistake'.

The NCAT appeal panel was told that previous cases had found one party is entitled 'to an order rescinding the contract' if the other party 'is aware that circumstances exist that indicate that the first party is entering the contract under some serious mistake'.

'(But) in this appeal there is simply no evidence to support the application of such principles.

'The only matters ... justifying a finding that the respondent knew or must have known of the mistake lies in the fact that he was a mathematician, that he conducted a web search at some unspecified time and located the ring on the cheapdiamonds.com website that advertised a 2.15 carat ring for the price of US$4499.99 ($5844) and in his application to the tribunal, the respondent (Mr Buttle) stated that the value of a similar ring is $34 429', NCAT said.

9.3 CHECK YOUR LEARNING

Define and explain

1 In terms of entering into a contract, explain why purchasing goods online is no different to purchasing goods in a store.
2 In Australia, are the principles of contract law found in statutes or in cases? Justify your response.
3 Using an online shopping example, distinguish between an express term and an implied term.
4 Identify and describe the elements that a plaintiff needs to establish to prove a breach of contract claim.

Synthesise and apply

5 Access an online shopping website. Go through the steps to select and purchase an item (but don't complete the purchase!).
   a Who is making the offer?
   b Who is accepting the offer?
   c What is the consideration passing between you and the vendor?
   d Describe three terms and conditions that apply to the purchase.
   e Is the vendor based in Australia? If not, what problems might arise if a remedy is sought?
6 For each of the following scenarios, identify the element the plaintiff might have difficulty proving. Justify your answers.
   a Bernadette is Susan's mother. Susan purchased some golf clubs for Bernadette online that never showed up. Bernadette is intending to sue the supplier for loss and damage.
   b Theo purchased a toy online for his grandson some weeks ago. In the past week, the toy has stopped working. Theo doesn't know that his grandson squished banana inside the toy's battery part. Theo is intending to make a claim on the basis that the toy is not of good quality.
   c Olivio purchased some underwear online. Months later, the underwear arrived. Olivio plans to make a claim because of how long it took for his goods to arrive.
   d In 2010, Frodo bought a ring online. A few months after he bought it, it started fading in colour and the engraving on the side of the ring started to wear out. He woke up this morning and he's angry about this ring. He wants to sue the supplier.
7 Read the scenario *Joyner v Intrepid Travel Pty Ltd*.
   a What was purchased online?
   b What was the primary issue in dispute?
   c What did VCAT order?
   d Do you agree with this decision? Give reasons for your response.

Analyse and evaluate

8 Read the scenario 'Jeweller forced to sell $34 000 diamond ring for $1100'. Discuss the extent to which you think this outcome was fair.
9 As a class, discuss what you think should occur to ensure a vendor and a consumer are protected in an online purchase.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 9.3 Check your learning
- **Video** Contracts
- **Video worksheet** Contracts
- **Weblink** Shopping online (Australian Competition and Consumer Commission)

9.4 WORKPLACE PAY AND CONDITIONS

Source 1 Young workers often need greater protection because they are underpaid more often than older workers.

Workplace laws are essential to employers and to the operation of businesses. These laws protect the rights of employees in the workplace. The legal issues that can arise from employment include:

- the underpayment of workers
- workplace safety
- bullying
- discrimination and harassment.

The workplace is governed by various federal and state laws, which are designed to ensure the safety of employees and to promote harmonious and cooperative work environments. Many of these laws establish minimum requirements that employers must abide by in relation to an employee's pay and conditions.

In Australia, the main law that governs pay and work conditions is the *Fair Work Act 2009* (Cth). This and associated laws set out what employees should be paid, and what work conditions they are entitled to (e.g. in relation to annual leave, sick leave, working hours and lunch breaks). Most employees are covered by the *Fair Work Act*. One exception is employees of a state body (e.g. one of Victoria's state-owned water companies).

Pay and conditions in Australia

Under current laws, a person's pay and conditions can be determined by an award or an agreement.

Award

award
the minimum wages and conditions that an employer is legally required to pay a worker for a particular job or occupation

An **award** is a document that sets out the wages that must be paid to people in a particular occupation or industry. An award also sets out what overtime rates, penalties and allowances are to be paid to an employee, and the amount of leave the person is to receive.

An award is often seen as a 'safety net', because wages cannot fall below the amount set out in the award. Through the Fair Work Ombudsman – a statutory government body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints, and ensures compliance with Australia's workplace laws – people can find out what minimum wage applies to their particular job.

Minimum wages are reviewed annually by an expert panel of the Fair Work Commission. The Fair Work Commission is an independent national tribunal that has the power to establish minimum wages and employment conditions for particular jobs and industries.

The underpayment of staff can significantly affect employer–employee relationships as well as an organisation's reputation. The hypothetical scenario on the next page provides an example of an employee discovering they are being underpaid by accessing the information for employees provided online by the Fair Work Ombudsman.

HYPOTHETICAL SCENARIO

Fast-food award

Dory, 16, has started working at a local fish and chip shop as a casual worker. She is paid $9.50 an hour. She wants to know whether she is getting the right pay. Dory accesses the Fair Work Ombudsman website and works out she is covered by the Fast Food Industry Award 2010. She then finds out that she should actually be getting paid $13.39 per hour, which increases for evening and weekend work, and for public holiday work.

Agreement

It is possible for an employee to be covered not by an award, but by an agreement. Two types of agreements are:

- an **enterprise agreement**
- an **individual contract**.

enterprise agreement an agreement or contract about wages and conditions between two or more employees and their employer

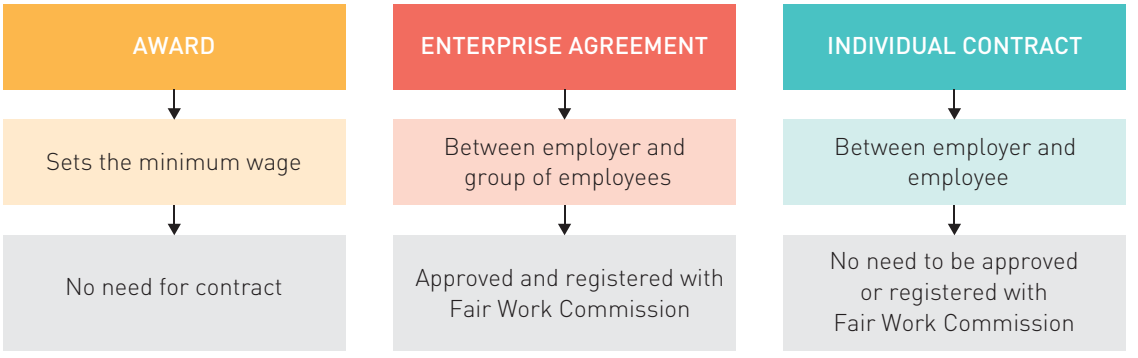
individual contract an agreement between an employee and their employer relating to wages and work conditions (which is legally binding and enforceable at law)

Enterprise agreements

An enterprise agreement is an agreement about wages and conditions between an employer and two or more employees. For this reason, enterprise agreements are also commonly known as **collective agreements**. Enterprise agreements effectively replace an existing award, and create an enforceable set of terms and conditions of employment that cover particular employees. The wages set out in enterprise agreements must not be below the award wages and are usually higher than those wages. An enterprise agreement must be approved by, and registered with, the Fair Work Commission so that it is publicly available and searchable.

Individual contracts

An individual contract is an agreement directly between an employer and an employee. Each contract is negotiated between the two parties and sets out the pay and conditions of the employee. The wages again must not be below the award wages. The contract does not need to be approved by, or registered with, the Fair Work Commission. Individual contracts are popular with private-sector companies such as accountancy and law firms.



Source 2 There are three main ways that a person's pay can be set.

Work conditions

The *Fair Work Act* established 10 **National Employment Standards (NES)**. All employees in Australia are entitled to the minimum conditions set out in the NES. The NES are considered to be a 'safety net' that ensures employees are not taken advantage of. The 10 NES are listed in the extract below.

National Employment Standards (NES) a set of 10 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

EXTRACT

Fair Work Act 2009 (Cth)

The National Employment Standards (as set out in section 61 of the *Fair Work Act 2009* (Cth)) are:

- **maximum weekly hours of work** – 38 hours per week, plus reasonable additional hours
- **requests for flexible working arrangements** – an entitlement for certain employees to request flexible working arrangements
- **parental leave and related entitlements** – up to 12 months' unpaid leave per employee, plus a right to request an additional 12 months' unpaid leave, plus other forms of parental and adoption-related leave
- **annual leave** – four weeks' paid leave per year, plus an additional week for certain shift workers
- **personal or carer's leave and compassionate leave** – 10 days' paid personal or carer's leave, two days' unpaid carer's leave as required, and two days' compassionate leave (unpaid for casuals) as required
- **community service leave** – unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service
- **long service leave** – a transitional entitlement for employees that comes from an applicable pre-modernised award, pending the development of a uniform national long service leave standard
- **public holidays** – a paid day off on a public holiday, except where reasonably requested to work
- **notice of termination and redundancy pay** – up to five weeks' notice of termination and up to 16 weeks' severance pay on redundancy, both based on length of service
- **Fair Work Information Statement** – must be provided by employers to all new employees, and contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, union rights of entry, transfer of business, and the respective roles of the Fair Work Commission and the Fair Work Ombudsman.

In addition to the NES, an individual contract or collective agreement may list further conditions that the employee is entitled to, such as extra leave, a company car, shares in the company, incentives or extra breaks.

Rights protected by the law

Laws governing workplace pay and conditions mainly aim to protect the rights of employees. In particular, these laws protect the following rights:

- the right to fair and equitable wages and conditions, and in particular the right to be fairly compensated for work performed
- the right to a safe, productive, harmonious and cooperative workplace
- the right to be able to balance work and family responsibilities by ensuring appropriate conditions are put in place
- the right to seek compensation if an employee has not received the correct pay and conditions.

The scenario on the next page is an example of staff being underpaid.

ACTUAL SCENARIO

Dinner by Heston at Melbourne's Crown Casino underpaid staff by more than $4 million

Nicole Asher, *ABC News*, 4 February 2020

A Melbourne restaurant linked to celebrity chef Heston Blumenthal cheated workers out of $4.5 million, according to a leaked administrator's report.

Dinner by Heston, which operates out of Melbourne's Crown Resort, charged up to $295 per head for its 'immersive experience' degustation meals.

The leaked creditors' report, compiled by provisional liquidators BRI Ferrier, details debts of nearly $8 million, the majority of which is owed to workers.

Source 3 Crown Casino's Dinner by Heston, linked to Heston Blumenthal, was found to have underpaid its workers before closing its doors in February 2020.

'The major financial issue confronting the company is the underpayment of employee entitlements over a period of four years from commencement of business until circa June 2019, when the employment arrangements were changed to comply with employment legislation', the report said.

Employees of Dinner by Heston were underpaid more than $4 million in wages and another $435 000 in entitlements.

'We have been informed that the blueprint for the retainer of the majority of staff was initially established by a Crown employee', it read.

'The blueprint was applied over several years and resulted in the underpayment of employee wages.

'The company self-reported the under-payments to the Fair Work Ombudsman.'

The United Workers Union (UWU) has slammed the restaurant and Crown for ripping off workers and demanded the resort take on the responsibility for the wage-theft debt.

'We have requested that Crown repay all unpaid wages and entitlements owed to our members – and offer employment to these members as well as sponsoring those who are on temporary visas', UWU national president Jo-anne Schofield said.

BRI Ferrier reported Dinner by Heston was 'best described as a joint venture' between Crown and the restaurant's parent company Tipsy Cake, registered in Saint Kitts and Nevis in the Caribbean.

...

Elements required to establish liability

If an employee has not been paid the right amount, or has not been provided with appropriate or minimum work conditions, they can take action against their employer. A person can issue a small claim in the Magistrates' Court if the claim is less than $20 000.

To establish the claim, the employee must establish the following elements:

- the plaintiff was an employee of the employer
- the plaintiff received less than what they were entitled to.

Element 1 – The plaintiff was an employee of the employer

The plaintiff must first establish that they were an employee of the employer, and not another type of worker, such as a contractor. Contractors normally negotiate their own fees and working arrangements, and have different obligations and rights because they run their own businesses.

There are no set criteria that establish whether a person is an employee or a contractor, but usually a person is an employee if they are paid wages regularly, are entitled to paid leave, work set or standard hours, have an ongoing expectation of work, and their work is directed and controlled by their employer.

If a person is a contractor, then the wages and conditions provisions may not apply to them.

Element 2 – The plaintiff received less than what they were entitled to

The main element that the employee needs to establish is that they were paid (or received conditions) less than what they were entitled to. To establish this, the employee needs to establish that:

- a particular award or agreement applied to them
- they were classified under the award or agreement as casual, part-time or full-time, and classified as a certain type of employee (e.g. a 'Level 3 employee')
- they received less than what the award or agreement specified at any particular point in time.

To establish this, the employee needs to have details about the relevant award or agreement, details about the type of work they performed, and details about what they were paid.

Source 4 A breach of an employee's pay or work conditions can result in a claim issued in the Magistrates' Court.

As discussed in the scenario below, in 2019, it was alleged that Woolworths underpaid thousands of workers. This has been described as one of the biggest cases of underpaid wages in Australia.

ACTUAL SCENARIO

Woolworths underpaid thousands of workers by up to $300m

Ben Butler and agencies, *The Guardian*, 30 October 2019

The supermarket giant Woolworths is to be investigated by the Fair Work Ombudsman in what is believed to be Australia's biggest wage underpayment case after admitting it owes staff as much as $300m.

Woolworths on Wednesday told the stock exchange it had so far identified 5700 current staff it had underpaid for as much as nine years.

But the number of underpaid workers is set to increase as Woolworths sifts through payment records, because the company is yet to determine how many former staff have also been shortchanged.

The Fair Work Ombudsman, Sandra Parker, said she was 'shocked' to see Woolworths join a list of large companies guilty of underpayment that already included Wesfarmers, Qantas, Commonwealth Bank, Super Retail Group and Michael Hill Jewellers.

'The Fair Work Ombudsman will conduct an investigation in relation to Woolworths' self-disclosure and hold them to account for breaching workplace laws', she said.

Woolworths' confession also sparked calls from Labor's employment spokesman, Tony Bourke, for a wide-ranging parliamentary inquiry into wage theft.

He said Labor would try to set one up when the Senate sits again next month.

Giri Sivaraman, a principal employment lawyer at Maurice Blackburn, which has had its own underpayment problems, said Woolworths' underpayment was 'the biggest I've ever seen'.

He said it was far more than the previous record, set by a group of underpaid 7-Eleven workers who eventually clawed $160m back from the convenience store chain.

'That was the highest ever underpayment I've seen and this is double', he said. 'There's no universe in which $300m isn't significant.'

Woolworths said on Wednesday it had only analysed two years of data but that the issue could date back to 2010, which it expects will result in a one-off remediation charge of between $200m and $300m in February's first-half results.

Source 5 Supermarket chain Woolworths has been embroiled in an underpayment scandal that has impacted workers over many years.

A Woolworths spokeswoman said the company reported itself to the Fair Work Ombudsman in August.

But it is believed that, although Woolworths flagged it had compliance problems with the Fair Work Ombudsman about two months ago, it did not inform the regulator of the vast scale of the underpayment until it made its announcement to the ASX (Australian Securities Exchange).

The company discovered the underpayments in a review triggered by staff complaints after workers checked their pay packets following the introduction of a new enterprise bargaining agreement at the start of the year.

...

Limitation of actions

Under section 545(5) of the *Fair Work Act*, a court cannot make an order about the underpayment of wages if the underpayment occurred **more than six years** before the court proceedings were commenced.

If an action is commenced because of a breach of contract (i.e. the employee is on an individual contract), then under the *Limitation of Actions Act 1958* (Vic), the employee has six years to recover the underpayment.

Defences to a workplace pay and conditions claim

There are no defences to a claim that an employer underpaid an employee. The minimum wages and conditions established under statute law mean that an employer must pay the minimum amount, even if they believe that the minimum amount does not apply (e.g. the employer thought they could contract with the employee to pay them less).

The only way in which an employer can defend a claim of underpaying an employee is by arguing that one of the elements is not satisfied. The defendant could argue that:

- **the plaintiff was not an employee** – this could mean that the person was a contractor rather than an employee
- **the employee had received what they were entitled to** – this means the employee received what they were entitled to under the relevant award or agreement.

The role of the law in developing the elements of and defences to breaches of workplace pay and conditions laws

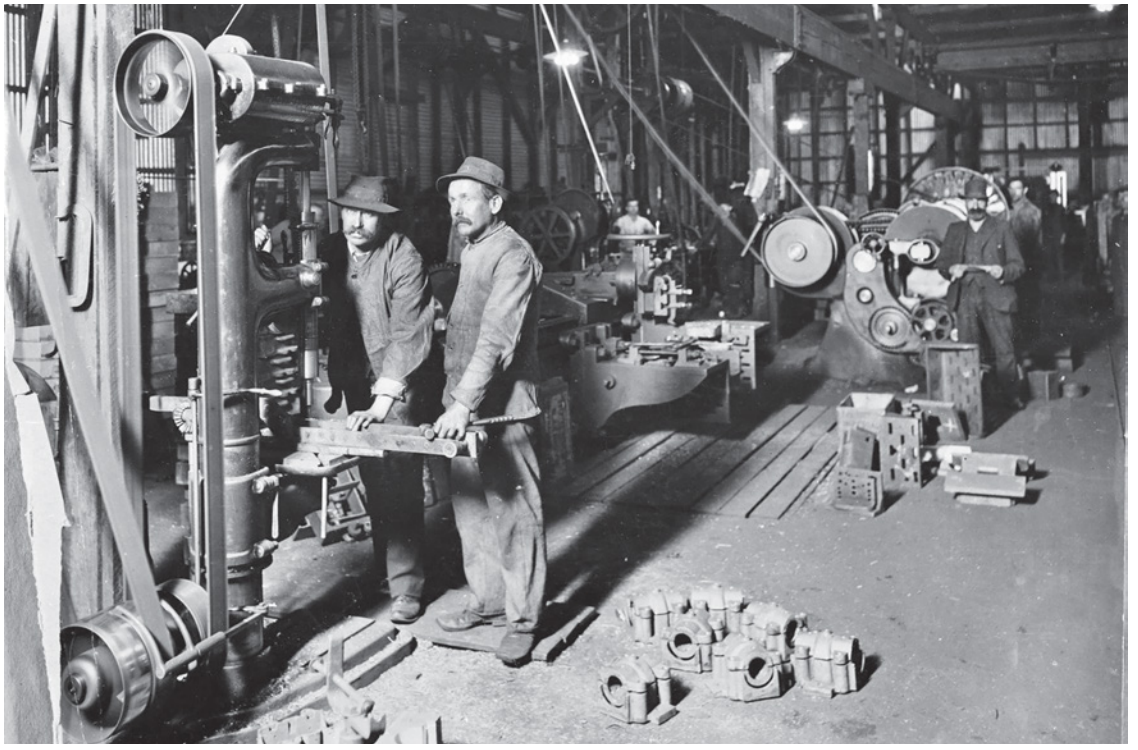
The law that covers work pay and conditions has been largely developed by statute law, particularly Commonwealth statute law. However, the courts have been fundamental in establishing what is now known as the modern award system.

Common law

Before 1900, and before the existence of the Commonwealth of Australia (i.e. before **Federation**), Victoria had set down minimum wage rates for Victorians working in certain industries.

Federation of Australia the union of sovereign states that gave up some of their powers to a central authority to form Australia

However, minimum wages were not standardised in Australia until a federal Australian court called the Commonwealth Court of Conciliation and Arbitration (which no longer exists) handed down a decision that established a system of minimum wages. This Court had the power to make awards and increase awards. In the case of *Ex parte HV McKay*, the Court found that an unskilled male worker needed to be paid fair and reasonable wages for him to be able to live and support his wife and three children, and that a skilled worker should receive an additional margin for their skills. This decision, often referred to as the '*Harvester case*', formed the basis for the minimum wage system that is now in place in Australia.



Source 6 Workers in McKay's factory in Sunshine. The factory was the centre of the *Harvester case*, which established the world's first national minimum wage.

By the 1920s, Australia's states had increased their award rates and many workers were covered by the minimum wage system. At around the same time, the Commonwealth Court of Conciliation and Arbitration stated in a decision that the basic wage should be increased in line with inflation so that wages could reflect standards of living. Over the years, the Court continued to increase minimum wages depending on the circumstances at the time. Now, it is the role of the Fair Work Commission to determine the minimum wages in modern awards.

Did you know?

In the last few years of the nineteenth century, Victorian wages boards set the first minimum wages in Australia. In November 1897, one of these boards, the Boot and Shoe Board, set a minimum wage of seven shillings and sixpence per day for adult males, and three shillings and fourpence for adult females.

The courts have also played a role in determining what defences are not available. In particular, the courts have confirmed that there is no defence available to an employer who believes that the safety net did not apply when entering into a contract with an individual. This was confirmed in the 2011 case of *ACE Insurance Ltd v Trifunovski*, where the Federal Court found that an employer cannot 'contract out' of the minimum wages and conditions – that is, a person cannot be given less than minimum wages and conditions by entering into a contract, even if the employee is willing to be paid less than the minimum wage.

Statute law

The Commonwealth Parliament has passed various pieces of legislation that reformed the laws relating to minimum wages. These Acts include:

- the *Industrial Relations Act 1988* (Cth), which introduced enterprise agreements
- the *Workplace Relations Act 1996* (Cth), which introduced further changes to workplace pay and conditions
- the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), commonly known as 'WorkChoices', which was a controversial law strongly opposed by many employees and unions
- the *Fair Work Act*, which replaced WorkChoices as the law that governs pay and conditions.

Therefore, both the courts and the Fair Work Commission (by deciding the minimum wages of awards) and the parliament (by passing legislation around pay and conditions) have played a significant role in developing workplace pay and conditions laws.

Possible impacts of a breach

Impact of a breach on the employee

The impact of a breach of workplace pay and conditions on an employee can be significant, particularly if the employee relies heavily on their wage. Possible impacts on an employee are:

- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person may develop anxiety as a result of not being paid enough.
- **Loss of income** – This could occur as a direct result of the underpayment. For example, young students may struggle to afford their everyday living expenses.
- **Vulnerability** – This could include workers who do not know their rights. For example, young workers or migrants may struggle with the idea of having to raise a dispute with their employer.

Impact of a breach on the employer

The possible impacts of a breach of workplace pay and conditions on an employer are:

- **Financial loss** – This could occur when the employer loses the case. For example, the employer might be ordered to pay penalties as a result of underpaying their workers, causing financial hardship.
- **Loss of reputation** – This could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of an adverse finding in court, and may also not be seen as an 'employer of choice' because people do not want to work for them.

Source 7 on the next page summarises some of the possible impacts that a breach of workplace pay and conditions can have on the employee and on the employer.

IMPACT ON THE EMPLOYEE	IMPACT ON THE EMPLOYER
• Effect on mental health • Loss of income • Vulnerability	• Financial loss • Loss of reputation

Source 7 A summary of the impacts of a breach of workplace pay and conditions

9.4 CHECK YOUR LEARNING

Define and explain

1 Using an example of each, define the following terms:
   - **a** award
   - **b** enterprise agreement
   - **c** National Employment Standards.

2 Explain how establishing minimum wages protects the rights of workers.

3 Does a statute or a tribunal establish the minimum wage for a job? Explain your answer.

4 Are there any defences to an underpayment claim? Give reasons for your answer.

Synthesise and apply

5 Read the scenario 'Dinner by Heston at Melbourne's Crown Casino underpaid staff by more than $4 million'.
   - **a** Why do you think so many staff members did not know they were being underpaid?
   - **b** Describe two possible impacts of the breach on these staff members.
   - **c** Describe two possible impacts of the breach on the employer.

6 Imagine that you are an employment lawyer and a man called Ozem comes to see you. He tells you that he thinks he is being underpaid after having a chat to a colleague at work. Ozem tells you that:
   - he is 22 years of age
   - his business does not have a registered agreement and he is covered by the award, but doesn't know what it's called
   - he works full-time as a help desk operator in the graphic arts industry
   - he is not a trainee, not eligible for a supported wage, and not an apprentice
   - he does not work in a place that publishes newspapers
   - he believes he is a Level 5 worker
   - he gets paid $16.50 an hour.

   Access the Fair Work Ombudsman website. A link is provided in your obook assess. Research and prepare a summary for Ozem that outlines the following information:
   - **a** what his hourly pay rate should be
   - **b** whether he is being underpaid
   - **c** whether he has a claim for underpayment. If he does, what possible defences or arguments could be raised by Ozem's employer?

Analyse and evaluate

7 Do you think there should be a limitation period for bringing a claim seeking recovery of unpaid wages? Why or why not?

8 'There should be an "honest mistake" defence. This defence would allow employers who genuinely believed they were paying their workers properly to not have to compensate those workers.' Discuss this statement as a class. In your discussion, consider the perspective of the employee, the employer and society.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 9.4 Check your learning
- **Weblink** Fair Work Ombudsman
- **Weblink** Fair Work Commission
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

TOP TIPS FROM CHAPTER 9

1 In Unit 1 – Area of Study 3, you look at two areas of civil law. For these two areas, make sure you know each of the six key knowledge points in the Study Design (rights, elements, limitation of actions, possible defences, role of law in developing the elements and defences, and impacts of breaches).

2 Use visual maps or drawings to summarise your two areas of civil law. Try to find an example for each of the points you make.

3 One of the best ways to absorb information is by teaching the information yourself. Find someone who is prepared to be taught by you about one of these areas of civil law – and think about an innovative way to teach it. It might be somebody in your class, someone at home, or someone else in your school.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 For each of the areas of law that you have studied, **identify** the time period within which a claim must be brought.

(2 marks)

Difficulty: medium

2 Choose one of the following inaccurate statements and **rewrite** it so it is correct.

- **a** The principles of contract law are set out in the Australian Consumer Law, which outlines the rights available to a person when their express rights have been breached.
- **b** The common law principles of marriage establish when a person can be legally married, including the marriageable age.
- **c** The *Equal Opportunity Act 2010* (Vic) is the main statute in Victoria that governs discrimination claims. The role of the courts is to modify the *Equal Opportunity Act 2010* (Vic), which includes expanding the attributes for which a person may be discriminated against.
- **d** The Commonwealth Government establishes what the minimum wage is for each job within each industry. It is the role of the Fair Work Commission to determine whether a person has been underpaid.

(4 marks)

Difficulty: high

3 Choose one case study in one of the areas of law you have studied. Choose which party you would represent. If you chose the plaintiff, prepare a written statement for the court about why the defendant should be found liable. If you chose the defendant, prepare a written statement about why they should not be found liable.

(8 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Use the stimulus material to answer the questions in this section. It is not intended that this material will provide you with all the information you need to answer the questions.

A series of disputes

Note that only 'Dispute one: Online shopping' is given below. The other disputes are available on your obook assess:

- 'Dispute two: Workplace pay and conditions'
- 'Dispute three: Discrimination'
- 'Dispute four: Marriage'.

Dispute one: Online shopping

Imagine you are a lawyer. On Monday morning, you receive an email from Justice Belieber, a female musician who lives in an outer Melbourne suburb. She has asked you for advice.

The email reads in part as follows:

'I need your help in suing an online retailer. A few years ago, I purchased a fair amount of musical instruments online. Recently, most of them stopped working. I know that my little bro was fiddling around a bit with the equipment, but I'm pretty sure that's not the reason why the instruments are broken. I've always had problems with the equipment, particularly the guitar, and I think they are faulty. The equipment cost me so much money, and I've suffered a lot of pain because I haven't been able to produce music as good as I used to. I want to sue them for the cost of the equipment, plus the pain and humiliation that I have suffered because I haven't been able to get a record deal. I checked out the terms and conditions that I agreed to online, but I reckon I didn't read them at the time and so I can say that I didn't actually agree to them. Plus, I'm told that there's some consumer law that protects me anyway.'

Practice assessment task questions

Choose **one** of the disputes above or on your obook assess.

1 Consider the facts of the case and advise whether, in your view, and on the balance of probabilities, the plaintiff has a claim. In your answer, address:

a the relevant law in question
(1 mark)

b a summary of the rights that are protected by the relevant law
(3 marks)

c whether each of the elements is likely to be established by the plaintiff
(8 marks)

d whether any defences might be able to be used by the defendant, and if so, the likelihood of those defences succeeding
(8 marks)

e your conclusion on whether the plaintiff will be successful, and the reason(s) why.
(5 marks)

Total: 25 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 9

Revision notes
Revision notes for Chapter 9

Practice assessment task scenarios
Dispute two: Workplace pay and conditions
Dispute three: Discrimination
Dispute four: A void marraige

assess quiz
Chapter 9
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

PRACTICE ASSESSMENT TASKS

UNIT 1 – Area of Study 1

Religious discrimination Bill gives Australians 'right to be a bigot' Judith Ireland, *The Sydney Morning Herald*, 30 January 2020

Proposed religious discrimination laws could make it legal for a boss to tell a gay worker 'being gay is a form of brokenness', or a childcare provider to tell a single mother 'God will judge you harshly for taking away the child's right to have a father'.

As public submissions close on the second draft of the Morrison government's religious discrimination Bill, Monash University associate professor of constitutional law Luke Beck warned the revised Bill included provisions that 'appear to be motivated by a desire to allow people to be nasty to others'.

In a separate submission, the 13-member Australian Discrimination Law Experts Group (ADLEG), said the Bill was 'deeply flawed', prioritising religious beliefs over the rights of LGBTIQ Australians, people with a disability and women.

The ADLEG, which includes Sydney University professor Simon Rice and Melbourne University professor Beth Gaze, said the Bill's wide definition of 'statements of belief' meant current unlawful acts of discrimination would 'likely become lawful if based on religious belief'.

As an example, a receptionist in a medical practice telling a person with a disability 'they have been given their disability by God so they can learn important lessons' would be protected.

In explanatory information accompanying the Bill, the government said it would not be discrimination under any Australian anti-discrimination law for 'merely expressing … genuinely held religious beliefs in good faith'.

Attorney-General Christian Porter said the Bill's approach to statements of belief was a 'common-sense position'.

'In essence, the Bill simply takes the uncontroversial position that, on their own, mere written or spoken words are not discrimination – provided they express genuine religious beliefs and are stated in a way that is not malicious and does not harass, vilify, threaten, intimidate or urge criminal offences.'

But Professor Beck said the practical effect of the right to make statements of belief was to establish 'the right to be a bigot', noting there was still room for statements that insulted, offended, ridiculed or humiliated others. He also noted the proposed Bill ruled out only 'serious' intimidation.

'Provided a person does not use threats, this Bill gives a person the right to intimidate others', he said. Professor Beck gave the example of a boss telling a gay worker they were 'broken' or a childcare provider judging a single mother.

While many faith groups – including the Catholic Archdiocese of Sydney, the Anglican Diocese of Sydney, the Executive Council of Australian Jewry and the National Imams Council – have been pushing for greater religious freedoms in the Bill, the Uniting Church has been among those saying there needs to be more protection for vulnerable groups.

In its submission, the Uniting Church in Australia echoed the concerns of legal experts, saying the redrafted version does not 'get the balance right'.

'To be a welcoming, inclusive, multi-faith and multi-cultural society, it is important that people are able to freely [practise] religion without fear', Uniting Church president Dr Deidre Palmer told a forum in Sydney last week.

'But privileging statements of religious belief at the expense of other people's dignity and wellbeing is not something we support. Christians in Australia are not persecuted. In Australia, churches aren't victims. To cultivate some kind of victim status is disingenuous.'

The Morrison government released the second draft of the religious discrimination Bill shortly before Christmas in response to wide-ranging criticism from faith groups, business, community groups and legal experts. Mr Porter said submissions on the second draft would be 'considered in detail' before the legislation was introduced to parliament.

Source 1 If enacted, the Religious Discrimination Bill 2019 (Cth) would introduce a legal right to make statements of belief.

Practice assessment task questions

1 Define the following terms:

- **a** fairness
- **b** common law
- **c** civil law.

(3 marks)

2 If enacted, will the Religious Discrimination Bill be statute law or common law? Justify your answer.

(2 marks)

3 Justify one reason for the Victorian court hierarchy.

(3 marks)

4 Explain how the Religious Discrimination Bill may be relevant in a criminal case and in a civil case.

(5 marks)

5 Explain how the Bill may aim to achieve social cohesion and protect the rights of individuals.

(6 marks)

6 Using examples, explain two features of the relationship between parliament and the courts in respect of religious discrimination.

(6 marks)

7 If enacted, do you think the Bill will be effective? Give reasons for your response. In your answer, address each of the five characteristics of an effective law.

(10 marks)

Total: 35 marks

PRACTICE ASSESSMENT TASK

UNIT 1 – Area of Study 2

Part 1

SIRSEI LION CHARGED

Sirsei Lion is a 25-year-old university student from Lannister in Victoria. She is part of the 'Lannister gang'. The Lannister gang's main enemies are people who are in the 'Stark gang', who live in the neighbouring suburb of Stark.

One night, Sirsei and a few of her gang members decided to drive over to Stark and damage a few letterboxes and egg a few houses. They continue to do this throughout the night until Sirsei decides to 'step things up' and substantially damages a car parked outside one of the houses.

Before they could drive home, the Lannister gang members are confronted by several members of the Stark gang. They get into a big fight. Police officers arrive, and several people are arrested, including Sirsei. After some weeks, Sirsei is also charged with destroying property, which is an indictable offence.

Practice assessment task questions

1 Referring to the scenario above, describe two purposes of criminal law.
(4 marks)

2 'Sirsei needs to prove her innocence.' Is this statement true? Justify your answer.
(3 marks)

3 Who has the burden of proof in Sirsei's case? To what standard does Sirsei's case need to be proven?
(2 marks)

4 Distinguish between a crime against the person and a crime against property. Use examples from the scenario above to demonstrate your response.
(4 marks)

5 Is Sirsei a principal offender or an accessory? Justify your answer.
(3 marks)

6 Explain one difference between a summary offence and an indictable offence.
(3 marks)

7 Sirsei has been charged under section 197 of the *Crimes Act 1958* (Vic), which states that, 'a person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence'. Identify and describe the *mens rea* and the *actus reus* for Sirsei's crime.
(6 marks)

Total: 25 marks

Part 2

In Unit 1 – Area of Study 2, you have studied two criminal offences. Choose one of these offences. Identify one recent case of a person being charged with that offence. Conduct as much research as you can about the circumstances of the crime and the offender.

Once you have finished your research, complete each of the following tasks for the offence.

1 List the elements that need to be proven by the prosecutor. State whether these elements are likely be proven. If you are unable to comment on one or more of the elements, then identify this, and explain what further information you need.

(10 marks)

2 Outline any possible defences that may be raised. State whether these defences are likely to succeed. If you are unable to comment on one or more of the defences, then identify this, and explain what further information you need.

(12 marks)

3 What is your conclusion about to the likely culpability of the accused person?

(3 marks)

Total: 25 marks

PRACTICE ASSESSMENT TASK

UNIT 1 – Area of Study 3

Imagine you are a Melbourne barrister. You work in the areas of tort (including negligence, nuisance and defamation), contract law, discrimination, void marriages, and employment law. You have been approached by a producer at a prominent news channel who wishes to arrange an interview between you and a reporter about one of these areas of law (you can choose which area). The producer has given you a set of questions that the reporter is likely to ask you during the interview. The interview will be live on television and will take only three minutes. The producer has suggested that you prepare answers to the questions, and that your answers be as clear and concise as possible. The producer asks you to not use any legal jargon, but that if you do, then the jargon needs to be explained.

Choose one of these areas of law, then answer the following questions.

Practice assessment task questions

The questions that the producer has given you are:

1 Is the area of law criminal law or civil law? Why?

(3 marks)

2 What is the main purpose of civil law?

(3 marks)

3 What are the rights that are protected by this area of law?

(4 marks)

4 What do the terms 'burden of proof' and 'standard of proof' mean? How are they relevant to a civil claim that can be made in this area of law?

(5 marks)

5 What do the terms 'remoteness' and 'break in the chain of causation' mean?

(2 marks)

6 Who are the potential parties to a claim in this area of law?

(4 marks)

7 If somebody wanted to bring a claim in relation to this area of law, what do they need to prove?

(6 marks)

8 Is there any time limit for making a claim? If so, why is there a time limit? Shouldn't people be able to decide when they want to make a claim?

(7 marks)

9 Provide a hypothetical example of somebody who has a claim in this area of law, and then explain:

- the elements the person needs to establish and whether there are any weak elements in the plaintiff's case

(6 marks)

- the likely defences the defendant would raise, and whether one or more will succeed

(6 marks)

- whether the plaintiff is likely to be successful in establishing liability, and why.

(4 marks)

Total: 50 marks

UNIT 2

SANCTIONS, REMEDIES AND RIGHTS

Source 1 The Supreme Court of Victoria (shown here) is the highest court in the state of Victoria. In Unit 2, you will look at how the courts, such as the Supreme Court, resolve criminal and civil cases.

UNIT 2 – SANCTIONS, REMEDIES AND RIGHTS

Area of Study 1 – Sanctions

OUTCOME 1

On completion of this unit, you should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches.

	CHAPTER	CHAPTER TITLE	KEY KNOWLEDGE
UNIT 2 — AREA OF STUDY 1: SANCTIONS	Chapter 11	Sanctions	• the principles of justice: fairness, equality and access • institutions that enforce criminal law, such as the police and delegated bodies • the balance between institutional powers and individual rights • an overview of the role and criminal jurisdictions of the Victorian courts • the role of the jury in a criminal trial • the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation • types of sanctions such as fines, community correction orders and imprisonment • factors considered by judges in sentencing • aspects of sentencing practices in Victoria and in one other jurisdiction • alternative approaches to sentencing, such as the use of the Drug Court, the Koori Courts and diversion programs
	Chapter 12	Recent criminal cases	• two recent criminal cases and for each case: – an overview of the charges and the central facts of the case – courts that may be or were involved – sanctions that could be or were imposed and their appropriateness – factors that may be or were taken into consideration in sentencing – possible avenues of appeal – the extent to which the principles of justice could be or were achieved

Area of Study 2 – Remedies

OUTCOME 2

On completion of this unit, you should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.

	CHAPTER	CHAPTER TITLE	KEY KNOWLEDGE
UNIT 2 — AREA OF STUDY 2: REMEDIES	Chapter 13	Remedies	• the principles of justice: fairness, equality and access • methods used to resolve a civil dispute such as mediation, conciliation and arbitration • institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies • an overview of the role and civil jurisdictions of the Victorian courts • the role of the jury in a civil trial • the purposes of remedies • types of remedies, such as damages and injunctions
	Chapter 14	Recent civil cases	• two recent civil cases and for each case: – an overview of the claim and the central facts of the case – dispute resolution bodies that may be or were involved – methods of dispute resolution and their appropriateness – remedies that could be or were awarded and their appropriateness – possible avenues of appeal – the extent to which the principles of justice were or could be achieved

Area of Study 3 – Rights

OUTCOME 3

On completion of this unit, you should be able to evaluate the ways in which rights are protected in Australia, compare this approach with that adopted by another country and discuss the impact of an Australian case on the rights of individuals and the legal system.

	CHAPTER	CHAPTER TITLE	KEY KNOWLEDGE
UNIT 2 — AREA OF STUDY 3: RIGHTS	Chapter 15	Rights	• an overview of the ways in which rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law • the influence of international declarations and treaties on the protection of rights in Australia • the approach adopted by one other country in protecting rights • possible reforms to the protection of rights in Australia • one Australian case that has had an impact on the protection of rights in Australia, including: – the role of the individual in taking a case to court – the facts and issues central to the case, including the rights in question – the laws that applied to the case – the outcome of the case and its impact on the rights of individuals and on the legal system – possible conflicting attitudes in relation to the case

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CHAPTER 10

INTRODUCTION TO

UNIT 2 – SANCTIONS, REMEDIES AND RIGHTS

Source 1 A jury is an independent group of people chosen at random to decide on the evidence in a case and reach a verdict. In Unit 2, you will learn about the role of the jury in both a criminal and civil trial.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

AIM

The aim of this chapter is to provide an introduction to the basic topics covered in Unit 2 of the VCE Legal Studies course. It is intended to support students who did not complete Unit 1 of the course, but it also provides useful revision for those who did. Many of the topics covered in this chapter will be explored in greater detail throughout Unit 2.

TOPICS COVERED

The following topics are covered in this chapter:

- 10.1: revisiting the meaning of laws
- 10.2: foundations of criminal law
- 10.3: foundations of civil law
- 10.4: the relationship between criminal cases and civil disputes.

KEY LEGAL TERMS

accused a person charged with a criminal offence

balance of probabilities the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

beyond reasonable doubt the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

bicameral parliament a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (the upper house) and the House of Representatives (the lower house). In the Victorian Parliament, the two houses are the Legislative Council (the upper house) and the Legislative Assembly (the lower house)

burden of proof the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

civil law an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

common law law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

criminal law an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

damages an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

defendant (in civil disputes) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

indictable offence a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

indictable offence heard and determined summarily a serious offence that can be heard and determined as a summary offence if the court and the accused agree

jury an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

plaintiff (in civil disputes) a party who makes a legal claim against another party (i.e. the defendant) in court

precedent a principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

presumption of innocence the right of a person accused of a crime to be presumed not guilty unless proven otherwise

remedy any order made by a court that is designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to the position they were in before they were wronged or their rights were breached

rule of law the principle that everyone in society is bound by law and must obey the law, and that laws should be fair and clear, so people are willing and able to obey them

sanction a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

standard of proof the degree or extent to which a case must be proved in court

statute law law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

statutory interpretation the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. a statute) so it can be applied to resolve the case before them

summary offence a minor offence generally heard in the Magistrates' Court of Victoria

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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10.1 REVISITING THE MEANING OF LAWS

laws
legal rules made by a legal authority (i.e. the parliament or courts) that are enforceable by the police and other law enforcement agencies

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

Laws are enforceable legal rules that regulate a wide range of situations in society. Laws identify different behaviours and actions that are considered acceptable or unacceptable for individuals in the community.

In Australia, laws are made by law-making bodies (e.g. **parliament**) and also by the courts. Laws apply to every member of society equally and are enforceable through the courts. For example, a person who breaks a criminal law may receive a **sanction** (also known as a sentence) imposed by the courts. In less serious cases, this sanction may be a fine. In more serious cases, it may be a term of imprisonment.

Source 1 Laws are enforceable legal rules. They define a range of different behaviours and actions as acceptable or unacceptable for individuals in a society.

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

Laws aim to achieve **social cohesion**; that is, a peaceful, unified and cooperative society in which all individuals respect one another, and the rules that govern them, in order to survive and prosper. Laws also aim to protect the rights of individuals. Individual rights include the right to freedom of expression and the right to freedom of movement.

Sources of law

'Sources of law' is a term used to refer to the organisations that make the laws. There are two main sources of law in Australia:

- **statute law** – law made by parliament
- **common law** – law made by the courts.

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

bicameral parliament
a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (the upper house) and the House of Representatives (the lower house). In the Victorian Parliament, the two houses are the Legislative Council (the upper house) and the Legislative Assembly (the lower house)

Statute law

Statute law is law made by parliament. Parliament is the supreme (i.e. the highest) law-making body in Australia, meaning that the final law-making power rests with parliament. Laws made by parliament are known as statutes, Acts of Parliament or legislation.

The Parliament of Australia (which sits in Canberra) and the Parliament of Victoria (which sits in Melbourne) are both **bicameral parliaments**, meaning that they each have two houses (or chambers).

The Parliament of Australia, which is also known as the Commonwealth Parliament or the Federal Parliament, is made up of the:

- House of Representatives (also known as the lower house)
- Senate (also known as the upper house).

The Victorian Parliament is made up of the:

- Legislative Assembly (also known as the lower house)
- Legislative Council (also known as the upper house).

Each of these houses of parliament is made up of members of parliament who are elected by the people at a general election. Within each parliament, there is also a representative of the Queen, who acts on her behalf as Australia's head of state.

Each parliament's role is to pass laws for the good government of the country, state or territory. For an Act of Parliament to pass in the Commonwealth Parliament or the Victorian Parliament, it must pass through both houses of parliament. After that, it will receive **royal assent** from the Queen's representative in that parliament.

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or a governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

An example of a new law made by the Victorian Parliament is a law that allows a person to apply to alter the sex recorded on their registration of birth. To bring in the new law, the parliament made changes (called amendments) to the existing *Births, Deaths and Marriages Registration Act 1996* (Vic).

EXTRACT

Births, Deaths and Marriages Registration Amendment Act 2019 (Vic) (No. 25 of 2019) – section 1

Purposes

The main purposes of this Act are:

a to amend the *Births, Deaths and Marriages Registration Act 1996*:

- **i** to provide for applications to alter a record of sex in a birth registration to a sex descriptor nominated by an applicant; and
- **ii** to provide for the issuing of a document acknowledging the name and sex of a person who is aged 18 years or over and whose birth is registered in a place other than Victoria; and
- **iii** to remove the requirement that a person has undergone sex affirmation surgery in respect of applications to alter a record of sex in a birth registration or for the issuing of a document acknowledging name and sex; and
- **iv** to provide for alteration of the record of a child's sex in a child's birth registration; and
- **v** to provide for the issuing of a document acknowledging the name and sex of a child whose birth is registered in a place other than Victoria; and

...

Common law

Common law is law made by the courts. It is also referred to as judge-made law or case law.

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

There are both federal courts and state courts in Australia. The Victorian courts are the Supreme Court (which has two divisions: the Trial Division and the Court of Appeal), County Court, Magistrates' Court, Children's Court and Coroners Court. The federal courts are the High Court, Family Court, Federal Court and Federal Circuit Court.

The courts in Australia are ranked in a hierarchy, with the higher courts hearing the serious and complicated cases, and the lower courts dealing with minor cases.

The main role of the courts in Australia is to apply existing laws (e.g. laws made by parliament) to the facts of each case and to make a ruling on each case.

Judges can sometimes make common law when they are deciding on particular cases, although only judges in superior courts (e.g. the Supreme Court of Victoria or the High Court of Australia) can make law.

Did you know?

There are nine parliaments in Australia:

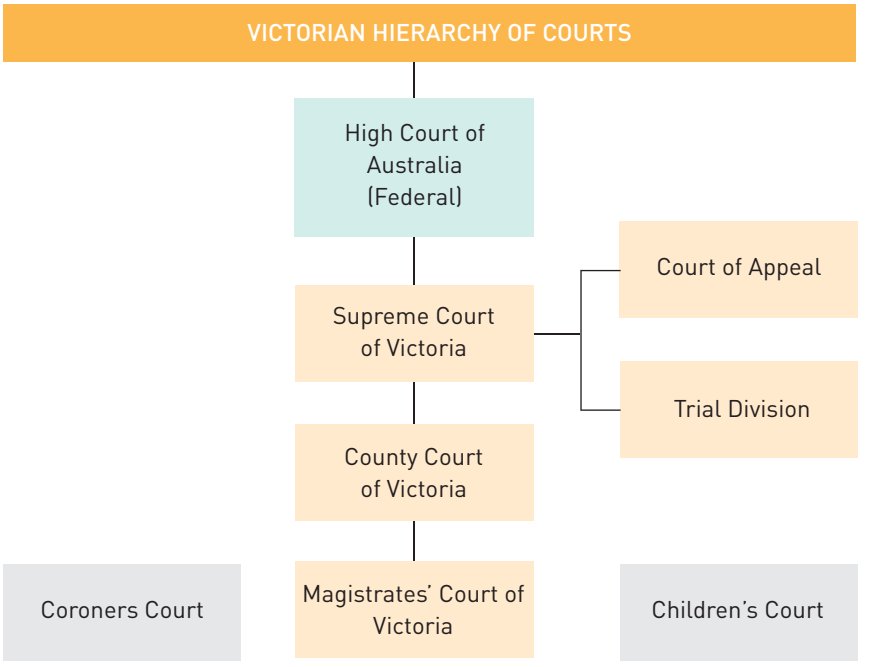
- one Commonwealth Parliament
- six state parliaments
- two territory parliaments.

precedent
a principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

Judges in superior courts can make law when deciding the outcome of a case because the legal reasoning behind their decision can set a **precedent** (i.e. a principle of law) to be followed by other courts ranked lower in the same court hierarchy, in cases where the circumstances are similar. For example, judges and magistrates in the lower courts (e.g. the County Court and Magistrates' Court) must follow the precedents or legal principles made by judges in the higher courts (e.g. the Supreme Court and High Court). This is the basis of the doctrine of precedent, or the common law principle by which the reasons for the decisions of courts higher in the hierarchy are binding upon courts lower in the same hierarchy. It has the benefit of ensuring that the laws made by courts are consistent and predictable.

statutory interpretation
the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. a statute) so it can be applied to resolve the case before them

Often, judges will make common law when they interpret statutes (i.e. legislation) made by parliament. This is known as **statutory interpretation** and occurs when judges have to give meaning to words or phrases in a statute so it can be applied to resolve the case before them. An example of statutory interpretation is provided in the case of *Wright v McMurchy* (see below).



Source 2 The hierarchy of courts in Victoria. Although the High Court is a federal court, it can hear appeals from the Supreme Court of Victoria

ACTUAL SCENARIO

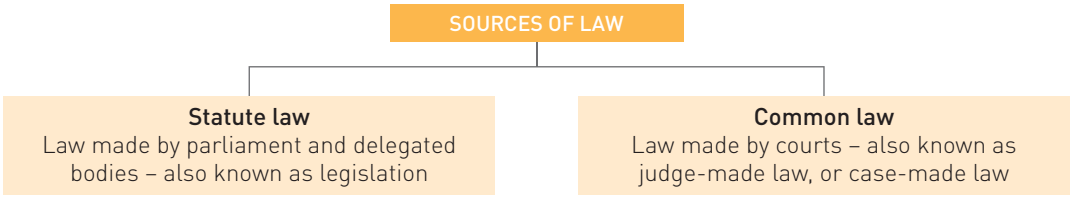
What is a public place?

Wright v McMurchy (2011) 42 WAR 113

In this case, the Court was required to interpret the words 'public place' to determine whether conduct that took place in a taxi was conduct that occurred in a public place. The case involved a taxi driver who had used his mobile phone to take images of a female passenger while she was in the front seat of the taxi. The taxi driver argued that the conduct did not occur in a public place.

The Court considered past cases that had interpreted the words 'public place' and found that it has been generally held that a person in a motor vehicle located in a public place is treated as being in a public place. The Court also noted that the interior of the taxi can be seen from the outside, and that the passenger photographed was a member of the public. The Court therefore held that the conduct in the taxi was conduct that occurred in a public place.

The accused was convicted. He appealed, but the Court of Appeal (WA) dismissed the appeal.



Source 3 There are two main sources of law in Australia: statute law and common law.

The rule of law

The **rule of law** means that laws apply equally to all members of society – including individuals, groups and members of the government – and that everyone must adhere to the law. Nobody is above the law; not even the people who make the laws (e.g. politicians and judges). Everyone is bound by the same laws and can be held accountable if they break them.

The rule of law also means that laws should be made in such a way that people are willing and able to abide by them. The rule of law is at the heart of Australia's legal and political systems. You will learn more about many of its principles, as part of the VCE Legal Studies course. For example, in Unit 2, you will look at the following concepts, which uphold the rule of law:

- the right to silence
- the protection of rights in Australia
- the presumption of innocence.

rule of law
the principle that everyone in society is bound by law and must obey the law, and that laws should be fair and clear, so people are willing and able to obey them

10.1 CHECK YOUR LEARNING

Define and explain

1 Identify two aims of laws.
2 Identify two sources of law and who makes each type of law.
3 Define the term 'bicameral parliament'. Name the houses of the Victorian and Commonwealth Parliaments.
4 What is statutory interpretation?

Synthesise and apply

5 Look at the pictures in Source 1 on page 306.
   a Identify the type of legal rule that applies to each picture.
   b What individual right is each legal rule protecting?
   c How does each legal rule aim to achieve social cohesion?
6 Read the extract from the *Births, Deaths and Marriages Registration Amendment Act 2019* (Vic).
   a Who made this law?
   b What is one of the purposes of this law?
   c Why is this Act called an 'amending Act'?
7 Read the scenario *Wright v McMurchy*.
   a In this case, what was the issue that needed to be decided by the Court?
   b What is the 'law' that was created in this case?
8 Access the website of the Rule of Law Institute of Australia. A link is provided on your obook assess.
   a Go to the education section of the website and watch one video that interests you.
   b Prepare a short summary of the video to present to your class.
   c If other students have chosen the same video, join together to collate your summaries and present them to the class as a group.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 10.1 Check your learning
- **Video tutorial** Introduction to Unit 2
- **Weblink** VicRoads
- **Weblink** Rule of Law Institute of Australia
- **Weblink** Australia's privacy laws

10.2 FOUNDATIONS OF CRIMINAL LAW

criminal law
an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

crime
an act or omission that is (1) against an existing law, (2) harmful to an individual or to society as a whole, and (3) punishable by law

Criminal law is the body of law that protects the community by:

- defining acts or omissions that are considered to be crimes
- setting sanctions for people who commit crimes.

A **crime** is an act or omission that is:

- against an existing law
- harmful to an individual or to society as a whole
- punishable by law.

There are many laws that make certain acts (i.e. doing things) or omissions (i.e. not doing things) a crime. For example, if you steal something from a shop, you are breaking a criminal law because you are committing the offence of theft (stealing). By stealing, you are causing harm to an individual (the owner of the shop) and doing something that is punishable by law.

Source 1 Criminal law is the body of law that aims to protect the community by defining acts that are considered to be crimes and setting sanctions for people who commit crimes. If you steal something from a shop, you are breaking a criminal law.

An omission is something you should do, but do not do. For example, if you walk through a shop and a scarf becomes snagged on your bag, you may walk out of the shop with the scarf perfectly innocently. But if you fail to return the scarf as soon as you realise what has happened, you have omitted to do something. That omission can be an offence.

accused
a person charged with a criminal offence

prosecution
the lawyers who prepare a criminal case and take it to court on behalf of the state, the victim and society

presumption of innocence
the right of a person accused of a crime to be presumed not guilty unless proven otherwise

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

standard of proof
the degree or extent to which a case must be proved in court

Parties to a criminal case

There are two parties to a criminal case:

- the **accused** – the person who has been charged with allegedly committing a crime
- the **prosecution** – the lawyers responsible for taking a criminal case to court on behalf of the state, the victim and society.

In most criminal cases, a person or company has been the victim of the offence committed, but they are not a party to the case. That is, the case is between the prosecution and the accused. The victim may, however, be a witness for the prosecution.

The result of a successful criminal prosecution is a finding of guilt and the imposition of a sanction. When there is a finding of guilt, the accused generally becomes known as the offender.

Key concepts of criminal law

There are three key concepts of criminal law that you should become familiar with: the **presumption of innocence**, the **burden of proof**, and the **standard of proof**.

Presumption of innocence

The presumption of innocence is a fundamental right in Australia. It is a guarantee to an accused that they will be assumed to be not guilty (innocent), and as far as possible treated as not guilty, until they are proven or plead otherwise (guilty).

Burden of proof

The burden of proof (also known as the onus of proof) refers to the party with the responsibility of proving the facts of the case. In a criminal case, the prosecution holds the burden of proof.

However, in certain circumstances, the burden of proof can be reversed; for example, if the accused pleads a defence such as mental impairment. In this situation, the accused has the responsibility of proving they were not of sound mind at the time they committed the offence.

Standard of proof

The standard of proof refers to the strength of evidence required to prove or succeed in a case. In a criminal case, the prosecution must prove the case **beyond reasonable doubt**. If an accused has pleaded a certain defence (e.g. mental impairment), then they must prove this defence on the **balance of probabilities**.

Summary offences and indictable offences

There are two types of crimes or offences:

- **summary offences**
- **indictable offences**.

Summary offences are minor criminal offences that are generally heard before a magistrate in the Magistrates' Court. Summary offences include minor theft, drink-driving and minor assaults. The *Summary Offences Act 1966* (Vic) establishes a number of summary offences, as do various other statutes. These statutes also set the maximum sanctions for each offence.

Indictable offences are serious criminal offences that are generally heard before a judge and a **jury** in the County Court or the Supreme Court if the accused pleads not guilty. If the accused pleads guilty, there is no need for a jury (as a jury is only required to determine guilt). Many indictable offences are found in the *Crimes Act 1958* (Vic). Examples of indictable offences are rape, arson and manslaughter. The case of Daniel Eckersley below is an example of an indictable offence.

Certain indictable offences can be heard in the Magistrates' Court as if they were summary offences. These are known as **indictable offences heard and determined summarily**. For example, in Victoria a magistrate may hear and determine any offence that is punishable by no more than 10 years' imprisonment – such as obtaining property by deception or destroying property where the amount involved does not exceed $100 000. The accused must give their consent to have the case heard in the Magistrates' Court rather than by a judge and jury in a higher court.

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

summary offence
a minor offence generally heard in the Magistrates' Court of Victoria

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

indictable offence heard and determined summarily
a serious offence that can be heard and determined as a summary offence if the court and the accused agree

ACTUAL SCENARIO

Tragic stabbing of partner leads to 18 years' imprisonment

R v Eckersley [2020] VSC 22 (30 January 2020)

On 29 April 2019, Daniel Eckersley pleaded guilty to murdering Amanda Harris on 7 July 2018.

Eckersley and Harris first met in 2001. They had three children together. At the time of the offence, they all lived together in a house in Cranbourne North. According to Harris' family, Eckersley exhibited controlling behaviour towards Harris.

In the weeks before the murder, Eckersley's mood and demeanour had deteriorated. Eckersley was struggling with depression due to his loss of income and employment, and had been self-medicating with alcohol and cannabis. In the days leading up to the murder, neighbours observed Eckersley acting strangely.

On the day of the murder, Eckersley attacked Harris. Horrific violence then followed, during which the victim was seriously injured. Eckersley ultimately put his three children and dog in the car, and drove away. Neighbours were alerted. By the time paramedics arrived, Harris had passed away. Eckersley was arrested that afternoon.

In their sentencing, the Supreme Court Judge said that this was a brutal killing, witnessed by three children. The Court said that the killing of an intimate partner is one of the most serious forms of offending, and the Court must emphasise that through sentencing. Taking all the factors into account, Eckersley was ordered to serve a period of 18 years' imprisonment. He must serve a minimum of 14 years before he is eligible for parole.

10.2 CHECK YOUR LEARNING

Define and explain

1 Using two examples, define the term 'crime'.

2 Fill in the following gaps.

- **a** The _____ and the _____ are the parties to a criminal case.
- **b** A possible outcome of a criminal case is a finding of _____ and the imposition of a _____.
- **c** The _____ of _____ is on the prosecution.
- **d** The standard of _____ is _____ _____ doubt.

Synthesise and apply

3 Your friend believes that a person accused of a crime should be presumed to be guilty until they are proven otherwise. Devise a way to convince your friend that it is better for a person to be presumed innocent until they are proven to be guilty.

4 Conduct some research and find three examples of indictable offences and three examples of summary offences.

5 Read the scenario *R v Eckersley*.

- **a** Identify the words used in the scenario that suggest that this is a criminal case and not a civil dispute.
- **b** Describe the central facts of the case.
- **c** Would this case have been heard by a jury? Why or why not?
- **d** What was the sanction imposed by the Supreme Court? Do you agree? Why or why not?
- **e** The Supreme Court Judge who heard the case noted that the killing of an intimate partner is one of the most serious forms of offending.
  - **i** Identify at least three other cases involving a person killing their partner.
  - **ii** As a class, discuss this type of offending.
  - **iii** Conduct some research to identify what is being done by the parliament and courts in response to this type of offending.

Check your Student obook assess for these additional resources and more:

Student book questions
10.2 Check your learning

Weblink
The Rule of Law Institute of Australia

Weblink
The presumption of innocence

10.3 FOUNDATIONS OF CIVIL LAW

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

remedy
any order made by a court that is designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to the position they were in before they were wronged or their rights were breached

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

plaintiff
(in civil disputes) a party who makes a legal claim against another party (i.e. the defendant) in court

defendant
(in civil disputes) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

Civil law deals with disputes between two parties (individuals, groups or organisations) over alleged breaches of rights by one of the parties. Civil law protects the rights of individuals by providing a way of returning a wronged party to the position they were in before they were wronged or before the breach took place. This is done through civil **remedies**. The most common civil remedy is **damages**, which is an amount of money paid by the party in the wrong to the party whose rights have been infringed.

Parties to a civil dispute

There are two parties to a civil dispute: the **plaintiff**, being the party who commences the civil action, and the **defendant**, being the party who the plaintiff claims has caused the loss and who defends the claim.

Key concepts of civil law

There are two key concepts of civil law that you should become familiar with: the burden of proof and the standard of proof.

Burden of proof

In a civil dispute, the burden of proof lies with the plaintiff. This means that the plaintiff must establish that they are in the right; that is, that their version of the facts is true.

The burden of proof can be reversed if the defendant pleads a **counterclaim** (that is, makes a claim against the plaintiff, in which case the roles are reversed) or pleads a particular defence to the claim. For example, if a defendant in a negligence claim argues that the plaintiff contributed to the harm or loss suffered, then the defendant has the burden of proving that fact.

Standard of proof

In a civil dispute, the plaintiff must prove the case on the **balance of probabilities**. This means that the plaintiff must prove that the defendant was most likely in the wrong or breached their rights.

Source 1 In a civil dispute, the plaintiff must prove the case on the balance of probabilities.

Types of civil law

There are many types of civil disputes, as shown in Source 2 below.

Study tip

Start collecting articles that relate to civil law and criminal law. Try to collect one article per week for each area of law. For each article, write a short summary of the case. This will help you understand the key concepts of criminal law and civil law.

NEGLIGENCE	Acting carelessly, or doing something that a reasonable person would not do (or failing to do something a reasonable person would do), which causes loss to another person (e.g. driving in a way that causes a collision)
TRESPASS	Going onto, or invading, another person's land, body or goods (e.g. refusing to leave someone's property when told to go, or doing a medical procedure on someone without their consent)
DEFAMATION	Making false statements that lower a person's good reputation (e.g. spreading rumours that a butcher adds sawdust to his hamburger meat)
NUISANCE	Causing the loss of enjoyment or use of personal or public property (e.g. playing drums in your garage at 2 am)
FAMILY DISPUTE	Disputes between family members (e.g. financial agreements after a divorce, or which parent will look after the children on weekdays)

Source 2 There are many different types of civil disputes.

10.3 CHECK YOUR LEARNING

Define and explain

1. What is a civil dispute?
2. Who are the two parties to a civil dispute?
3. Identify two types of dispute resolution bodies.
4. Who has the burden of proof in a civil dispute? To what degree does this party need to prove their case?
5. What is a counterclaim?

Synthesise and apply

6. Find two newspaper articles about civil disputes. Highlight the words in each article that indicate that the dispute is a civil matter and not a criminal case. Briefly summarise the facts of each civil dispute.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 10.3 Check your learning
- **Weblink** Defamation law reform debate
- **Weblink** Victoria Legal Aid

10.4 THE RELATIONSHIP BETWEEN CRIMINAL CASES AND CIVIL DISPUTES

assault
the intentional or reckless use of force or the threat of force against another person without a lawful excuse

There is some overlap between criminal cases and civil disputes. Some crimes, such as an **assault**, can give rise to a criminal prosecution brought by the state as well as a civil action brought by the victim. The difference is that when a crime has been committed, the offender's actions give rise to a court action by the state, and a sanction (penalty) of some kind. In a civil action, the defendant's actions give rise to a court action by another citizen, and if successful generally leads to the payment of money as compensation for the harm caused.

In cases such as defamation and negligence, where this occurs, it is only the more serious examples of wrongdoing that are treated by the state as criminal acts. They are then called, for example, 'criminal defamation' or 'criminal negligence' because they are extremely serious.

In instances where the same wrongdoing gives rise to both a criminal case and a civil action, the two cases are heard separately and may be heard in different courts. The outcome of one matter does not affect the outcome of the other; although, a guilty verdict in a criminal case may provide a stronger basis for the plaintiff to succeed in a civil action.

It is possible for an accused to be found not guilty in a criminal case but found liable in a civil dispute relating to the same wrongdoing. This may be because the standard of proof in a criminal case is much higher than in a civil dispute. The jury (or magistrate if the matter is a summary offence or an indictable offence heard summarily) may not find that an accused is guilty beyond reasonable doubt. However, in a civil dispute, the judge (or the jury of six: see Source 2 on page 317) may believe that the plaintiff's version of the facts is more believable than the defendant's version of the facts and may therefore find the defendant liable.

The scenario below highlights how a criminal case can also result in a corresponding civil lawsuit.

Study tip

When answering questions in assessment tasks, use examples, where you can. For example, if you are asked to define 'summary offence', provide an example of this offence. This will help to demonstrate that you understand legal concepts.

ACTUAL SCENARIO

Victoria court to decide whether police were negligent in family violence case

Luke Henriques-Gomes, *The Guardian*, 28 August 2018

A Victorian court will decide whether the police were negligent in failing to protect a woman and her three children from nearly a decade of abuse, in what the woman's lawyers say will be a landmark test case.

On Monday, Victoria's Supreme Court rejected a bid from the state of Victoria to have the lawsuit dismissed.

Court documents say the woman, Tara Smith, which is a pseudonym ordered by the court, and her children, known as Jasmine, Tegan and Imogen, suffered many instances of family violence at the hands of the children's biological father between 2005 and 2014. The children identify as Indigenous.

The plaintiffs allege that police failed in their duty of care to protect them from physical and psychological harm. According to the court judgment, this included the father allegedly kicking and choking Smith, verbally abusing her, ransacking her home, and coercing her into sex to avoid further acts of violence.

The father was subject to a number of intervention orders between 2006 and 2013. The initial order was granted after a family violence incident in which the father was 'extremely intoxicated'.

Later in 2006, a police officer who was aware that the intervention order was in place, dropped off the father 140 metres outside Smith's home with the expectation he would walk the remaining distance, court documents allege.

'On a second occasion soon after, police dropped the father while intoxicated at the plaintiffs' residence where he committed family violence against Smith in the presence of Jasmine', the judgment said.

In another incident in 2008, the father again 'committed family violence' against Smith while he was intoxicated. When Smith called police, it is alleged there was no 'substantive response'.

In a separate incident in 2012, the father contacted Smith to tell her he was coming to her house, which prompted her to leave. She returned to find her belongings and garbage strewn over the bedroom, the house phone ripped off the wall and holes punched in the wall.

The incident was reported to the police, who recorded it in a police database. But 'Smith alleged that she was embarrassed, humiliated and demeaned by the conduct of the investigating detective', the documents added.

'Police doubted that the father had committed the crime or could be prosecuted because he had willingly been invited onto the premises from time to time. She was informed that the incident would not be further investigated.'

...

Source 1 Victoria Police are at the centre of a case that involves both criminal law and civil law.

Differences between criminal cases and civil disputes

The key differences between criminal cases and civil disputes are set out in Source 2 below.

ACTION	CRIMINAL CASE	CIVIL DISPUTE
Person bringing the action	Prosecution, on behalf of the state	Plaintiff
Person defending the action	Accused	Defendant
Case name	*Director of Public Prosecutions (DPP) v Accused* (also *R v Accused*)	*Plaintiff v Defendant*
Consequence of action	Sanction	Remedy
Party who has the burden of proof	Prosecution	Plaintiff
Standard of proof	Beyond reasonable doubt	On the balance of probabilities
Evidence or investigation	The police investigate the matter on behalf of the state	The plaintiff gathers the evidence to establish the case
Heard by a jury	• No jury in the Magistrates' Court • Jury of 12 in higher courts when the accused pleads not guilty	• No jury in the Magistrates' Court • Jury of six in higher courts is optional

Source 2 Some of the differences between criminal cases and civil disputes

10.4 CHECK YOUR LEARNING

Define and explain

1 Explain how one incident can give rise to both a criminal case and a civil dispute.

2 Why is it possible for an accused to be found not guilty in a criminal case but liable in a civil dispute?

Synthesise and apply

3 Read the scenario 'Victoria court to decide whether police were negligent in family violence case'.

- **a** What happened to Tara Smith?
- **b** Who are the plaintiffs and who is the defendant in this case?
- **c** Write down all the words in the scenario that relate to the criminal component of this case, and all of the words that relate to the civil component.
- **d** Conduct some research. Can you find any outcome to this case?

4 Conduct some research on the case involving Inflation Nightclub, Dale Ewins and Zita Sukys.

- **a** What happened to Dale Ewins and Zita Sukys?
- **b** What were they seeking?
- **c** How does this case demonstrate the overlap between criminal law and civil law?
- **d** What was the outcome of this case?

Check your Student obook assess for these additional resources and more:

Student book questions
10.4 Check your learning

Going further
OJ Simpson

Weblink
Family violence and criminal law

CHAPTER 11

SANCTIONS

Source 1 A sanction is a penalty or punishment imposed by the courts on individuals or companies that have committed a criminal offence. In Victoria, there are a number of institutions that enforce criminal law, but Victoria Police is the largest and most visible of these. In this chapter, you will learn about the institutions that enforce criminal law and discover how criminal cases are heard and how sanctions are imposed.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 2 – Area of Study 1** (i.e. Chapters 11 and 12), you should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches.

KEY KNOWLEDGE

In the chapter, you will learn about:

- the principles of justice: fairness, equality and access
- institutions that enforce criminal law, such as the police and delegated bodies
- the balance between institutional powers and individual rights
- an overview of the role and criminal jurisdictions of the Victorian courts
- the role of the jury in a criminal trial
- the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation
- types of sanctions such as fines, community correction orders and imprisonment
- factors considered by judges in sentencing
- aspects of sentencing practices in Victoria and in one other jurisdiction
- alternative approaches to sentencing, such as the use of the Drug Court, the Koori Courts and diversion programs.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research, analyse and apply information in relation to criminal law
- describe the institutions that enforce criminal law
- explain the role of the Victorian courts and juries in criminal cases
- discuss the principles of justice in relation to the enforcement of criminal law and sanctions
- discuss the ability of sanctions to achieve their purposes
- discuss approaches to sentencing.

KEY LEGAL TERMS

access one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

community correction order (CCO) a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

delegated body an authority or agency given power by parliament to make and/or enforce laws

denunciation one purpose of a sanction, designed to demonstrate the community's disapproval of the offender's actions

deterrence one purpose of a sanction, designed to discourage the offender and others in the community from committing similar offences

diversion program a method used in the Magistrates' Court and Children's Court to divert offenders away from the court and avoid a criminal record by placing them on a plan

Drug Court a specialist court that sentences offenders to a drug treatment order where drugs or alcohol contributed to the commission of the offence

equality one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

fairness one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

fine a sanction that requires the offender to pay an amount of money to the state

general deterrence one purpose of a sanction, designed to discourage others in the community from committing similar offences

imprisonment a sanction that involves removing the offender from society for a stated period of time and placing them in prison

jurisdiction the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

Koori Court a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Indigenous people

protection one purpose of a sanction, designed to safeguard the community from an offender by preventing them from committing a further offence (e.g. by imprisoning the offender)

punishment one purpose of a sanction, designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

rehabilitation one purpose of a sanction, designed to reform an offender in order to prevent them from committing offences in the future

specific deterrence one purpose of a sanction, designed discourage the offender from committing similar offences

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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11.1 INTRODUCTION TO SANCTIONS

criminal law
an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

prosecution
the lawyers who prepare a criminal case and take it to court on behalf of the state, the victim and society

Director of Public Prosecutions (DPP)
the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

Criminal law aims to protect the community by defining what a crime is and determining appropriate penalties for people who commit crimes. Even though various laws are in place that establish that certain acts or omissions are a crime, sometimes people still commit crimes, and a court needs to decide whether the person is guilty of the offence and, if so, impose a penalty on that person.

Criminal cases are initiated by the **prosecution**, which pursues or undertakes the case on behalf of the state. In Victoria, the **Director of Public Prosecutions (DPP)** along with the **Office of Public Prosecutions (OPP)** prosecutes **indictable offences**. For **summary offences**, sometimes a Victoria Police officer prosecutes the case, though this depends on the body that is enforcing the law. Indictable offences and summary offences are dealt with differently by the courts because of their seriousness. In this chapter, you will explore the ways in which indictable offences and summary offences are dealt with.

An **accused** can be a human being, a company or an association. That is, in some situations, an organisation can be charged with a crime. These include crimes such as tax fraud and workplace health and safety offences. It is not possible for a company to go to jail, but it is possible for a director of a company to go to jail if they were involved in the crime.

An example of organisations and individuals being charged with a crime is provided in the scenario below. Although Cardinal Pell was ultimately acquitted of all charges, this did not affect the criminal proceedings against the editors and journalists who published articles about the case.

ACTUAL SCENARIO

DPP moves to jail dozens of editors, journalists over reports after Pell verdict

Adam Cooper, *The Age*, 26 March 2019

Dozens of Australia's leading media editors and journalists, including staff at *The Age* and *The Sydney Morning Herald*, could face prison for contempt of court over allegations they breached a suppression order in reports published after George Pell's conviction on child sex abuse charges.

Source 1 In 2019, dozens of leading editors and journalists were charged with contempt of court (actions that act in disregard of the court) for allegedly breaching a suppression order (a court order that prohibits publication of information). In this photo, journalists are reporting on Pell's release from prison in April 2020.

Victoria's Director of Public Prosecutions, Kerri Judd, QC, has named 36 organisations and individuals in a motion before the Supreme Court and applied that they be found guilty, convicted and either imprisoned or fined.

Editors of *The Age*, the *Herald Sun*, *The Sydney Morning Herald*, Sydney's *Daily Telegraph* and the *Australian Financial Review* are all named in the motion.

The Age and its owner, Nine Entertainment, *The Herald and Weekly Times* and Nationwide News, the publisher of *The Daily Telegraph*, are among the organisations in the motion.

...

EDITOR'S NOTE: The High Court overturned Cardinal George Pell's conviction for historic child sex offences in a judgment handed down on 7 April 2020. In a unanimous decision, all seven High Court judges found Victoria's Court of Appeal should not have upheld Pell's conviction. It found the evidence could not support a guilty verdict.

When a crime has been committed, people expect that justice will be achieved. In this chapter, you will consider the principles of justice in relation to criminal cases. You will look at the ways that criminal law can be enforced, the role of the courts and juries in determining (i.e. ruling on) criminal cases, and sentencing practices. In particular, you will explore:

- institutions that enforce criminal law
- the balance between institutional powers and individual rights
- the role and jurisdiction of the Victorian courts when determining criminal cases
- the role of the jury in a criminal trial
- sentencing (including the purposes and types of sanctions, and alternative approaches to sentencing and sentencing practices in Victoria and in Norway).

These topics are designed to help you develop an appreciation for how criminal law is enforced and how criminal cases are resolved.

Unlike civil disputes (which can be heard by bodies other than the courts), criminal cases must be heard by the courts. The courts decide a person's guilt and hand down a **sanction**.

Office of Public Prosecutions (OPP)
the Victorian public prosecutions office that prepares and conducts criminal proceedings on behalf of the Director of Public Prosecutions

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

summary offence
a minor offence generally heard in the Magistrates' Court of Victoria

accused
a person charged with a criminal offence

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

11.1 CHECK YOUR LEARNING

Define and explain

1 Who are the two parties to a criminal case?
2 Outline two aims of criminal law.
3 Identify two types of crimes that a company may commit.

Synthesise and apply

4 Read the scenario 'DPP moves to jail dozens of editors, journalists over reports after Pell verdict'.
   a What is the allegation in this case?
   b What is Kerri Judd QC's role in this case?
   c Explain why there are both organisations and individuals charged with this crime.
   d Conduct some research. Can you find anything about the outcome of this case?

Analyse and evaluate

5 A new Prime Minister has been elected in Australia who has radical ideas about the law. She believes there is no need for laws setting out what is criminal and what is not. She thinks that people know what is acceptable behaviour and what is not, based on their own values and moral standards.
   In class, conduct a debate arguing for and against this position.
6 'Summary offences have more of an effect on the community than indictable offences, because they occur more often, and they often lead to more serious offences. Therefore, the DPP should prosecute all summary offences.'
   Do you agree with this statement? Give reasons for your answer.

Check your Student obook assess for these additional resources and more:

Student book questions
11.1 Check your learning

Video tutorial
Introduction to Chapter 11

Going further
An insight into the Director of Public Prosecutions' office

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quz

11.2 THE PRINCIPLES OF JUSTICE IN CRIMINAL LAW

'Justice' is a word you often hear when people talk about the law – particularly when it comes to verdicts in criminal cases.

Every day, newspaper articles, news reports, websites and radio commentators talk about the outcome of certain criminal cases being 'just', while others are considered to be 'unjust'. People talk about 'justice being achieved' – and sometimes not. There is even a common saying that 'justice delayed is justice denied'. So, while most people would agree that the criminal justice system should achieve justice, what does 'justice' actually mean?

In criminal law, justice can mean different things to the different parties or people involved. For example, if a person accused of committing a crime is seeking **bail**:

bail
the release of an accused person from custody on condition that they will attend a court hearing to answer the charges

- the police may think justice is achieved if bail is refused because the accused could be a danger to society
- the victim and their family members may think justice is achieved if bail is denied because they have suffered as a result of the accused's actions
- the magistrate deciding the bail application may think justice is achieved if bail laws are correctly applied to the accused's circumstances, regardless of whether bail is granted or refused
- the accused may think justice is achieved if they are granted bail because they are not held in custody before pleading, or being found, guilty of the offence.

To determine whether justice has been achieved in a particular case, you should consider the following three principles of justice:

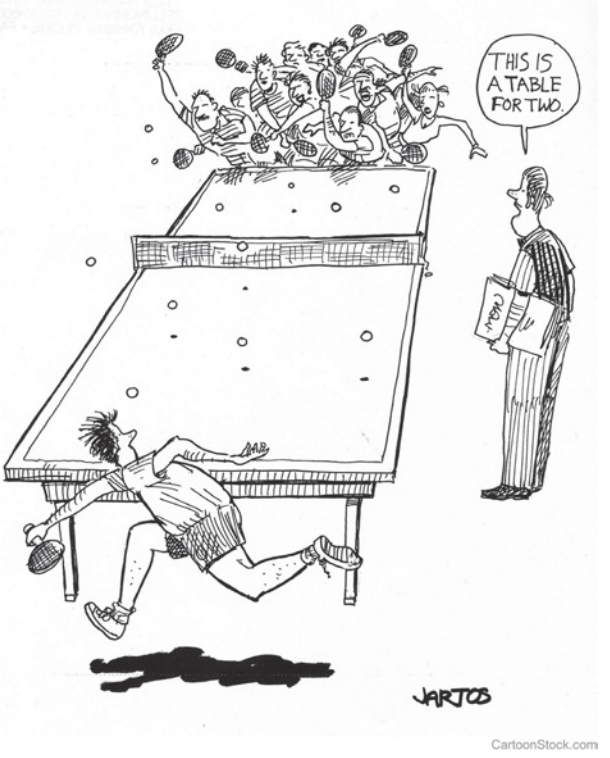
- fairness
- equality
- access.

If an objective and reasonable person, after considering all the factors in the case, and the various aspects of the criminal justice system, believes that each of the three principles of justice have on the whole been achieved, then it is likely that there has been justice.

Fairness

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

In the criminal justice system, **fairness** means there should be fair legal processes and a fair hearing or trial. That is, laws should be reasonable, and processes (including investigative, pre-hearing and trial processes) should ensure that people have an opportunity to present their case and challenge or question the other party's case. A fair hearing or trial also means that the processes used to determine guilt in a criminal case should be objective and without discrimination.



Source 1 Is this a fair game?

We expect processes to be fair. For example, in a criminal case, we expect that the accused, even if they are notorious or considered to be 'evil', will be given the opportunity to defend their case and present their own version of events. We also expect that there will be a fair trial before the accused is sanctioned. The right to a fair trial is a right largely upheld in Australia – but not sometimes in other countries, where often people are imprisoned without due processes (i.e. unfair processes, including where people do not get an opportunity to defend the charges).

Equality

Equality is the second principle of justice. It means that all individuals are treated equally regardless of their own attributes or characteristics, such as their status, race, religion, sex, or culture.

In criminal cases, equality means that people should be treated equally before the law, and should have an equal opportunity to present their case. Laws and processes should not discriminate against any individual. Also, laws should ensure that people and bodies cannot discriminate against other people and bodies. When a person is accused of a crime, equality means that their case should be heard and determined by people who are objective and unbiased, and the accused should not be treated advantageously or disadvantageously.

Source 2 In 1955, an African American woman by the name of Rosa Parks was arrested for refusing to give up her seat to a white passenger on a public bus. This was a key event in the struggle for civil rights in the United States. At this time in the United States, African Americans were not treated equally by the law.

In some circumstances, for fairness and equality to be achieved, a person may need to be treated differently. For example, consider an accused person who has learning difficulties. Is it appropriate for the accused to be treated exactly the same as the prosecutor, who may have no learning difficulties and would most likely have significant experience in criminal law and processes? In this situation, for equality and fairness to be achieved, the accused person may need additional help to understand court processes that the prosecutor does not get. Similarly, if an accused person is not represented by a lawyer (which is often the case in summary offence hearings), it would be inappropriate for them to be treated exactly the same as a highly skilled prosecutor. This would create both inequality and unfairness.

Access

Access is the last principle of justice. Access means that all parties should be able to understand their legal rights. It also means that everyone has the right and should be given the opportunity to use legal institutions, processes and systems. This not only includes access to the courts, but also access to the institutions and people who provide legal information (including information about people's rights), advice and representation.

Access also means that victims should be able to get information about a criminal case, including information about hearings, whether an accused has pleaded guilty, or the date an offender is due to be released from prison.

Australia's legal system is often criticised for failing to provide adequate access to justice to many groups within our society. One of the biggest reasons for this is because our legal system is considered to be too expensive, and only accessible to those who can afford it.

Study tip

Keep the three principles of justice in mind when exploring the topics in Unit 2. In the margin of your notes, make a comment when you see one of these principles touched on. The more you are able to apply each of these three principles to actual cases, the more you will be able to understand what they mean.

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

rule of law
the principle that everyone in society is bound by law and must obey the law, and that laws should be fair and clear, so people are willing and able to obey them

The extract below is from the website of the Australian Bar Association – this is the main organisation that represents barristers in Australia. The Association promotes the **rule of law** and advocates for fair and equal access to justice for all. The extract provides further insight into the principle of access.

EXTRACT

Access to justice

It is a key priority area of the Australian Bar Association to advocate for fair and equal access to justice for all. The concept of fair and equal access to justice requires that, regardless of means, all people have access to high-quality legal services or effective dispute resolution alternatives necessary to protect their rights and interests. Fair and equal access to justice also requires that all people, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities before the law, and in employment, education and other sectors and services within our society.

Source: Australian Bar Association

11.2 CHECK YOUR LEARNING

Define and explain

1 Identify and define the three principles of justice.
2 Describe one of the principles of justice. Explain how it could be achieved in a criminal case.

Synthesise and apply

3 Conduct some research and find at least three definitions of 'justice'. What does your research tell you about the concept of justice?
4 Link each of the following statements to the principle of justice that you think it *most* closely describes.
   a The use of an unbiased judge
   b Free legal information given to an accused
   c An information session about knowing your legal rights
   d The prosecution telling the accused the witnesses who will give evidence during the trial
   e The use of a randomly selected jury
   f Both parties given the opportunity to make opening submissions
   g The victim being told by the police about the progress of the case
   h The accused being assisted by the judge about procedural matters
   i The jury not being told about the accused's prior convictions during a trial
5 Form pairs or small groups and look at Source 1 on page 322.
   a Is this a fair game?
   b How might something similar be played out in a criminal case?
   c Draw a cartoon or picture of your own that reflects two or more people being treated the *same* but not *equally* or *fairly* (you may wish to find something online if you prefer). Present your picture to the class. As a class, discuss fairness and equality in relation to your cartoon or picture.

Analyse and evaluate

6 In your view, which individuals or groups in society are the most disadvantaged if they are charged with committing a crime? Give reasons for your response.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 11.2 Check your learning
- **Video tutorial** How to incorporate the principles of justice in an answer
- **Worksheet** The principles of justice: fairness, equality and access
- **Weblink** Jurors and social media

11.3 INSTITUTIONS THAT ENFORCE CRIMINAL LAW

Did you know?

In 1924, women were allowed to be sworn members of Victoria Police. However, it was not until 1972 that married women were allowed to join the force.

If an individual or company has broken the law by committing a crime, the law must be enforced so that the individual or company is brought to justice. But who actually has the power to enforce criminal laws?

In Victoria, the following institutions have the power to enforce certain types of criminal laws:

- the police, including Victoria Police and the Australian Federal Police
- other delegated bodies, including WorkSafe Victoria and local councils.

The police

The role of the police is to serve the community and the law, and to enforce criminal law. The police preserve the peace, protect life and property, prevent crime, detect and apprehend offenders, and assist victims of crime and other people in times of emergency.

If a crime is committed in Victoria, depending on the nature of the crime, Victoria Police or the Australian Federal Police, or even both, may be involved. These two bodies are explored further below.

Victoria Police

Victoria Police was established in 1853, not long after the Colony of Victoria was established. The police force is governed by the *Victoria Police Act 2013* (Vic). As at 30 June 2019, there were 21 292 members of the police force, which include the Chief Commissioner, deputy commissioners, assistant commissioners and various ranking police officers such as constables, sergeants and senior sergeants.

The role of Victoria Police is to serve the Victorian community and to uphold the law to promote a safe, secure and orderly society.

Victoria Police is the main institution that enforces criminal law relating to indictable offences and most summary offences in Victoria. Their role in enforcing criminal law is to:

- talk to victims or witnesses about what happened
- question possible suspects
- examine the scene(s) of the crime
- look for and gather physical or forensic evidence
- conduct searches of people or property
- arrest accused persons
- charge people with the offences that most fit the crime.

Source 1 Victoria Police officers in action

Victoria Police also has forensic experts to assist with investigations, who can analyse evidence such as drugs, paint, fibres and biological material (e.g. hair and blood).

For summary offences, the police has the power to prosecute these cases in court. Normally, police prosecutors who specialise in conducting such cases prosecute summary offences in court. For indictable offences, police officers undertake the investigations, gather the evidence, and charge the accused persons. The information gathered is given to the Office of Public Prosecutions (OPP), which is responsible for the prosecution in court.

In the year 2018–2019, there were 514 398 criminal offences recorded by Victoria Police. A large portion of those offences were property and deception offences, such as theft, property damage and fraud.

Source 2 The investigation of possible terror attacks, and response to terror-related emergencies, are roles played by the AFP.

To allow Victoria Police to enforce the law, various statutes provide this institution with a number of powers. For example:

- section 458 of the *Crimes Act 1958* (Vic) provides a Victoria Police officer with the power to arrest a person without a warrant (i.e. a document issued by a court that allows a person such as a police officer to undertake an action such as arrest) in some circumstances
- the *Criminal Procedure Act 2009* (Vic) enables a Victoria Police officer to take fingerprints of suspects in certain circumstances.

Australian Federal Police

In Australia, there is also the Australian Federal Police (AFP), established by the *Australian Federal Police Act 1979* (Cth). The AFP consists of a Commissioner of Police, deputy commissioners, AFP employees, special members, and special protective service officers.

One of the key roles of the AFP is to investigate offences that have a federal aspect. Offences that have a federal aspect include offences that are against the law of the Commonwealth or a territory. One of these laws is the *Criminal Code Act 1995* (Cth), which establishes a number of Commonwealth offences (e.g. terrorist-related offences, war crimes, and some drug offences).

The AFP is provided with various powers to enforce criminal law. For example, protective service officers have the power to arrest a person without a warrant and to search a person.

Depending on the nature of the offences, the AFP may work with Victoria Police or other investigative agencies (including other state police forces) to identify and arrest possible offenders, as illustrated in the following scenario.

ACTUAL SCENARIO

Drugs and cash seized in Melbourne and South Yarra

In February 2020, a 26-year-old woman and a 32-year-old man were arrested and charged with various drug offences after raids were conducted on properties in Melbourne and South Yarra.

The pair were arrested as part of an investigation into alleged drug trafficking coordinated by Taskforce Icarus and Taskforce Trident. Taskforce Icarus was staffed by Victoria Police officers, officers from the federal Australian Border Force agency, Australian Federal Police officers, and staff members of the Australian Government Department of Home Affairs.

Allegedly, the pair imported commercial quantities of border-controlled drugs, including methamphetamine ('ice'). The methamphetamine alone was enough to make more than 75000 street doses. The pair have been remanded.

These arrests are an example of how agencies can work together to detect, identify and prosecute those involved in the importation of illegal drugs in Australia.

delegated body
an authority or agency given power by parliament to make and/or enforce laws

Act of Parliament
a law made by parliament; a bill that has passed through parliament and has received royal assent (also known as a statute)

Delegated bodies

In addition to state and federal police forces, there are a number of bodies in Victoria that are given authority by the Victorian Parliament to enforce criminal laws. These bodies are known as **delegated bodies** because they are delegated (i.e. given) power by the parliament to make and/or enforce laws.

The power to enforce criminal law is given by an **Act of Parliament**, which specifies who has the power to enforce the law. For example, section 48 of the *First Home Owner Grant Act 2000* (Vic) gives power to the Commissioner of State Revenue to impose a penalty if a person has been dishonest when obtaining a first home owner grant (being a payment to a person who buys their first home and who is eligible for a payment by the government to help them buy their home).

Victorian delegated bodies

Some of the Victorian bodies that have the power to enforce criminal laws are listed in Source 3 below.

VICTORIAN DELEGATED BODY	DESCRIPTION OF POWERS TO ENFORCE CRIMINAL LAWS
Consumer Affairs Victoria	Consumer Affairs Victoria can take action in relation to breaches of consumer trading laws and tenancy laws.
Environment Protection Authority Victoria (EPA)	The EPA has the power to investigate breaches of environmental laws and to commence proceedings for offences committed in relation to the environment.
Local councils	Local councils govern at a local level and have the power to enforce local laws where a local law makes an act or an omission a criminal offence.
State Revenue Office (SRO)	The SRO is Victoria's tax collection agency. The SRO also administers laws relating to taxes, duties and levies. For example, the SRO can take action in relation to individuals providing false and misleading information to obtain a first home owner grant.
VicRoads	VicRoads has authority to prosecute certain road and traffic offences. It can also issue infringement notices for breaches of road rules.
Victorian WorkCover Authority (WorkSafe Victoria)	WorkSafe monitors and enforces compliance of Victoria's occupational health and safety laws. It can investigate breaches of laws and prosecute in relation to any breaches.

Source 3 Examples of Victorian delegated bodies that have the power to enforce criminal laws

Commonwealth delegated bodies

Some of the Commonwealth bodies that have the power to enforce criminal laws are listed in Source 4 below.

COMMONWEALTH DELEGATED BODY	DESCRIPTION OF POWERS TO ENFORCE CRIMINAL LAWS
Australian Securities and Investments Commission (ASIC)	ASIC investigates breaches of legislation, including where directors have acted in breach of their duties. Sometimes, matters are prosecuted by the Commonwealth Director of Public Prosecutions (CDPP).
Australian Taxation Office (ATO)	The ATO investigates serious tax-related fraud offences. The ATO prosecutes summary offences (e.g. failing to lodge a tax return) and generally refers serious cases to the CDPP.

Source 4 Examples of Commonwealth delegated bodies that have the power to enforce criminal laws

There are also a number of other bodies and agencies that can refer matters to the DPP or CDPP to prosecute. They include Services Australia, an Australian Government department (in relation to welfare fraud), and AUSTRAC, which is the Commonwealth's anti-money laundering and terrorist financing intelligence agency.

Focus on WorkSafe Victoria

WorkSafe Victoria is the trading name of the Victorian WorkCover Authority, which was established under the *Occupational Health and Safety Act 2004* (Vic). This Act is the main statute in Victoria that aims to ensure the health, safety and welfare of employees and other individuals at work. Laws that regulate safe work conditions are designed to ensure that workers are protected, and do not feel their safety is at risk when working. These laws also ensure that businesses do not have to pay the financial costs that are associated with having unsafe practices. For example, a business may end up spending more as a result of workplace injuries, a lack of productivity and worker absenteeism if unsafe practices are in place.

One of the functions of WorkSafe Victoria is to monitor and enforce compliance with the *Occupational Health and Safety Act* and other statutes such as the *Dangerous Goods Act 1985* (Vic). It is a criminal offence to not comply with this legislation.

Study tip

The WorkSafe Victoria website provides information about its recent prosecutions, including a detailed summary of each action taken and the penalty imposed. Looking at this information is a useful way to get an idea of the sorts of incidents that WorkSafe investigates and prosecutes. A link to the WorkSafe Victoria website is provided in your obook assess.

Source 5 WorkSafe Victoria is a delegated body established by the Victorian Parliament to monitor and enforce workplace health and safety laws.

For example, section 21 of the *Occupational Health and Safety Act* imposes a duty on an employer to provide and maintain a working environment that is safe and without risks to health.

In many prosecutions, WorkSafe works with the OPP to prosecute the matter. This means that WorkSafe investigates the breaches and prepares the evidence, and then the OPP prepares for and conducts the hearings.

The following scenario outlines a tragic incident that resulted in charges being laid by WorkSafe Victoria.

ACTUAL SCENARIO

Carnival ride that killed six-year-old boy only closed for two days before reopening, court hears

Danny Tran, *ABC News*, 12 February 2020

A carnival ride that hurled a six-year-old Victorian boy to his death was allowed to reopen before the child's life support machine was turned off, the Melbourne Magistrates' Court has heard.

The ride continues to be in circulation, with lawyers indicating it will be used again in the future.

Eugene Mahauariki died at the Royal Children's Hospital from head injuries four days after falling from the Cha Cha ride at the Rye foreshore on Easter Monday in 2017.

His father, Stacey Mahauariki, worked at the carnival and Eugene was taking the last ride of the day with another six-year-old.

Wittingslow Amusements was charged by WorkSafe Victoria over the boy's death and today appeared in the Melbourne Magistrates' Court.

After the fatal incident, the ride was shut down for just two days before its owner, Wittingslow Amusements, was allowed to reopen it.

Seatbelts were fitted to the ride after the incident.

The Cha Cha ride then operated for several months until November 2017, before Victoria's workplace safety watchdog issued the operator with an improvement notice, which caused the ride to be dismantled and fitted with longer lap bars.

'The relevant authority didn't ban the ride and allowed the ride to continue whilst a notice of improvement was issued', Magistrate Ross Maxted told the Court.

Barrister Stephen Russell, representing the carnival company, conceded this was the case.

'It's not actually being used at the moment', he said. 'It will be used in the future.'

Source 6 Eugene Mahauariki died after going on the Cha Cha ride at a carnival in Rye.

WorkSafe barrister Andrew Palmer QC said the prosecution's case did not rely on the proposition that the ride breached national standards.

'Our case is that the design of the restraints is flawed because they permitted, in our case, a rider, Mr Mahauariki, to slip out and be ejected from the ride and that it was reasonably practicable to have reduced that risk by firstly having a secondary restraint system', he said.

'We say it was reasonably practical to further reduce the risk by not operating the ride, [to] modify the restraint system, to have a lap bar and a seatbelt.'

...

Focus on local councils

Local councils – sometimes referred to as 'municipal councils' – were established to ensure the peace, order and good government of local districts. There are 79 local councils in Victoria. They have been given authority by the Victorian Parliament under the *Local Government Act 1989* (Vic) to make and enforce local laws, often called **by-laws**, for their own local district. These include laws relating to building and planning permits, childcare centres, rubbish and local libraries.

by-laws
local laws or regulations made by local councils that apply to residents in local areas

For example, the General Purposes Local Law 2015 is a by-law passed by Maribyrnong City Council. Section 13 of that by-law makes it an offence for a person to consume alcohol or be in possession of alcohol, other than in a sealed container, on a road or on council land. The penalty for committing this offence is 20 penalty units. If that law is broken, the Maribyrnong City Council could enforce the law by:

- warning the person who has breached the law
- directing the person to cease the activity
- issuing an infringement notice
- commencing legal proceedings.

In addition to making and enforcing by-laws, local councils can also enforce certain state laws. That is, there are Victorian statutes that give local councils the power to enforce the law if an offence has been committed. For example, the *Food Act 1984* (Vic) establishes a number of offences in relation to food handling. The purpose of establishing these offences is to ensure that food for sale is safe and suitable for human consumption. The *Food Act* gives local councils the power to bring proceedings for offences under the Act.

The following scenario is an example of a food safety offence.

Did you know?

Acts of Parliament refer to 'penalty units' when identifying penalties for crimes. The use of penalty units instead of fixed monetary fines enables the government to increase all fines by increasing the value of a penalty unit each year without having to change every statute.

Mordialloc cafe charged

ACTUAL SCENARIO

Kingston City Council v Wong & Lapont International (Criminal) [2013] VMC 6 (10 April 2013)

Proceedings were commenced by Kingston City Council against a company (Lapont International) – and its director (Tony Wong) – that operated a food business in Mordialloc, Melbourne.

In 2012, the business was inspected by an officer of Kingston City Council. The inspector found improper storage of food, improper refrigeration and temperature control, mouldy food, a lack of separation of raw and cooked food, an abundance of cockroaches and evidence of pest infestation. The company and its director were charged with breaking food standards laws.

The offenders pleaded guilty to the charges and submitted that a moderate fine should be imposed without conviction. Kingston City Council submitted that a significant fine with conviction should be imposed, given the number and seriousness of the breaches and the period (nearly four months) during which they occurred.

The magistrate fined the offenders $50 000 with conviction. He also ordered that the prosecution's costs of $7990 be paid by the offenders.

Source 7 A council inspection found mouldy food.

11.3 CHECK YOUR LEARNING

Define and explain

1 What does it mean to enforce criminal law?
2 What are delegated bodies? Where do they get their power to enforce criminal law?
3 Identify at least five different bodies or institutions that have the power to enforce criminal law.
4 Distinguish between Victoria Police and the Australian Federal Police in terms of the offences they investigate.

Synthesise and apply

5 For each of the following breaches of law, identify the body that is most likely to enforce the law.
   a A street party has been organised without a permit.
   b A house has been deliberately burnt down and has injured two of its occupants.
   c Bernard runs a sushi shop. A customer has complained because she just found maggots in her sushi.
   d Scaffolding has fallen down on a construction site, injuring three workers.
   e There has been asbestos dumped on a vacant block of land in Prahran.
   f A real estate agent in Yarraville has been underquoting properties for sale.
   g There have been some murmurs of a proposed terror attack in Melbourne.
6 Read the scenario *Kingston City Council v Wong & Lapont International*.
   a Describe the nature of the offence.
   b Why did the local council have the authority to prosecute this offence?
   c Describe one way in which the principle of fairness was upheld in this case.
7 Read the scenario 'Drugs and cash seized in Melbourne and South Yarra'. Why did this investigation involve Victoria Police, the Australian Federal Police and other agencies?
8 Visit the website of your local council.
   a Find the page that shows the local laws.
   b Find a general local law.
   c Identify at least three offences in that law. What are the sanctions for these offences?

Analyse and evaluate

9 Conduct some further research on:
   - one police force
   - one delegated body.

   Prepare a report explaining how the force or body ensures fairness in the way it enforces criminal law.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 11.3 Check your learning
- **Weblink** WorkSafe Victoria
- **Weblink** Australian Federal Police
- **Weblink** Victoria Police

11.4 INSTITUTIONAL POWERS AND INDIVIDUAL RIGHTS

Source 1 Victoria Police has various powers in relation to gathering fingerprints.

Australians are entitled to a number of rights and freedoms. These come through various sources of law, including statute law. For example, the Victorian Parliament has passed the *Equal Opportunity Act 2010* (Vic), which is designed to protect people from discrimination, sexual harassment and victimisation.

Rights are also given to people who are suspected or accused of committing a crime, and people who are guilty of crimes.

For example, every accused has the right to be presumed innocent until proven guilty. This is a right that is recognised internationally (in documents such as the *International Covenant on Civil and Political Rights* (1966)) and protected in Victoria by the **Human Rights Charter** (i.e. the *Charter of Human Rights and Responsibilities Act 2006* (Vic)), a statute that protects and promotes human rights in Victoria.

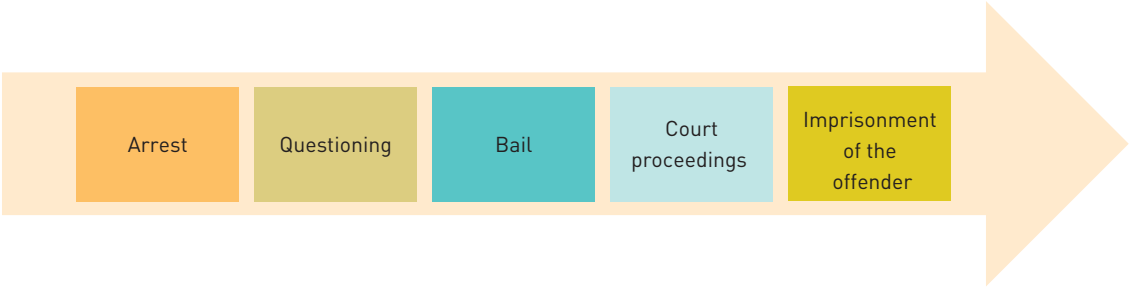
On the other hand, investigative and prosecution agencies such as Victoria Police and the OPP have powers that enable them to investigate crime and bring offenders to justice. The powers given to these bodies to carry out their job of enforcing the law are sometimes referred to as **institutional powers**. They include powers such as gathering fingerprints, charging an accused, and initiating criminal proceedings against an accused.

Human Rights Charter the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The main purpose of this Act is to protect and promote human rights

institutional powers the authority (i.e. power) given to bodies (i.e. institutions) such as Victoria Police to undertake certain actions

Those powers, however, must be balanced against the rights of individuals. If institutions have too much power, individuals may be unjustly treated. However, if their powers are too few or too limited, crime prevention and law enforcement can become difficult or almost impossible.

In this topic, you will explore how institutional powers are balanced against individual rights in the following stages of a criminal case: arrest, questioning, bail, court proceedings and the imprisonment of the offender.



Source 2 The balance between institutional powers and police rights can be examined through the stages of a criminal case listed above.

Arrest

Once a crime has been committed, the police have the power to arrest the offender. The power of arrest, with or without a warrant, is found in the *Crimes Act 1958* (Vic). Most arrests are made without a warrant.

Police can arrest without a warrant any person found committing an offence if the police believe it is necessary to:

- ensure the offender appears in court
- preserve public order
- prevent the continuation or repetition of an offence or the commission of a further offence
- ensure the safety or welfare of the public or the offender.

Did you know?

A member of the public can arrest another person if that person is committing an offence and arresting the offender is necessary. This is called a 'citizen's arrest'.

Study tip

It can be difficult to remember all of the institutional powers and rights. Research suggests that many people learn well by teaching others – why not try and teach someone else in your class, or even someone not in your class, about some of these rights and powers?

Police officers can also arrest a person without a warrant if the police officers reasonably believe the person has committed an indictable offence either in Victoria or elsewhere that, if committed in Victoria, is an indictable offence.

Police officers can use reasonable force when making an arrest, although what is reasonable force depends on the circumstances of the arrest.

However, an individual has certain rights in relation to an arrest. These rights ensure there is a balance between the power of arrest and the rights of an individual. For example:

- An individual can refuse to attend a police station unless they are under arrest. This upholds a person's right to freedom of movement and right to liberty.
- Under the Human Rights Charter, if a person is arrested, they must be informed of the reason for the arrest at the time of the arrest. The arrested person must also be promptly informed about any proceedings that are to be brought against them.
- The Human Rights Charter also states that an arrested person must be promptly brought before a court and that they have the right to be brought to trial without an unreasonable delay.
- A person does not need to say anything when arrested, other than to provide their name and address (it is an offence to refuse to do so).
- If arrested, a person must be released (unconditionally or on bail) or brought before a **bail justice** or magistrate in the Magistrates' Court within a reasonable time of being taken into custody. What is a reasonable time depends on the circumstances of the case.

bail justice
a volunteer who works within the justice system, generally outside normal court operating hours, to hear applications for bail, remand and interim or temporary accommodation orders relating to children

The scenario below provides an example of an incident where Victoria Police made numerous arrests.

ACTUAL SCENARIO

Extinction Rebellion protest in Melbourne leads to dozens of arrests

Extinction Rebellion describes itself as a 'global movement'. The movement's primary concerns are climate change and environmental protection. Extinction Rebellion's aim is to force governments around the world to reduce greenhouse gas emissions to net zero by 2025. To achieve this, the movement's core strategy is to cause mass disruption to city centres through non-violent civil disobedience.

Source 3 A protestor was forcibly removed from a bridge after refusing to follow police orders.

In September 2019, around 200 people took part in an Extinction Rebellion rally in Melbourne, seeking to raise awareness about climate change and to voice concerns about the state of our environment. As part of the rally, 36 activists disrupted traffic by blocking tram services and traffic on Princes Bridge, a major bridge in Melbourne, for several hours.

Police warned the activists to move, but some didn't, which resulted in police officers physically carrying the activists from the scene one by one, and arresting them. The activists were expected to be charged with obstructing a roadway, which is a summary offence.

Questioning

Under section 464A of the *Crimes Act*, if a person has been arrested and is in custody for being suspected of committing an offence, an investigating official has the power to question that person within a reasonable time. The person is questioned to determine what involvement, if any, they had in the offence.

However, to balance this power, rights are given to a person who is questioned:

- the person must first be informed that they do not have to do or say anything, but that anything the person does say or do may be given in evidence, and the giving of that information must be recorded if the crime is an indictable offence
- the person must be informed that they can communicate with or attempt to communicate with:
  - a friend or relative (to inform them of their whereabouts)
  - a legal practitioner, and they are allowed to do so unless the communication would result in the escape of an accomplice, or the fabrication or destruction of evidence, or unless the questioning is so urgent that it should not be delayed
- the person has a right to an interpreter if the person does not have sufficient knowledge of the English language
- communications with the person's legal practitioner must be such that the communication is not overheard
- the questioning can only occur within a reasonable time (that time depends on circumstances such as the number and complexity of offences to be investigated)
- the person being questioned can stay silent and does not need to respond to any questions (other than to supply their name and address)
- if the person is under 18 years of age, a parent, guardian or independent person must be present during the questioning.

The following scenario describes a situation where several teenagers were arrested for questioning by police.

ACTUAL SCENARIO

Family of teenage boy killed in Melbourne brawl mourn 'humble, quiet child'

Emilia Terzon and Joseph Dunstan, *ABC News*, 22 December 2019

The family of a 17-year-old boy who died after he was allegedly stabbed during a youth brawl in Melbourne's north-west has described him as a 'humble, quiet' child who got mixed up with the wrong crowd.

Detectives believe the boy died on the footpath outside Keilor Plains train station after he was stabbed during a fight between two groups just after 1:30 am.

Paramedics tried to save him but he died at the scene and several teenagers have since been arrested for questioning by police.

A family spokesperson told the ABC that the teenager's family was in 'shock' and his mother was so upset by the news of his death that she was taken to hospital unconscious.

'The child was very humble, quiet and respectful,' the family spokesperson said.

'But he got involved in the wrong side.'

The boy had just finished studying Year 11 in Melbourne and originally came to Australia from South Sudan with his family under a family visa arrangement.

The chair of Victoria's South Sudanese Community Association, Achol Marial, said it was a 'heartbreaking situation'.

'This Christmas has been torn apart. It won't seem like Christmas anymore,' she said.

She said the boy's other siblings were living in Kenya with their grandparents.

'He was the only one that remained there with the mum. Now she has no child here to celebrate Christmas with,' Ms Marial said.

She also urged young people caught up in the conflict not to take the situation into their own hands.

Source 4 Police found the injured teenager on a street in St Albans.

'We're not in a war zone, we're in a democratic system that is upheld by the laws in this country,' she said.

'If you know anything, report it to the police.'

Another South Sudanese community leader, Richard Deng, said he knew the boy's family well.

'It is very sad for a young man to lose his life like this,' Mr Deng said.

'It's a very sad time to have a son killed during Christmas.'

Forensic police officers spent several hours collecting evidence from the area near the Keilor Plains station and Regan Street in St Albans, where the boy was found.

Police have urged anyone with information to contact Crime Stoppers.

Bail

Bail rights and procedures are set out in the *Bail Act 1977* (Vic). The decision to grant or refuse bail is normally determined by either a court, a bail justice or a police officer, depending on the circumstances.

The *Bail Act* states that a person accused of an offence, and being held in custody in relation to that offence, is entitled to be granted bail unless the person deciding whether to grant bail is required to refuse bail under the Act. Therefore, there is a presumption that an accused person is entitled to bail. In other circumstances, an accused person can apply for bail, including where a hearing has been postponed or adjourned, or while they are awaiting sentence.

However, the right to bail and the right to apply for bail are balanced by powers given to the prosecutor to oppose bail, and to the person deciding on bail to refuse bail or impose certain conditions. The prosecutor can also apply to revoke (i.e. cancel) bail.

Bail must be refused in certain circumstances. These circumstances include where the person has been charged with certain offences such as murder. Bail can also be refused when the court is satisfied there is an unacceptable risk that if the accused were released on bail, they would fail to surrender into custody when it is time to do so, or they would commit an offence, or endanger the public's safety, or interfere with witnesses or the course of justice.

Being granted bail has been made more difficult by legislation passed in 2017 by the Victorian Parliament that amended the *Bail Act*. These amendments came about following the tragic incident in Bourke Street, Melbourne, in January 2017, which resulted in six people dying and many more being injured. The person who committed the crimes, and who has since been jailed, was on bail at the time.

Conditions that can be imposed as part of bail include the requirement that the accused report to a police station, live at a particular address, not contact specified individuals, surrender their passport, or not drive a motor vehicle.

Court proceedings

As you have learnt, many bodies have the power to enforce the law. Along with that power is the power to commence criminal action against an accused for the purposes of obtaining a guilty verdict (or plea) and to punish the offender for their actions.

For summary offences, the Magistrates' Court hears and determines the charges and the magistrate decides on guilt. For indictable offences, the Magistrates' Court determines whether there is evidence of a sufficient weight to support a **conviction** at a trial (through a **committal proceeding**) before the matter is then transferred to either the County Court or the Supreme Court for pre-trial procedures and, eventually, a trial.

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

committal proceeding
the processes and hearings that take place in the Magistrates' Court for indictable offences

Various powers are given to the prosecutor as part of the proceedings. Prosecutors have the power to prepare the case, speak with witnesses, obtain evidence and negotiate with the accused (or their legal practitioners) about an early guilty plea.

In these proceedings, the accused also has certain rights. Many of these rights are protected by the Human Rights Charter. The accused's rights include the right to:

- have the charge or proceeding decided by a competent, independent and impartial court after a fair and public hearing
- be presumed innocent until proven guilty
- be informed promptly and in detail about the nature and reason for the charge
- have adequate time and facilities to prepare a defence
- be tried without unreasonable delay
- have **legal aid** if the interests of justice require it
- have the assistance of an interpreter if needed
- have the opportunity to challenge and rebut the evidence put against them, which includes examining the prosecution's witnesses, and examining their own witnesses.

legal aid
free or low-cost legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

Many of these rights aim to ensure the principles of justice are achieved. For example, the right to have the assistance of an interpreter aims to uphold equality, by seeking to put an accused person who is not proficient in the English language on an equal footing with a prosecutor who is proficient in English.

Imprisonment of the offender

The sanction of last resort is **imprisonment**, which involves removing an offender from society and placing them in jail for a period of time. You will learn more about imprisonment later in this chapter, but imprisonment aims to protect the community and to punish an offender by depriving them of their liberty.

imprisonment
a sanction that involves removing the offender from society for a stated period of time and placing them in prison

If the maximum penalty for a crime is a term of imprisonment, and the court considers it to be the most appropriate sentence, then the court has the power to imprison the offender for a period of time. Once that occurs, Corrections Victoria, which is a business unit of the Victorian Government's Department of Justice and Community Safety, oversees the detention of the offender.

The management of prisons is governed by the *Corrections Act 1986* (Vic). This Act provides prison officers with various powers to enable them to manage prisons. These include the power to search and examine any person, seize unauthorised goods, arrange for medical tests for alcohol or drugs, and require a prisoner to be electronically monitored. The *Corrections Act* also includes other powers, such as the power to open, inspect and read letters sent to prisoners.

However, every prisoner has certain rights under section 47 of the *Corrections Act*:

- the right to be in the open air for at least an hour each day (weather permitting)
- the right to be provided with adequate food and, where necessary, special dietary food (e.g. where the prisoner is vegetarian or has religious beliefs that dictate what food they can eat)
- the right to be provided with suitable clothing
- the right to have access to reasonable medical care and treatment, as well as to reasonable dental treatment
- if the prisoner is intellectually disabled or mentally ill, the right to appropriate special care and treatment

- the right to practise a religion, which includes the right to join with other prisoners to practise that religion (so long as it does not jeopardise prison security)
- the right to receive at least one half-hour visit a week.

Young persons who are detained have additional rights under the *Children, Youth and Families Act 2005* (Vic). These include an entitlement to have their development needs catered for, the right to receive visits from family and legal practitioners, and the right to have their medical, religious and cultural needs met.

The importance of the rights of youth offenders was highlighted in the case of a group of children who were placed in Barwon Prison, a maximum-security prison for adult men (see the scenario below).

ACTUAL SCENARIO

Legal proceedings to get youth offenders out of Barwon Prison

Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families & Children (2016) 51 VR 473 (21 December 2016) and *Certain Children v Minister for Families & Children (No 2)* [2017] VSC 251 (11 May 2017)

Following a series of incidents at the Melbourne Youth Justice Centre in Parkville – where young inmates had caused extensive damage to the facility – the Victorian Government moved some of the young offenders from the Parkville facility to the Grevillea unit at Barwon Prison. Barwon Prison is a maximum-security prison for high-risk adult men.

A series of proceedings began in the Supreme Court of Victoria alleging that the detention of children at Barwon Prison was unlawful. Proceedings were commenced through a litigation guardian (a person who commences proceedings on behalf of children). One of the issues raised was that the decision to transfer the children was contrary to certain rights under the Human Rights Charter, including the right of children to be protected from cruel, inhumane or degrading treatment. Evidence was given about the conditions at Barwon Prison, which included long periods of confinement in cells meant for adults, threats by prison staff, and a lack of space.

Source 5 The transfer of young offenders from the Melbourne Youth Justice Centre to Barwon Prison sparked a series of proceedings in the Supreme Court about the rights of young people in detention.

In December 2016, the children's lawyers were successful in challenging the decision to transfer them to Barwon Prison. Despite an appeal, the Supreme Court ordered that the children be removed from the adult prison by 30 December 2016.

The Victorian Government issued new directions that resulted in the children remaining at Barwon Prison. In addition, two other children were transferred to the prison. A proceeding was again issued in the Supreme Court, which was heard in April 2017. Judgment was handed down by Justice Dixon on 11 May 2017, who held that the government's directions were incompatible with the human rights afforded by the Human Rights Charter. Justice Dixon ruled that the transfer of the children to Barwon Prison was unlawful. As a result, the children were removed from Barwon Prison and returned to the Melbourne Youth Justice Centre.

11.4 CHECK YOUR LEARNING

Define and explain

1 Identify two sources of individual rights and two sources of institutional powers.
2 Identify two institutions that have powers in criminal law. For each institution, describe one of its powers.
3 Explain why there is a need for a balance between powers and rights.
4 Identify whether the following statements are true or false.
   a A police officer can arrest a person using force.
   b A person must give their name and address when asked by a police officer at any time.
   c A person can be asked any questions by an investigating official about a crime.
   d A person charged with an offence has an absolute right to bail.
   e A prisoner can be placed in solitary confinement for 24 hours a day.
5 Explain why youth prisoners have particular rights and entitlements.

Synthesise and apply

6 Create a poster or multimedia visual presentation that shows the balance between individual rights and institutional powers in three stages of a criminal case.
7 Read the scenario 'Extinction Rebellion protest in Melbourne leads to dozens of arrests'.
   a Identify and describe one power used by Victoria Police in this incident.
   b Would the arrests have been made with or without a warrant? Justify your answer.
   c What reasonable force may have been used to arrest the activists?
   d What rights would have been available to the individuals arrested?
8 Read the scenario 'Family of teenage boy killed in Melbourne brawl mourn "humble, quiet child"'.
   a Describe what happened in this scenario.
   b Who was questioned, and what happened after the questioning?
   c Describe two rights that would have been available during questioning.
   d Conduct some research and find out whether there is any outcome of this case.
9 As a class, find a recent article that describes a serious offence that has been committed. Separate into four groups that represent the magistrate who will decide whether or not to grant bail, the victim, the accused, and the police. Summarise the reasons why bail should or should not be granted, based on the person you are representing.

Analyse and evaluate

10 'The balance is too much in favour of the individual. We need to pull back some of their rights and give more power to the institutions.' With reference to at least two rights and powers, discuss the extent to which you agree with this statement.
11 Conduct some further research about the youth offenders kept in Barwon Prison.
   a Explain the circumstances in which the youth offenders were transferred to a unit of Barwon Prison.
   b Why do you think there is concern about youth offenders being kept in Barwon Prison? Give reasons for your response.
   c In your view, should youth offenders be given greater rights than adult offenders? Discuss as a class.
12 The Bourke Street tragedy that occurred in January 2017 resulted in new laws being introduced that make it even harder for accused people to get bail. To what extent do you agree with bail laws being tightened in light of the presumption of innocence? Give reasons for your answer.

Check your Student obook assess for these additional resources and more:

Student book questions
11.4 Check your learning

Worksheet
Matching rights and powers

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

11.5 THE ROLE AND CRIMINAL JURISDICTIONS OF VICTORIAN COURTS

In Australia, there are a number of courts that provide a means of resolving and determining both criminal cases and civil disputes.

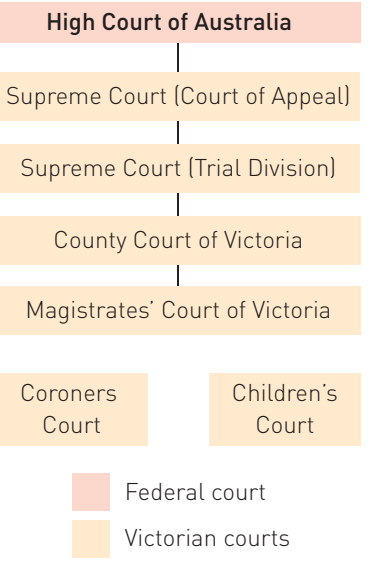
There are two types of courts: state courts and federal courts. Generally, state courts deal with issues arising under state law, and federal courts deal with issues arising under federal law.

The courts in the Australian court system are ranked in a hierarchy, with the higher courts hearing the more serious and complicated cases, and the lower courts dealing with minor offences.

Reasons for a court hierarchy

There are four main reasons for ranking the courts in a hierarchy:

- A court hierarchy allows for **specialisation** or **expertise**, with the courts developing expertise in dealing with the types of cases that come before them. For example, the Magistrates' Court hears minor offences, and so is specialised in offences such as drink-driving.
- A court hierarchy enables parties to a court case to **appeal** to a higher court if they are not satisfied with a decision made in a lower court. This means that a person who believes that an error has been made in a lower court can appeal the case to a higher court for the higher court to review that decision.
- A court hierarchy is a necessary part of the **doctrine of precedent** (i.e. law-making through courts) because the process of law-making through courts depends on a decision being made in a higher court that is binding on lower courts.
- A court hierarchy allows for **administrative convenience**. The courts have different **jurisdictions** to hear different matters, which allows smaller and minor cases (of which there are more) to be heard in the Magistrates' Court (of which there are a number in the state) and more complex and larger cases to be heard in the County Court and the Supreme Court.



Source 1 The court hierarchy in Victoria

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

doctrine of precedent
the common law principle by which the reasons for the decisions of higher courts are binding on courts ranked lower in the same hierarchy in cases where the material facts are similar

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

The role of Victorian courts

Even though laws provide guidelines for acceptable behaviour, laws are broken and crimes are committed. The role of the Victorian courts in criminal cases is to:

- determine a criminal case (by deciding whether the accused is guilty)
- impose a sanction (if a person has been found, or has pleaded, guilty).

Determine a criminal case

committal hearing
a hearing that is held as part of the committal proceeding. At a committal hearing, a magistrate decides whether there is sufficient evidence to support a conviction for the offence charged

If an accused pleads not guilty, then it is the role of the courts to determine whether the accused is guilty by managing and hearing criminal proceedings. If an accused continues to plead not guilty, then their guilt is determined at a hearing in the Magistrates' Court for a summary offence, or at a trial in the County Court or Supreme Court for an indictable offence. A judge or magistrate oversees the trial or hearing. The judge or magistrate, in doing so, acts as an impartial referee who has no bias or connection with either party, and who does not favour any side.

If the accused is charged with an indictable offence, the case first goes to the Magistrates' Court for a committal proceeding. Several stages occur during a committal proceeding. The final stage is a **committal hearing**, where a magistrate decides whether there is evidence of a sufficient weight to support a conviction at a trial. After this, the proceeding continues in either the County Court or the Supreme Court. This process acts as a filter to ensure that only the strongest cases use the resources of the higher courts, which are often overburdened with cases.

As part of the court's role in determining the guilt of an accused, the court:

- **provides specialisation and expertise in the type of case it is hearing** – the Magistrates' Court specialises in minor criminal offences (e.g. minor thefts and assaults), whereas the Supreme Court specialises in the most serious indictable offences (e.g. manslaughter)
- **manages the case** – judges and magistrates have significant powers of **case management**, which means they can give **orders** and **directions** to the parties. This includes setting down a timeline of when certain steps are to occur, so that delays can be managed
- **hears appeals** – certain Victorian courts have the power to hear an appeal made by one or both parties following a guilty verdict. An appeal may be in relation to a conviction, sentence or on a point of law. The party who appeals is known as the appellant, and the other party is known as the respondent.

The following scenario details the appeal proceedings of a murder case.

case management
a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (e.g. an order that the parties attend mediation)

orders
the way in which the instructions, decisions or directions of a court or tribunal are described. They can be given during the course of a proceeding or at the end of a proceeding

Appeal refused in cold case

ACTUAL SCENARIO

Bradley v The Queen [2017] VSCA 69 (30 March 2017)

On the night of 21 October 1983, 16-year-old Michelle Buckingham was stabbed to death. The next morning, Steven Bradley told his brother-in-law that he and two friends had 'killed a girl last night'. Bradley also told his brother-in-law that they had left the girl's body by the side of a road outside Shepparton in Victoria. Despite his brother-in-law advising him to go to the police station, Bradley sold his car and moved interstate. Michelle's body was found on 7 November 1983 with 19 knife wounds to her back.

In 2012, almost 30 years later, a local newspaper published articles about Michelle's murder. Bradley's brother-in-law came forward and spoke to the police. This eventually led to Bradley being charged. In 2015, Bradley was convicted of Michelle's murder in the Supreme Court of Victoria and was sentenced to 27 years' imprisonment with a non-parole period of 21 years.

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

Bradley's lawyer applied for leave (i.e. permission) to appeal this sentence to the Court of Appeal. Bradley's lawyer argued that the sentence was manifestly excessive in light of a number of factors, including Bradley's young age at the time of the offence (he was 21 years old), his good prospects of rehabilitation, and the possible recurrence of his depressive disorder.

The Court of Appeal refused to grant Bradley leave to appeal the Supreme Court's decision. The Court of Appeal found that the sentence was not outside the range of current sentences for murder. It also stated that 'it must not be forgotten that the applicant pleaded not guilty, and showed no remorse'.

Source 2 Michelle Buckingham's mother holds a photo of her daughter. Nearly 30 years after Michelle was murdered, Steven Bradley was convicted of her murder.

Impose a sanction

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

If an accused pleads guilty, or the magistrate or **jury** finds the accused guilty, then the court sets a date for a plea hearing. At this hearing, both parties make submissions about the facts of the case, the circumstances of the offender, the relevant factors that should be taken into account in sentencing, and the type of sentence the offender should receive.

Following the plea hearing (on that day or on a later date), the judge or magistrate hands down a sanction at a sentencing hearing. In higher courts, a judge normally provides a written judgment about the sanction they have imposed. This document can be made available to the public at a later date.

The following scenario is an example of a sanction the County Court imposed in a case where the offender pleaded guilty.

ACTUAL SCENARIO

Imprisonment for offender who breached family violence intervention order

DPP v Hilton-Taylor [2020] VCC 105 (19 February 2020)

In February 2020, Harrison Hilton-Taylor pleaded guilty in the County Court of Victoria to one charge of attempted aggravated burglary, one charge of damaging property, and one charge of contravening an intervention order. These offences took place on 11 March 2019.

Hilton-Taylor had been in a relationship with his victim, a young woman aged 22 years at the time of the offending. The relationship broke down 18 months before the offending took place. Around the time the relationship broke down, the young woman took out an intervention order (an order which protects one person from another person, such as preventing the second person from contacting or being near the first person) against Hilton-Taylor.

On 11 March 2019, the victim was in her bedroom when she heard the offender banging on her window – this was in breach of the intervention order. He smashed two panels of the bedroom window, after which time the victim ran out of her bedroom and towards the front door. She found the offender at the front door trying to force himself inside through the security door. The victim's mother helped her by locking the front door and calling triple-0. The offender continued to beat on the security door for about five minutes, screaming and yelling derogatory things about a young man whom he believed to be the current boyfriend of the victim.

Source 3 The County Court has recognised the need to protect people from breaches of intervention orders.

The police arrived and the offender was later charged. The County Court noted that the offender had a history of criminal activity, including breaching previous intervention orders relating to his sister, mother and brother, unlawful assault and other crimes.

In sentencing Hilton-Taylor, Judge Hogan said:

> Your offending strikes at the heart of the right of every citizen to feel safe in their home, particularly at night … In our community, there has been an alarming increase in the rate of violence perpetrated against intimate partners or former intimate partners. The law must make it very clear to people like you and to others who might be minded to offend against either current or former partners, that this will not be tolerated.

> Men do not own women with whom they have had a relationship. A sense of entitlement borne of jealousy, even if your former partner had commenced a new relationship, is in no way a mitigatory explanation. If every person who was unhappy with the break-up of a relationship behaved like you have done, we would be living in chaos.

The offender was sentenced to 48 months' imprisonment with a non-parole period of 30 months. The County Court noted that while it was not optimistic of Hilton-Taylor's rehabilitation prospects, it was concerned about him becoming institutionalised.

The criminal jurisdiction of the Victorian courts

Jurisdiction refers to the right or power of a court to apply the law and hear cases. There are two types of jurisdiction: **original jurisdiction** and **appellate jurisdiction**. When a court is hearing a dispute for the first time, it is operating in its original jurisdiction. When a court is hearing an appeal, it is operating in its appellate jurisdiction.

Source 4 below summarises the criminal jurisdiction of the Victorian courts.

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

original jurisdiction
the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

appellate jurisdiction
the power of a court to hear a case on appeal

VICTORIAN COURT	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court	• Summary offences • Indictable offences heard summarily • Committal proceedings • Bail and warrant applications	No appellate jurisdiction
County Court	Indictable offences except murder, attempted murder, certain conspiracies, corporate offences	From the Magistrates' Court on a conviction or sentence
Supreme Court (Trial Division)	Serious indictable offences	From the Magistrates' Court on a question of law
Supreme Court (Court of Appeal)	No original jurisdiction	From the County Court or the Supreme Court (with leave)
Children's Court	Offences committed by children 10–17 years of age (except for certain offences)	No appellate jurisdiction
Coroners Court	Investigation of deaths and fires	No appellate jurisdiction

Source 4 A summary of the criminal jurisdiction of Victorian courts

Study tip

In an assessment task, if you are asked to outline or describe 'the criminal jurisdiction' of a Victorian court, remember that there is *both* original and appellate jurisdiction. Don't forget one or the other!

Magistrates' Court

Original jurisdiction

The Magistrates' Court has jurisdiction to hear summary offences and **indictable offences heard and determined summarily**. When the accused pleads not guilty, the hearing that is conducted to determine guilt is called a hearing (not a trial).

The Magistrates' Court also has the power to hear applications in relation to bail and warrants, and to conduct committal proceedings for indictable offences.

indictable offence heard and determined summarily
a serious offence that can be heard and determined as a summary offence if the court and the accused agree

Appellate jurisdiction

As the Magistrates' Court is the lowest court in the Victorian court hierarchy, it is not able to hear any appeals from other courts.

Did you know?

The Magistrates' Court has various specialist lists and courts, such as the Sexual Offences List, the Assessment and Referral Court List, the Drug Court, and the Koori Court.

County Court

Original jurisdiction

The County Court hears all indictable offences except those set out in section 36A of the *County Court Act 1958* (Vic). That is, the County Court cannot hear cases that involve murder, attempted murder and certain conspiracies. If the accused pleads not guilty, the hearing at which guilt is determined is known as a trial.

Appellate jurisdiction

The County Court can hear criminal appeals against convictions or sentences handed down in the Magistrates' Court. This means that people can appeal to the County Court if they think they have been wrongly convicted in the Magistrates' Court and no reasonable magistrate would have convicted them on the facts presented in the case, or their sentence was too harsh. The DPP can also appeal on the basis of a sentence being too lenient.

Supreme Court (Trial Division)

Original jurisdiction

The Trial Division of the Supreme Court has jurisdiction to hear all indictable offences. It generally hears the most serious indictable offences that cannot be heard by the County Court, such as treason, murder and attempted murder. If the accused pleads not guilty, the hearing at which guilt is determined is known as a trial.

Appellate jurisdiction

The Trial Division can hear criminal appeals on questions of law from cases heard in the Magistrates' Court. For example, an appeal can be made on a question of whether the magistrate incorrectly applied the law when determining whether an offence was committed.

Supreme Court (Court of Appeal)

Original jurisdiction

The Court of Appeal has no original jurisdiction.

Appellate jurisdiction

The Court of Appeal hears appeals from the County Court and the Supreme Court, which are usually determined by three justices. These appeals may question a conviction, the severity or leniency of a sentence, or a question of law. The Court of Appeal's leave (i.e. consent) is required for the offender, but generally no leave is required for the DPP to appeal to the Court of Appeal against a sentence imposed.

Any further appeals from the Court of Appeal are heard by the High Court of Australia, which is the final appeal court. Leave (permission) is required from the High Court to appeal a decision.

Specialised Victorian courts

Children's Court

The Children's Court is a specialist court for children. It has two divisions:

- the Family Division
- the Criminal Division.

The Criminal Division deals with all cases in which a child (aged 10–17 years at the time of the offence, and under 19 years old when proceedings begin) has been charged with an offence, except for certain offences (i.e. murder, attempted murder, manslaughter, child homicide, arson causing death, and culpable driving causing death). These offences are dealt with in the County or Supreme Court.

The Family Division deals with issues in relation to child protection where a child is at risk, as well as applications for intervention orders.

Coroners Court

The Coroners Court investigates any death that is considered to be unexpected, unnatural or violent, or that resulted from an accident or injury, or that occurred during or following a medical procedure. The coroner also investigates fires that involve death, serious injury or significant damage to property.

11.5 CHECK YOUR LEARNING

Define and explain

1 Identify and describe the two main roles of Victorian courts in criminal cases.
2 Identify two specialised courts in Victoria. Explain the extent to which they have jurisdiction to hear and determine criminal cases.
3 Why doesn't the Magistrates' Court have an appellate jurisdiction?
4 What is a committal proceeding? Explain the main purpose of a committal proceeding.

Synthesise and apply

5 Read the scenario *Bradley v The Queen*.
  a Explain what happened to Michelle Buckingham.
  b Why was this cold case reinvigorated 30 years later?
  c Why did the Supreme Court and not the County Court hear this case?
  d What sentence was imposed by the Supreme Court?
  e Why did Bradley appeal the trial court's sentence?
  f What was the decision of the Court of Appeal?
  g Do you think this is an appropriate sentence? Give reasons for your response.
6 Read the scenario *DPP v Hilton-Taylor*.
  a Describe the circumstances of Hilton-Taylor's offending. Describe which circumstances would have resulted in which charges.
  b Would a jury have been involved in hearing and determining this case? Justify your answer.
  c Which court sentenced Hilton-Taylor? Why did this particular court sentence Hilton-Taylor?
  d If Hilton-Taylor was to appeal, which court would hear the appeal?
  e Do you think Hilton-Taylor received an appropriate sentence? Give reasons for your response.
7 For each of the following scenarios, identify whether a committal proceeding is required, whether a trial or hearing is necessary, and which court would hear the case.
  a Akala has been charged with petty theft and is pleading not guilty.
  b Valentin has been charged with manslaughter and is pleading guilty.
  c Simone has pleaded not guilty to 17 charges of sexual assault.
  d Kenji has pleaded guilty to a minor assault.

Analyse and evaluate

8 Do you think that it is appropriate that children charged with murder are tried as adults? Give reasons for your response.
9 Discuss two strengths of the role of the courts in resolving criminal cases.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 11.5 Check your learning
- **Going further** World legal systems
- **Weblink** The court system
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

11.6 THE ROLE OF THE JURY IN A CRIMINAL TRIAL

Did you know?

In 1994 in the United Kingdom, four members of a jury used a Ouija board to conduct a séance to determine what happened to the murder victims. A re-trial was ordered.

In Australia, the jury system is sometimes used to determine whether a person is guilty of an offence.

The jury system began in medieval Europe, around 1215. Before this time, the way in which a person's guilt or innocence was determined was by trial by ordeal. This involved subjecting the accused to some sort of experience (i.e. ordeal), after which time their guilt or innocence was declared. For example, an ordeal by water involved throwing the accused into a river or lake. If the accused sank, they were taken out of the water and presumed to be innocent. If they floated, they were considered to be guilty.

Trial by ordeal was abolished in 1215. By this time, **trial by jury** had started to become more common. A trial by jury is a trial by peers in which an impartial group of people are randomly selected to hear the evidence and hand down a verdict as to whether the accused is guilty or not guilty.

trial by jury
a type of trial by peers in which an impartial group of randomly selected people hears evidence and hands down a verdict (i.e. a decision)

When are criminal juries used?

Criminal juries are used in the original jurisdiction of the County Court and Supreme Court. That is, criminal juries are used to determine the guilt of an accused person who is charged with an indictable offence. In 2020, temporary measures were put in place to allow for judge-alone trials (that is, the judge and not the jury decides guilt) in certain circumstances as a result of the COVID-19 pandemic, during which jury trials were suspended.

Juries are never used in the Magistrates' Court and are not used in appeals. Juries are also not used when an offender has pleaded guilty, because a jury's only role is to determine guilt or innocence, and not the sanction.

The *Juries Act 2000* (Vic) governs the selection, composition and role of a jury in Victoria. The *Jury Directions Act 2015* (Vic) is another important statute that establishes the way in which **jury directions** are to be given to a jury by a judge (these are instructions about the law or about the way that certain evidence should be considered by the jury).

jury directions
instructions given by a judge to a jury either during or at the end of a trial

Composition of a criminal jury

A jury of 12 is compulsory in criminal cases heard in the County Court and Supreme Court, where the accused pleads not guilty. Three extra jurors can be empanelled (that is, be selected to form part of the jury panel) for lengthy trials in case a situation arises where one of the jury members has to withdraw from the trial (e.g. if a jury member falls ill).

Individuals aged 18 years or over who are enrolled to vote in Victoria are qualified and liable for jury service. Individuals are selected at random and are sent a questionnaire by the Juries Commissioner (the person responsible for overseeing the jury system in Victoria) for the purposes of determining their eligibility for jury service. If they are eligible, they are sent a jury summons requiring them to attend court for jury service at a later date. On the day, people who are summoned may or may not end up on a jury. That is, some people may be excused or challenged to be on a jury.

Source 1 One of the roles of a jury is to concentrate during the trial. In 2008, a trial in the Sydney District Court was abandoned after it was found that some of the jurors were playing Sudoku during the proceedings.

Role of a criminal jury

The jury in a criminal trial must:

- listen to all the evidence
- concentrate during the trial
- piece the evidence together and decide whether the accused is guilty or not guilty.

It is the judge's role to explain the law to the jury. The jury considers the evidence with respect to the law and makes its decision.

A key part of a jury trial is the directions given by a judge to a jury. The *Jury Directions Act* was passed in 2015 to reduce the complexity of jury directions in criminal trials, and to simplify and clarify the issues that juries must determine. In particular, there are now legal requirements about what directions should be given to a jury in trials related to sexual offences and family violence offences. For example, if requested by either party to do so, the judge must give a direction to a jury that family violence is not limited to physical abuse, and may include sexual abuse and psychological abuse.

The following scenario explores a trial by jury that was aborted (i.e. cancelled) because of a television news report that aired during the trial.

ACTUAL SCENARIO

Ballarat murder trial aborted, jury dismissed after 'reckless' television report on Karen Ashcroft case

Bridget Rollason, *ABC News*, 7 June 2019

The trial of a man accused of murdering a Victorian grandmother has been aborted after a local television news bulletin broadcast inaccurate information, and details that had not been heard by the jury.

Karen Ashcroft, 52, was at a friend's house in the central Victorian town of Maryborough in May last year when she was fatally stabbed.

Forty-year-old Ben Wardlaw, from nearby Percydale, had been on trial in the Supreme Court, which has been sitting in Ballarat.

Eight witnesses had given evidence in the first three days of the trial.

But Justice John Champion today dismissed the jury after an application from defence lawyer Malcolm Thomas.

Mr Thomas told the Supreme Court a WIN News report, broadcast last night, included inaccurate information, and evidence that was inadmissible in court and had not been heard by the jury.

Justice Champion told the Supreme Court there was a high risk that members of the jury would have seen the report, which was aired on prime-time television at 6:00 pm, and could speculate based on the information.

'Why these words were said were remarkable,' Justice Champion said.

'The reportage was reckless.

'This is a regrettable decision but I am particularly concerned for the friends and relatives of Ms Ashcroft who will have to sit through all of this again.'

Mr Wardlaw was remanded in custody for a retrial and the matter will return to the Supreme Court next month for a mention.

The publication of prejudicial material can give rise to a charge of contempt of court.

Lawyers may seek costs from the television network.

Source 2 Relatives of Karen Ashcroft leaving the Supreme Court on 25 October 2019. Ben Wardlaw was ultimately found guilty of murdering Karen Ashcroft in October 2019, and was jailed for 22 years.

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

unanimous verdict
a jury vote or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty). In a criminal case, this means all 12 jurors are in agreement

majority verdict
a jury vote or decision where all but one of the members of the jury agree with the decision. In a criminal trial, this means 11 of the 12 jurors are in agreement

In a criminal case, the finding of guilt by a jury must be made **beyond reasonable doubt**. This means that if a member of the jury is not sure that the accused is guilty, they must state 'not guilty'. It is not possible for a juror to be absolutely certain, because they were not there when the crime was committed, but they must be as sure as rationally possible. In this instance, 'reasonable' is what the average person in the street would believe to be the case; that is, when the evidence is looked at in a logical and practical manner. Reasonable doubt does not include a doubt that is imaginary or fanciful, or an unrealistic possibility.

A criminal jury must first try to reach a **unanimous verdict**. That is, 12 out of 12 jurors must agree. If this is not possible, a judge may allow a majority decision for criminal offences other than murder, treason, trafficking or cultivating a large commercial quantity of drugs, and for Commonwealth offences. For a **majority verdict**, 11 out of 12 jurors must agree. If a majority verdict cannot be reached, there is a hung jury. This means that the accused has not been found either guilty or not guilty and can be tried again at a later date.

A jury does not have to give reasons for the verdict it reached. All deliberations that take place in the jury room are confidential and cannot be revealed to the parties, the judge or the public. Therefore, the parties have no way of knowing how the jurors decided, or whether they understood the facts and law that were relevant to making a decision. Interestingly, for judge-alone trials conducted in 2020 during the COVID-19 pandemic, judges were required to give reasons for their decision.

At no stage are members of a criminal jury – from the time they are selected to be on a jury until they are excused from jury service – allowed to make enquiries about matters related to the trial. This includes using the internet to search for information about the case.

The following scenario is an example of where a new trial was ordered as a result of the conduct of two jurors.

ACTUAL SCENARIO

Jurors attend crime scene

R v Skaf (2004) 60 NSWLR 86

In August 2000, Bilal Skaf orchestrated a series of horrific and brutal rapes that were committed against young girls in New South Wales. One of the attacks occurred on 12 August 2000, when Skaf and another man raped a 16-year-old school student in Gosling Park in Greenacre. Twelve other men were present at the time.

The actions of the jury appointed to hear this case highlights the responsibilities of jurors hearing criminal trials in Australia. The day before the jury was due to deliver their verdict, the jurors went home early. The foreperson called one of the other jurors and they decided to visit Gosling Park. The two jurors spent 15–20 minutes at the park, walking through the park and observing the lighting.

Source 3 Gosling Park was visited by two jurors who were conducting their own investigations. Their actions, although well-intentioned, wasted the court's time, money and resources.

The reason the jurors visited the park was that the foreperson felt he had a duty to the court to be right, and he wanted to clarify something for his own mind. The lighting in the park was relevant to the case because a key issue was whether the victim had properly identified Skaf as the man who first sexually assaulted her, and whether Skaf was present when a second man assaulted her.

As a result of the jurors visiting the park and conducting their own investigations, the offenders' convictions were quashed, and a new trial ordered.

In the re-trial, nine men who were involved in the attacks were sentenced to a total of 240 years in jail.

Strengths and weaknesses of the jury system

Some of the strengths and weaknesses of the jury system are set out in Source 4 below.

STRENGTHS OF THE JURY SYSTEM	WEAKNESSES OF THE JURY SYSTEM
Jurors are independent and impartial – and in particular, they are independent of the legal and political system – thus ensuring equality and fairness in their decision.	Jurors do not give reasons for their decision, and deliberations occur behind closed doors, so some may question whether the decision has been made based on the facts and the evidence.
The jury system allows the community to be involved in the legal system. This increases the confidence that the community has in the system, and ensures that the verdict reflects the values of the community.	The task is difficult, particularly where there is complicated evidence or a significant amount of evidence. It has been questioned whether ordinary members of the public can understand the evidence and come to the right decision.
The jury system ensures fairness by requiring the jury to deliberate based on the evidence and facts, and not on their own independent research or investigations.	Jurors may be unduly influenced by skilled lawyers or by the emotional elements of a trial.
The jury system spreads the responsibility of making a decision. Therefore, the decision is more likely to be fair and correct than if it was made by one person (a judge).	Jurors may have biases that may play a role in their deliberation, even if they aren't aware of those biases.
The jury system reflects community values and brings a common-sense approach to decision-making to the court.	A jury trial may result in delays because legal terms have to be explained to the jury and the judge must give directions to the jury.

Source 4 Strengths and weaknesses of the jury system

11.6 CHECK YOUR LEARNING

Define and explain

1 How and why are jurors selected at random?

2 Explain the role of a jury in a criminal trial.

Synthesise and apply

3 Read the scenario 'Ballarat murder trial aborted, jury dismissed after "reckless" television report on Karen Ashcroft case'.

- **a** What was reported by the television news bulletin? Why was this a concern?
- **b** Why was the jury dismissed? What effect did this have on the court and on the parties involved in the case?
- **c** What occurred can result in a further criminal case, but against a different accused. Explain why this is the case.

4 Read the scenario *R v Skaf*.

- **a** What happened in this case?
- **b** What did two of the jurors do? Why did they do this?
- **c** Do you think the jurors' actions were appropriate? Discuss with a classmate.

5 Read the following scenarios and state whether a jury is necessary for each. Justify your answers.

- **a** Paolo has appealed against his conviction and sentence to the Court of Appeal.
- **b** Drago has pleaded not guilty to drug trafficking.
- **c** Oendrila has pleaded not guilty to offensive behaviour (she peed in a public place).

Analyse and evaluate

6 'Jurors should be able to conduct their own research into a case.' Do you agree with this statement? In your answer, make reference to the principle of fairness.

7 Evaluate the ability of the jury system to achieve the principle of equality in criminal cases.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 11.6 Check your learning
- **Going further** Selection of a jury
- **Worksheet** Jury cases
- **Weblink** Jury service

11.7 THE PURPOSES OF SANCTIONS

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

If an accused pleads guilty or is found guilty, the judge or magistrate decides on a suitable penalty for the offender. Criminal penalties imposed by the courts are known as **sanctions**.

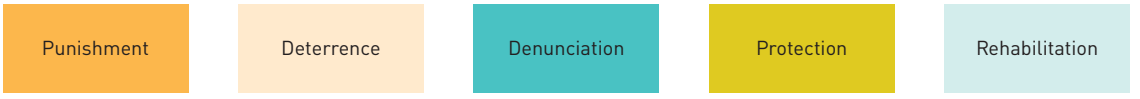
In Australia, an offender has the right to be given a sanction that is proportionate to the crime they committed. The victims or their families also have the right to see the offender punished for the harm they have done. However, it is possible that each person affected by the outcome will feel differently. An accused who has been found guilty but given a lenient sentence may feel that the outcome is just. The victim may disagree.

The law in Victoria that governs sentencing is the *Sentencing Act 1991* (Vic). This Act sets out the purposes for which sanctions (or sentences) may be imposed.

The purposes of sanctions are set out in Source 1 below.

Did you know?

Different countries have different approaches to sentencing. For example, in 2016 the Indonesian Parliament passed a new law that provided tougher punishments for child sex offenders, including the death penalty, chemical castrations and electronic tracking of released prisoners.



Source 1 The five purposes of sanctions

When sentencing an offender, a court can hand down a sentence that achieves one or more of the five purposes set out in the *Sentencing Act* (more often than not, at least two purposes are sought to be achieved by sentencing an offender). However, the court must not sentence an offender for any purpose other than the five purposes in the *Sentencing Act*.

A sentencing judge must take these purposes into consideration when imposing a sentence but must not impose a sentence that is more severe that necessary to achieve the purposes of the sentence imposed (this is called the principle of parsimony).

Punishment

punishment
one purpose of a sanction, designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

One of the purposes of a sanction is to **punish** (i.e. penalise) the offender. This allows victims and their families to feel a sense of retribution without taking the law into their own hands. If individuals did take the law into their own hands, crime would increase and there would be no social cohesion. Therefore, the courts take it upon themselves to ensure that an offender is punished by imposing a sanction that is just and fair in light of the relevant circumstances of the offending.

In our society, imprisonment and the deprivation of freedom are the ultimate punishment. Australia no longer uses capital punishment or corporal punishment as sanctions. These punishments are considered to be inhumane and unacceptable in the twenty-first century.

Deterrence

general deterrence
one purpose of a sanction, designed to discourage others in the community from committing similar offences

specific deterrence
one purpose of a sanction, designed to discourage the offender from committing similar offences

The law aims to deter or discourage the offender and others in society from committing the same or similar offences in the future by imposing a penalty that is severe enough that the offender and others can see the serious consequences of committing the crime. There are two types of deterrence: **general deterrence** and **specific deterrence**. A sanction imposed as a general deterrent is one that discourages people in general from committing the crime. On the other hand, a sanction imposed as a specific deterrent is aimed at stopping the particular offender who is being sentenced from repeating the offence.

The scenario on the following page is an example of a case where general deterrence was considered important in sentencing.

General deterrence given significant weight in imprisonment sentence

ACTUAL SCENARIO

DPP v Kendall [2020] VCC 74 (24 January 2020)

Blake Kendall pleaded guilty in the County Court to five charges, including one charge of intentionally destroying property, one charge of contravening a family violence intervention order, and one charge of child stealing. The Court also dealt with one summary offence of unlawful assault against his former domestic partner.

At the time of his offending, Kendall was 31 years old. He had been in a relationship with one of the victims, with whom he had a six-year-old son. The relationship ended in March 2019 and a family violence intervention order was issued against Kendall that sought to protect his former partner and his son. An intervention order was also in place on behalf of Kendall's mother.

In March and April 2019, Kendall undertook a series of acts that led to the charges. In March 2019, he attended his mother's home and damaged property. In April 2019, he again visited his mother's home, damaged property, and took his son from the home. His former partner chased Kendall and got her son back. Kendall forcefully pushed his former partner with one hand, and she fell to the ground. Kendall continued to cause destruction, including going into a neighbour's premises armed with a knife. He was arrested and interviewed by police.

In sentencing Kendall, Judge Trapnell noted that the Court of Appeal has made 'repeated statements that sentences imposed for family violence should be set at a level that will send a message to those – predominantly men – who might offend violently against domestic partners or former partners or family members'. That is, the Court of Appeal has emphasised the importance of general deterrence, denunciation and just punishment in cases involving family violence.

Judge Trapnell noted that in determining Kendall's sentence, he had given general deterrence significant weight. Also, while specifically deterring Kendall from future offending was a purpose for sentencing Kendall, this was not a primary purpose of the sentence handed down.

Kendall was sentenced to a total of 655 days' imprisonment. As he had already served 291 days, he was required to serve the remainder in prison and then would serve a community correction order for a period of three years with various conditions attached to the order (which included the requirement to perform unpaid community work, be supervised, and attend treatment for drug and alcohol abuse).

Source 2 Blake Kendall pleaded guilty to five charges in the County Court.

Denunciation

When deciding on an appropriate sanction for a crime, the court may impose a sentence that is harsh enough to show its disapproval. This is known as **denunciation** and it is designed to convey the message that this type of criminal behaviour will not be tolerated by the courts. The denunciation purpose of a sanction is often emphasised in cases involving offending that could be undertaken by many members of society (e.g. theft and tax fraud), as detailed in the scenario on the following page.

denunciation one purpose of a sanction, designed to demonstrate the community's disapproval of the offender's actions

ACTUAL SCENARIO

Security boss linked to Arnie cops fine

Marnie Banger, *AAP*, 8 October 2019

A former security company boss with links to Hollywood action man Arnold Schwarzenegger has been fined $10 000 for his part in a tax fraud scheme.

Harry Korras, 44, has avoided spending time behind bars after admitting to short-changing the Australian Taxation Office by $85 638.

The security company Korras co-founded, ACG Security, avoided paying money to the ATO between 2011 and 2014 by using two subcontractors who paid their employees untaxed cash 'off the books'.

Several security workers thought they were employed by ACG Security when they were in fact employed by the two subcontractors, who have been Korras' co-accused.

ACG Security was purchased by Spotless in 2014, with Korras now working as a motivational speaker, consultant and event manager for touring celebrities.

He was pictured beside Schwarzenegger when the star visited Melbourne for a health expo that bears his name last year. Korras worked at the event.

County Court of Victoria Judge Douglas Trapnell on Tuesday noted Korras had not instigated the tax evasion scheme. But he turned a blind eye to it, leading the judge to believe his moral culpability remained high.

'You were in a position to stop the offending conduct,' Judge Trapnell said.

Korras and his co-accused were charged in 2015 after a series of raids.

Source 3 Harry Korras is a former security company boss with links to Hollywood action star Arnold Schwarzenegger.

Judge Trapnell said it was crucial to deter others considering a similar crime.

'General deterrence and denunciation are prime considerations in sentencing you for this offence,' he said.

'Because the tax system is based on trust, it is open to abuse.

'Your crime is not victimless, because the burden of fraud perpetrated on the Commonwealth government falls on the entire Australian community.'

The judge also took into account Korras paying the money back to the ATO in full and the care he provides to his mother, who had long struggled with health issues.

He sentenced Korras to two-and-a-half years in prison. However, Korras will not spend any time in jail after being released on an order that he be of good behaviour.

Korras was ordered to pay $5000 to instigate the order and was fined another $10 000.

Protection

protection
one purpose of a sanction, designed to safeguard the community from an offender by preventing them from committing a further offence (e.g. by imprisoning the offender)

One of the purposes of a sanction is **protection**. This purpose seeks to ensure the safety of society by imposing a sanction that prevents the offender from harming again. An offender may be required to serve a term of imprisonment to remove them from society so that they cannot commit any more harmful acts, and to ensure the safety of all members of the community. While imprisonment is seen as a sanction of last resort, some offenders are given very long periods of imprisonment because the courts consider them to be a danger to society. A horrendous crime, a lack of remorse, and an offender's callous attitude indicate that the person should be kept out of society for as long as possible.

Rehabilitation

One of the purposes of a sanction is to **rehabilitate** (i.e. treat) the offender. It is in society's interests to help offenders change their ways, otherwise crime rates and prison costs will escalate. In providing offenders with opportunities in the form of education, training, assistance and support (e.g. counselling), the legal system hopes that offenders grasp the chance of a better future, change their offending ways, and become law-abiding citizens.

rehabilitation one purpose of a sanction, designed to reform an offender in order to prevent them from committing offences in the future

The following scenario illustrates how an offender's prospects of rehabilitation are considered by a court.

ACTUAL SCENARIO

Poor prospects of rehabilitation for 30-year-old drug offender

DPP v Lam [2020] VCC 160 (20 February 2020)

The offender, Anthony Lam, pleaded guilty in the County Court to two charges of trafficking in a commercial quantity of a drug of dependence, and one charge of trafficking a drug of dependence.

These charges arose after police executed a search warrant at a house in Avondale Heights in Melbourne that the offender was occupying at the time. During the search, police officers seized nearly 600 grams of pure heroin, over 350 grams of pure methylamphetamine, and 17 grams of cocaine. The drugs were found inside the house and in a black BMW parked in a garage. The police also seized various items associated with drug trafficking, including cash.

Lam pleaded guilty to the three charges at a relatively early stage of the process: before committal proceedings were conducted.

Although Lam was only 30 years old at the time of this case, he came before the County Court with a criminal history dating back 10 years. Lam's history included driving offences, fraudulently using a licence, various drug charges, and contravening community correction orders. Lam had also spent time in prison.

Lam's lawyer stated that he had a longstanding addiction to drugs and a history of behavioural problems. Lam had shown problematic behaviour from the age of five, had a high rate of school absenteeism, and at one stage attempted to strangle another child.

The County Court noted that in the three years since his last court appearance, there had been no real attempt by Lam to engage in any rehabilitation, and that he had been afforded the opportunity to rehabilitate in the past. The Court noted that if Lam abstained from drugs and tried to improve his mental health and employment prospects, then this may help set him on a path to rehabilitation.

The Court noted that the primary sentencing principle was general deterrence. A total sentence of seven years' imprisonment was imposed, with Lam to serve a minimum period of four-and-a-half years before becoming eligible for parole.

Source 4 In the case of *DPP v Lam*, a black BMW was found to have drugs inside.

11.7 CHECK YOUR LEARNING

Define and explain

1 In Victoria, what is the main statute that governs sentencing?
2 Identify and describe the five purposes of a sanction.
3 Distinguish between general deterrence and specific deterrence.

Synthesise and apply

4 Read the scenario *DPP v Kendall*.
   a Who were the parties in this case?
   b Describe the nature of Kendall's offending.
   c What were the main purposes of sentencing Kendall?
   d Do you agree with the sentence? Give reasons for your response.
5 Read the scenario 'Security boss linked to Arnie cops fine'. Conduct some research to find the County Court's judgment for this case, and then answer the following questions.
   a What was Korras charged with?
   b Did a jury hear this case? Why or why not?
   c Why did the County Court hear this case?
   d Explain the purposes that were most important in Korras' sentence.
   e Do you think the sanction imposed on Korras was appropriate? Give reasons for your answer.
6 Read the scenario *DPP v Lam*.
   a What were the circumstances that gave rise to the charges?
   b Do you think this is a minor, medium or serious example of drug trafficking? Give reasons for your answer.
   c Did a jury hear this case? Why or why not?
   d Given Lam's prior offending and chances of rehabilitation, do you agree with the sentence? Give reasons for your response.
7 Create your own scenario of a crime that has just been committed. You can be as inventive as you want to be, but you should address matters such as the nature and gravity of the offence, the accused's prior offending, the type of crime committed, and whether there is any need for rehabilitation. Exchange scenarios with a classmate. Identify the purposes of sanctions that you think are most appropriate in each case. Discuss your findings with each other.

Analyse and evaluate

8 Which one do you believe is more important: rehabilitation or punishment? Discuss this question as a class.

Check your Student obook assess for these additional resources and more:

Student book questions
11.7 Check your learning

Worksheet
Purposes of sanctions

Weblink
Australia's booming prison population

assess quiz
Test your knowledge on this topic with an auto-correcting multiple-choice quiz

11.8 TYPES OF SANCTIONS

When an offender pleads guilty or is found guilty, it is the role of the court to impose a sanction (penalty). Given most crimes committed in Victoria are minor offences, the Sentencing Advisory Council states that about 90 per cent of sentencing in Victoria occurs in the Magistrates' Court.

If a statute makes an act or omission a crime, it states the maximum penalty that may be imposed on a person for committing that crime. For example, section 38 of the *Crimes Act 1958* (Vic) states that the maximum penalty for rape is 25 years' imprisonment. Section 19 of the *Summary Offences Act 1966* (Vic) – which makes obscene exposure of a genital area in a public place a crime – states that the maximum penalty for that crime is two years' imprisonment.

Sanctions can be divided into two types: custodial sentences (where the offender is removed out of society and into an institution), and non-custodial sentences (where the offender serves the sentence in the community). The *Sentencing Act 1991* (Vic) sets out a hierarchy of possible sentencing options. The most serious sanction that can be imposed, and which is a sanction of last resort, is imprisonment.

	SANCTION	DESCRIPTION
MOST SEVERE ↑	**Imprisonment** with conviction	Record a conviction and order that the offender serve a term in prison
	Drug treatment order with conviction	Record a conviction and order that the offender undertake a judicially supervised drug or alcohol treatment program; this is only available from the Drug Court if a person pleads guilty and the Drug Court is satisfied that the offender is dependent on drugs or alcohol
	Youth justice centre order with conviction	In cases involving an offender aged 15 years or older, record a conviction and order that the young offender be detained in a youth justice centre
	Youth residential centre order with conviction	In cases involving an offender aged under 15 years, record a conviction and order that the young offender be detained in a youth residential centre
	Community correction order with or without conviction	With or without recording a conviction, make a community correction order in respect of the offender. The order has certain conditions attached to it
	Fine with or without conviction	With or without recording a conviction, order the offender to pay a fine, which is a sum of money payable to the court
	Adjournment with or without conviction	Record a conviction and order the release of the offender with conditions attached. Or, without recording a conviction, order the release of the offender on the adjournment of the hearing with conditions attached
	Discharge with conviction	Record a conviction and order the offender to be discharged
↓ LEAST SEVERE	**Dismissal** without conviction	Without recording a conviction, order the charge(s) to be dismissed

Source 1 An overview of the sentencing hierarchy in Victoria

In this topic, you will explore three possible sanctions: fines, community correction orders and imprisonment.

Fines

fine
a sanction that requires the offender to pay an amount of money to the state

A **fine** is a monetary penalty that is paid by the offender to the state of Victoria (not the victim). Fines are expressed in penalty units, ranging from one penalty unit to 3000 penalty units. Fines are expressed in this way to make it easier to change the dollar amount of fines across all offences every year. Up until 30 June 2021, the value of one penalty unit was $165.22. It increases every year.

When can a fine be imposed?

A fine can be imposed in addition to another sentence. When deciding whether to impose a fine, and what fine to impose, a court considers:

- the financial circumstances of the offender
- any loss or destruction of, or damage to, property suffered as a result of the offence
- the value of benefit received by the offender from the offence
- any forfeiture, compensation or restitution order imposed (being orders that may have already resulted in the offender paying compensation or handing over property).

Conditions of fines

The court can order that the fine be paid by instalments. If the person defaults in making payments, the court can issue a warrant to arrest the person. The court may instead order the offender to do community work, or may allow further time to pay, depending on the offender's circumstances.

In the following scenario, a man was fined for committing a religious vilification offence.

ACTUAL SCENARIO

Fine upheld for charge of serious religious vilification

Cottrell v Ross [2019] VCC 2142 (19 December 2019)

In 2017, Blair Cottrell was convicted in the Melbourne Magistrates' Court of the offence of knowingly engaging in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, Muslims on the ground of their religious belief or activity. The conduct Cottrell engaged in was participating in an 'Islamic style' mock-beheading involving a mannequin while being videoed. The video was published on a Facebook page.

Cottrell was convicted and fined $2000. He appealed against his conviction to the County Court. Cottrell's appeal was dismissed. Chief Judge Peter Kidd found that the only inference available was that the mock-beheading scene was intended to whip up extreme negative feelings in the audience about Muslims. Also, Chief Judge Kidd did not believe Cottrell's claim that the video was intended to be humorous. The County Court upheld the fine and the conviction.

Source 2 Chief Judge Peter Kidd presided over Blair Cottrell's unsuccessful appeal in the County Court.

Purposes of fines

The general purposes of fines are to punish the offender, deter the offender from committing crimes any further, and deter the general community. If a high enough fine is given, the court may also denounce the crime. A fine is not likely to help in the rehabilitation of the offender, nor does it protect the community, unless it is imposed in addition to another sentence such as imprisonment.

Community correction order

community correction order (CCO)
a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

A **community correction order (CCO)** is a sanction that allows an offender to remain in the community while serving the sanction. The sanction requires them to comply with certain basic conditions that are

attached to the order. In addition, the offender is required to comply with at least one other 'optional' condition, such as performing unpaid community work.

Given the range of conditions that can be imposed, a CCO is seen as a flexible sentencing option that can be given as a sanction for a wide range of crimes. A CCO can be combined with either a fine or imprisonment of one year or less.

When can a community correction order be imposed?

A CCO can be imposed if:

- the offence is punishable by more than five penalty units, and
- the offender consents to the making of a CCO.

A CCO cannot be imposed on an offender who has committed a 'category 1' offence (which includes murder and rape). It also cannot be imposed on an offender who has committed a 'category 2' offence (which includes manslaughter and kidnapping) unless special circumstances exist (e.g. where the offender has impaired mental functioning).

A CCO must not exceed five years if it is made in the Magistrates' Court in respect of three or more offences (or two years in respect of one offence), or five years if made in the County or Supreme Court.

In 2018, a new 'mandatory treatment and monitoring order', a type of CCO, was introduced. This is a CCO that contains a judicial monitoring condition (where the offender is monitored), and either a treatment and rehabilitation condition, or a justice plan condition (see Source 3 below).

Conditions of community correction orders

There are two types of conditions imposed on an offender when given a CCO:

- **mandatory conditions** – conditions that apply to every offender
- **optional conditions** – conditions that are specific to an offender.

At least one optional condition must be attached to a CCO. Source 3 below sets out the mandatory conditions and the optional conditions.

CCO MANDATORY CONDITIONS	CCO OPTIONAL CONDITIONS
• Must not commit an offence punishable by imprisonment during the period of the order • Must report to and receive visits from the community corrections officer • Must report to the community corrections centre within two clear working days after the order comes into force	• Unpaid community work condition: must perform unpaid community work (which must not exceed 600 hours in total) • Treatment and rehabilitation condition: must undergo treatment and rehabilitation • Supervision condition: must be supervised, monitored and managed • Non-association condition: must not contact or associate with a particular person • Residence restriction or exclusion condition: must live at a particular place • Place or area exclusion condition: must not enter or remain in a specified place or area • Curfew condition: must remain at a particular place between specified hours of each day
• Must notify any change of address or employment • Must not leave Victoria except with permission • Must comply with any direction given	• Alcohol exclusion condition: must not enter or consume alcohol on licensed premises • Bond condition: must pay an amount of money as a bond that is forfeited if there is a failure to comply with the order • Judicial monitoring condition: must be monitored by the court • Electronic monitoring: a monitoring device must be attached to the offender • Justice plan condition: must participate in services specified in a plan prepared for the offender

Source 3 The types of conditions that must be and can be imposed on an offender as part of a CCO

The following scenario is an example of the court imposing conditions when sentencing.

Purposes of community correction orders

A CCO is a punishment because it can often impose certain conditions on an offender that are an imposition or an annoyance – for example, the condition to undertake unpaid community work, or have a curfew imposed. A CCO can also serve as a general deterrent as well as a specific deterrent.

Depending on the conditions that are imposed, a CCO can help to rehabilitate an offender. This is particularly so if the treatment and rehabilitation condition or alcohol exclusion condition is imposed, both of which aim to address the reasons for offending. A CCO can also protect society if the offender is kept busy, is prevented from entering certain areas, or must reside at certain places as part of the conditions.

ACTUAL SCENARIO

Treatment and rehabilitation programs part of CCO

DPP v Larkins [2020] VCC 15 (29 January 2020)

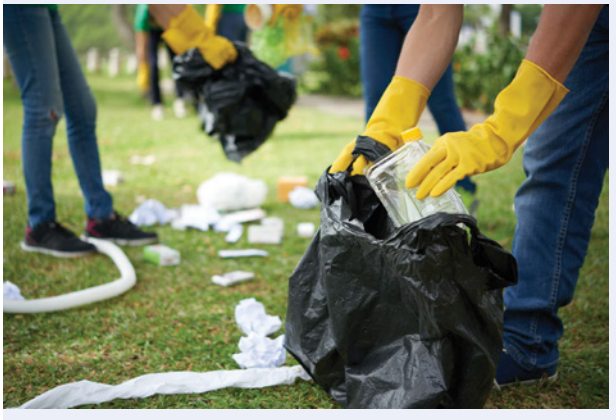
In this case heard by the County Court, Scott Larkins was convicted of one charge of home invasion. He was found not guilty of one charge of assault. Larkins also pleaded guilty to one charge of theft.

The charges came about after Larkins, along with his friend Luke Fitzgerald, went to Joshua O'Connell's house with the intention of assaulting O'Connell because Fitzgerald thought O'Connell had become involved with his former girlfriend. Fitzgerald was enraged by this.

O'Connell was not home but his female housemate was home. The housemate woke at 2 am to the sound of Larkins and Fitzgerald in the house. She stayed in her room for a short amount of time and then decided to confront the men. When she encountered the two men in the spare room, one of the men told her to go back to bed. Also, one of men came close to her and she was intimidated. She eventually went back to her room. While in the house, Larkins and Fitzgerald took items including a laptop and bass guitar. They left the house on foot.

After he left the house, Larkins realised he would have left a lot of fingerprints at the house, so he thought he should return to the house and try and get rid of the prints. When Larkins visited the house a second time, a police officer was there. Larkins was apprehended by the police officer.

Judge Lewitan described the facts in this case as 'very serious'. However, Judge Lewitan did note that Larkins expressed remorse for his conduct and had made some admissions. Larkins had prior convictions and had been drinking heavily since he was 18 years old (he was 24 at the time of his offending). Judge Lewitan noted that since the offending, Larkins had taken steps to overcome his addiction to alcohol. He had also undertaken courses at Swinburne University while in remand and had a good chance of being employed again.



Source 4 As a part of his CCO, Larkins must complete 150 hours of unpaid work.

The County Court sentenced Larkins to 18 months' imprisonment. Following his release, Larkins would be on a CCO for 18 months. As part of the CCO, Larkins must perform 150 hours of unpaid work, undergo assessment and treatment for alcohol or drug addiction, submit to testing for alcohol or drug use, and undergo programs for treatment and rehabilitation. He was also ordered to not contact or associate with Fitzgerald, and not to consume alcohol.

Imprisonment

Imprisonment is the most serious sanction that can be imposed, and involves the removal of the offender from society and into a secured facility known as a jail or prison.

imprisonment
a sanction that involves removing the offender from society for a stated period of time and placing them in prison

When can imprisonment be imposed?

Each offence has a maximum penalty that can be imposed for that offence. This is set out in the relevant statute. For example, the maximum penalty for murder is Level 1, being life in prison. Maximum penalties are reserved for the worst examples of an offence. Therefore, it is rare for an offender to be given the maximum penalty.

For 'category 1' offences, imprisonment is the only option as a sanction. 'Category 1' offences include murder, rape and incest.

Conditions of imprisonment

Parole

Parole is an early release from prison. In certain situations (e.g. where an offender has been imprisoned for a term of two years or more), the court must fix a non-parole period. This period is the time an offender must serve in prison before applying for parole.

parole
the supervised and conditional release of a prisoner after the minimum period of imprisonment has been served

Being granted parole is not automatic. The offender must prove to the Parole Board that they are worthy of serving the rest of their sentence in the community.

LEVEL	MAXIMUM TERM OF IMPRISONMENT
1	Life
2	25 years
3	20 years
4	15 years
5	10 years
6	5 years
7	2 years
8	1 year
9	6 months

Source 5 Sentencing levels and the maximum term of imprisonment for each level, as set out in the *Sentencing Act*

Concurrent and cumulative sentences

If the offender is guilty of more than one offence, more than one sentence may be imposed, and therefore more than one term of imprisonment may be imposed. If that is the case, the court needs to specify whether the terms of imprisonment are to be served concurrently or cumulatively.

Most sentences are concurrent sentences (served at the same time). This means that if an offender is given, for example, three years for burglary, and one year for stealing, they would serve three years because the sentences are served at the same time. If the sentences are served cumulatively, in the above example the offender would serve four years in prison.

Purposes of imprisonment

Imprisonment, as it removes the offender from the community, serves to both protect the community and punish the offender (by denying them of liberty). Imprisonment also generally serves to act as a deterrent (both generally and specifically for the offender), and shows the court's disapproval of the acts committed.

Imprisonment may lead to rehabilitation, but this largely depends on the circumstances of the offender, the nature and length of the time served in prison, and the support network of the prisoner. The high rate of **recidivism** (return of prisoners) also suggests that imprisonment is not an effective means of rehabilitating people, as they continue to commit crimes. For example, in Victoria, it is estimated that approximately 44 per cent of prisoners return to custody within two years of their release.

Did you know?

Section 74AA of the *Corrections Act 1986* (Vic) was made for one person: Julian Knight (the mass murderer responsible for the 1987 Hoddle Street massacre). This section states that Knight is only to be given parole if he is in imminent danger of dying or is seriously incapacitated and cannot do any harm to any person and does not pose a risk to the community.

recidivism
reoffending; returning to crime after already having been convicted and sentenced

The ability of sanctions to achieve their purposes

Even though sanctions are intended to achieve certain purposes, in some cases they may not always be effective in doing so. Source 6 below provides some factors to consider when determining whether fines, CCOs and imprisonment are able to achieve their purpose.

SANCTION	FACTORS
Fines	• If high enough and given to the appropriate person, can act as a general and specific deterrent • Can act as punishment if it is a burden on the offender • Can demonstrate the court's disapproval if high enough • Many fines don't get reported, so may not act as a general deterrent • Unlikely to rehabilitate or protect unless imposed with another sentence • If the offender has capacity to pay, may not be a specific deterrent
CCOs	• Can enable the offender to rehabilitate and be punished away from influences of prison • Can act as a burden on the offender, thus specifically deterring them • Provides flexible rehabilitation conditions • Can address underlying issues of offending such as alcohol or association with certain persons • May not punish the offender if inappropriate conditions imposed • Rehabilitation depends on the willingness of the offender • Unlikely to punish as much as imprisonment • Not able to be given for many offences
Imprisonment	• Serves as an effective method of protection • Most serious punishment, with deprivation of liberty • Widely reported and can act as an appropriate general deterrent • Rehabilitation depends on the offender, the programs and the environment • High recidivism rates may suggest imprisonment is ineffective

Source 6 Some of the factors to consider when determining whether fines, CCOs and imprisonment will achieve their purposes

Source 7 The Dame Phyllis Frost Centre is in the suburb of Ravenhall in Melbourne's outer west. It is a women's maximum-security prison with capacity for 604 female prisoners.

11.8 CHECK YOUR LEARNING

Define and explain

1 Why are fines described in penalty units?
2 What is a CCO?
3 Why do you think that imprisonment is considered to be a sanction of last resort?
4 Distinguish between a cumulative sentence and a concurrent sentence.

Synthesise and apply

5 Read the scenario *Cottrell v Ross*.
   - **a** Who was the offender in this case? What was the offender charged with?
   - **b** Did a jury hear this case? Why or why not?
   - **c** What sanction was imposed?
   - **d** Describe the extent to which this sanction acts as a deterrent for:
     - the offender
     - individuals in society
     - companies.

6 Read the scenario *DPP v Larkins*.
   - **a** Explain why a jury trial was necessary even though the accused pleaded guilty to one charge of theft.
   - **b** Describe the factors that contributed to the County Court thinking Larkins had good prospects of rehabilitation.
   - **c** Do you agree that a CCO is an appropriate sanction in this case? Give reasons for your response.

7 For each of the following statements, state whether you agree or disagree. Your teacher may use this activity as the basis for a class discussion or debate.
   - **a** Prisoners should be able to access government funding to complete university degrees.
   - **b** All prisoners should have the right to vote.
   - **c** There should not be any consideration of the offender's financial circumstances when imposing a fine.
   - **d** There should be a public register of people who are on a CCO.
   - **e** Prisoners should be electronically monitored at all times following their release.

Analyse and evaluate

8 Conduct some research into current recidivism rates in Victoria. In your view, is imprisonment an effective sanction? Give reasons for your response, using the statistics you find.
9 Discuss the extent to which a CCO can rehabilitate an offender.
10 Access the Victorian register of legislation online. A link is provided in your obook assess. Find the *Corrections Act*. Find section 74AB of the Act. Summarise the purpose of section 74AB. As a class, discuss the extent to which the Victorian Parliament ought to be entitled to introduce sections such as these.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 11.8 Check your learning
- **Going further** Other types of sanctions
- **Weblink** Victorian register of legislation

11.9 FACTORS CONSIDERED BY JUDGES IN SENTENCING

When sentencing an offender, the court must ensure the sentence that is given is appropriate to the crime committed.

Section 5(2) of the *Sentencing Act 1991* (Vic) sets out the factors a court must take into consideration when sentencing an offender. They include current sentencing practices, the maximum penalty for the offence, the personal circumstances of any victim, and the presence of any **aggravating factors** or **mitigating factors**.

aggravating factors facts or circumstances about an offender or an offence that can lead to a more severe sentence

mitigating factors facts or circumstances about the offender or the offence that can lead to a less severe sentence

Some of these factors may help to **reduce** the sentence, whereas other factors may help to **increase** the sentence that may be imposed.

Factors that may reduce the sentence

Some of the factors listed in Source 1 below may help to reduce the sentence imposed. These are likely to be factors that the offender, when submitting to the court what the appropriate sentence should be, emphasises as being important considerations.

FACTOR	DESCRIPTION
Nature and gravity of offence	If the offending is on the low end of the scale, then this may persuade the court that a sentence much less than the maximum penalty should be imposed.
Early guilty plea	If an offender has pleaded guilty, a court may impose a lesser sentence. Also, the earlier in the process the guilty plea is submitted, the better. An early guilty plea can reduce an offender's sentence as it saves time and resources by not having to have a trial. It also spares the witnesses and victims the trauma and inconvenience of a trial.
Mitigating factors	Mitigating factors are factors that reduce the seriousness of an offence or the offender's culpability. Examples of mitigating factors include where the offender was acting under duress, the offender's good prospects of rehabilitation, any personal strain the offender was under, the lack of injury or harm caused by the offence, or full admissions made by the offender. An early guilty plea and remorse are also mitigating factors.
Lack of prior offending	If the offender has not offended before, this is likely to work in their favour as their offending may be considered to be a one-off incident. This can also show an offender's lack of criminality.
Remorse	If the offender shows significant remorse, then the court may take this into account. Remorse can be demonstrated through an early guilty plea, apologies to victims, early confessions or admissions, or full cooperation with investigative agencies (e.g. the police).

Source 1 Some of the factors that may help in reducing a sentence

Study tip

You don't need to know the section numbers of statutes to answer questions. However, accessing relevant sections (e.g. section 5 of the *Sentencing Act*) will help you understand many legal concepts. Use AustLII or the Victorian register of legislation to find current statutes.

The scenario on the following page illustrates how a court can take certain factors into consideration when sentencing an offender.

Armed robber with dreadful childhood 'doesn't know how to live in society': Judge

ACTUAL SCENARIO

Adam Cooper, *The Age*, 6 April 2017

He has six children to six partners. He first used cocaine at 11 and pulled his first armed robbery a year later.

The man is now 20.

He was sexually, physically and emotionally abused at age six by men in his aunt's life and was treated in a psychiatric unit for children when he showed signs of aggressive behaviour. He went into foster care several years later.

Then came the drugs. At age nine it was alcohol and cannabis, by 11 it was cocaine and ecstasy, a year later he was trafficking and by 13 or 14 he was addicted to ice.

By this stage he was a regular in the Children's Court, where he had convictions for armed robbery.

It was this 'dreadful childhood' that on Thursday prompted a County Court judge to mitigate the jail term she imposed for two armed robberies that the man, whom Fairfax Media has chosen not to name in order to report details of his childhood, committed across three days in Springvale in July last year.

On the night of 2 July, the Court heard, the man wore a hoodie and cloth over his face and threatened two bottle shop staff with a knife and robbed them of cash and alcohol.

Two nights later, he disguised himself and used a knife to rob a service station attendant – in her first week on the job – of cash and tobacco.

Despite his offending, the judge said she took the impact of the man's childhood into account in setting a jail term of three years and four months after he pleaded guilty to two charges of armed robbery.

She said he was let down by just about every adult who featured in his childhood, and that it was 'a very sad situation' to come across a young illiterate man who had children he didn't know, a drug habit he couldn't beat and 'who doesn't know how to live in society'.

...

Source 2 Judges consider a range of factors when sentencing offenders.

Factors that may increase the sentence

Various factors may act to increase the sentence imposed. Some of these are set out in Source 3 (continued on the next page).

FACTOR	DESCRIPTION
Nature and gravity of the offence	If the offending is on the high end of the scale, the court may view a higher sentence as more appropriate. For example, the use of weapons, or the intentional conduct of the offender, are likely to increase a sentence.
Aggravating factors	Aggravating factors increase the seriousness of the offence and the offender's culpability. Such factors include the use of violence or explosives, the offence taking place in front of children, the offender being motivated by hatred or prejudice, or the offender being in a position of trust and breaching that trust (e.g. a parent committing a crime against a child).
Previous offending	If the offender has engaged in previous criminal behaviour, then this may result in the sentence being increased.

FACTOR	DESCRIPTION
Impact of the offence on any victim	If the victim has significantly suffered as a result of the offence, then this can persuade the court to increase the sentence. The victim can demonstrate their loss or suffering by filing a victim impact statement, which is read in court during sentencing.
Injury, loss or damage as a result of the offence	If there was significant injury, loss or damage to property or to a person, then this is likely to increase the sentence. For example, if someone died, or there was widespread property damage, this is taken into account.

Source 3 Some of the factors that may increase a sentence

11.9 CHECK YOUR LEARNING

Define and explain

1 Using examples, identify one factor that may reduce the severity of a sentence and one factor that may increase the severity of a sentence.

2 Using examples, distinguish between mitigating factors and aggravating factors.

Synthesise and apply

3 For each of the following scenarios, identify two factors that may be taken into account in sentencing. For each factor, state whether it is likely to increase or decrease the sanction imposed.

- **a** Barty is a first-time offender and has committed a violent assault against his former wife. She is now in a coma in hospital.
- **b** Giovanna has pleaded guilty at the time of arrest to drug trafficking. She has been found to have been a significant trafficker in the Melbourne area.
- **c** Cassius laughed when he was arrested and pleaded not guilty to the charges. He has had a terrible childhood and suffered physical and mental abuse from his parents.

4 Read the scenario 'Armed robber with dreadful childhood "doesn't know how to live in society": Judge'.

- **a** Identify the parties in this case.
- **b** Which court had a role in sentencing, and why?
- **c** Identify and describe three factors that are likely to have been taken into account in sentencing this man. Would these three factors have reduced or increased his sentence?
- **d** Do you agree that these factors should be taken into account in sentencing? Give reasons for your response.

5 Access the 'Virtual you be the judge' page on the Sentencing Advisory Council's website. A link is provided in your obook assess. Choose one of the scripts. Watch the video and undertake the activity. Once you have finished, discuss what you learnt during the activity.

Analyse and evaluate

6 Do you think that an early guilty plea should reduce a sentence? Write down the possible different views on this question. In particular, consider the views of the accused, the victim, society, and the courts. What is the most objective view in light of the principles of justice?

Check your Student obook assess for these additional resources and more:

- **Student book questions** 11.9 Check your learning
- **Weblink** Virtual 'you be the judge' page on the Sentencing Advisory Council's website
- **Weblink** *Sentencing Act 1991* (Vic)
- **Weblink** A quick guide to sentencing (Sentencing Advisory Council)

11.10 SENTENCING PRACTICES

How does Victoria approach sentencing? Is it tough on crime, or does it take alternative approaches to sentencing that do not always involve punishing the offender?

This topic explores aspects of sentencing practices in Victoria and then explores sentencing practices in Norway.

Sentencing practices in Victoria

Drug Court
a specialist court that sentences offenders to a drug treatment order where drugs or alcohol contributed to the commission of the offence

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Indigenous people

Sentencing in Victoria in the past 10 years or so has seen a reduction in the number of sentences available to a court, with the Victorian Parliament passing legislation to this effect. The Victorian Parliament has also passed laws that limit the ability of the court to impose sanctions such as a CCO instead of imprisonment, leaving imprisonment the only option for some offences. The aim of these changes is to be 'tougher' on offenders who commit serious offences such as murder and sexual offences involving children.

At the same time, however, our legal system has also sought to adopt a therapeutic approach to sentencing for some crimes by utilising courts such as the **Drug Court** and the **Koori Court**, and specialist divisions and lists in the Magistrates' Court.

Sentencing options in Victoria

Since 2012, there have been substantial changes to the sentences that can be imposed on offenders. The possible sentences that were available as at 1 January 2012 were those contained in Source 1 below.

SANCTION	DESCRIPTION
Dismissals, discharges and adjournments	The release or discharge of the accused person
Fines	The payment of an amount of money to the court
Community-based orders	Similar to a CCO; a sentence served in the community with certain conditions attached (though fewer conditions may be imposed)
Youth justice centre orders and youth residential centre orders	The detention of a young offender in a youth justice centre or a youth residential centre
Suspended sentences	An order that the term of imprisonment is suspended wholly or in part (that is, served in the community and not in prison)
Home detention orders	An order that imposes a sentence of imprisonment that is served at the person's residence
Intensive correction orders	A term of imprisonment served by way of intensive correction in the community with strict conditions imposed, including attending a centre for 12 hours a week to complete rehabilitation or community work
Drug treatment orders	An order given in the Drug Court to drug offenders to undertake a rehabilitation program
Combined custody and treatment orders	An order that the offender serve a term of imprisonment partly in custody and partly in the community, where alcohol or drug addiction contributed to the offence
Hospital security orders	The detention of a person in an approved mental health facility
Imprisonment	The removal of the offender from society and into prison

Source 1 Sentencing options in the *Sentencing Act 1991* (Vic), as at 1 January 2012

However, since that time, several amendments have been made to the *Sentencing Act*. For example:

- in 2011, suspended sentences were abolished as an option to the Supreme Court and the County Court for serious or significant offences committed on or after 1 May 2011
- in 2012, home detention was abolished, and the new CCO was created, which also abolished the community-based order, intensive correction order, and combined custody and treatment order. That is, the CCO was flexible enough to deal with certain types of offences and offenders by imposing various conditions
- in 2013, the Victorian Government introduced non-parole periods of at least four years for a number of 'gross violence' offences, which meant that for those offences, a court was required to impose a term of imprisonment for that minimum period unless there were 'special reasons' (such as the offender had an acquired brain injury or mental illness)
- in 2014, suspended sentences were completely abolished in Victoria for all offences
- in 2016, the Victorian Parliament passed legislation that limited the ability of courts to hand down a sentence other than imprisonment for 'category 1' offences. It also restricted the ability of the courts to hand down a sanction other than imprisonment for 'category 2' offences, except in certain circumstances. In 2018, the number of category 1 and 2 offences increased – which means that there are more offences for which the sentence that can be imposed is limited
- in 2018, 'standard sentences' came into effect, which provide legislative guidance to courts for certain serious offences. One of the purposes of standard sentences was to increase sentences for a number of specified offences (including murder, rape, certain sexual offences involving children, and culpable driving causing death) on the basis that the median sentence imposed for some crimes was seen as 'too light'.

The above illustrates a trend of the Victorian Parliament wanting to be 'tough on crime' by substantially controlling what sentences can be imposed by the courts for certain offences. For some offences, imprisonment is the only option. Suspended sentences and home detention orders are now not available.

Many have questioned the effectiveness of prison as a rehabilitative tool, given Victoria's recidivism rate, which suggests that imprisonment does not deter people from committing crimes again.

Therapeutic justice

therapeutic justice
a method used in the criminal justice system to deal with offenders in a way that addresses the underlying causes of crime and seeks to provide offenders with support to avoid further reoffending

Therapeutic justice is a term given to a process used in the criminal justice system where underlying health and personal issues are addressed to prevent offenders from reoffending. It is recognition that a pure punishment approach – imprisoning offenders or sentencing them without considering the causes of crime – is not effective in changing behaviour and keeping communities safe. Rather, therapeutic justice aims to look at the causes of crime and deal with those causes. It reflects the idea that the traditional approach of sentencing and taking a 'tough stance on crime' may not be appropriate for everybody, and that imprisonment is not an effective way of preventing reoffending.

In the past 20 years in Victoria, several therapeutic justice approaches have been adopted. These include:

- in 2002, the Drug Court was established at Dandenong Magistrates' Court. The Drug Court aims to deal with offenders who have committed crimes as a result of a drug or alcohol addiction, and aims to place offenders on a treatment plan to deal with the underlying causes. You will explore the Drug Court in the next topic
- in 2002, the first Koori Court was opened in the Magistrates' Court in Broadmeadows. The Koori Court is a sentencing court for Indigenous people, and aims to include the Indigenous community in the sentencing process, which uses an informal atmosphere. You will explore the Koori Court in the next topic

- in 2007, the Neighbourhood Justice Centre (NJC) was established in 2007. The NJC attempts to determine criminal matters by addressing the underlying causes of harmful behaviour and tackling social disadvantage
- in 2010, the Assessment and Referral Court List (ARC) was established as a specialist court list in the Magistrates' Court. It aims to meet the needs of an accused person who has a mental illness and/or cognitive impairment.

Source 2 The Neighbourhood Justice Centre uses a therapeutic justice approach to deal with offenders.

Therapeutic justice approaches are not without critics. Many people believe such approaches are taking a 'soft on crime' approach and result in an increase in criminal activity, not a decrease. In response to some of these critics, in 2017 the Law Institute of Victoria (LIV) issued the following statement (LIV is the legal body that represents lawyers in Victoria and provides professional development relating to their practice).

EXTRACT

Therapeutic justice the solution, not the cause of criminal activity

Law Institute of Victoria media release, 1 February 2017

The LIV is concerned about recent media commentary that suggests a therapeutic approach by magistrates and the judiciary is to blame for the spate of criminal activity in Victoria over the past year.

Therapeutic justice is an evidence-based approach to law and sentencing that recognises that a purely punitive approach is not effective in changing behaviour and keeping communities safe, LIV president Belinda Wilson said. 'Punishment alone does not prevent crime. Addressing the causes of crime prevents crime.'

Contrary to some reports, therapeutic justice does not let offenders off lightly, Ms Wilson said. 'It is not soft justice. In fact, it holds offenders accountable for their actions, requiring them to face up to their actions, take steps to repair the harm they have inflicted, and make changes in their lives.'

Therapeutic justice does, however, recognise that crime has a social dimension and takes into account the context and issues that have led to offenders' harmful behaviour.

Last year's report by the Victorian Ombudsman on the rehabilitation of prisoners showed that a large proportion of offenders come from the most disadvantaged backgrounds – with high rates of poverty, unemployment, family violence, substance abuse and mental health issues.

Therapeutic justice aims to halt the social and intergenerational aspect of crime by addressing its causes and providing offenders with the tools and support to avoid further reoffending.

Ms Wilson pointed to the reduced recidivism rates among those involved in therapeutic justice programs in Victoria's 'problem-solving courts' such as the Drug Court and the Assessment and Referral Court (ARC), which deals with offenders diagnosed with mental illness, and participants in Youth Justice Group Conferences, where offenders engage with their victims, family members and other court and support staff to make reparations for their crime.

'These programs have been shown to be highly effective and economical,' she said.

The current spate of crime does not mean therapeutic justice does not work, she said. 'Therapeutic justice is an ongoing process. More work needs to be done to find ways to address the underlying causes of the crime and to help steer these offenders away from becoming hardened lifelong criminals,' she said.

Cultural issues, intergenerational trauma, and the impact of the drug ice created new challenges that needed to be dealt with by skilled experts, not responded to with a retributive approach that would not solve the crime problem in the long term, she said.

Source 3 Norway's *Storting* (parliament)

Source 4 The 2011 Norway attacks included an attack on a youth camp on Utoya Island. This resulted in the right-wing extremist, Anders Breivik, receiving a preventive detention.

Sentencing practices in Norway

Norway has a population of just over five million. Similar to Australia, Norway has a parliament and is a constitutional monarchy. This means it has its own constitution, but its head of state is the King (currently King Harald V). Norway is a highly advanced democratic nation, ranking number one in the 2016 Economic Intelligence Unit Democracy Index (an index intended to measure the state of democracy across 167 countries). Norwegians value the right to vote, and their people are engaged in politics.

Norway also has a low crime rate. The United Nations Global Study on Homicide found in 2018 that the rate of homicide in Norway was 0.5 per 100 000 population, with 25 homicides occurring that year. Australia's homicide rate was 0.9 per 100 000 population in the same year (with 222 homicides), and the United States of America's homicide rate was 5.0 per 100 000 population in the same year (with 16 214 homicides). Many of the criminal offences reported in Norway are theft-related offences. Drug and alcohol offences, public order violations, traffic offences and violence offences are also significantly reported.

Norway has one of the lowest recidivism rates in the world – 20 per cent. In comparison, on average, over 75 per cent of prisoners in America reoffend within five years of being released.

Sentencing options in Norway

The sentencing options in Norway are in some ways similar to those of Victoria. Some of the forms of punishment are listed in Source 5 below.

SANCTION	DESCRIPTION
Preventative detention	This is reserved for dangerous and sane offenders. Once the minimum period of detention (21 years) has been served, an assessment is made about the offender, and the detention can be increased by up to five years. This is repeated, such that a life sentence may result. There are generally fewer than 100 offenders in Norway at any one time that are serving a preventive detention.
Imprisonment	The maximum term of imprisonment that can be imposed in Norway is 21 years (though a 30-year maximum sentence can be imposed for certain crimes such as war crimes, genocide and crimes against humanity). Some of the term of imprisonment can be served at home, depending on the circumstances, and some of the sentence can also be suspended.
Community sentence	This can be imposed instead of a term of imprisonment and generally requires the person to undertake community service.
Fines	Similar to Victoria, consideration is given to the offender's financial position as to whether a fine is appropriate.
Loss of rights	Where an offender is unfit for a particular position or activity, they may be deprived of that position or prevented from undertaking that activity in the future.

Source 5 Sentencing options in Norway

Norway focuses far more on rehabilitation and restorative justice (that is, trying to heal and put things right), and less on punishment. It believes that prisons do not work. Fines, suspended sentences and community service are often used as sanctions, with imprisonment reserved for the most serious offences.

The death penalty is prohibited in Norway.

Victim–offender mediation is also used as part of sentencing in Norway. It can be used as an alternative sentence for some offences. Both the victim and offender must voluntarily participate, but the mediation service is part of the therapeutic justice (or restorative justice) approach that aims to involve the offender in putting things right.

Imprisonment in Norway

The International Centre for Prison Studies reported the prison population totals listed in Source 6 below, as well as the prison population rates for Australia, Norway, the United States and India (as a point of comparison).

COUNTRY	AS AT	PRISON POPULATION: TOTAL (INCLUDING REMAND PRISONERS)	PRISON POPULATION: RATE (PER 100 000 OF NATIONAL POPULATION)
Australia	30 June 2019	43 032	170
Norway	1 January 2019	3190	60
United States	31 December 2016	2 121 600	655
India	31 December 2018	466 084	34

Source: International Centre for Prison Studies, World Prison Brief

Source 6 Prison population totals and rates for Australia, Norway, the United States and India

Generally, the maximum term of imprisonment that can be imposed in Norway is 21 years, with life sentences abolished. However, a 30-year maximum sentence can be imposed for crimes related to genocide, crimes against humanity or war crimes. The average sentence is about eight months long.

If people are imprisoned, then Norway believes that they should be able to live their life as if they were on the outside, to the extent that this is possible. Norway believes that removing freedom is enough of a punishment, and there is no need to punish them further by denying them what they need to live on the inside. There is also a view taken that because most prisoners return back to society, then they should be treated fairly so that they are able to reintegrate back into society. Therefore, the offender is given the same rights as all others in society, and they are placed in the lowest possible security facility.

Source 7 Inside Halden Prison in Norway

For example, Halden Prison is one of Norway's maximum-security prisons. It aims to replicate life on the outside as much as possible. Vocational programs are offered to prisoners, and there are running tracks, recording studios, and fully equipped kitchens with sharp knives. Classes and workshops in various vocational activities such as assembly and cooking are also provided. The cells have televisions, computers and sanitation.

11.10 CHECK YOUR LEARNING

Define and explain

1 Define the following terms:
   - **a** therapeutic justice
   - **b** preventive detention
   - **c** suspended sentence
   - **d** home detention.

2 Explain two aspects of sentencing practices in Victoria.

3 Explain how Victoria has adopted the therapeutic justice approach to sentencing.

4 Describe crime in Norway, using statistics in your description.

5 What is the maximum penalty that can be imposed in Norway?

Synthesise and apply

6 Describe two factors or pressures that may encourage the Victorian Government to be 'tough on crime', and two factors or pressures that may encourage the Victorian Government to adopt therapeutic justice approaches.

7 Draw a timeline of sentencing in Victoria.

8 Draw a table in your notebook that identifies the similarities and differences between the sentencing approaches in Norway and in Victoria.

9 Conduct some more research on the 2011 Norway attacks.
   - **a** What sentence was imposed?
   - **b** Did Breivik appeal? Why or why not?
   - **c** Do you think Breivik received an adequate sentence? Give reasons for your response.

Analyse and evaluate

10 Do you think that Victoria could, and should, adopt Norway's sentencing approaches? Be prepared to discuss your views with your classmates.

11 Do you think a 'tough on crime' approach is the right approach? Discuss as a class.

12 Conduct some research on Norway's Halden Prison. Comment on whether you think Victoria should adopt a similar facility for its prisons.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 11.10 Check your learning
- **Going further** A comparison with the United States
- **Weblink** Tightening community correction orders
- **Weblink** Victorian sentencing process

11.11 ALTERNATIVE APPROACHES TO SENTENCING

Courts sometimes adopt different approaches to sentencing (rather than sentencing through the traditional method of a plea hearing in court). Three of these approaches are the use of the Drug Court, the Koori Court and diversion programs.

The Drug Court

drug treatment order
a type of sanction imposed by the Drug Court that aims to treat the underlying causes of offending, and which includes both the treatment and custody of the offender

The Drug Court was established in 2002 as a division of the Magistrates' Court. The first Drug Court was located at Dandenong Magistrates' Court, and a second Drug Court opened in Melbourne in March 2017. In 2020, it was announced that the Drug Court would be expanded to Ballarat and Shepparton, and legislation was passed to establish the Drug Court in the County Court. The Drug Court deals with offenders who commit crimes while under the influence of drugs or to support a drug habit.

The Drug Court is intended to respond to the failure of traditional methods of sentencing offenders to adequately address drug use and offending, by directly addressing the issue of drug and alcohol dependency. It does this by imposing a **drug treatment order** (DTO) on the offender.

Source 1 One of Victoria's Drug Courts is located at the Dandenong Magistrates' Court

Source 2 Magistrate Tony Parsons speaking at a hearing in the Drug Court

Eligibility

Not every offender is eligible to be sentenced in the Drug Court. To be eligible, the following criteria must be met:

- the offender must reside within an area serviced by the Drug Court
- the offender must plead guilty to the offence
- the offence must be within the jurisdiction of the Magistrates' Court (i.e. a summary offence, or an indictable offence heard summarily) and punishable by imprisonment, or it must be within the jurisdiction of the County Court and punishable by a sentence of imprisonment of no more than four years
- the offence must not be a sexual offence or an offence that involved actual bodily harm
- the Drug Court must be satisfied that the offender is dependent on drugs or alcohol, and that dependency contributed to the offence being committed.

Process

The screening process first determines whether an offender is suitable to participate in a DTO. This involves determining the offender's location, prior and current offences, whether drug or alcohol abuse is a significant factor in the offending, and whether the offender is willing to participate.

The assessment process then determines whether the program can address the offender's behaviour. Once the screening and assessment processes are complete, a treatment plan is prepared and a DTO is imposed.

Drug treatment order

A DTO is an order that aims to rehabilitate the offender by providing a judicially supervised, therapeutically oriented drug or alcohol treatment program. There are two parts to a DTO:

- **the treatment and supervision part** – this consists of core conditions and program conditions
- **the custodial part** – this requires the Drug Court to impose a sentence of imprisonment that it would have imposed if it had not made the DTO, but the sentence of imprisonment must be no more than two years (or four years if made in the County Court).

The conditions of a DTO that must be imposed (i.e. core conditions) and those that may be imposed (i.e. program conditions) are listed in Source 3 below.

CORE CONDITIONS	PROGRAM CONDITIONS
• Must not commit an offence punishable on conviction by imprisonment • Must attend the Drug Court when required • Must undergo treatment for drug or alcohol dependency • Must report to and accept visits from a relevant officer • Must give notice of any change of address • Must not leave Victoria except with permission • Must obey all lawful instructions and directions given	• Must submit to drug or alcohol testing • Must submit to detoxification or other treatment • Must attend vocational, educational, employment or other programs • Must submit to medical, psychiatric or psychological treatment • Must not associate with specified persons • Must reside at a specified place for a specified period

Source 3 Core conditions and program conditions associated with a DTO

The Drug Court has the power to give a reward from time to time to an offender who has been compliant, such as supermarket vouchers and tickets to a football game. However, failure to comply with conditions can result in negative actions, such as requiring that the offender perform unpaid community work, or ordering that the custodial part of the DTO be activated for a specified period (but for no more than 7 days). The intention of imposing a short period of time in custody is to encourage offenders to stay on the program, rather than risk the effects associated with time in prison.

A DTO can be cancelled if the offender is no longer willing to participate, or its continuation is not likely to be effective. The offender is re-sentenced or sent to custody to serve out the custodial part of the DTO.

The following scenario explains how the Drug Court could potentially help more people than it currently can, due to its current level of services.

ACTUAL SCENARIO

County Court judge says Warrnambool's lack of Drug Court is unfortunate

Jessica Howard, *The Standard*, 12 December 2019

A County Court judge says it's unfortunate Warrnambool doesn't have a Drug Court despite having a problem with ice.

Judge Mark Taft presided over the sentence appeal of Warrnambool's Jesse James, 33, in Warrnambool County Court on Thursday.

James was jailed for six months in November after he was caught dealing GHB and other drugs from a studio at his parents' house. He was also placed on a 12-month corrections order, to commence upon his release.

But lawyer Michael Reardon said James was in prison lock down for 23 hours a day following threats made by other inmates.

He said James had already served 86 days in custody and would benefit from being immediately released so he could start the community order with the support of his family and corrections.

The appeal was adjourned so James could seek admission into Melbourne rehabilitation facility Odyssey House.

The judge said it was unfortunate Warrnambool did not have the benefit of a Drug Court, which offers accused persons the option to undertake a drug treatment order in lieu of serving a sentence.

'It is unfortunate that the lottery of the postcode justice applies and people in areas such as this, where it seems ice is such a problem, don't have the benefit of Drug Courts which are highly intensive, have supervised urine screens three times per week, sanctions if there are breaches and intensive drug and alcohol counselling,' he said.

'I'm not of the mind to release Mr James after 86 days and have him on a community correction order. That simply seems to be a recipe for future problems.

'In my experience, community correction orders for people with ice addiction mostly fail. You need more than a community corrections order, which does not have the regulatory mandatory urine screens, and consistent and persistent drug treatment and counselling that is required.'

James will appear in court again in February next year.

The Drug Court is available at the Melbourne and Dandenong Magistrates' Courts only.

The initiative was launched in 2017 as part of the state government's Ice Action Plan.

Source 4 Drug Courts are not available at all regional and metropolitan areas in Victoria. There is pressure on the government to expand the availability of the Drug Court to offenders.

Effectiveness of the Drug Court

The Drug Court benefits both participants and the community. For participants, the Drug Court breaks the cycle of offending by addressing the underlying causes of a person's offending, by helping connect the offender to the local community, by providing them with improved health and wellbeing, self-esteem and employment prospects, and by rehabilitating the offender to reduce the possibility of them reoffending.

In December 2014, KPMG released a report that evaluated the Drug Court in Victoria. Some of the key findings of the KPMG evaluation found that:

- there was a significant reduction in the rate of reoffending compared to those who were imprisoned. For example, the rate of reoffending in the first 12 months for Drug Court participants was 31 per cent lower than those who were imprisoned
- there was a cost saving of approximately $1 212 840 over a two-year period as a result of fewer imprisonment days
- there were significant improvements in the participants' health and wellbeing.

There are limits on the number of offenders who can be given a DTO. This is largely because of the intensity of the treatment plan and the resources required to ensure participants are given adequate treatment. The opening of the Drug Court in other areas of Victoria and in the County Court will substantially expand the number of offenders who are eligible for a DTO.

Some have criticised the Drug Court, and in particular the rewards program, following the launch of the Melbourne Drug Court in 2017. Opposition Attorney-General, John Pesutto, was reported by the *Herald Sun* as suggesting that the rewards program 'bribed' people to obey the law, saying 'people should abide by the law because it's the right thing to do, not because there's something in it for them'.

The Koori Court

The Koori Court was first established as a division of the Magistrates' Court in 2002. Since then, it has expanded to become a division of the Children's Court and County Court. The Koori Court is a sentencing court available to an Indigenous accused person. Its aim is to provide an informal atmosphere for sentencing, and to allow representation from the Indigenous community in the sentencing process. This is achieved by having elders and family members present during sentencing. Koori Courts are particularly important given the over-representation of Aboriginal and Torres Strait Islander people in the justice system, and the negative experiences that are associated with that over-representation.

The Koori Court system has been successful in Victoria, as it aims to explore sentencing alternatives to imprisonment, and increase Indigenous ownership of and participation in the justice system.

Source 5 below identifies where the Koori Court sits in Victoria (as at September 2020). The latest Koori Court to open was the County Koori Court in Warrnambool in October 2019.

	MAGISTRATES' COURT	CHILDREN'S COURT	COUNTY COURT
Number	12	12	5
Locations	Bairnsdale, Broadmeadows, Dandenong, Geelong, Hamilton, Latrobe Valley, Melbourne, Mildura, Portland, Shepparton, Swan Hill, Warrnambool	Bairnsdale, Dandenong, Geelong, Hamilton, Heidelberg, Latrobe Valley, Melbourne, Mildura, Portland, Shepparton, Swan Hill, Warrnambool	Latrobe Valley, Melbourne, Mildura, Shepparton, Warrnambool

Source 5 The locations of the Koori Court in Victoria

Eligibility

To be eligible to be sentenced in the Koori Court, the following criteria must be met:

- the accused must be Aboriginal or Torres Strait Islander
- the offence must be within the jurisdiction of the relevant court
- the offence must not be a sexual offence, or a contravention of a family violence intervention order or personal safety intervention order
- the accused intends to plead guilty or has pleaded guilty
- the accused consents to the case being dealt with by the Koori Court.

The Koori Court process

lawyer
a general term used to describe somebody who has been trained in the law and is qualified to give legal advice (e.g. a barrister or a solicitor)

The Koori Court is less formal than the Magistrates' Court, the Children's Court and the County Court. All court participants sit around a table. The magistrate or judge sits opposite the offender, who may have the support of a **lawyer**, a family member, one or more Indigenous elders or respected persons, and an Indigenous justice worker. The magistrate or judge can take advice from Indigenous elders or other respected persons on cultural issues and appropriate sentencing. However, the magistrate or judge is the ultimate decision-maker and has the same sentencing options that are available in the relevant court.

An Indigenous justice worker, corrections officer, prosecutor and lawyer for the offender assist the magistrate with the case. A range of sentences can be imposed on the offender, depending on the offence and relevant sentencing factors.

Source 6 A sitting of the Koori Court in the Children's Court

Effectiveness of the Koori Courts

An independent university study concluded that Koori Courts reduce recidivism, with an average of 14 per cent of offenders reoffending, compared to the general recidivism rate of 29 per cent.

An evaluation conducted for the County Court in 2011 also found that:

- of the 31 offenders included in the analysis, only one had reoffended, and that was for a low-level offence
- the experiences of the offenders in the justice system were vastly improved, with the majority finding the process more engaging and inclusive, and less intimidating
- there was a need to have greater participation of service providers in the process to address underlying causes of offending behaviour, such as drug and alcohol service providers
- the Koori Court provided access to fair, culturally relevant and appropriate justice.

In 2018, the Supreme Court of Victoria made a significant decision for Indigenous people in Victoria. The details of this decision are outlined in the scenario below.

ACTUAL SCENARIO

Cultural rights, access and the Koori Court: A significant decision for Indigenous people in Victoria

Cemino v Cannan [2018] VSC 535 (17 September 2018)

In a significant decision in September 2018, the Supreme Court of Victoria confirmed that the cultural rights of Indigenous people must be considered by the courts when deciding whether to grant an accused's request that their matter be heard in the Koori Court.

In this case of *Cemino v Cannan*, the accused was a 22-year-old Indigenous Yorta Yorta man who lived in Echuca. There is no Koori Court in Echuca, but there is one in Shepparton, which is part of Yorta Yorta land. The accused, who had an intellectual disability, was charged with 25 offences that were alleged to have been committed in 2016 in or around Echuca. The accused was also alleged to have breached a CCO. The case was heard in the Echuca Magistrates' Court.

The accused applied to have his case transferred to the Koori Court division of the Magistrates' Court in Shepparton. This meant that he was intending to plead guilty, as the Koori Court is a sentencing court only. The Magistrates' Court refused his request.

The accused appealed to the Supreme Court to review the decision to refuse his transfer request. The Supreme Court found in favour of the accused and ordered that the Echuca Magistrates' Court's decision be set aside. The Supreme Court justice (Justice Ginnane) ordered that the case go back to the Magistrates' Court, and that a different magistrate consider the accused's transfer request.

Justice Ginnane also said that the Koori Court provides an opportunity for Indigenous people to enjoy their identity and culture, and can help ensure that equality is upheld.

Justice Ginnane said:

> The Koori Court was established for purposes that included addressing systemic disadvantage faced by Aboriginal people who have been over-represented in the criminal justice system, in imprisonment and in deaths in custody. The Koori Court seeks to reduce that systemic disadvantage by providing special measures and accommodations so that the procedure is less disadvantageous for Aboriginal offenders; it protects against indirect discrimination on the basis of race. It is a means through which systemic disadvantage in the justice system is mitigated in pursuance of the s 8(3) right.

This judgment clearly illustrates a person's right under the Human Rights Charter to equality before the law. In this judgment, the Supreme Court found that the courts must uphold this right, and that every person is equal before the law, is entitled to equal protection of the law without discrimination, and has the right to equal and effective protection against discrimination (as set out in section 8(3) of the Human Rights Charter).

Diversion programs

diversion program
a method used in the Magistrates' Court and Children's Court to divert offenders away from the court and avoid a criminal record by placing them on a plan

A **diversion program** is available in the Magistrates' Court and Children's Court for summary offences. It is a way in which a criminal matter can be dealt with out of court by placing the offender on a program (sometimes called a plan), rather than entering a plea or being found guilty. It is an opportunity for an offender to avoid a criminal record, and avoid being sentenced by a court, on the basis that they comply with certain conditions as part of the plan.

The program is intended for first-time offenders. It aims to reduce reoffending and assist rehabilitation, rather than have first-time or low-risk accused people enter the criminal justice system. It also aims to save court resources by avoiding the need for a hearing, and aims to enable the accused to avoid a criminal record and to access assistance such as rehabilitation and counselling. The program can also involve victims, who can participate in the process.

Eligibility

Section 59 of the *Criminal Procedure Act 2009* (Vic) establishes the diversion program in the Magistrates' Court. For a person to be eligible to take part in the program, the following criteria must be met:

- the accused must acknowledge to the Magistrates' Court responsibility for the offence
- it must appear appropriate to the Magistrates' Court that the accused should participate in the program
- both the prosecution and the accused must consent to the matter being diverted
- the offence must not be one that is punishable by a minimum or fixed sentence or penalty (e.g. a suspension of a licence).

Generally, first-time offenders are afforded the opportunity to undertake a diversion program if the offence is not too serious. More common offences that the offender may have committed include criminal damage, theft or minor drug offences.

Following a 12-month pilot, from January 2017 a youth diversion program became available in all Children's Courts across Victoria. The youth diversion program operates in the same way as that in the Magistrates' Court. It aims to ensure that offenders take responsibility for their actions, address underlying causes of offending, and avoid the stigma associated with a criminal record. The Sentencing Advisory Council reported in December 2016 that children who are sentenced between 10 and 12 years of age are more likely to reoffend than those who are first sentenced when they are older, suggesting that diversion programs may assist in reducing recidivism rates for children.

The scenario on the next page details the importance of diversion programs for youth offenders.

Juvenile offenders diverted to a better path

ACTUAL SCENARIO

Tessa Akerman, *The Australian*, 15 December 2019

More than 90 per cent of juvenile offenders in Victoria are successfully completing assigned diversion programs, fresh data shows, with Children's Court judge Amanda Chambers praising the program.

Diversion plans often include a letter of apology to the victim, engagement in a structured activity such as sport or music, education-related intervention and a commitment to take part in counselling or another activity to address a health or wellbeing concern.

Successfully completing a diversion program also allows the offender to avoid a criminal record.

During 2018–2019, 9230 matters in the criminal division were finalised and 1408 diversions were overseen by diversion service coordinators, with 94 per cent of cases completed (excluding pending matters).

Judge Chambers said for a child to succeed, sometimes the lightest touch was the best one.

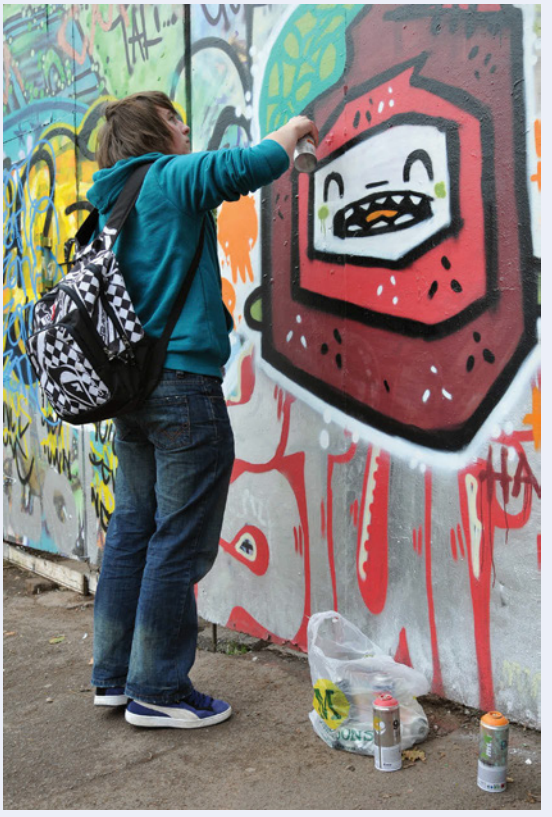
'There are studies that demonstrate that interaction with police alone will often be an effective experience to divert young people from further offending,' she said.

'But we know that for many other young people that come into the Children's Court, more is needed.

'For many, the behaviours that lead to their interaction with police may be driven by other factors including exposure to family violence, mental health issues, disengagement from education or drug and alcohol issues.'

A Justice and Community Safety spokeswoman said the diversion program provided an opportunity for young people to avoid further involvement in the criminal justice system by accepting responsibility for their offending and completing a diversion plan before the offending became entrenched.

'By intervening early and completing a diversion plan, youth diversion gives young people a chance to understand the impacts of their offending, to repair any harm caused and to increase connection to family, community and support services to address the factors underlying their behaviour,' she said.



Source 7 Young offenders are able to avoid a criminal record with the introduction of a diversion program in all Children's Courts in Victoria.

Process

The onus is on the offender to ask for a diversion. The court may seek the victim's views on the matter.

If a magistrate agrees that the offender should be diverted away from sentencing in court, the offender is put on a diversion plan, and the proceeding is adjourned for up to 12 months to enable them to participate in and complete the plan.

The diversion plan might involve the offender having to:

- obtain treatment, such as counselling, or drug or alcohol treatment
- write a letter of apology to the victim
- compensate the victim

- undertake an appropriate education course
- make a donation or do some other service such as community work.

If the diversion program is successfully completed, then the offender does not need to enter a plea, and they are discharged without any finding of guilt. If the diversion program is not successfully completed, then the case returns to the court for a hearing, and the offender is sentenced.

Effectiveness of diversion programs

A report prepared by Turning Point Alcohol and Drug Centre Inc. (in collaboration with Health Outcomes International Pty Ltd) in 2004 found that between July 2001 and September 2003, over 90 per cent of the diversion program participants were first-time offenders, with males representing over double the number of females. It also found that the reoffending rate was very low: of 100 participants, 0–7 per cent would be convicted of a subsequent offence in the 12 months following commencement of the program. Ninety-four per cent of participants completed the program.

The evaluation also suggested that the diversion program was successful in achieving rehabilitation, and found that generally the program was a success.

Strengths and weaknesses of alternative approaches

Some of the strengths and weaknesses of the Drug Court, Koori Court and diversion programs are set out in Source 8 below.

ALTERNATIVE APPROACH TO SENTENCING	STRENGTHS	WEAKNESSES
Drug Court	• Addresses underlying causes of crime – drug and alcohol dependency • Avoids effects of imprisonment • Provides ongoing support and supervision • Provides positive reinforcement through the rewards program • Better alternative to prison • More cost-effective • Breaks the cycle of offending and helps to connect offender with their local community	• Not every offender is eligible to be sentenced • Not always successful in reforming offenders • Drug Court is limited in its capacity to accept offenders • Expensive to establish • Some have criticised the rewards program
Koori Court	• Increases Indigenous ownership and participation • Provides an informal atmosphere for sentencing • Reduces recidivism • Experience of the accused is vastly improved, with the experience being more engaging and inclusive, and less intimidating	• Not available to all offenders • Not available in all locations • Limited to sentencing only and does not extend to trials • Over-representation of Indigenous people in the criminal justice system has not generally improved over the years
Diversion programs	• Allows avoidance of criminal records • Saves court resources • Provides offenders with access to assistance such as rehabilitation and counselling • Can involve victims • Reduces recidivism	• Limited to certain offenders and offences • Effectiveness depends on the offender • Prosecution can prohibit the offender from participating • May be seen as 'soft option' for punishing offenders

Source 8 Strengths and weaknesses of alternative approaches to sentencing

11.11 CHECK YOUR LEARNING

Define and explain

1 Explain how each of the following is a method of therapeutic justice:
- Drug Court
- Koori Court
- diversion program.

2 What are the two parts of a drug treatment order (DTO)?

3 Using an example for each, distinguish between the core conditions and program conditions of a DTO.

4 Explain three features of a Koori Court hearing.

5 What is a diversion program? Who are diversion programs intended to assist?

6 Describe one benefit each of the Drug Court, Koori Court and diversion programs.

Synthesise and apply

7 For each of the following situations, identify whether the accused is eligible for the Drug Court, the Koori Court, or a diversion program. Justify your answers.
- **a** Jose has pleaded not guilty to petty theft.
- **b** Zoran from Wodonga has pleaded guilty to petty theft that was caused when he was drinking heavily. He has an alcohol addiction.
- **c** Ivy is an Aboriginal person from Dandenong. She wants to plead guilty to murder.
- **d** Nicola has been charged with offensive behaviour. She has no prior convictions.
- **e** Ray is an Aboriginal person. He has been charged with vandalism.

8 Read the scenario 'County Court judge says Warrnambool's lack of Drug Court is unfortunate'.
- **a** Explain three reasons why a Drug Court would have been useful in this case.
- **b** In this case, Judge Taft said, 'It is unfortunate that the lottery of the postcode justice applies and people in areas such as this … don't have the benefit of Drug Courts'. What did Judge Taft mean by this statement?
- **c** In your view, should the Drug Court be expanded into other regional areas? Give reasons for your answer, referring to the principles of justice.

Analyse and evaluate

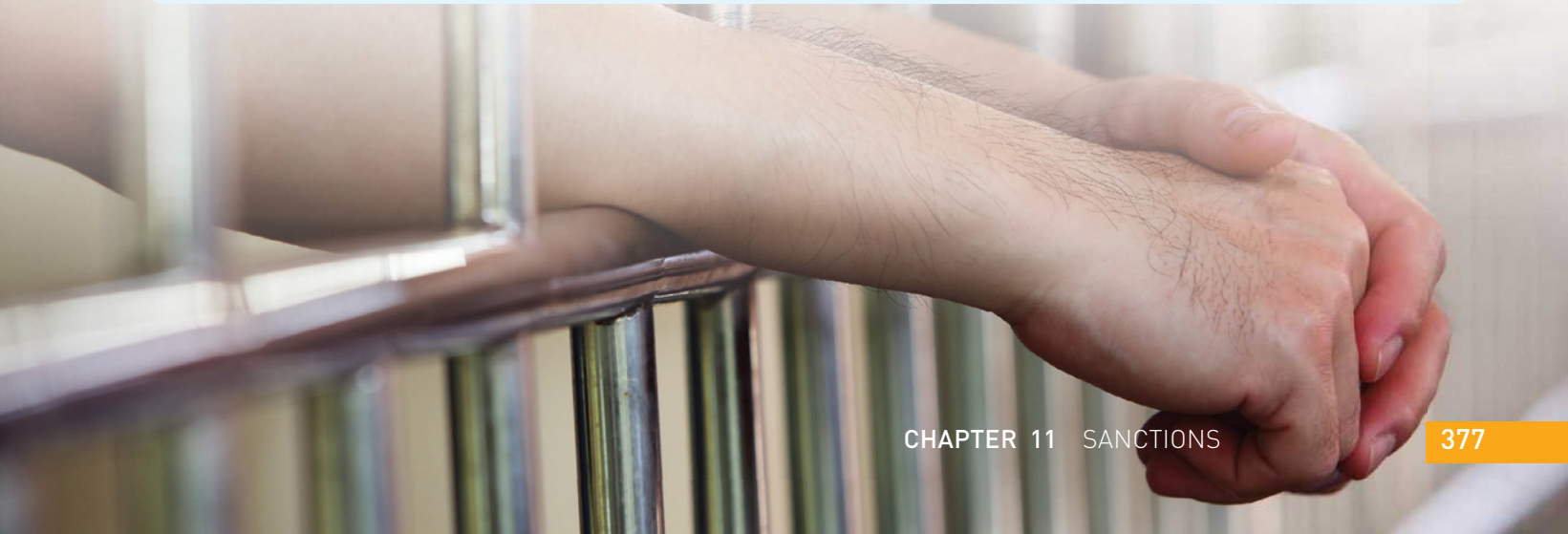
9 Discuss the benefits of a diversion program for youth offenders.

10 There has been a suggestion that the Drug Court is 'soft on crime' and the rewards it gives to participants are over the top. Do you agree? Give reasons for your answer.

11 Evaluate the ability of the Koori Court to achieve the principle of equality. In your answer, refer to *Cemino v Cannan*.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 11.11 Check your learning
- **Weblink** Jail for repeat offender
- **Weblink** Drug Court
- **Weblink** Koori Court



CHAPTER 11

REVIEW

TOP TIPS FROM CHAPTER 11

1 One of the key skills you are expected to show in Unit 2 – Area of Study 1 is the ability to discuss the principles of justice in relation to the enforcement of criminal law and sanctions. When looking at an area of criminal law and sanctions, always consider where the three principles of justice (fairness, equality and access) are most achieved (or not achieved).

2 You are expected to understand fines, community correction orders and imprisonment in Unit 3, so look closely at these in Unit 2. It will help in your studies next year!

3 There's a lot to remember when it comes to institutional powers and individual rights. The goal is not to memorise each of the powers and rights. Rather, choose one or two of them, get to know them well and show *how* the law tries to balance the powers and rights.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Distinguish** between aggravating factors and mitigating factors.

(3 marks)

Difficulty: medium

2 **Compare** community correction orders and imprisonment. In your answer, refer to one purpose of sanctions.

(6 marks)

Difficulty: high

3 'Drug Courts, Koori Courts and diversion programs are soft on crime. They don't achieve justice, and they should be abolished.' **Discuss** this statement.

(10 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Use the stimulus material to answer the questions in this section. It is not intended that this material will provide you with all the information you need to answer the questions.

Night out leads to crime

Amedeo is 22 years old. He attends university and is a good student.

One night, Amedeo went out drinking with his mates. He wanted to get home early to study, but was convinced by his friend Victor to continue drinking at one of the local pubs.

While at the pub, Victor suggested it would be a good idea to rob the convenience store next door. Amedeo knew that Victor had drunk a lot of alcohol. Victor also seemed to be under the influence of drugs.

Amedeo disagreed, but Victor told him that it would be fun. Amedeo, who was drunk, agreed. They got to the front of the convenience store and Victor pulled out a small handgun. Amedeo went to walk away, but Victor grabbed him and said, 'You owe me one. If you don't do this, I'll hurt you.'

Victor went inside the convenience store. The convenience store employee was terrified and screamed. Victor started yelling and pointing the gun at her, and told her to open the till.

Amedeo stood frozen in the doorway, not knowing what to do. Victor grabbed all the money from the till and ran out of the store. He took Amedeo with him.

Both Victor and Amedeo were charged with aggravated burglary. Amedeo wants to plead guilty, but Victor laughed, saying he's going to 'take the case all the way'.

Practice assessment task questions

1 Outline the original criminal jurisdiction of the court that is likely to hear this case.
(2 marks)

2 Describe one right available to Amedeo during court proceedings.
(3 marks)

3 Explain the role of the police in this case.
(4 marks)

4 Do you think that WorkSafe Victoria or the local council would have had the power to arrest Amedeo or Victor? Justify your answer.
(5 marks)

5 If Victor was questioned, to what extent could he remain silent? Give reasons for your response.
(4 marks)

6 Would any of the courts listed below be involved in this case? Justify your answer.
(6 marks)
- a Magistrates' Court
- b Koori Court
- c Drug Court

7 Is Victor eligible for a diversion program? Justify your answer.
(3 marks)

8 Explain the role of the court in Amedeo's case.
(4 marks)

9 Describe two factors that are likely to be relevant in sentencing Amedeo.
(4 marks)

10 Discuss the extent to which two of the principles of justice can be achieved in Victor's case.
(7 marks)

11 If Victor is found guilty, identify one sanction that is likely to be imposed on him. Discuss the extent to which this sanction could achieve rehabilitation and punishment.
(8 marks)

Total: 50 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 11

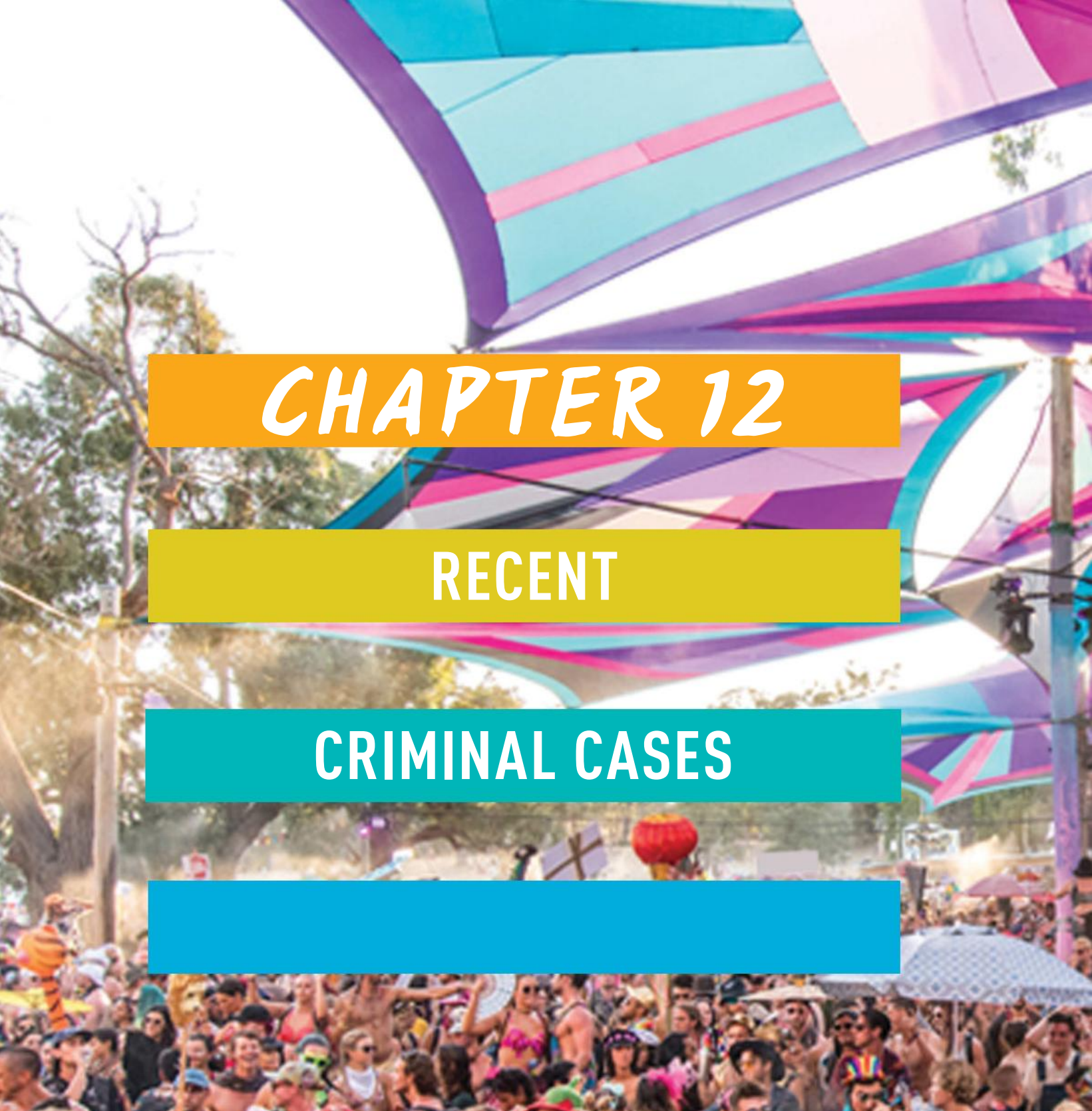
Revision notes
Revision notes for Chapter 11

assess quiz
Chapter 11
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 12

RECENT CRIMINAL CASES



Source 1 Criminal cases are heard by the courts in Australia every day. This chapter contains four recent criminal cases, one of which involves an offender who attended Rainbow Serpent Festival (pictured) on the day of his offending. You are required to study two of these cases for Unit 2 – Area of Study 1 of the VCE Legal Studies course.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 2 – Area of Study 1** (i.e. Chapters 11 and 12), you should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches.

KEY KNOWLEDGE

In this chapter, you will learn about two recent criminal cases. For each case, you will learn about:

- an overview of the charges and the central facts of the case
- courts that may be or were involved
- sanctions that could be or were imposed and their appropriateness
- factors that may be or were taken into consideration in sentencing
- possible avenues of appeal
- the extent to which the principles of justice could be or were achieved.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research, analyse and apply information in relation to criminal law and two recent criminal cases
- analyse the extent to which the principles of justice could be or were achieved in two recent criminal cases.

KEY LEGAL TERMS

access one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

aggravating factors facts or circumstances about an offender or an offence that can lead to a more severe sentence

appeal an application to have a higher court review a ruling (i.e. a decision) made by a lower court

equality one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

fairness one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

mitigating factors facts or circumstances about the offender or the offence that can lead to a less severe sentence

sanction a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

ADVICE TO TEACHERS AND STUDENTS

In **Unit 2 – Area of Study 1** (i.e. Chapters 11 and 12) you are required to study **two recent criminal cases** in detail.

'Recent cases' means cases from the previous four years. You may choose cases that have already been heard and determined by a court, or cases in which charges have just been laid.

YOU MAY CHOOSE TWO CRIMINAL CASES FROM THE FOLLOWING OPTIONS		PAGE
12.1	Recent criminal case 1: A weekend at an Airbnb ends in murder (*DPP v AK* (Sentence) [2019] VSC 852 (20 December 2019))	382
12.2	Recent criminal case 2: The case that captivated Victoria (*DPP v Ristevski* [2019] VSC 253 (18 April 2019); *DPP v Ristevski* [2019] VSCA 287 (6 December 2019))	389
12.3	Recent criminal case 3: The assault of a paramedic (*Tang v Haberfield* [2019] VMC (28 August 2019); *DPP v Haberfield* [2019] VCC 2082 (16 December 2019))	396
12.4	Recent criminal case 4: The trial and acquittal of Cardinal George Pell (*DPP v Pell* (Sentence) [2019] VCC 260 (13 March 2019); *Pell v The Queen* [2019] VSCA 186 (21 August 2019); *Pell v The Queen* [2020] HCA 12 (7 April 2020))	405

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12.1 RECENT CRIMINAL CASE 1: A WEEKEND AT AN AIRBNB ENDS IN MURDER

DPP v AK (Sentence) [2019] VSC 852 (20 December 2019)

Introduction

Director of Public Prosecutions (DPP) the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

indictable offence a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

The case of the ***Director of Public Prosecutions (DPP)*** *v AK* (Sentence) [2019] VSC 852 (20 December 2019) ('AK case') is a criminal case. The courts involved in the AK case were the Magistrates' Court and the Supreme Court. In this case, a jury found the accused (AK) guilty of murder – the most serious **indictable offence** that can be committed. The accused is known in this case under the pseudonym of 'AK' because he was under the age of 18 at the time of the offence (he was 17 years old).

The crime took place in Melbourne on 21 July 2018. The victim, Laa Chol, was 19 years old and was undertaking a Diploma of Legal Studies at Victoria University. A few days before her death, Chol and a friend had booked an Airbnb apartment in the EQ Tower in Melbourne's CBD. They planned to spend the weekend together, going to nightclubs and spending time with friends. The weekend ended in tragedy.

In this topic, we explore the following aspects of the AK case in detail:

- an overview of the charges and the central facts of the case
- the courts involved in the case
- the sanctions imposed and their appropriateness
- the factors taken into consideration in sentencing
- possible avenues of appeal
- the extent to which the principles of justice were achieved.

Overview of the charges and the central facts of the case

On Friday 20 July 2018, Chol and her friend, Dahlia Ali, arrived at the Airbnb apartment they had rented in Melbourne's CBD. Some friends joined them and the group enjoyed a small party with music and alcohol.

Source 1 Laa Chol (left), aged 19, was murdered when a group entered uninvited into a gathering she had organised at an Airbnb apartment in Melbourne. An altercation ensued, where Chol was killed by a single stab wound to the heart.

Early the following morning, the accused (AK) and his friends arrived at the party, despite not being invited. AK and his friends, including PM and MM (also pseudonyms), were granted access to the party by another friend who was inside. However, Ali asked them to leave because they had not been invited. They refused, which left Chol and Ali frustrated.

At about this time, Ali saw members of this uninvited group rummaging through drawers in the bedroom of the apartment. Chol and Ali also realised that their mobile phones were missing.

A number of the intruders attempted to leave, and Chol followed them into the hallway where she pushed PM. A verbal altercation occurred, and MM pulled Chol backwards by grabbing her clothing. Chol was then kicked and punched by members of AK's group while she was forcibly held down. She threw punches to protect herself. The altercation moved towards the apartment lifts.

As the group moved towards the lifts, MM grabbed Chol and held her. The accused, AK, stood looking at Chol, removed a knife from his clothing and stabbed her forcibly in the chest. MM continued to hold Chol during AK's attack. This was captured on CCTV and used as evidence at the trial.

Even though Chol was mortally wounded, MM continued to wrestle with her. PM also grabbed hold of Chol and AK aimed a kick at her stomach. Evidence presented to the Supreme Court showed that Ali entered the fray and, in the words of the judge, 'bravely intervened' to help Chol back to the apartment. Chol collapsed on the floor and an ambulance was called. Before the paramedics arrived, Chol had died.

According to Dr Matthew Lynch, who conducted the autopsy on Chol's body, the knife wound inflicted on Chol was three centimetres long, and between 5 and 10 centimetres deep, causing massive blood loss.

AK and his friends left the EQ Tower. On 23 July 2018, two days later, police officers arrested AK at his home, although they were unable to locate the knife used to kill Chol.

Ultimately, the accused pleaded not guilty to the charge of murder, but guilty to manslaughter. The prosecution did not accept the defence's offer of a plea to the lesser charge. They alleged that AK intended to cause Chol 'really serious injury' to such an extent that his actions satisfied the ***mens rea*** (guilty mind) required for a conviction for the offence of murder. That is, while the accused was willing to plead guilty to the lesser charge of manslaughter, the prosecution believed that AK's intent to cause very serious harm was clear, and it should be left to a Supreme Court **jury** to make the final decision.

mens rea
a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

Courts involved in the case

The courts involved in the AK case were the Magistrates' Court and the Supreme Court.

Magistrates' Court

Because AK was charged with an indictable offence, to which he pleaded not guilty, a **committal proceeding** was conducted in the Magistrates' Court. One purpose of a committal proceeding is to determine whether there is evidence of a sufficient weight to support a conviction for the offence. If the magistrate decides that the evidence is of such weight, the accused person is committed to stand trial in a higher court.

committal proceeding
the processes and hearings that take place in the Magistrates' Court for indictable offences

It was at the committal proceeding that AK first pleaded not guilty to murder but guilty to manslaughter. However, as explained above, that plea was not accepted by the prosecution, and therefore the committal proceeding was required for the murder charge.

At the committal proceeding, the magistrate in this case held that the evidence was enough to support a conviction for murder at trial.

Supreme Court

AK's trial was heard in the Supreme Court. Under section 36A of the *County Court Act 1958* (Vic), the County Court does not have the jurisdiction to hear a case involving a charge of murder. In addition, although AK was younger than 18 years at the time of offending, the Children's Court does not have the jurisdiction to hear murder cases involving children. So only the Supreme Court had the jurisdiction to hear AK's case.

At the opening of the trial, a jury of 12 was chosen. The jury's role was to decide the key facts in the case and to reach a verdict. A jury was required because, at the start of the trial, the prosecution rejected AK's plea of guilty of manslaughter and not guilty of murder. The sole issue at the trial was whether the jury was satisfied, **beyond reasonable doubt**, that at the time AK struck the fatal blow that caused Chol's death, he intended to cause her really serious injury.

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

There were many factors indicating that AK did intend to cause really serious harm to Chol. These included the fact that Chol was restrained by one of AK's friends when he stabbed her, and the fact that the accused displayed no concern for her wellbeing after stabbing her, but instead left the scene.

The jury was satisfied that AK's intention was to cause Chol really serious injury and found him guilty of murder. As a result, AK was convicted of the most serious crime in Australia's legal system – the murder of another human being.

Sanctions imposed and their appropriateness

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

imprisonment
a sanction that involves removing the offender from society for a stated period of time and placing them in prison

Under section 3 of the *Crimes Act 1958* (Vic), the **sanction** for murder is Level 1 **imprisonment** (being life, which means imprisonment for the duration of an offender's natural life) or imprisonment for another term decided by the court. Only the Supreme Court can impose a sentence of life imprisonment.

The Supreme Court judge presiding over the AK case, Justice Kaye, imposed a maximum term of 20 years' imprisonment, with a non-parole period of 15 years. Justice Kaye noted that the task of deciding the appropriate sentence was not a simple one. On the one hand, he had to consider the seriousness of the crime, but on the other hand, he had to give weight to the mitigating factors that were relevant in the case (described further below). Justice Kaye noted that while he had considered current sentencing practices, no two cases are ever alike, and so he had to consider the nature of the offending and AK's particular circumstances.

In sentencing AK, Justice Kaye identified the key purposes of imprisonment in this case and in particular the following:

- there was a need to express the Supreme Court's and the community's condemnation of the crime, and to uphold the sanctity of human life
- the sentence had to be of sufficient severity to serve as a general deterrent to violence among the wider community and to send a clear message to any person not to engage in the kind of violence that AK did
- the sentence needed to ensure that AK is personally deterred from further acts of violence, and to instil some understanding of, and insight into, the serious nature of the crime of murder
- the sentence needed to provide a measure of protection to the community from AK's tendency to resort to serious acts of violence, which was reflected in his extensive prior convictions.

As to rehabilitation, Justice Kaye considered AK's prospects of rehabilitation as being 'problematic'. Justice Kaye found that AK had a real problem with controlling his feelings and he was often all too ready to resort to serious acts of violence.

Factors taken into consideration in sentencing

mitigating factors
facts or circumstances about the offender or the offence that can lead to a less severe sentence

aggravating factors
facts or circumstances about an offender or an offence that can lead to a more severe sentence

The two main types of sentencing factors are **mitigating factors** and **aggravating factors**:

- **mitigating factors** are factors or circumstances that count in the offender's favour and may be considered by the judge as a reason to give a lesser penalty (e.g. a difficult childhood, an existing mental illness, or remorse)
- **aggravating factors** are factors or circumstances that count against the offender and may be considered by the judge as a reason to give a higher penalty (e.g. a prior record or use of violence).

The extract below from the judgment in the AK case highlights some of the key factors that Justice Kaye considered when sentencing AK.

EXTRACT

DPP v AK (Sentence) [2019] VSC 852 (20 December 2019)

45 Mr Guy Coffey, a clinical psychologist, interviewed you on three occasions in November at the request of your solicitors, and he has provided a detailed and comprehensive report in respect of his examination of you. Mr Coffey observed that the circumstances of your early life were not positive for your future psychological wellbeing. In particular, he noted that you were the second youngest of six children in a single parent refugee family, who struggled scholastically at school, and suffered from racism. Further, some aspects of your first period of youth detention did not assist you in being rehabilitated into the community.

46 Mr Coffey considered that, at the time of the offence, you were not suffering from a mental illness or any cognitive impairment. When you committed the offence, you were addicted to cannabis and Xanax, but, plainly, that is not a mitigating factor. Mr Coffey considered that your consumption of those substances might have caused a mild to moderate degree of disinhibition. However, you were aware of what you were doing. You were capable of understanding the consequences of your actions, and you had the ability to choose to resolve the situation, in which you had become embroiled, without resorting to violence.

47 Mr Coffey noted that you regarded your resort to the use of a knife as being quite inexplicable, which it was. He also noted, however, that you have routinely resorted to violence to resolve conflict throughout the years of your adolescence. On a more positive note, you expressed some remorse for your actions when speaking to Mr Coffey. However, that remorse was described by him as being a feeling that was emerging, and that was not persuasive in detail.

48 In respect of your prospects of rehabilitation, Mr Coffey considers that you require psychological treatment to address unmet developmental needs, including your sense of identity as a Sudanese Australian, your capacity for emotional regulation, and your ability to cope with stressors. Your substance abuse needs to be addressed through specialised counselling. In addition, you require psychological interventions that target your attitude towards, and your resort to, violence and offending, and which enables you to feel genuine empathy for your victims, and an appreciation of the fact that other people also have rights. Mr Coffey noted that, in light of your youth and your background, you have shown a propensity to be influenced by peers who have criminal attitudes, and that you are at risk of identifying with the criminal attitudes and lifestyle of older prisoners while in adult prison.

49 It can be seen, then, that there are a number of mitigating factors that are required to be taken into account in the determination of your sentence. First and foremost, are the circumstances of your childhood and early adolescence. Your difficult experiences during that important stage of your life, none of which were of your making, all played a relevant role in shaping your personality and your responses. As a result, your culpability – that is, the level of your moral guilt – for the offending, in which you engaged, could not be equated with that of a person who had had the advantage of a normal, stable and regular home environment and upbringing. As the High Court, and the Court of Appeal of this state, have recognised, such a consideration is a relevant mitigating circumstance in the assessment of the degree of your culpability for the offending in which you engaged.

In addition to the above, Justice Kaye took into account the following factors:

- **AK's young age** – At the time of the offence, he was 17 years old. When he was sentenced, he was 18 years and five months old. However, because of the seriousness of the offending, Justice Kaye gave less weight to AK's youth as a mitigating factor than what would ordinarily be the case.
- **AK's acceptance of guilt** for the homicide of Chol – AK pleading guilty to manslaughter had the effect of reducing the trauma to Chol's family and friends. In addition, as a result of this plea, the issues that were disputed at trial were substantially narrowed – the only real issue was whether AK had intended to cause Chol really serious injury.
- **AK's degree of remorse** – Justice Kaye noted that AK's remorse was genuine but quite limited and ill-informed, and so it was taken into account to a limited extent.
- **AK's previous criminal convictions** and subsequent offending – AK had prior convictions of aggravated burglary, assault and offences of dishonesty. He had previously spent time in youth justice centres for prior offences.
- **The seriousness of the offence** and the violent nature of what had occurred – Justice Kaye noted that Chol was defenceless, and AK's actions were unprovoked, needless, cowardly and callous. Justice Kaye also noted that AK's behaviour after the offence (he left the scene and disposed of the knife) demonstrated no remorse for what he had done and no concern for Chol's wellbeing.
- **The impact of the crime** on Chol's friends and family – The **victim impact statements** showed that Chol's friends and family continue to suffer.

Study tip

One key difference between the AK and Ristevski murder cases is the reason why the prosecution did or did not accept a guilty plea for the lesser charge of manslaughter. The Ristevski case is considered in Topic 12.2.

victim impact statement
a statement filed with the court by a victim that is considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

Possible avenues of appeal

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

Source 2 The family of Laa Chol attended the sentencing of AK for the murder of their loved one.

Any **appeals** from this decision would need to have been made to the Court of Appeal. Appeals must be lodged within 28 days after the **conviction**. An offender needs to get leave (i.e. permission) to appeal.

An offender can:

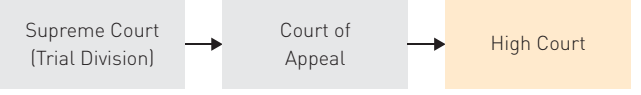
- **appeal against the conviction** – the offender can claim that the verdict was unreasonable, based on the evidence, that it was based on an error of law, or that a miscarriage of justice occurred
- **appeal against the sentence** – the offender can appeal against a sentence, claiming that it is too harsh
- **appeal against both** – the offender can appeal against the conviction and the sentence.

The prosecution can appeal against the sentence being too lenient. The prosecution does not need leave to appeal.

Did you know?

Although an accused can appeal against a conviction, the prosecution cannot appeal if the accused is acquitted. This is because, under the rule of 'double jeopardy', a person cannot be tried twice for the same offence. However, there are now exceptions to the double jeopardy rule, such as where there is fresh new evidence.

From the Court of Appeal, the offender or the prosecution would have been able to file an appeal with the High Court, which is the ultimate court of appeal in Australia. The High Court has to grant leave to appeal.



Source 3 Possible avenues of appeal for the AK case

Three months after the sentencing by Justice Kaye, an appeal had not been lodged by either party. Therefore, the decision of the Supreme Court and its sentence of AK stands, and AK will remain in prison for the duration of his sentence.

The extent to which the principles of justice were achieved in the AK case

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in the AK case is provided below. For each principle, the assessment is made on the evidence available.

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

Fairness

The principle of **fairness** means people should be treated fairly and impartially. Every person should be aware of the case against them and be able to present their case. For fairness to be achieved, the criminal justice system relies on fair legal processes and fair hearings.

In the AK case:

- AK would have been able to exercise his rights before and during the trial (e.g. the **right to silence** when being interviewed by police). In particular, AK had the right to plead guilty or not guilty, and was entitled to change his plea.
- AK was **legally represented**, which the courts have recognised is necessary for a fair trial of a serious indictable offence. Having legal representation would have enabled AK to

understand the court's processes and procedures, as well as the implications of pleading guilty to manslaughter.

- At the committal proceeding, AK and his defence team knew what the prosecution's **evidence** was, giving them an understanding of the strength of the case the DPP would present to the Supreme Court at the trial. This would have helped the defence prepare for the **cross-examination of prosecution witnesses**.
- The **prosecution had the burden** of establishing that AK committed the offence of murder.
- The **standard of proof in this case is beyond reasonable doubt**. AK could not be found guilty unless the DPP satisfied the jury of AK's guilt according to this high standard. AK was presumed innocent until proved guilty.
- AK was able to **introduce evidence** by a clinical psychologist, Dr Coffey, who interviewed AK on three occasions at the request of AK's solicitors. This provided expert evidence to the Supreme Court as to AK's state of mind and personal characteristics.
- The trial would have been conducted through **a set of processes** to ensure a fair trial. For example, submissions would have been made by both parties, who were also entitled to address the jury, and the trial judge would have given directions to the jury in accordance with legislation.

cross-examination
the questioning of a witness called by the other side in a legal case

Equality

The principle of **equality** requires all people to be equal before the law, regardless of who they are. Every person should also have the same opportunity to present their case without advantage or disadvantage. For equality to be achieved, the criminal justice system relies on both parties being treated equally.

In the AK case:

- Both parties had the right to engage **legal representation**, which helps to uphold equality. According to the rules of procedure, parties can **examine the evidence presented** by their opponent.
- Justice Kaye acted as an **independent and impartial adjudicator** at the trial. His role was to ensure that the rules of evidence were applied, and that both parties had the opportunity to be heard and were able to present evidence and address the jury.
- AK had the benefit of a trial by a jury of people **selected at random** from the electoral roll, who reached **a verdict based on evidence** from both parties (i.e. the prosecution and the defence).
- Both parties could call **witnesses in the case** and have those witnesses examined before the jury.
- There is no evidence to suggest that AK suffered any form of **discrimination** or was not treated equally before the law.
- In this case, a **pseudonym** was used because, at the time of the offending, AK was a minor. Using a pseudonym was designed to protect AK from suffering discrimination. In addition, there may have been adjustments made to the court's processes given AK was a minor because, in previous cases, the courts have recognised that children and minors can be at a special disadvantage in court processes.

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

Access

The principle of **access** requires everyone to have equal access to legal agencies and legal institutions, and to be given every opportunity to understand their legal rights and to pursue their legal claims. For access to be achieved, the criminal justice system relies on accused people having legal advice and representation. Legal representation is essential for parties attempting to navigate complex legal processes.

In a criminal trial, there are strict processes for the sharing of evidence between the parties, especially the key facts that must be revealed by the prosecution to the defence before the trial. This helps legal counsel prepare for the trial. In a criminal trial, the burden of proof rests on the prosecution, and it is their role to lay out all the evidence required to establish the case.

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

sentencing hearing
a hearing during which a judge will hand down the sanction imposed on an offender

In the AK case:

- The trial and the **sentencing hearing** were conducted as **open hearings**, and the sentencing remarks are **available to the public**, including the victim's family.
- During the trial, both parties had an equal opportunity to **present evidence**.
- AK had access to all of the **evidence** that was used against him at the trial.
- At the end of the trial, both parties had **the right of appeal** on grounds relating to the sentence imposed by the judge.
- Before AK was sentenced, members of the victim's family presented **victim impact statements** to the Supreme Court. These statements expressed their grief over Chol's death. Victim impact statements allow such suffering to be considered by a judge when sentencing an offender.

12.1 CHECK YOUR LEARNING

Define and explain

1 Explain two types of intention that a person can have at the time they commit murder. Identify which intention was relevant in the AK case.

2 Outline the key facts of the case against AK.

Synthesise and apply

3 Read the extract from the sentencing hearing by Justice Kaye on pages 384–5, and note the additional factors taken into account by His Honour in sentencing.
   - **a** Prepare a table that identifies all of the factors taken into account in sentencing AK.
   - **b** For each factor, identify whether it was a mitigating factor or an aggravating factor, and provide a short statement justifying your decision.

4 Provide two reasons why the following evidence would have been important for Justice Kaye when considering an appropriate sentence for AK:
   - **a** AK's prior convictions
   - **b** the victim impact statements from Chol's family and friends
   - **c** the nature of the offending.

Analyse and evaluate

5 Both the High Court and the Court of Appeal have recognised that a traumatic upbringing can be regarded as a mitigating factor in sentencing.

To what extent do you agree with a traumatic upbringing being a mitigating factor? Give reasons for your response.

6 In sentencing AK, Justice Kaye said that he needed to take into account general and specific deterrence.
   - **a** Distinguish between general deterrence and specific deterrence.
   - **b** What type of community behaviour was Justice Kaye seeking to discourage? Justify your response.
   - **c** Discuss the ability of imprisonment to act as a general deterrent in a case where the offending was underpinned by the offender's unique circumstances.

7 Justice Kaye said the following in sentencing:

> In a character reference provided to the Court, Mr Tom Pearce, the transitions teacher of Parkville College, stated that you have shown maturity and leadership both in and outside the classroom. You encourage your fellow detainees to be respectful to teachers, and you have been a model of good behaviour and attitude in relation to your work.

With reference to the above excerpt, discuss the extent to which you support the proposition that when sentencing offenders, courts should take into account the offender's conduct after committing the offence.

Check your Student obook assess for these additional resources and more:

Student book questions
12.1 Check your learning

Video tutorial
DPP v AK (Sentence) [2019] VSC 852 (20 December 2019) – overview

Weblink
DPP v AK (Sentence) [2019] VSC 852 (20 December 2019) – sentence

12.2 RECENT CRIMINAL CASE 2: THE CASE THAT CAPTIVATED VICTORIA

DPP v Ristevski [2019] VSC 253 (18 April 2019); *DPP v Ristevski* [2019] VSCA 287 (6 December 2019)

Introduction

Director of Public Prosecutions (DPP) the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

The case of ***Director of Public Prosecutions (DPP)*** *v Ristevski* [2019] VSC 253 (18 April 2019); *DPP v Ristevski* [2019] VSCA 287 (6 December 2019) ('Ristevski case') is a domestic violence manslaughter case. The courts involved in the Ristevski case were the Magistrates' Court, the Supreme Court, and the Court of Appeal.

The murder of Karen Ristevski in 2016 and the subsequent trial of her husband, Borce Ristevski, for her murder captured the attention of Victorians for more than three years. The case involved the concealment of Karen's body, a protracted course of 'lies and deceit' by Ristevski, and his ultimate arrest and conviction. The decision by the accused to plead guilty to manslaughter just before his murder trial was due to commence, and his refusal to reveal how or why he killed his wife, have been the subject of ongoing media analysis.

In this topic, we explore the following aspects of the Ristevski case in detail:

- an overview of the charges and the central facts of the case
- the courts involved in the case
- the sanctions imposed and their appropriateness
- the factors taken into account in sentencing
- possible avenues of appeal
- the extent to which the principles of justice were achieved.

Overview of the charges and the central facts of the case

Some time between 8:58 am and 10:43 am on 29 June 2016, Borce Ristevski killed his wife, Karen Ristevski, in their home in Avondale Heights in Melbourne. They had one child, Sarah, then aged 21. The couple had been married for 27 years. There was no evidence of ongoing domestic violence.

The means by which Ristevski killed his wife remains unknown. What is known is that Karen's body was found eight months after she disappeared, dumped and concealed. The body was so badly decomposed that a post-mortem could not reach a definitive outcome for investigators. Her body was found in bushland in the Macedon Regional Park, north-west of Melbourne.

Did you know?

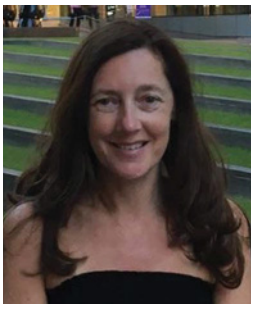
According to the Australian Institute of Criminology (2018), on average, one woman per week is murdered by her current or former partner in Australia. Also, one in four Australian women over the age of 15 years have experienced emotional abuse by a current or former partner.

On 13 December 2017, Ristevski was arrested and charged with murder. By this stage, investigations had established that Ristevski's accounts of his movements on the day Karen disappeared could not be true. The case against Ristevski was built around a series of contradictory and misleading statements he gave to police officers, family and friends in the months after his wife's disappearance. For example:

- Ristevski initially told police officers that he used his wife's car for about an hour-and-a-half on the day of her disappearance, but CCTV footage revealed the car was gone for close to three hours.
- At one stage, Ristevski told investigators that he had taken the car to a garage to get a fuel gauge repaired. However, Ristevski changed his story once police officers told him they intended to verify it with the garage owner.

- Phone taps revealed Ristevski later told his daughter, Sarah, that he 'went to get shisha' (a type of tobacco product) on the day his wife disappeared but he didn't tell the police because he didn't know if the substance was legal.

In March 2019, Ristevski's trial for murder commenced. The trial was expected to last for five weeks.



Source 1 Karen Ristevski was last seen leaving her Avondale Heights home in June 2016. Her decomposed body was found eight months later.

Courts involved in the case

The courts involved in the Ristevski case were the Magistrates' Court, the Supreme Court, and the Court of Appeal.

Magistrates' Court

committal proceeding the processes and hearings that take place in the Magistrates' Court for indictable offences

indictable offence a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

In July and August 2018, a **committal proceeding** was conducted in the Magistrates' Court. A committal proceeding is used in cases involving **indictable offences** to determine whether there is evidence of sufficient weight to support a conviction at trial. The process is used when an accused pleads not guilty.

The committal hearing ran for two weeks in the Magistrates' Court. At the conclusion of the committal hearing, Magistrate Suzanne Cameron ordered that Ristevski stand trial for the crime of murder. Magistrate Cameron said she was satisfied the 'evidence is of sufficient weight to support a charge of murder. I am of the view it would be open to a **jury** properly instructed to find [you acted] with murderous intent'. At the end of the committal hearing, Ristevski entered a plea of not guilty to the charge of murder.

jury an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

On 10 September 2018, Ristevski made a written offer to the prosecution to plead guilty to the lesser offence of manslaughter. Given that Ristevski had refused to reveal how he killed his wife, that offer was rejected by the prosecution.

Supreme Court

Ristevski's trial for murder was due to commence in the Supreme Court on 12 March 2019 before Justice Beale. Under section 36A of the *County Court Act 1958* (Vic), the County Court does not have jurisdiction to hear a case involving a charge of murder. Therefore, only the Supreme Court had the jurisdiction to hear Ristevski's case.

After legal argument, on 13 March 2019 the trial judge in the Supreme Court ruled that Ristevski's conduct *after* Karen's death could not be used by the prosecution to establish that the crime of murder had been committed. This decision – that Ristevski's post-offence conduct could not be relied on as incriminating – is contained in the separate ruling of *DPP v Ristevski (Ruling No 1)* [2019] VSC 165 (15 March 2019). The post-offence conduct included acts by Ristevski in close proximity to Karen's death, Ristevski's inconsistent statements, omissions, lies during his accounts to police officers, and his attitude towards the police investigation.

appeal an application to have a higher court review a ruling (i.e. a decision) made by a lower court

sanction a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

imprisonment a sanction that involves removing the offender from society for a stated period of time and placing them in prison

Later that day, the prosecution filed an indictment charging Ristevski with the offence of manslaughter. Ristevski immediately pleaded guilty to manslaughter. This meant that a jury was not required to determine guilt, and the only role of the Supreme Court was to sentence Ristevski for manslaughter. By this stage, Ristevski had still refused to give any details about how or why he killed his wife.

Court of Appeal

The Ristevski case also went to the Court of Appeal because of an **appeal** made by the DPP against the ultimate sentence that was imposed on Ristevski. Further details about the appeal are set out below.

Sanctions imposed and their appropriateness

Under section 5 of the *Crimes Act 1958* (Vic), the **sanction** for manslaughter is Level 3 **imprisonment** (a maximum of 20 years' imprisonment).

Supreme Court sentence

At the **sentencing hearing**, the prosecution submitted that Ristevski's offending was in the upper range of the offence of manslaughter, despite there being no information about how the offender killed his wife. The prosecution based its submission on the following: the longevity of Ristevski's relationship with his wife, the fact that Karen was killed in her home, and that domestic violence is an aggravated form of violence.

sentencing hearing a hearing during which a judge will hand down the sanction imposed on an offender

On the other hand, Ristevski's lawyers submitted that, because of the lack of information, the offence could not be placed on the spectrum of seriousness. The defence also noted that there was no previous history of domestic violence.

On 18 April 2019, the trial judge sentenced the offender to nine years' imprisonment, with a non-parole period of six years. Justice Beale found that he had insufficient information to say whether Ristevski's offence was in the mid or upper range of manslaughter. Justice Beale's remarks about the submissions made by the prosecution and defence are below.

EXTRACT

DPP v Ristevski [2019] VSC 253 (18 April 2019)

36 Ultimately, the view that I have arrived at is that I have insufficient information to say whether your offence is a mid or upper range example of manslaughter, although it is clearly not a low range example of manslaughter because of the aggravating domestic violence aspect. Without knowing the level and duration of the violence perpetrated by you which caused your wife's death, I simply cannot say whether your offending was mid or upper range. I do not regard your silence as to how you killed your wife as providing a sufficiently firm basis for drawing the inference that yours must have been an upper range example of the offence of manslaughter. Whilst the community and the courts rightly abhor domestic violence, it is simplistic to suppose that all domestic violence manslaughter cases necessarily fall into the upper range on the spectrum of seriousness for manslaughter. It takes little imagination to think of circumstances where a domestic violence manslaughter – for example, one involving a momentary loss of control and a comparatively low level of violence – could not reasonably be viewed as an upper range example of the offence of manslaughter.

While the sanction of imprisonment was the most appropriate outcome in this case, the key issue was the length of the sentence to be imposed on the offender. This was the basis for the appeal made by the prosecution to the Court of Appeal.

Court of Appeal sentence

On appeal, Ristevski's sentence was increased to 12 years' imprisonment, with a non-parole period of nine years. That is, the Court of Appeal increased the maximum sentence imposed by the Supreme Court by three years.

The Court of Appeal's decision was based largely on the aggravating factors present in this case (see the definition on the next page), as explained in the extract on the next page. The Court of Appeal noted that each case should be decided on its own circumstances to determine the appropriateness of the sentence, and that this offence was unique for a number of reasons. In particular, the Court of Appeal said that this was not a case where there was a 'sudden loss of control' in a volatile situation, and there was no apparent reason as to why Ristevski did what he did. However, they noted that Ristevski's conduct showed a real lack of remorse, and that his lies, his active steps to avoid the discovery of the crime, and the circumstances of the crime (all of which took place in a family setting) were significant.

The Court of Appeal said that **general deterrence** and denunciation had particular importance in this case, but that Ristevski's prospects of rehabilitation were good. The Court also found that just punishment was required. In particular, one of the Court of Appeal judges, Justice Priest, said that Karen 'was killed by an unlawful and dangerous act in her own home, a place [that] should have been a sanctuary for her'.

general deterrence one purpose of a sanction, designed to discourage others in the community from committing similar offences

EXTRACT

DPP v Ristevski [2019] VSCA 287 (6 December 2019)

7 The circumstances of this crime include the positive acts that the respondent took to hide his involvement in the death. He immediately removed his dead wife's body from their home. He placed her body in the boot of her car. He then searched for and found a remote location a considerable distance away. He carried or dragged her body to a spot 66 metres from the road. In a manner which must have involved some significant time and effort, he concealed her body in such a way that she might never have been found. When it was found some eight months later, her remains were between two tree trunks lying parallel and almost completely concealed beneath a number of branches and logs. Three of the logs weighed between 13 and 39 kilograms. Those things make this crime more serious than it would have been had the respondent not engaged in that conduct. We regard this conduct as significantly aggravating his offence.

8 The respondent accepted that 'the conduct of the respondent in disposing of his wife's body and subsequent lies and deceit were a circumstance of significant aggravation'.

9 The respondent's conduct also reveals an astonishing lack of remorse. Remorse is a mitigating factor to be taken into account where it is present. Conversely, a lack of remorse is not an aggravating feature. To this day, the respondent has shown not one scintilla of remorse. He has subjected those affected by the death to the most awful state of the unknown.

10 All of the respondent's conduct took place in a family setting. There was a time when the seriousness of such domestic violence offences was not properly recognised. That is no longer the case. It is also a significant aggravating feature of the crime committed by the respondent that he killed his wife in her home. She should have been able to live without any fear in her own home. It should have been a safe place for her. General deterrence and denunciation have particular importance in this case.

11 In favour of the respondent we take into account his good character before the commission of this crime; his prospects of rehabilitation, as to which the prosecution does not contest the sentencing judge's conclusion that they are good; and his plea of guilty, which has utilitarian value.

Factors taken into consideration in sentencing

mitigating factors
facts or circumstances about the offender or the offence that can lead to a less severe sentence

aggravating factors
facts or circumstances about an offender or an offence that can lead to a more severe sentence

The two main types of sentencing factors are **mitigating factors** and **aggravating factors**:

- **mitigating factors** are factors or circumstances that count in the offender's favour and may be considered by the judge as a reason to give a lesser penalty (e.g. a difficult childhood, an existing mental illness, or remorse)
- **aggravating factors** are factors or circumstances that count against the offender and may be considered by the judge as a reason to give a higher penalty (e.g. a prior record or use of violence).

The extract below describes some of the factors that the Court of Appeal considered in sentencing Borce Ristevski.

EXTRACT

DPP v Ristevski [2019] VSCA 287 (6 December 2019)

78 In the present case, the unlawful violence that caused Karen Ristevski's death was inflicted by her husband in a 'domestic' setting, so much being an aggravating circumstance of the offence. It may be inferred that the respondent thought that the circumstances of the killing were sufficiently serious that he needed to dispose of his wife's body so as to conceal the mechanism of her death. The manner in which he disposed of her body is, as the respondent's counsel conceded, a significantly aggravating feature of his crime. Moreover, and also significantly, the respondent has displayed not

one skerrick of remorse for having killed his wife, the mother of his daughter. Not merely has the respondent refused to reveal how he killed his wife, but he maintained the charade of a grieving husband whilst weaving a web of lies and deceit. Against those aspects, he can call in aid his previous good character and prospects of rehabilitation, and the utilitarian value of his guilty plea.

In addition, the Court of Appeal considered the following factors:

- **The state of the evidence** – Given the state of the evidence, it was impossible to reach any conclusion about the level and duration of the unlawful act(s) of violence. That is, it could not be concluded how violent or not the crime was, as Ristevski never revealed how he killed his wife. However, given Ristevski pleaded guilty to manslaughter, the prosecution had accepted that he committed the acts without intending to kill or seriously injure his wife.
- **Ristevski's plea** – By his plea, Ristevski admitted his unlawful act(s) were dangerous, and it could at least be said with certainty that he assaulted his wife in a domestic setting where she should have felt safe.
- **Ristevski's lack of remorse** – The disposal of his wife's body was a significant aggravating factor and was emblematic of his complete lack of remorse. A lack of remorse cannot be used as an aggravating factor but a lack of remorse means it is not a mitigating factor.

Source 2 Such was the deception by Borce Ristevski that he was a pallbearer at his wife's funeral. The Supreme Court ruled that this post-offence conduct could not be used as evidence that a murder had been committed.

Possible avenues of appeal

Any appeal by either party against the sentence imposed on the offender in the Supreme Court needed to be made to the Court of Appeal. As described above, the DPP appealed the Supreme Court's decision to the Court of Appeal, contending that Ristevski's sentence was manifestly inadequate. The DPP submitted that the trial judge:

- failed to fix a sentence commensurate with the circumstances of the offending
- failed to have sufficient regard to significant aggravating features when determining the nature and the objective gravity of the offending (the circumstances of the killing), particularly in the context of family violence and breach of trust
- failed to have sufficient regard to the impact of the offending on the victim's family
- failed to give sufficient weight to the principles of general deterrence, specific deterrence, denunciation and just punishment
- failed to have sufficient regard to the maximum penalty for the offence and
- placed too much weight on the matters in mitigation, particularly in light of the lack of remorse, including the offender's plea of guilty and prospects of rehabilitation.

As stated above, in December 2019, the Court of Appeal upheld the DPP's appeal and imposed a prison term of 13 years, with a non-parole period of 10 years.

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

Any appeals from this decision needed to be made to the High Court of Australia. Appeals must usually be lodged within 28 days after the **conviction**. The High Court has to grant leave to appeal.

Ristevski could have appealed against the sentence on the basis that it was too harsh. The prosecution could have appealed against the sentence on the basis that it was too lenient. Neither party appealed the decision.

Source 3 The avenues of appeal in the Ristevski case. The prosecution appealed to the Court of Appeal against the leniency of the sentence imposed by the Supreme Court. Both parties had the right to appeal to the High Court.

The extent to which the principles of justice were achieved in the Ristevski case

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in the Ristevski case is provided below. For each principle, the assessment is made on the evidence available.

Fairness

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

The principle of **fairness** means people should be treated fairly and impartially. Every person should be aware of the case against them and be able to present their case. For fairness to be achieved, the criminal justice system relies on fair legal processes and fair hearings.

In the Ristevski case:

- The offender would have been able to exercise his rights before and during the trial. In fact, Ristevski maintained his **right to silence** – and still to this day has not explained the reason for his offending.
- Ristevski was **legally represented**, which the courts have recognised is necessary for a fair trial of a serious indictable offence.
- At the committal proceeding, Ristevski and his defence team knew what the prosecution's **evidence** was, giving them an understanding of the strength of the case before any trial. This would have helped the defence prepare for **cross-examination of prosecution witnesses**, had there been a trial.
- The **prosecution, until the late guilty plea by the offender, had the burden** of establishing that the accused committed the offence of murder.
- The **standard of proof in this case is beyond reasonable doubt**. Had Ristevski maintained his not guilty plea, he could not have been found guilty of murder unless the DPP satisfied the jury of his guilt according to this high standard. Ristevski was presumed innocent until proved guilty.
- Ristevski was entitled to **plead guilty** to the lesser charge of manslaughter, which he did.

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

Equality

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

The principle of **equality** requires all people to be equal before the law, regardless of who they are. Every person should also have the same opportunity to present their case without advantage or disadvantage. For equality to be achieved, the criminal justice system relies on both parties being treated equally.

In the Ristevski case:

- Both parties had the right to engage **legal representation**, which is designed to ensure equality. According to the rules of procedure, parties can **examine the evidence presented** by their opponent.
- The judges acted as **independent and impartial adjudicators** at the trial and the appeal. Their role was to ensure that the rules of evidence were applied, and that both parties had an opportunity to make submissions to the judge on sentencing.
- Both parties were **entitled to appeal against the sentence** – if that right was only available to one party, that would create inequality.

Access

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

The principle of **access** requires everyone to have equal access to legal agencies and legal institutions, and to be given every opportunity to understand their legal rights and to pursue their legal claims. For access to be achieved, the criminal justice system relies on accused people having legal advice and representation. Legal representation is essential for parties attempting to navigate complex legal processes.

In a criminal trial, there are strict processes for the sharing of evidence between the parties, especially the key facts that must be revealed by the prosecution to the defence before the trial. This helps legal counsel prepare for the trial. In a criminal trial, the burden of proof rests on the prosecution, and it is their role to lay out all the evidence required to establish the case.

In the Ristevski case:

- The sentencing hearing and the appeal were conducted as **open hearings**, and the sentencing remarks are **available to the public**, including the victim's family.
- Both parties had an equal opportunity to **make submissions about sentencing**. Interestingly, the judges noted that the complete details of what happened to Karen have not emerged and are unlikely to do so.
- At the end of the trial, both parties had **the right of appeal** on grounds relating to the sentence imposed by the trial judge.
- Before the offender was sentenced, members of the victim's family presented **victim impact statements** to the court. These statements expressed their grief over Karen's death. Victim impact statements allow such suffering to be considered by a judge when sentencing an offender.

victim impact statement
a statement filed with the court by a victim that is considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

12.2 CHECK YOUR LEARNING

Define and explain

1 Explain how the offence of manslaughter is different to the offence of murder.
2 Outline the key facts of the case against Borce Ristevski.
3 Explain how the right to appeal achieved one of the principles of justice in this case.

Synthesise and apply

4 Read the information about the mitigating factors and the aggravating factors that were relevant in this case.
   a Prepare a table that identifies all of the factors that were taken into account in the appeal.
   b For each factor, identify whether it was a mitigating factor or an aggravating factor, and provide a short statement justifying your decision.
5 Conduct some research to find one other case where the accused remained silent. As a class, discuss these cases in light of the principle of fairness.

Analyse and evaluate

6 In sentencing Borce Ristevski, the Court of Appeal judges said that, 'The respondent did more than maintain his right to silence. He took active steps to avoid discovery of his crime and how the death was caused'.
   In light of this comment, discuss whether Ristevski's guilty plea should be a mitigating factor in sentencing.
7 In sentencing Borce Ristevski, the Court of Appeal judges said that they needed to take into account general deterrence.
   a Define the term 'general deterrence'.
   b What specific type of community behaviour was the Court seeking to discourage? Justify your response.
   c To what extent do you believe that heavy sentences imposed by the courts discourage family violence? Give reasons for your response.

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DPP v Ristevski [2019] VSC 253 (18 April 2019); *DPP v Ristevski* [2019] VSCA 287 (6 December 2019) – judgment

Weblink
Sarah Ristevski

12.3 RECENT CRIMINAL CASE 3: THE ASSAULT OF A PARAMEDIC

Tang v Haberfield [2019] VMC (28 August 2019); *DPP v Haberfield* [2019] VCC 2082 (16 December 2019)

Introduction

Director of Public Prosecutions (DPP) the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

The case of *Tang v Haberfield* [2019] VMC (28 August 2019); ***Director of Public Prosecutions (DPP)*** *v Haberfield* [2019] VCC 2082 (16 December 2019) ('Haberfield case') is a case about the assault of an emergency worker. The courts involved in the Haberfield case were the Magistrates' Court and the County Court.

Given the importance of emergency workers (also known as first responders) such as firefighters, police officers and paramedics, the Victorian Parliament has created laws designed to protect these workers while they are on duty. In particular, the surge in drug-related psychoses in the community has made the work of emergency workers even more dangerous, as it has fuelled an increased use of violence against first responders.

Under section 31(1)(b) of the *Crimes Act 1958* (Vic), it is an indictable offence to assault or threaten to assault an emergency worker on duty. In addition, section 18 of the *Crimes Act* makes it an offence to intentionally or recklessly cause injury to another person without lawful excuse. If the victim is an emergency worker on duty, then a minimum term of six months' imprisonment must be imposed unless a 'special reason' exists.

The Haberfield case is an example of a serious assault on a female paramedic who was on duty at the time. While in a drug-induced state, James Haberfield attacked one of the paramedics who was called out to assist him. The paramedic, Monica (who preferred not to have her surname used), suffered significant physical and psychological harm as a result of this attack. This case provoked significant media commentary about the extent to which emergency workers are protected.

In this topic, we explore the following aspects of the Haberfield case in detail:

- an overview of the charges and the central facts of the case
- the courts involved in the case
- the sanctions imposed and their appropriateness
- the factors taken into consideration in sentencing
- possible avenues of appeal
- the extent to which the principles of justice were achieved.

Overview of the charges and the central facts of the case

On 29 January 2019, James Haberfield, then aged 21, returned to Melbourne after attending the Rainbow Serpent Festival in Lexton, Victoria. At the festival, Haberfield consumed a cocktail of drugs that included amphetamines and ecstasy. After his return to Melbourne, Haberfield's family became worried about his conduct. They noticed that he was expressing some delusional behaviour, or psychosis, so they tried to take him to hospital.

At some stage, Haberfield escaped and hid in a dog kennel to avoid detection. At around 10 pm, Haberfield entered the home of strangers in Coburg in a disturbed state. One of the occupants of the house escorted Haberfield outside, while another person called triple-0 and requested an ambulance. Two paramedics, Monica and her partner Sam, were allocated the job. The County Court noted it was 'one of those "sliding doors' moments" in Monica's life' – that it could have so easily been any other crew member who attended the job.

Once inside the back of the ambulance, Monica started to assess Haberfield. She placed a blood pressure cuff on his arm, and Haberfield mumbled something about a phone number. Monica rang it, and it was his father. Without warning, Haberfield became aggressive and agitated. He ripped off the blood pressure cuff and pushed Monica down with force. She tried to escape, but Haberfield responded by punching her in the face and wrapping his arms around her, squeezing her. Monica was trapped and screamed for help. A number of civilians heard and could see the ambulance rocking from side to side.

Source 1 The Rainbow Serpent Festival in Lexton, Victoria, has been running for 20 years. It is a celebration of electronic-dance music. James Haberfield attended the event before assaulting a paramedic.

Sam saw that Monica was pinned down in the ambulance. Sam intervened, which gave Monica the opportunity to escape the ambulance. In the process, Sam was assaulted as well. The police were called. Brave civilians opened the ambulance door and removed Haberfield, so the assault on Sam stopped. Haberfield was restrained and sedated by Sam. He was arrested and taken to the Royal Melbourne Hospital.

Monica suffered a serious haematoma and swelling to her left cheek, as well as injuries to her head, neck and back. After the incident, she was diagnosed with post-traumatic stress disorder and anxiety as a result of the assault. She also felt unsettled and unsafe, even in her own home.

Haberfield was charged with one count of assaulting an emergency worker while on duty (section 31(1)(b) of the *Crimes Act*), which related to the violence inflicted on Sam when he went to Monica's aid. Haberfield was also charged with one count of recklessly causing injury (section 18 of the *Crimes Act*), which related to the violence inflicted on Monica. The following extracts outline the sections of the *Crimes Act* that relate to Haberfield's charges.

EXTRACT

Crimes Act 1958 (Vic) – section 31

Assaults

1 A person who

. . .

b assaults or threatens to assault, resists or intentionally obstructs an emergency worker on duty or a youth justice custodial worker on duty, or a custodial officer on duty, knowing or being reckless as to whether the person was an emergency worker or a youth justice custodial worker or a custodial officer . . .

. . .

is guilty of an indictable offence.

Penalty: Level 6 imprisonment (five years maximum).

EXTRACT

Crimes Act 1958 (Vic) – section 18

Causing injury intentionally or recklessly

A person who, without lawful excuse, intentionally or recklessly causes injury to another person is guilty of an indictable offence.

Penalty: If the injury was caused intentionally – Level 5 imprisonment (10 years maximum).
If the injury was caused recklessly – Level 6 imprisonment (five years maximum).

Notes:

1 An offence against this section is a category 1 offence under the *Sentencing Act 1991* if the victim was an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty and the offender knew or was reckless as to whether the victim was such a person. See section 5(2G) and (2GA) of that Act for the requirement to impose a custodial order or other specified order for this offence if committed in those circumstances.

2 See section 10AA(4) of the *Sentencing Act 1991* for the requirement that a term of imprisonment of not less than 6 months be imposed for an offence against section 18 if the victim was an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty unless the court finds under section 10A of that Act that a special reason exists.

Courts involved in the case

The courts involved in the Haberfield case were the Magistrates' Court and the County Court.

Magistrates' Court

indictable offence heard and determined summarily
a serious offence that can be heard and determined as a summary offence if the court and the accused agree

Haberfield was charged with two indictable offences that are punishable by imprisonment. However, as both these offences are punishable by Level 6 imprisonment, they are **indictable offences that can be heard and determined summarily**.

The Magistrates' Court can hear and determine these types of offences if the court considers it is appropriate and the accused consents to a summary hearing (section 29 of the *Criminal Procedure Act 2009* (Vic)). If that happens, then the maximum sentence that can be imposed by the Magistrates' Court is two years' imprisonment for a single offence, and five years' imprisonment for multiple offences.

Ultimately, Haberfield pleaded guilty. Therefore, the role of the Magistrates' Court was to sentence Haberfield. Details of the sentence are contained on the next page, in the discussion of sanctions imposed and their appropriateness.

County Court

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

The DPP **appealed** against the sentence imposed on Haberfield by the Magistrates' Court. In accordance with section 257 of the *Criminal Procedure Act* – which states that the DPP may appeal to the County Court against a sentence imposed by the Magistrates' Court if it is satisfied that an appeal should be brought in the public interest – the appeal was heard by the County Court.

In relation to section 257 of the *Criminal Procedure Act*, the DPP needed to carefully consider whether an appeal in this case was in the public interest. In light of the increased concern about violence against emergency workers, and the decision by the magistrate not to impose a term of imprisonment (described on the next page), the DPP was satisfied that an appeal was in the public interest.

Therefore, the role of the County Court was to consider whether an error was made in the Magistrates' Court in relation to the sentence that was imposed on Haberfield.

Sanctions imposed and their appropriateness

Under section 31(1)(b) of the *Crimes Act*, the **sanction** for assaulting an emergency worker while on duty is Level 6 **imprisonment** (a maximum of five years' imprisonment). Under section 18 of the *Crimes Act*, the sanction for recklessly causing injury is also Level 6 imprisonment (a maximum of five years' imprisonment).

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

imprisonment
a sanction that involves removing the offender from society for a stated period of time and placing them in prison

community correction order (CCO)
a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

Magistrates' Court sentence

In September 2019, following Haberfield's plea of guilty to both offences, Magistrate Zebrowski sentenced him to an 18-month mandatory treatment and monitoring order (MTMO).

An MTMO is a modified and more intense form of **community correction order**. These orders were introduced in October 2018 as a new form of sentence for certain offences against emergency workers. A judicial monitoring condition – which is a condition that requires the accused to appear periodically before a magistrate to monitor their progress – must be attached to an MTMO. In addition, a court must attach either a treatment and rehabilitation condition or a justice plan condition.

In Haberfield's case, a treatment and rehabilitation condition was attached to the MTMO, which was aimed at addressing Haberfield's mental health. The magistrate was satisfied that Haberfield suffered from a major depressive disorder, which was diagnosed along with two other mental disorders.

One of the key issues for the magistrate was whether it was appropriate for Haberfield to be sentenced to a minimum of six months' imprisonment. This is because the *Crimes Act* requires a minimum of six months' imprisonment to be imposed if the victim is an emergency worker on duty unless a 'special reason' exists.

Two of these special reasons relate to impaired mental functioning (which includes a mental illness, autism spectrum disorder and/or an acquired brain injury):

- First, if at the time of the offence, Haberfield had impaired mental functioning, then the magistrate would not have to impose the minimum six-month term of imprisonment. However, this does not apply to impaired mental functioning caused solely by self-induced intoxication. Therefore, if Haberfield did not have impaired mental functioning at the time of the offence, then he had to spend at least six months in prison. Or, if Haberfield did have impaired mental functioning at the time of the offence, but it was because of self-induced intoxication, then this was not a special reason and Haberfield had to spend at least six months in prison.
- Second, if Haberfield's impaired mental functioning meant that he would endure substantially and materially greater risks during imprisonment than the ordinary person, then this would constitute a 'special reason'.

The magistrate found that Haberfield did have impaired mental functioning at the time of the offence. However, the magistrate also found that Haberfield's impaired mental functioning was caused by self-induced intoxication. That is, Haberfield would not have been delusional and acted the way he did had he not taken drugs at the musical festival. Therefore, the magistrate concluded that no 'special reason' existed in relation to impaired mental functioning.

However, the magistrate did find that Haberfield's impaired mental functioning would result in Haberfield being subject to a substantially and materially greater burden or risk than the ordinary person when imprisoned. In particular, the magistrate noted that Haberfield suffered from various mental disorders, was clinically depressed and would not get the same level of mental health treatment in prison as he would receive outside of prison, and that his disorders were such that it would be very difficult for him to navigate prison. Therefore, instead of a term of imprisonment, an MTMO was imposed.

County Court sentence

The DPP appealed against the sentence given to Haberfield by Magistrate Zebrowski.

The County Court upheld the sentence of an MTMO on the charge of recklessly causing injury (the offence committed against Monica), but increased the duration of the order by four months. In relation to

Study tip

In your answers to questions, use proper legal terminology. For example, use the word 'offender' rather than 'accused' once the person is guilty of an offence. Say 'Judge X' when referring to a County Court judge, and 'Justice X' when referring to a Supreme Court judge or a High Court judge (also known as a High Court justice).

the second charge (assaulting an emergency worker while on duty – the offence committed against Sam), the County Court imposed an 18-month CCO. However, the conditions of the CCO were the same as the MTMO and it commenced on the same day as the MTMO.

Interestingly, Judge Tinney of the County Court decided that it could not be said that Haberfield's impaired mental functioning was solely self-induced by the drugs he took at the Rainbow Serpent Festival. Rather, the Judge was satisfied that there was an underlying condition, being schizophrenia, that Haberfield was unaware of. He was also satisfied that Haberfield's impaired mental functioning meant that prison was not the right place for him and he would be subjected to great risks. Therefore, Judge Tinney found that both special reasons existed, which meant that Haberfield did not have to serve the six-month term of imprisonment.

In rejecting prison as an option in this case, Judge Tinney was clear that the best needs of Haberfield and the community would be served by him remaining within the reach of supportive people such as family and professional psychologists and counsellors. The nature of the MTMO places Haberfield, as a young offender, in a positive environment where he can build on the gains that he made since he committed the offence. His early guilty plea and subsequent remorse suggested, in the mind of the Judge, that Haberfield would make the most of these opportunities.

EXTRACT

DPP v Haberfield [2019] VCC 2082 (16 December 2019)

Rehabilitation

49 ... You obviously have very strong family support. Your family are simply aghast at what you have done but still support you as they should. It is critical that they do, as you have become increasingly isolated. You have pleaded guilty at an early stage and are genuinely remorseful. I suppose the greatest threat to your future prospects would be continued drug use or disconnection from appropriate treatment and paradoxically that later outcome is far more likely if I allow the Directors' appeal and imprison you. Prison will disconnect you from much of your treatment and heightens your risk of significant deterioration. ...

Judge Tinney acknowledged that Monica was unlikely to believe that the sanction given to Haberfield reflected her suffering. Judge Tinney also acknowledged the intention of parliament in establishing these laws but noted that it was the role of the courts to apply the law.

EXTRACT

DPP v Haberfield [2019] VCC 2082 (16 December 2019)

A new sentencing landscape for judicial officers

99 The message sent by parliament could not be clearer. Do not assault emergency services workers. If you do, don't say you have not been warned. Prison will ordinarily be the outcome, whoever you are, whatever your character, whatever the reasons for you so acting, whatever damage may be caused to you in prison.

100 Part of the law I must apply are the special reasons provisions. I am bound to consider those as well. Again, some of the publicity might have suggested that some tricky lawyer had sniffed around and found some hidden loophole or come up with some novel interpretation of the legislation. It was not a hidden loophole or novel interpretation. The special reasons exceptions were very sensibly inserted into the Act by parliament to prevent an injustice in the rare cases where they may be enlivened. They exist for a reason. The magistrate was obliged to consider those provisions. He could not just ignore them, no more [than] I can.

Therefore, while accepting that the suffering of the victim, Monica, in this case was severe, and that these types of crimes are serious, Judge Tinny found that the law meant that a term of imprisonment in this case was not appropriate.

Source 2 James Haberfield was sentenced to an 18-month mandatory treatment and monitoring order (MTMO) for assaulting paramedics while under the influence of drugs.

Factors taken into consideration in sentencing

The two main types of sentencing factors are **mitigating factors** and **aggravating factors**:

- **mitigating factors** are factors or circumstances that count in the offender's favour and may be considered by the magistrate or judge as a reason to give a lesser penalty (e.g. Haberfield's pre-existing mental illness, his early guilty plea, and the remorse he had shown since the incident)
- **aggravating factors** are factors or circumstances that count against the offender and may be considered by the magistrate or judge as a reason to give a higher penalty (e.g. prior convictions or the use of violence).

mitigating factors facts or circumstances about the offender or the offence that can lead to a less severe sentence

aggravating factors facts or circumstances about an offender or an offence that can lead to a more severe sentence

In the appeal, the following factors were taken into account in sentencing:

- **Haberfield's plea** – The fact that Haberfield had pleaded guilty at the earliest stage in the proceedings showed Haberfield had taken responsibility for his offending. Witnesses were spared the experience of coming to court to give evidence, and the community was saved the time, cost and effort associated with a hearing.
- **Haberfield's remorse** – Judge Tinney had no doubt that Haberfield was genuinely sorry for what he had done.
- **Haberfield's prospects of rehabilitation** – The steps that Haberfield had taken since the offending showed he had excellent prospects of rehabilitation. The Judge said that Haberfield was 'a young man of otherwise excellent character' and he told Haberfield that '[y]ou have done everything you can to deal with your own issues including performing excellently on the treatment and monitoring order that was imposed in the Magistrates' Court'.
- **Haberfield's young age** – He was 21 at the time of sentencing.
- **Haberfield's use of violence** – Judge Tinney also addressed the aggravating factor of the violence that Haberfield had inflicted on Monica. While the nature of the violence was deeply concerning to the Judge, the focus on rehabilitation was the paramount consideration in this case.

EXTRACT

DPP v Haberfield [2019] VCC 2082 (16 December 2019)

Sentence

125 I am not saying it is okay to assault an emergency worker. It is never okay to do so. It is never okay to assault a paramedic. Your attack was completely unacceptable and has had dire consequences upon a totally innocent victim and one who I acknowledge may well feel very let down by this Court outcome. It is not a matter of not respecting her or recognising the impact upon her. I do. It is not a matter of endorsing your behaviour. I don't. It was totally unacceptable. ...

Possible avenues of appeal

As mentioned above, the DPP appealed to the County Court on the grounds that the sentence was inadequate. The County Court found that there were special reasons that existed that meant that a mandatory term of six months in prison was not required, but still increased the duration of the MTMO by four months.

Any appeal of the County Court's decision needs to be made to the Court of Appeal. Appeals to a higher court must usually be lodged within 28 days after the **conviction**.

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

In this case, Haberfield could have appealed against the severity of the sentence that had been imposed by Judge Tinney. The prosecution could have appealed on the grounds that the sentence was too lenient, especially as, in the Haberfield case, the DPP was seeking the imposition of a term of imprisonment. However, neither party appealed the County Court's decision, and so the sentence imposed by the County Court is the sentence that Haberfield will serve.

If there was an appeal to the Court of Appeal, either Haberfield or the prosecution could then file an appeal with the High Court, which is the ultimate court of appeal in Australia. The High Court has to grant leave to appeal. The High Court only hears criminal appeals if the Court is needed to make a decision about a serious legal issue.

Source 3 Possible avenues of appeal for both the DPP and Haberfield

The extent to which the principles of justice were achieved in the Haberfield case

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in the Haberfield case is provided below. For each principle, the assessment is made on the evidence available.

Fairness

The principle of **fairness** means people should be treated fairly and impartially. Every person should be aware of the case against them and be able to present their case. For fairness to be achieved, the criminal justice system relies on fair legal processes and fair hearings.

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial)

In the Haberfield case:

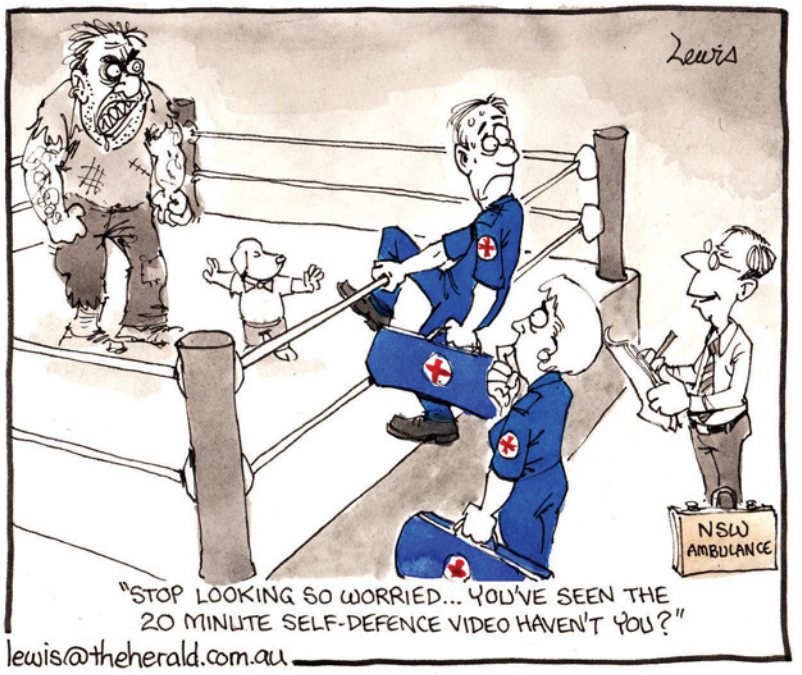
- Haberfield was **legally represented**, which assisted in ensuring he received a fair trial.
- Haberfield was able to **exercise his rights**, including the right to enter a plea at an early stage of the process, which reduced the severity of his sentence. The DPP also exercised their right to **appeal**.
- Fairness was ensured at the **appeal hearing**, where Haberfield was represented in the County Court and could call **expert witnesses** to give evidence about his mental health.
- Judge Tinney also highlighted an aspect of unfairness where an offender is **exposed to media scrutiny and public abuse** as a result of the offence. The Judge noted to Haberfield that 'you seem to have become public enemy number one. You have been the subject of much public vitriol'. Given that the courts offer a public and transparent forum where offenders can be dealt with, these comments by the Judge highlight the issue that some offenders suffer additional hardship as a result of media reporting. The cartoon on the next page is an example of such media attention.

Equality

The principle of **equality** requires all people to be equal before the law, regardless of who they are. Every person should also have the same opportunity to present their case without advantage or disadvantage. For equality to be achieved, the criminal justice system relies on both parties being treated equally.

In the Haberfield case:

- Both parties had the **right to engage legal representation**.
- Equality was ensured at the appeal because both the magistrate and the judge acted as **independent and impartial adjudicators** and decided the sanction based on the facts.
- Both parties were entitled to **present evidence** at the **sentencing hearing**, which included the **victim impact statement** made by the paramedic, Monica.
- There was nothing to suggest that Haberfield suffered from a **particular vulnerability** that required the judge to ensure he was on an equal footing with the prosecution (e.g. Haberfield was not a child, and he was proficient in English, so he was not disadvantaged in terms of language).



Source 4 This cartoon by Peter Lewis is an example of the widespread criticism of the violence that first responders are exposed to in cases such as the Haberfield one. Such negative commentary can impact on the rehabilitation of an offender, as noted by Judge Tinney.

Access

The principle of **access** requires everyone to have equal access to legal agencies and institutions, and to be given every opportunity to understand their legal rights and to pursue their legal claims. For access to be achieved, the criminal justice system relies on accused people having legal advice and representation. Legal representation is essential for parties attempting to navigate complex legal processes.

In a criminal trial, there are strict processes for the sharing of evidence between the parties, especially the key facts that must be revealed by the prosecution to the defence before the trial. This helps legal counsel prepare for the trial. In a criminal trial, the burden of proof rests on the prosecution, and it is their role to lay out all the evidence required to establish the case.

In the Haberfield case:

- Members of the public and victims could **attend the sentencing hearing**, and the sentencing remarks are **publicly available**.
- Haberfield was **legally represented** during both the sentencing hearing and the appeal, and so would have had access to information about court processes and his rights.
- At the end of the Magistrates' Court hearing, both parties had the **right of appeal** on grounds relating to the sentence imposed and the decisions made about the special reasons for which a person is not imprisoned for an offence such as this.
- Access was also provided to the **victims** in this case. One of the victims, Monica, was able to explain the impact of the crime to the court via a victim impact statement. This information was taken into consideration when the court determined the appropriate sanction.

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

sentencing hearing
a hearing during which a judge will hand down the sanction imposed on an offender

victim impact statement
a statement filed with the court by a victim that is considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

12.3 CHECK YOUR LEARNING

Define and explain

1 Outline the key facts in the case involving James Haberfield.

2 Explain why it would have been in the public interest for the DPP to appeal the Magistrates' Court sentence.

Synthesise and apply

3 Make notes on the key factors that were taken into account in sentencing in this case.
   - **a** Prepare a table that identifies all of the factors that were taken into account in sentencing by Judge Tinney in this case.
   - **b** For each factor, identify whether it was a mitigating factor or aggravating factor, and provide a short statement justifying your decision.

4 Access the Magistrates' Court judgment of this case. Explain how the victims' needs were taken into consideration in sentencing.

Analyse and evaluate

5 In this case, there was a victim impact statement given by Monica.
   - **a** What impact does a victim impact statement have in sentencing?
   - **b** To what extent does the use of victim impact statements in court allow for greater access to the sentencing process? Explain.
   - **c** In the appeal, Judge Tinney said that he was 'understandably concerned as to Monica feeling a sense of being abandoned or not protected by the Court if a prison term is not imposed'.
     To what extent do you believe that this sentence deters people from assaulting emergency workers? Give reasons.

6 Read paragraphs 99 and 100 of the County Court judgment (extracted on page 400). Discuss as a class how these paragraphs demonstrate the role of and relationship between parliament and courts.

7 Conduct some research about the *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic).
   - **a** Explain how the Act would impact on a case in the future that has the same facts as the Haberfield case.
   - **b** Discuss the extent to which you agree with parliament being able to pass legislation to impose minimum sentences for certain types of offences.

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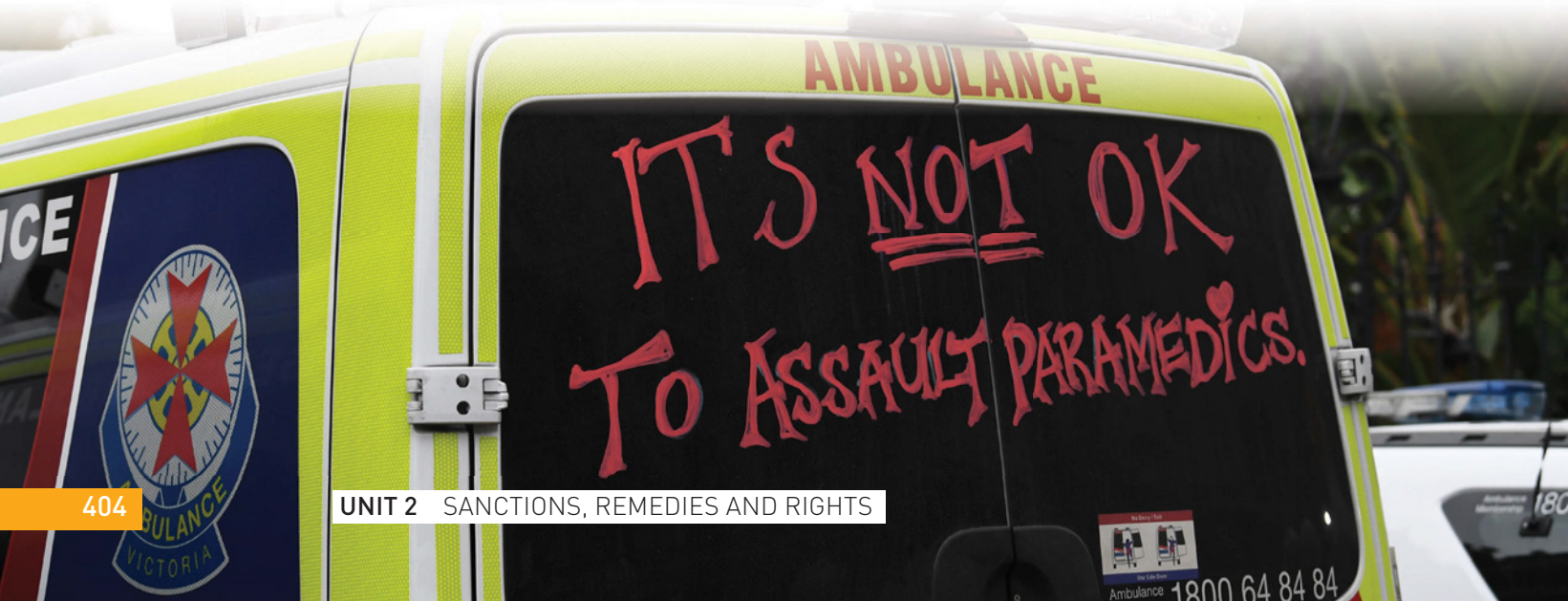
Tang v Haberfield [2019] VMC (28 August 2019); *DPP v Haberfield* [2019] VCC 2082 (16 December 2019) – sentence



12.4 RECENT CRIMINAL CASE 4: THE TRIAL AND ACQUITTAL OF CARDINAL GEORGE PELL

DPP v Pell (Sentence) [2019] VCC 260 (13 March 2019); *Pell v The Queen* [2019] VSCA 186 (21 August 2019); *Pell v The Queen* [2020] HCA 12 (7 April 2020)

Introduction

Director of Public Prosecutions (DPP) the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

royal commission the highest form of inquiry into matters of public concern and importance. Royal commissions are established by the government and are given wide powers to investigate and report on an important matter of public concern

appeal an application to have a higher court review a ruling (i.e. a decision) made by a lower court

jury an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

The case of the ***Director of Public Prosecutions (DPP)*** *v Pell* (Sentence) [2019] VCC 260 (13 March 2019); *Pell v The Queen* [2019] VSCA 186 (21 August 2019); *Pell v The Queen* [2020] HCA 12 (7 April 2020) ('Cardinal Pell case') is a case of alleged child sexual abuse. The courts involved in this case were the Magistrates' Court, the County Court, the Court of Appeal, and the High Court.

The sexual abuse of children by adults in positions of authority has dominated the news for many years, particularly following the **Royal Commission** into Institutional Responses to Child Sexual Abuse (2013–2017).

This Royal Commission was established to inquire into how institutions had responded to allegations and incidents of child sexual abuse. That is, how large and small institutions and organisations (e.g. clubs, religious bodies and schools) have dealt with allegations and incidents of child sexual abuse within their communities.

As part of its inquiry, this Royal Commission heard from 7981 survivors of child sexual abuse in private sessions and received 1344 written accounts of abuse. Of these accounts, 2562 matters were referred to the police for further investigation.

One of the people to address the Royal Commission was Cardinal George Pell. Cardinal Pell is a leading priest within the Catholic Church and is considered to be the most senior Australian Catholic in the world. While he was Archbishop of Melbourne, Cardinal Pell was tasked with handling the child sexual abuse allegations that were made from the early 1990s in relation to priests of the Catholic Church.

Ultimately, Cardinal Pell faced trial himself for alleged child sexual abuse. This case was one of the most significant and widely reported cases of alleged child sexual abuse globally. The case began in the Magistrates' Court and the County Court; then Cardinal Pell **appealed** the County Court's decision to the Court of Appeal, and then appealed the Court of Appeal's decision in the High Court. Cardinal Pell was acquitted in April 2020 by the High Court. This case is significant because of the legal principles addressed, the questions raised about the role of and need for a **jury** in certain trials, and the standard of proof applicable in criminal trials.

Overview of the charges and the central facts of the case

The alleged offending

In late 1996 and into 1997, while in the role of Archbishop of Melbourne, Cardinal Pell conducted Sunday Solemn Mass at St Patrick's Cathedral in East Melbourne. The two victims, known only as R and J, were choir boys who performed duties during Mass. The charges against Cardinal Pell involved two incidents of alleged offending. The following describes the *allegations* made against Cardinal Pell.

Source 1 This is the priests' corridor at St Patrick's Cathedral, East Melbourne, where it was alleged that Cardinal George Pell committed crimes in 1996 and 1997. At the trial, defence counsel argued that this is a busy thoroughfare after Sunday Mass and called witnesses to support these claims.

First, allegedly in late 1996, at the conclusion of Solemn Mass, the choristers formed part of a procession with Cardinal Pell outside of the cathedral. In evidence presented to the County Court, the two boys walked back towards their choir room, still dressed in their robes. It was alleged in court that without asking permission, the boys separated themselves from the procession and went to the priests' corridor, which was off limits to the public. It was claimed in evidence by one of the boys, who was referred to in the trial as J, that they drank some sacramental wine, which is reserved for use in church services.

When Cardinal Pell entered the priests' sacristy and saw the boys, he allegedly stood in the doorway and said something to the effect of 'you're in trouble'. In evidence, J claimed that Cardinal Pell then committed an indecent act on the other boy, who was referred to in the trial as R. That person is now deceased. It was alleged that a short time after this, the accused then committed indecent acts with J.

In addition, it was alleged that over a month later, there was a second incident of offending following another Sunday Solemn Mass that involved J only, who did not tell R about this second offence.

No charges were laid at the time of the alleged offending, and the allegations against Cardinal Pell were not made public for over 20 years.

Ultimately, Cardinal Pell was charged with four counts of performing an indecent act with or in the presence of a child under 16 and one charge of sexual penetration of a child under 16.

The alleged victims and the investigation

The two boys, R and J, were 13 years old in 1996 and 1997. R passed away in 2014 at the age of 31 from accidental causes. In 2001, when asked by his mother whether he had ever been 'interfered with or touched up' while in the Cathedral choir, R said he had not.

Four years before the trial, in June 2015, J came forward and made a statement to the police. He ultimately made two statements to the police. As was noted by the Court of Appeal, where children are the alleged victims of sexually inappropriate conduct, it is not unusual for there to be a delay between the offending and a report being made to police, as often the children suppress what they went through until they are older.

committal proceeding the processes and hearings that take place in the Magistrates Court for indictable offences

J gave evidence twice – at the **committal proceeding** and at the trial. He was also required during the trial to do a 'walkthrough' of the cathedral – the first time he had been back since he was 13 years old.

Subsequent to J's reporting of the alleged offences, Victoria Police issued a public request for information regarding any other possible offending during that period.

Cardinal Pell participated voluntarily in a record of interview with the police in October 2016. In the interview, Cardinal Pell strongly denied the allegations. He noted in the interview that if people who were staff and choirboys at the cathedral in 1996 and 1997 were interviewed, they would confirm that the allegations were fundamentally improbable and most certainly false. In his interview, Cardinal Pell said the allegations were a 'load of absolute and disgraceful rubbish'.

After a police investigation, Cardinal Pell was charged. He pleaded not guilty, and therefore a trial was required.

Courts involved in the case

The courts involved in this case were the Magistrates' Court, the County Court, the Court of Appeal, and the High Court of Australia.

Magistrates' Court

In March 2018, a committal proceeding took place in the Melbourne Magistrates' Court. This is because Cardinal Pell was charged with **indictable offences**, to which he pleaded not guilty, and therefore a committal proceeding was required. One of the purposes of a committal proceeding is to determine whether there is evidence of a sufficient weight to support a **conviction** for the offences. If the magistrate decides that the evidence is of such weight, the accused person is directed to stand trial in a superior court.

During the committal hearing, senior counsel for Cardinal Pell cross-examined J. This became relevant because the accused's lawyers ultimately identified differences in what J said at the committal hearing and what he said at the trial.

The committal hearing ran for four weeks in the Melbourne Magistrates' Court. The magistrate decided that the evidence was enough to support a conviction at a trial. At this stage, the case against Cardinal Pell was not made public.

At the same time, the Magistrates' Court also committed Cardinal Pell to stand trial for other alleged offences committed at a swimming pool during his early years as a priest in Ballarat in the 1970s. This trial was to be conducted in 2019, and was to be run separately to the trial for the alleged offences that had occurred at St Patrick's Cathedral involving R and J. This later trial was discontinued when a key witness passed away.

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

County Court

Cardinal Pell's first trial was heard in August and September 2018 in the County Court. The County Court hears most sexual offence cases in Victoria and has the jurisdiction to do so. The trial lasted for five weeks. After a week of deliberations, the jurors could not reach the required verdict (a unanimous or majority verdict of 11–1).

The second trial began in the County Court in November 2018. Nine men and five women were sworn in for the second trial. The prosecution called 24 witnesses, including J. Most of the witnesses were involved or associated with Sunday Solemn Mass at St Patrick's Cathedral, and most gave evidence about the general or normal procedure followed at mass. There were several witnesses at the trial who gave evidence that there was little or no opportunity for Cardinal Pell to commit these offences. The defence did not call any witnesses, and the accused did not give evidence.

In December 2018, Cardinal Pell was found guilty by the jury of all five charges. In 2019, County Court Chief Judge Kidd sentenced Cardinal Pell to six years' imprisonment, with a non-parole period of three years and eight months, the details of which are outlined in the section on the next page, 'Sanctions imposed and their appropriateness'.

Source 2 Cardinal Pell leaves the County Court during his trial, surrounded by members of the media and police officers.

A suppression order was made to restrict media reporting of the two trials in the County Court because Cardinal Pell was facing other charges involving alleged offences in Ballarat that were due to be heard in 2019. The suppression order made it an offence to reveal any aspects of the two County Court trials. When the case that was due to be heard in 2019 was discontinued, the suppression order was lifted and the details of the second County Court trial were published by the media.

Court of Appeal

After County Court Chief Judge Kidd sentenced Cardinal Pell in 2019, an appeal was lodged by the defence to the Court of Appeal. The appeal argued that Cardinal Pell being found guilty of all five charges was 'unreasonable and cannot be supported having regard to the evidence'.

In 2019, the Court of Appeal, in a 2–1 decision, dismissed the appeal. Details of the appeal are contained in the section below, 'Sanctions imposed and their appropriateness'.

High Court

The High Court was also involved in the Cardinal Pell case, hearing an appeal by the defence against the conviction handed to him by the County Court. The appeal hearing was held on 11 and 12 March 2020. On 7 April 2020, the High Court set aside the orders of the Court of Appeal and ordered that Cardinal Pell's convictions be quashed, and that he be acquitted. Cardinal Pell was immediately released from prison. Details of the appeal are further considered below.

Sanctions imposed and their appropriateness

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

imprisonment
a sanction that involves removing the offender from society for a stated period of time and placing them in prison

Under section 49B of the *Crimes Act 1958* (Vic), the **sanction** for sexual penetration of a child under 16 years old is Level 4 **imprisonment** (a maximum of 15 years' imprisonment).

Under sections 49B and 49F of the *Crimes Act*, the sanction for performing an indecent act with, or in the presence of, a child under 16 years old is Level 3 imprisonment (a maximum of 10 years' imprisonment).

County Court's sentence

County Court Chief Judge Kidd imposed on Cardinal Pell a total sentence of six years' imprisonment, with a non-parole period of three years and eight months.

The County Court also sentenced Cardinal Pell as a serious sexual offender. The *Serious Offenders Act 2018* (Vic) allows for the continued supervision or detention of serious sexual offenders beyond the term of their prison sentence. Given the acquittal of Cardinal Pell, **this no longer applies**.

In sentencing Cardinal Pell, Chief Judge Kidd was clear that the sentence was based purely on the offences with which Cardinal Pell had been charged. While many allegations had been directed at Cardinal Pell through the media, these were not taken into consideration in sentencing. The extract below describes Chief Judge Kidd's reasoning for the sentence he gave Cardinal Pell.

EXTRACT

DPP v Pell (Sentence) [2019] VCC 260 (13 March 2019)

7 First, I am required to sentence you today in accordance with the rule of law. This is a critical feature of our criminal justice system. The rule of law demands that when I sentence you, I must do so independently of any outside influences, only upon the evidence before me, and upon established legal principles. This means sentencing without fear or favour.

10 As I directed the jury who convicted you in this trial, you are not to be made a scapegoat for any failings or perceived failings of the Catholic Church. Nor are you being sentenced for any failure to prevent or report child sexual abuse by other clergy within the Catholic Church. You have not been charged with or convicted of any such conduct or failings.

Given the seriousness of the charges against Cardinal Pell, a term of imprisonment was considered by the Judge to be the most appropriate option available to the court. While the Judge did not regard Cardinal Pell as a risk in terms of reoffending, the Court expressed the need to condemn abuses of power in cases such as this and to offer **general deterrence** for others in positions of authority. The extract below is from the sentencing of Cardinal Pell by Chief Judge Kidd.

general deterrence one purpose of a sanction, designed to discourage others in the community from committing similar offences

EXTRACT

DPP v Pell (Sentence) [2019] VCC 260 (13 March 2019)

174 The message which the Courts send to would-be child sexual offenders must be unequivocal. They must be dissuaded, whether the offending is planned or whether it is the result of a spur of the moment decision.

Factors taken into consideration in sentencing

The two main types of sentencing factors are **mitigating factors** and **aggravating factors**:

- **mitigating factors** are factors or circumstances that count in the offender's favour and may be considered by the judge as a reason to give a lesser penalty (e.g. a difficult childhood, an existing mental illness, or remorse)
- **aggravating factors** are factors or circumstances that count against the offender and may be considered by the judge as a reason to give a higher penalty (e.g. a prior record or use of violence).

mitigating factors facts or circumstances about the offender or the offence that can lead to a less severe sentence

aggravating factors facts or circumstances about an offender or an offence that can lead to a more severe sentence

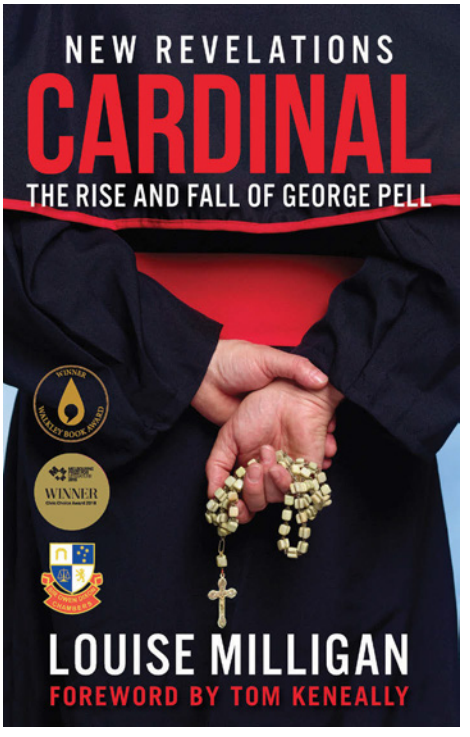
Although the convictions have been overturned and Cardinal Pell has been acquitted, some of the mitigating and aggravating factors that were considered are outlined below.

In the Cardinal Pell case, the main mitigating factor was the impact of imprisonment given his age and the media coverage of his case. At the time of sentencing, Chief Judge Kidd made reference to Cardinal Pell's age of 77 years, which would have added to the difficulties he would experience in prison. The Judge also referred to the extensive public outrage over the offences for which Cardinal Pell was convicted.

Other mitigating factors were that Cardinal Pell had enjoyed an 'exceptional career' and had no prior convictions. This suggested that, aside from this offending, he is the 'compassionate and generous person' that his character references described. The Judge also noted that the prosecution did not challenge any of these character references.

In terms of the aggravating factors in this case, Chief Judge Kidd particularly focused on the abuse of power and privilege in determining the sentence. The Judge also took into account the breach of trust in his assessment of the gravity of alleged offending such as this. Also, Cardinal Pell had pleaded not guilty and showed no remorse. However, Cardinal Pell's acquittal by the High Court supported his continued claims from the committal hearing in the Magistrates' Court, right through to the High Court appeal, that he was not guilty.

In describing Cardinal Pell's situation as 'unique', Chief Judge Kidd addressed the important issue of the impact of imprisonment in the extract below.



Source 3 In the years before his trial in the County Court, Cardinal Pell had been the subject of many news reports, as well as books including *Cardinal: The Rise and Fall of George Pell*, by Louise Milligan (Melbourne University Press, 2017). In Cardinal Pell's County Court trial, the Judge warned the jury to focus only on the evidence from the trial and not to make Cardinal Pell a 'scapegoat for ... the Catholic Church'.

EXTRACT

DPP v Pell (Sentence) [2019] VCC 260 (13 March 2019)

154 Even making full allowance for the fact that the experience of protective prisoners today is less restrictive than in the past, I need to make some predictive assessment concerning your likely personal experience. Like so many things to do with your case, Cardinal Pell, I think your situation is somewhat unique. As the affidavit [a written statement of what a person says about certain matters] highlights, there are concerns about your notoriety and the extremely high-profile nature of your case. This gives rise to security and safety concerns. The Assistant Commissioner can say no more than that the safety risk towards you – currently assessed as 'at immediate risk of serious threat' – may be reduced in protection, so that in time you may be able to mix with a limited number of heavily vetted prisoners. I emphasised the use of the term may. I am satisfied on the balance of probabilities, however, that even with the best will in the world your time in prison will be materially and negatively impacted upon because of these issues. Your position is not improved because of your advanced years and the vulnerability which goes with that.

155 I accept your counsel's argument that I should give weight to these considerations.

156 I will make allowance for these matters in my sentence.

Possible avenues of appeal

Appeal to the Court of Appeal

Following Cardinal Pell's conviction and sentence, his legal team immediately lodged an appeal against the County Court's verdict to the Court of Appeal. This appeal was unsuccessful.

At that appeal in the Court of Appeal, the judges decided by way of a 2–1 majority decision to dismiss the appeal. The majority judges – Chief Justice Ferguson (the Chief Justice of the Supreme Court) and Justice Maxwell (the President of the Court of Appeal) – found that 'nothing in the … evidence which we have analysed in this part of our reasons leads us to the conclusion that the jury must have had a doubt about whether there was a realistic opportunity for the offending to occur, nor a doubt that the particular sexual conduct occurred'. Taking the evidence as a whole, both Chief Justice Ferguson and Justice Maxwell found that 'it was open to the jury to be satisfied of Cardinal Pell's guilt **beyond reasonable doubt**'.

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

The dissenting judge in the Court of Appeal, Justice Weinberg, wrote the following, 'Having had regard to the whole of the evidence led at trial and having deliberated long and hard over this matter, I find myself in the position of having a genuine doubt as to the applicant's guilt'.

Appeal to the High Court

From the Court of Appeal, the defence filed an appeal with the High Court, which is the ultimate court of appeal in Australia. The High Court only hears criminal appeals if it grants leave, and there must be a serious legal issue to decide.

The appeal was made on two grounds. The second ground was that the verdicts were not reasonable as there remained a reasonable doubt about the existence of any opportunity for the offending to have occurred. That is, one of the key issues involved whether Cardinal Pell, based on the evidence, had an opportunity to offend in light of the practices that occurred after Mass at the Cathedral. This involved the claim that the prosecution had not satisfied the standard of proof based on the evidence and there was 'reasonable doubt'. The defence focused on a five to six-minute window in which the abuse was said to have taken place.

Counsel for Cardinal Pell, Bret Walker SC, argued that the area around the priests' corridor was typically very busy after a Solemn Mass at St Patrick's Cathedral. This fact could cast doubt on the allegations, given that there were no witnesses to the offending, other than the victim, J. The defence urged the judges to acquit the accused, rather than send the case back to the Court of Appeal for a re-hearing.

In their appeal documents lodged with the High Court, the defence cited the test to be applied in determining if a verdict was 'unreasonable'. This argument is based on the decision in the case of *M v The Queen* (1994) 181 CLR 487. Cardinal Pell's lawyers argued that:

> the '*ultimate question*' for an appellate court is whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied of guilt beyond reasonable doubt. The approach … requires the appellate court to undertake two steps. First, to make its own independent assessment of the whole of the evidence to determine whether the court itself has a reasonable doubt … Second, if the court does have a reasonable doubt, then it is to consider whether the jury had an advantage capable of resolving the doubt experienced by the court. If so, then the appeal fails. In most cases, however, a doubt experienced by the court will be a doubt which a jury should (or must) have also experienced.

The High Court had four options when considering the appeal:

- Special leave to appeal is rejected and Cardinal Pell remains in prison to serve the sentence imposed in March 2019 by the County Court.
- Special leave to appeal is granted, but the appeal is dismissed, with Cardinal Pell remaining in prison.
- Special leave to appeal is granted and the appeal case is sent back to the Court of Appeal to be re-examined by three new judges.
- Special leave to appeal is granted, and the appeal is allowed, which results in Cardinal Pell's immediate release. This was the option that was preferred by the High Court.

On 7 April 2020, the Full Bench of the High Court accepted the arguments that had been presented by the defence. Cardinal Pell was acquitted and released immediately from Barwon Prison. The seven judges found that the jury, acting rationally on the whole of the evidence, ought to have had a reasonable doubt about Cardinal Pell's guilt with respect to each of the offences. In a unanimous decision, the High Court found that the majority judges in the Court of Appeal (Chief Justice Ferguson and President Maxwell) failed to consider the reasonable possibility that the offending had not taken place, and that there ought to have been a reasonable doubt about Cardinal Pell's guilt.

The judgment received widespread media commentary and was both condemned and praised by various groups. Groups that support survivors and victims of sexual assault and abuse considered the judgment to be a step backwards. They encouraged survivors and victims to continue reporting crimes. On the other hand, supporters of Cardinal Pell and the Catholic Church considered the judgment to be a vindication. On a legal front, many questioned the right of the High Court to overturn a decision of 12 jurors. Others suggested it was time for Victoria to follow other states and allow for judge-alone trials.

Source 4 The process of appeal in the Cardinal Pell case. Cardinal Pell made each of the appeals and was finally successful in the High Court.

The extent to which the principles of justice were achieved in the Cardinal Pell case

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in the Cardinal Pell case is provided below. For each principle, the assessment is made on the evidence available.

Fairness

The principle of **fairness** means people should be treated fairly and impartially. Every person should be aware of the case against them and be able to present their case. For fairness to be achieved, the criminal justice system relies on fair legal processes and fair hearings.

Did you know?

When the High Court delivered its judgment, only Chief Justice Susan Kiefel was in attendance. The High Court registry in Brisbane, where the judgment was delivered, was almost empty due to the remaining judges not travelling because of the COVID-19 pandemic. The hearing lasted only a few minutes. The High Court initially delivered its decision to the public via Twitter.

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

Source 5 In June 2018, the County Court placed a suppression order on media discussion of any elements of the Cardinal Pell trial. When Cardinal Pell was found guilty in December 2018, some media outlets protested against the suppression order by running front page articles about the media's inability to report 'the nation's biggest story'.

In the Cardinal Pell case:

- A **suppression order** was placed on Cardinal Pell's two County Court trials in 2018 so that jurors in the second case involving the accused (the case that was abandoned in 2019) could not be influenced by the outcome of the first case. In addition, the jury that was empanelled for the second County Court trial in 2018 would not have been aware of the evidence presented at the first trial. This upheld fairness for the accused, because the jury for the second County Court trial – as well as the jurors who would have been empanelled for the 2019 trial, had it occurred – would have had no prior knowledge of the evidence presented by the prosecution.
- Cardinal Pell was able to **exercise his rights**, including the right to plead not guilty, the right to not give evidence (or to give evidence), and the right to appeal. Cardinal Pell also chose not to call his own witnesses, but his legal counsel did cross-examine J.
- The accused was **legally represented**, which assisted in ensuring he received a fair trial. His barristers were some of the most prominent legal practitioners in Australia.
- Many have questioned whether there can be a **fair trial** when an accused has a high profile. There has been increased focus on whether there should be an option for a judge-alone trial where there is a high-profile accused, to ensure that jurors are not swayed by prior knowledge or beliefs about the accused or the case.
- Chief Judge Peter Kidd highlighted an aspect of unfairness, where an offender is **exposed to media scrutiny and public abuse** as a result of their offending. The Judge advised the jury that it was not to pass judgment on Cardinal Pell based on media reporting of events concerning abuse of children by other members of the Catholic Church. Given that the courts offer a public and transparent forum where offenders can be dealt with, these comments by the Judge highlight the issue that some offenders suffer even greater hardship as a result of media reporting.

Equality

The principle of **equality** requires all people to be equal before the law, regardless of who they are. Every person should also have the same opportunity to present their case without advantage or disadvantage. For equality to be achieved, the criminal justice system relies on both parties being treated equally.

In the Cardinal Pell case:

- Cardinal Pell engaged **legal representation** at his trial (Robert Richter QC) and at his two appeals (Bret Walker SC). These excellent and very experienced lawyers matched the calibre of the prosecution's legal team, which consisted of Senior Crown Prosecutor Mark Gibson SC and the Victorian Director of Public Prosecutions, Kerri Judd QC.
- Equality was ensured at the appeal hearings because the Court of Appeal and the High Court judges acted as **independent and impartial adjudicators**. Also, both parties had the opportunity to present submissions to the courts regarding the key elements of their case.
- The use of a **jury** at the two trials in the County Court in 2018 ensured equality for Cardinal Pell, because he had available to him in such an important case a group of his peers who could assess the evidence and decide the facts regarding his conduct.

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

Access

The principle of **access** requires everyone to have equal access to legal agencies and legal institutions, and to be given every opportunity to understand their legal rights and to pursue their legal claims. For access to be achieved, the criminal justice system relies on accused people having legal advice and representation. Legal representation is essential for parties attempting to navigate complex legal processes. Cardinal Pell had excellent legal representation.

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

In a criminal trial, there are strict processes for the sharing of evidence between the parties, especially the key facts that must be revealed by the prosecution to the defence before the trial. This helps legal counsel prepare for the trial. In a criminal trial, the burden of proof rests on the prosecution, and it is their role to lay out all the evidence required to establish the case.

In the Cardinal Pell case:

- Access to the criminal justice system was enhanced for J in this case, because while evidence was being presented, the courts (including the Magistrates' Court at the committal hearing) were **closed** to the public. Also, processes would likely have been available to J, such as having a screen between the accused and the witness, to make the giving of evidence hopefully less traumatic. These processes encourage vulnerable witnesses and victims to come forward and report alleged incidents of abuse.
- At the **committal hearing**, Cardinal Pell's lawyers had access to the evidence presented by the prosecution, which helped them prepare for the trial.
- The **sentencing hearing** for Cardinal Pell in the County Court was live-streamed so that members of the public could **listen directly to the judge**, and the sentencing remarks are **publicly available**.
- At the end of the County Court trial, both parties had the **right of appeal** on grounds including the sentence that was imposed and whether the jury verdict was reasonable given the circumstances of the case.
- Both parties were also able to seek special leave to appeal to the **High Court** following the Court of Appeal's decision.

sentencing hearing
a hearing during which a judge will hand down the sanction imposed on an offender

12.4 CHECK YOUR LEARNING

Define and explain

1 Outline the key facts in the case involving Cardinal George Pell.
2 Explain why there was a need for a second trial in the County Court.
3 The sentencing of Cardinal Pell was live-streamed across all media outlets. Explain how this enhances one of the principles of justice.

Synthesise and apply

4 Create a visual diagram showing the avenues of appeal, who made those appeals, and the outcome of each of the appeals. Refer to any minority decisions in your diagram.
5 Conduct some research about Louise Mulligan. What role, if any, did she play in the case?
6 'Given the standard of proof in criminal cases is so high, it is very difficult in cases of historic allegations of sexual abuse for the prosecution to present evidence that can be considered credible.' Discuss this statement in light of the appeal hearings involving Cardinal Pell.

Analyse and evaluate

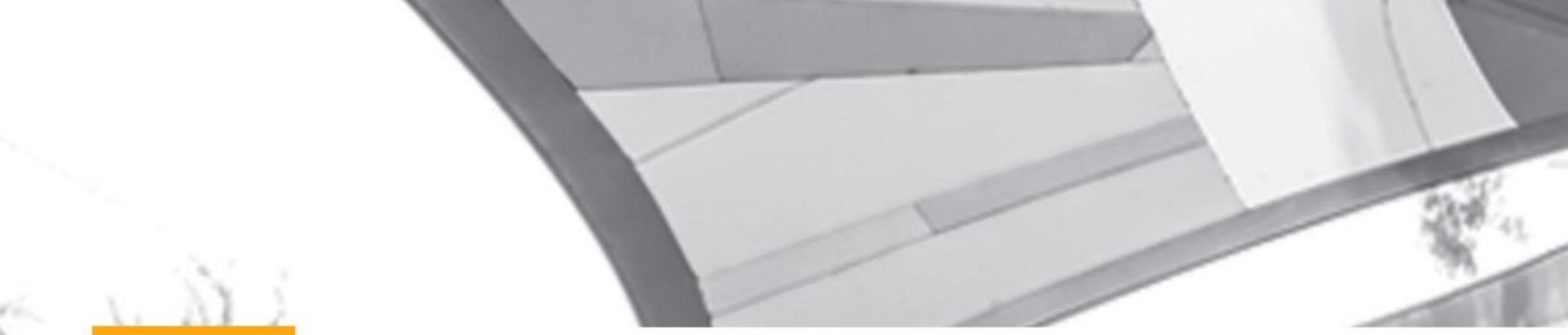
7 Discuss the extent to which trial by judge alone should be introduced in Victoria. In your answer, identify one other state that has judge-alone trials.
8 To what extent should the advanced age of an offender affect their sentence? Justify your answer with reference to general deterrence.
9 Create a chronology of key events in this case and in particular when certain appeals were held. Following this, discuss the extent to which delays may or may not have impacted on the outcome of the case.

Check your Student obook assess for these additional resources and more:

Student book questions
12.4 Check your learning

Video tutorial
DPP v Pell (Sentence) [2019] VCC 260 (13 March 2019); *Pell v The Queen* [2019] VSCA 186 (21 August 2019); *Pell v The Queen* [2020] HCA 12 (7 April 2020) – overview

Weblink
DPP v Pell (Sentence) [2019] VCC 260 (13 March 2019) – sentence



CHAPTER 12

REVIEW

TOP TIPS FROM CHAPTER 12

1 When researching and summarising a case, do not rely on media articles or other secondary sources. While media articles can offer background information, you should read the court judgment to get the facts of a case.

2 Not all the facts of a case are relevant when analysing it for the purposes of considering the principles of justice. Sometimes there are background facts that provide context but are not critical. When reading a case, use two highlighters – one to highlight the critical facts, and the other to highlight other facts that are interesting but are not necessarily important to know.

3 The principles of justice should be considered in the context of what you know about a case. There are likely to be other facts about the case that may be relevant to fairness, access or equality, so try to keep an open mind when undertaking that analysis.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 With reference to one of the criminal cases in this chapter, **describe** one of the three principles of justice.

(3 marks)

Difficulty: medium

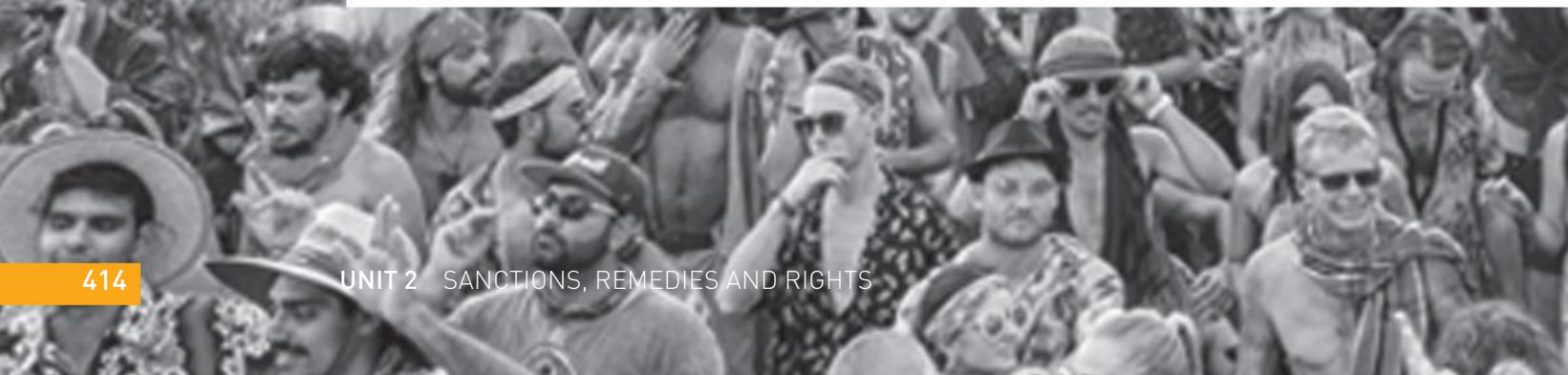
2 Imagine you are the judge imposing a sentence on an offender. **Explain** whether denunciation should be a significant factor in your sentencing decision. Use a case you have studied in this chapter as the basis for your discussion.

(6 marks)

Difficulty: high

3 **Discuss** the extent to which you think that an offender's personal circumstances (e.g. the impact of negative publicity during the trial or their abuse of drugs and alcohol) should be taken into account when sentencing that offender. In your answer, refer to one of the cases you have studied in this chapter.

(8 marks)



PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Practice assessment task questions

1 Choose two of the cases examined in this chapter. For each case, access the judgment of the case on the Australasian Legal Information Institute (AustLII) website (hint: access the court, then the year, and then search for the offender's name). If the judgment is not included in AustLII's database, research the case through the media's reporting of it. Using the information in this chapter, answer the following questions for each case.

a Describe the material facts of the case.

(5 marks)

b Identify the courts that were involved in the case and the purpose of their involvement.

(3 marks)

c Describe one aggravating factor and one mitigating factor that were taken into account when sentencing the offender.

(4 marks)

d Comment on the extent to which fairness was achieved in the case.

(5 marks)

e Identify the sanction imposed, and discuss the extent to which the sentence could have achieved two of its purposes.

(8 marks)

Total: 25 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 12

Revision notes
Revision notes for Chapter 12

assess quiz
Chapter 12
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 13

REMEDIES

Source 1 A remedy is an order made by a court (or tribunal) to address a civil wrong. The most common remedy is known as damages (i.e. an amount of money that a court or tribunal orders one party to pay to another). In 2009, a blowout occurred on an oil well off the coast of Australia, causing one of the worst oil spills Australia had seen. A class action was commenced on behalf of Indonesian seaweed farmers for the financial loss and property damage alleged to have been caused by the oil spill.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 2 – Area of Study 2** (i.e. Chapters 13 and 14), you should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.

KEY KNOWLEDGE

In the chapter, you will learn about:

- the principles of justice: fairness, equality and access
- methods used to resolve a civil dispute such as mediation, conciliation and arbitration
- institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies
- an overview of the role and civil jurisdictions of the Victorian courts
- the role of the jury in a civil trial
- the purposes of remedies
- types of remedies, such as damages and injunctions.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research, analyse and apply information in relation to civil law
- describe the institutions that resolve civil disputes
- explain the role of the Victorian courts and juries in civil cases
- discuss the principles of justice in relation to the resolution of civil disputes and remedies
- discuss the ability of remedies to achieve their purposes.

KEY LEGAL TERMS

access one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

arbitration a method of dispute resolution in which an independent person (an arbitrator) is appointed to listen to both sides of a dispute and to make a decision that is legally binding on the parties. An arbitrator's decision is known as an arbitral award

complaints body an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

conciliation a method of dispute resolution that uses an independent third party (i.e. a conciliator) to help the disputing parties reach a resolution

defendant (in civil disputes) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

equality one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

fairness one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

mediation a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

ombudsman an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

plaintiff (in civil disputes) a party who makes a legal claim against another person (i.e. the defendant) in court

remedy any order made by a court that is designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to the position they were in before they were wronged or their rights were breached

tribunal a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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13.1 INTRODUCTION TO REMEDIES

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

In society, disputes are common. The interaction between different people, groups and organisations can can lead to **civil law** being broken, or rights being infringed. These everyday events often result in civil disputes that need to be resolved.

If a person's rights have been infringed, that person may be able to take action against the person they believe has done them wrong.

In civil disputes:

- the plaintiff is the person who commences a civil action
- the defendant is the person who is being sued.

The plaintiff has the burden of proof. The plaintiff may be able to use a variety of dispute resolution bodies to seek compensation for the infringement of civil law.

Plaintiffs and defendants can be individuals, companies or associations. That is, companies and associations are entitled to certain rights, and owe certain obligations, and so can sue and be sued. An example of a company being sued is provided in the scenario below.

ACTUAL SCENARIO

Flatulence claim dismissed by the Victorian Supreme Court

Hingst v Construction Engineering (Aust) Pty Ltd (No 3) [2018] VSC 136 (29 March 2018)

In 2018, the Supreme Court of Victoria dismissed a $1.8 million negligence case against a construction company after it ruled that the actions of the plaintiff's colleagues did not amount to workplace bullying.

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

A man sued his employer and sought $1.8 million in **damages** for loss and damage suffered as a result of bullying. He claimed that his supervisor repeatedly abused him and, as a result, he suffered depression and anxiety. In one of the claims, the plaintiff alleged that his supervisor would 'lift his bum and fart' on him or at him. The trial lasted 18 days and was ultimately dismissed by Justice Zammit, who said that even if the claims of farting were true, it would not necessarily amount to bullying. She did not find that the staff had bullied or harassed the man. The plaintiff wanted to appeal the decision in the Court of Appeal, but leave to appeal was refused.

Source 1 A Melbourne man has lost his negligence claim in the Supreme Court.

When a civil dispute is resolved, people expect that justice will have been achieved. In Chapter 11, you considered the principles of justice in relation to criminal cases. The principles of justice also apply to civil disputes and can be used to determine whether justice has been achieved in the civil justice system, or in the resolution of a civil dispute.

In this chapter, you will look at the ways that civil disputes are resolved. You will explore:

- the methods used to resolve civil disputes
- the role of tribunals, ombudsmen and complaints bodies in resolving disputes
- the role and civil jurisdictions of the Victorian courts
- the role of the jury in a civil trial
- remedies and their purposes.

The purpose of these topics is to help you develop an understanding of how civil disputes can be resolved, and the effectiveness of dispute resolution bodies and remedies.

Source 2 Sometimes the rights and best interests of children can be at the centre of a civil dispute.

Did you know?

A child under the age of 18 can sue another through a litigation guardian, often called a 'next friend'. This person is usually a parent or guardian. Children can also be sued.

13.1 CHECK YOUR LEARNING

Define and explain

1 What are the names given to the two parties in a civil dispute?

2 What does it mean to sue somebody?

Synthesise and apply

3 Read the scenario *Hingst v Construction Engineering (Aust) Pty Ltd*.

- **a** Who is the plaintiff and who is the defendant in this case?
- **b** What was the nature of the claim made by the plaintiff?
- **c** What loss or harm does the plaintiff claim he had suffered?
- **d** Conduct some research on why leave to appeal was refused, and summarise your findings.

Analyse and evaluate

4 You are on the train on your way home from school and you overhear two people talking about civil disputes.

The two people both work at the same company, which is being sued by a colleague of theirs. This colleague is suing for being discriminated against based on their religious preferences.

You overhear the two people agreeing that a company should not be able to be sued, and that people with claims against companies should not be able to take action against those companies as it can affect business and other colleagues.

As a class, discuss the benefits and downsides of people being able to sue companies.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 13.1 Check your learning
- **Video tutorial** Introduction to Chapter 13
- **Going further** Can children sue and be sued?
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

13.2 THE PRINCIPLES OF JUSTICE IN CIVIL LAW

Throughout this chapter, you will look at the way in which civil disputes are resolved and how outcomes are achieved. To assess whether justice has been achieved, you should consider the principles of justice. The three principles of justice are **fairness**, **equality** and **access**.

A brief summary of the principles of justice, and how they apply to civil disputes, is provided in this topic.

Fairness

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

The principle of **fairness** means people should be treated fairly and impartially. Parties to a civil dispute must be dealt with fairly, and any outcome reached must be fair. In civil disputes, this means that there should be a fair hearing and the processes involved in resolving a civil dispute should also be fair. In a civil dispute, this means that:

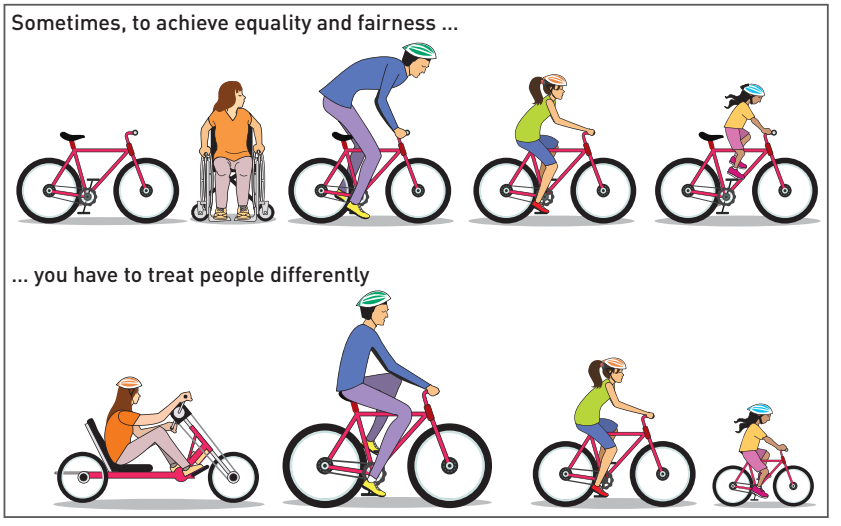
- laws should be properly applied
- the parties should know what the claims and defences are, and what evidence will be used to support the other side's case
- the parties should have the opportunity to present their case and rebut the other side's case
- the person who determines (i.e. makes a decision about) a dispute should be impartial and unbiased.

For example, by the time a matter gets to trial or a hearing, the plaintiff should know why the defendant says that they were not in the wrong. They should also know what documents the defendant will rely on to defend the case (and have been given an opportunity to review those documents), what witnesses the defendant will call, and what the issues in dispute are. The same applies to what the defendant should know about the plaintiff's case. These processes enable a fair playing field and avoid surprises or a 'trial by ambush'.

Equality

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

Equality means that all people should be treated equally before the law and should have an equal opportunity to present their case. In the civil justice system, this means that **no person or group should be treated better or worse because of a personal attribute or characteristic**. That is, the processes should be free from bias or prejudice, nobody should experience discrimination as part of the processes, and the persons who help to resolve a civil dispute should be impartial.



Source 1 Equality means that all people should be treated equally before the law, with an equal opportunity to present their case. But this does not mean that everyone should be treated the same. Sometimes, to treat people equally you have to treat them differently.

Study tip

Make a note when you come across something in this chapter that relates to one of the principles of justice. For example, when you look at the role of the courts in resolving civil disputes, identify how the courts can achieve fairness, equality and access.

Processes in the civil justice system should also be such that certain groups in society – particularly members of vulnerable groups such as people with disabilities or mental health issues, or those who do not have significant financial resources – are not disadvantaged. Because of the way that our civil justice

system operates, particularly the processes and high costs involved, many people are not equal before the law, even without deliberate discrimination. To try and avoid this, it is recognised that to treat people equally, sometimes you need to treat them differently. For example, an unrepresented party (i.e. a party who does not have a lawyer) may need more help with understanding the legal processes than a party who is represented (i.e. a party that has a lawyer).

Access

Access means that people should be able to understand their legal rights, should be able to access information, court processes and institutions, and should be able to pursue their case (either the claim that they have against a party, or their defence). That is, people should be able to **use the procedures, methods and institutions that resolve a civil dispute**. This includes the courts, **tribunals**, and bodies and institutions that provide legal advice, education, information, assistance and representation. People should also be able to get information about their rights, about when those rights may have been infringed, and about what **remedies** may be available to them.

The civil justice system has been criticised for being inaccessible for many people, particularly those who cannot afford legal representation. The provision of legal aid through Victoria Legal Aid (VLA) is limited for civil disputes because of limited funding, the significant number of people seeking legal aid, and the large amount of funding that goes towards criminal cases and family law matters. Other people who find it difficult to access the civil justice system are those who live in rural and remote areas, and those who have a limited or no understanding of the law, the legal system, or court processes and procedures.

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

tribunal
a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts

remedy
any order made by a court that is designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to the position they were in before they were wronged or their rights were breached

13.2 CHECK YOUR LEARNING

Define and explain

1 Identify and briefly describe the three principles of justice.
2 Identify two ways in which the principles of justice are upheld when resolving a civil dispute.

Synthesise and apply

3 In your class, form groups of three or four. Each group is to be allocated one of the following people (your teacher will decide which person to allocate if there are too many):
- a newly arrived migrant
- a person with an acquired brain injury
- a 15-year-old girl
- a person who lives in rural Victoria
- a person with little money.

For your allocated person, brainstorm the following:
- the issues that the person may face if they are involved in a civil dispute
- where the person can access information about their legal rights and about how civil disputes can be resolved
- how the civil justice system can ensure that the principles of justice are achieved for that person.

Share your ideas with the rest of the class.

4 Look at Source 1 on page 420. As a class, discuss this image in the context of fairness and equality.

Analyse and evaluate

5 In your class, form small groups and conduct a debate about the following statement:
'It is not the role of government to provide free legal aid or assistance. It should be a "user-pays system"'.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 13.2 Check your learning
- **Worksheet** The principles of justice
- **Weblink** Victoria Legal Aid (VLA)
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

13.3 METHODS USED TO RESOLVE A CIVIL DISPUTE

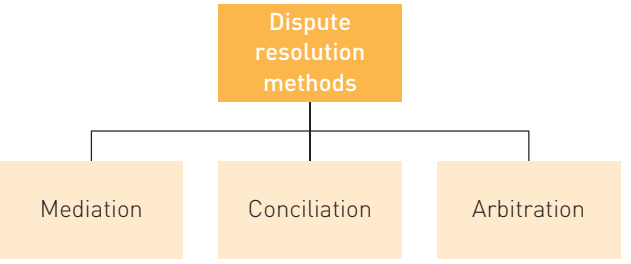
Parties to a civil dispute can use various methods to reach an agreement and settle the dispute without going to court. These methods are called dispute resolution methods. They are a way to obtain an outcome in a civil dispute that does not involve a court or tribunal making a binding decision on the parties. Dispute resolution methods are also known as **alternative dispute resolution methods**, but these methods are now so often used to resolve disputes that the word 'alternative' is becoming less appropriate to describe them.

alternative dispute resolution methods ways of resolving or settling civil disputes that do not involve a court or tribunal hearing (e.g. mediation, conciliation and arbitration) (also known as appropriate dispute resolution)

Dispute resolution methods include:

- mediation
- conciliation
- arbitration.

The legal system encourages parties to use mediation, conciliation and arbitration to resolve disputes because these dispute resolution methods are often less stressful and less expensive than court action. In some situations, these methods are even less stressful and less expensive than issuing a claim through a tribunal.



Source 1 Mediation, conciliation and arbitration are ways to resolve a civil dispute without a court or tribunal making a binding decision on the parties.

Mediation

Mediation is a cooperative method of resolving disputes. It is widely used by courts, tribunals and other dispute resolution bodies. Mediation is a joint problem-solving process in which the parties in dispute sit down and discuss the issues they disagree on, present their side of the case, and try to reach an agreement through negotiation. The parties do this with the help of a **mediator**, who is neutral and impartial.

mediation a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

mediator an independent third party who does not interfere or persuade but helps the parties in a mediation as they try to reach a settlement of the matter

Mediators are trained to assist parties in dispute to reach a decision. A mediator tries to 'empower' both parties. That is, the mediator helps the parties feel more in control of the situation and more confident during negotiations. The mediator discusses the issues with the parties and tries to even out any imbalance between the parties while providing them with support. The mediator does not necessarily need to be an expert in the area of law that is the subject of the dispute, but they do need to have good people skills and excellent conflict resolution skills. Their job is to help people come to a decision, not make the decision for them. Mediators do not make decisions about whether there has been a breach of the law, or offer legal advice.

Any discussions during mediation are normally 'without prejudice'.

Source 2 In 2019, former Australian rugby player Israel Folau settled his $14 million claim against Rugby Australia and NSW Rugby over his sacking for social media posts he published earlier that year. The claim ultimately settled at mediation. The terms of the settlement are confidential.

Study tip

Save articles that you come across about the resolution of civil disputes. This will help you to apply your knowledge to actual cases, and you will be able to use these real cases in your assessment tasks to demonstrate your understanding of civil disputes.

This means that the parties are free to openly discuss their dispute, and possibly weaknesses of their own case, as these discussions cannot be used against them at a later date. This allows the parties to speak freely and without fear of their openness being detrimental to their case if the matter does not settle at mediation.

If the parties resolve the case through mediation, they normally enter into a legally binding contract known as **terms of settlement**, or a deed of settlement. This means that the parties are bound by the promises they make at mediation. This agreement may be enforceable through the courts. The terms are confidential to the parties and cannot be disclosed to the public.

Mediation is available to the parties in a civil dispute in the following ways:

Source 3 Both mediation and conciliation seek to achieve a 'win-win' situation.

- parties can organise a private mediation between them. Mediators can be accessed through the Victorian Bar website, and through organisations such as the Dispute Settlement Centre of Victoria. There are many organisations that offer free or low-cost mediation services
- parties in a court case are often referred to mediation by a court before the final trial or hearing, to see if a resolution can be reached. The Magistrates' Court, County Court and Supreme Court actively order parties to attend mediation before a matter is set down for hearing or trial
- parties in a case heard by a tribunal are also often referred to mediation to try and resolve the dispute before the hearing.

terms of settlement
a document that sets out the terms on which the parties agree to resolve their dispute

Conciliation

Conciliation is also a process of dispute resolution involving the assistance of an independent third party that aims to enable parties to reach a decision. In many ways, conciliation operates the same way as mediation, but the role of the third party is different.

In conciliation, the third party, known as the **conciliator**, listens to both sides of the dispute and makes suggestions about appropriate ways of resolving the matter. The conciliator assists the parties by exploring solutions to the dispute. The conciliator is usually someone with specialist knowledge about the subject matter of the dispute; for example, if a dispute is an issue about a worker's pay, the conciliator is likely to be skilled in employee–employer relations.

In conciliation, the final decision is made by the parties and is not binding. However, like mediation, the parties often enter into terms of settlement, which can be legally enforceable. Like mediation, any discussions during conciliation are on a 'without prejudice' basis, meaning that those discussions cannot be used against either party if the matter does not settle at conciliation.

Conciliation is used to resolve civil disputes in the following ways:

- many dispute resolution bodies (e.g. the Victorian Equal Opportunity and Human Rights Commission and Consumer Affairs Victoria) use a form of conciliation to resolve disputes (you will explore dispute resolution bodies in more detail in Topics 13.4 to 13.6)
- parties in a dispute at the Victorian Civil and Administrative Tribunal (VCAT) are often sent to what is called a **compulsory conference**. The compulsory conference uses conciliation to help the parties come to a resolution
- some of the more specialised courts use a form of conciliation. For example, for cases relating to family disputes that are before the Family Court of Australia, a conciliation conference is organised between the parties to try and reach an agreement about financial or parenting issues.

conciliation
a method of dispute resolution that uses an independent third party (i.e. a conciliator) to help the disputing parties reach a resolution

conciliator
the independent third party in a conciliation who helps the parties reach an agreement that ends the dispute between them. The conciliator can make suggestions and offer advice to assist in finding a mutually acceptable resolution but the parties reach the decision themselves

compulsory conference
a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their dispute

Strengths and weaknesses of mediation and conciliation

Because conciliation is similar to mediation in many ways, the strengths and weaknesses of these methods are similar. A summary of the strengths and weaknesses of both methods is provided in Source 4 below.

STRENGTHS OF MEDIATION AND CONCILIATION	WEAKNESSES OF MEDIATION AND CONCILIATION
A decision made by the parties during mediation and conciliation is **more likely to be acceptable** to the parties, as they have reached a decision themselves rather than it being imposed on them by a third party	Both parties must be **willing to participate** in mediation or conciliation for it to be successful; if one or both parties are unwilling to cooperate, it will be a waste of time and money
Mediation and conciliation are held in a **less formal** setting than a courtroom, which can help alleviate any stress felt by the parties	Unless the parties enter into terms of settlement, decisions reached during mediation and conciliation are **not binding** on the parties or enforceable
Mediation and conciliation are **far less confrontational** than a courtroom (e.g. there is no examination of witnesses). Using these methods can alleviate any stress felt by the parties and can help the parties' ongoing relationship	Mediators and conciliators have **no power** to order parties to come to a decision, or even attend
Matters can be discussed confidentially, **without publicity** and without the discussions being held against a party if the matter doesn't settle as part of the process	Mediation and conciliation are **not appropriate for some disputes**, such as where one party has an unfair advantage or more bargaining power
There is more **flexibility** for the parties in resolving the dispute, as the parties are free to explore options to resolve the dispute that are not available to a court or tribunal	**One party may dominate** the other party and may influence either the third party or the other party, particularly if the other party does not have legal representation
The methods can more effectively achieve a 'win-win' solution where both parties feel satisfied, as opposed to a court making a decision where one party is successful and the other is not	Mediation and conciliation are not useful for civil disputes where an **urgent injunction** is required, or where the court's involvement is necessary
Conciliation only: The conciliator has specialised knowledge in the subject matter of the dispute and can guide the parties in reaching a solution	**Mediation only:** The mediator cannot give advice or offer suggestions

Source 4 The strengths and weaknesses of mediation and conciliation

Arbitration

arbitration
a method of dispute resolution in which an independent person (an arbitrator) is appointed to listen to both sides of a dispute and to make a decision that is legally binding on the parties. An arbitrator's decision is known as an arbitral award

Arbitration involves an independent third party (the **arbitrator**) who listens to the parties and tries to help them reach an agreement. If this is not possible, the arbitrator makes a binding decision on the parties. The decision is known as an **arbitral award** and is fully enforceable if the parties do not comply with it. When parties take their dispute to arbitration, they agree to abide by the arbitrator's decision. The Victorian Bar has trained arbitrators available to parties in dispute.

Professional arbitrators charge the parties a fee for acting as an arbitrator in a dispute. The arbitrator will generally have knowledge of the subject matter of the dispute and will also have an understanding of the applicable law. Arbitration is often used in commercial situations and in international disputes. Legal representation is usually allowed during the arbitration process. Therefore, arbitration can be an expensive process.

As a general rule, arbitration is more formal than mediation and conciliation, but can still be less formal than a court process. However, the way arbitration is conducted often depends on what has been agreed. That is, the parties can choose how evidence is presented, how formal the arbitration is, and what procedural rules will apply.

There are generally two situations in which arbitration is conducted in Victoria:

- where the parties have previously agreed (normally in a contract) that any dispute that arises between them will be resolved by arbitration – in this situation, the parties normally arrange the arbitration between themselves and decide how it is to be conducted. This includes choosing an appropriate arbitrator and agreeing on the rules of the arbitration
- in the Magistrates' Court, which uses arbitration to resolve civil claims of less than $10 000 – the Court initially attempts to facilitate an agreement between the parties, but if this is unsuccessful, a magistrate or registrar can make a binding decision.

Source 5 The Melbourne Commercial Arbitration and Mediation Centre is located in Melbourne's William Cooper Justice Centre.

Strengths and weaknesses of arbitration

Source 6 below provides a summary of the strengths and weaknesses of arbitration.

STRENGTHS OF ARBITRATION	WEAKNESSES OF ARBITRATION
Because arbitration is often conducted privately, there is **flexibility** in the way it can be conducted	Arbitration is **not as flexible** as mediation and conciliation; this means the parties are normally limited to particular remedies or outcomes
Arbitration is **less formal** than court processes, which allows the parties to feel more at ease (although, for private arbitrations, the degree of formality of the arbitration depends on what the parties have agreed to in terms of how it is to be conducted)	Arbitration can be **as formal as a court process**, depending on how the parties have agreed for the arbitration to run
It **can be cheaper** to resolve a dispute using arbitration than going to court (although, for private arbitrations, this depends on how the parties have agreed to conduct the arbitration)	Arbitration is **more expensive** than mediation and conciliation because evidence is often gathered and put before the arbitrator, and legal representation is normally used; using arbitration can be as expensive as going to court, depending on how it is conducted
The arbitral award (the decision made by the arbitrator) is **legally binding** on the parties, which ensures that the parties will most likely follow it	Arbitration is **not always available** to the parties in dispute, and is generally only available where the parties have agreed on arbitration, or for small claims in the Magistrates' Court
The third party will have **expertise** in the subject matter of the dispute and will use that expertise when making a binding decision	It can take a **long time** for a decision to be reached if the parties go through several stages, such as producing evidence
Arbitration is **private and confidential**, so it is attractive for parties who wish to avoid the publicity of a trial	The parties have **no control** over the outcome imposed on them by a third party

Source 6 The strengths and weaknesses of arbitration

arbitrator
the independent third party (i.e. person) appointed to settle a dispute during arbitration. Arbitrators have specialised expertise in particular kinds of disputes between parties and make decisions that are legally binding on the parties. An arbitrator's decision is known as an arbitral award

arbitral award
a legally binding decision made in arbitration by an arbitrator

Did you know?

Parties to a contract often agree that any arbitration will be conducted in Singapore. It is a leading jurisdiction for the resolution of international disputes through arbitration.

13.3 CHECK YOUR LEARNING

Define and explain

1 Define the term 'arbitration'.

2 Describe two differences between conciliation and mediation.

3 Copy the table below into your notebook. Fill in the six rows for each column, so you have a summary of each of these three methods of dispute resolution.

	MEDIATION	CONCILIATION	ARBITRATION
Description			
Name of the third party			
Role of the third party			
Who makes the decision?			
Is it available for all disputes?			
Do any courts use it?			

Synthesise and apply

4 For each of the scenarios below, identify:

- one dispute resolution method that may be used
- two advantages and two disadvantages of using this dispute resolution method.

a Jacqi, who is from Nigeria, wants to rent a house. The real estate agent keeps telling her that the house she wants is not available, even though it is empty and available for rent. She thinks she is being discriminated against.

b Jock and Jack are neighbours who are constantly feuding. Jock decides to put garden lattice on the fence between their properties. Jack doesn't like the lattice. He says it's an eyesore. He wants it removed but Jock refuses to take it down. Jack asks Jock to attend the Dispute Settlement Centre so they can discuss the issue on neutral ground.

c Jenny has separated from Max. They cannot agree on custody arrangements for their children but they do not want to take their dispute to court.

d Hong and Simon entered into a building contract that set out how disputes are to be resolved if they arise. The contract states that the parties must first try to mediate and then they must arbitrate to resolve any dispute. Hong refuses to attend mediation after a dispute arises about the quality of Simon's building work.

5 Access the Supreme Court's website. A link is provided on your obook assess. Read the information about the mediation offered as a means of settling disputes, then answer the following questions.

a When is mediation used?

b What are the benefits of mediation?

c Who can act as a mediator?

d Who pays for mediation?

6 Compare mediation and arbitration as methods of dispute resolution.

7 Conduct some research and find two civil disputes that have recently (in the past four years) been resolved through mediation. Prepare a summary about the cases that addresses the benefits and downsides of using mediation to resolve each of the disputes.

Analyse and evaluate

8 In your view, which method do you think is the best way to resolve disputes? Give reasons for your answer.

9 How do each of the dispute resolution methods achieve each of the principles of justice?

Check your Student obook assess for these additional resources and more:

- **Student book questions** 13.3 Check your learning
- **Video** Mediation
- **Video worksheet** Mediation
- **Weblink** Victorian Bar
- **Weblink** Supreme Court of Victoria

13.4 TRIBUNALS

ombudsman
an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

complaints body
an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

If parties to a civil dispute are unable to reach a resolution between themselves, the parties can take the matter to court. However, courts are not the only dispute resolution bodies. There are three other main types of dispute resolution bodies in Victoria:

- tribunals
- **ombudsmen**
- **complaints bodies**.

In 2014, the Australian Government's Productivity Commission (an independent research and advisory body) published a report that included the number of matters heard by complaints bodies, tribunals and civil courts between 2011 and 2013. The report found that there were a significant number of matters and complaints that tribunals, ombudsmen and complaints bodies heard each year. While the data in Source 1 below was collected some time ago, it gives us an indication of the volume of matters heard by those bodies in Australia.

NUMBER OF MATTERS HEARD BY OMBUDSMEN, COMPLAINTS BODIES, TRIBUNALS AND CIVIL COURTS (2011–2013)

	OMBUDSMEN AND COMPLAINTS BODIES	TRIBUNALS	CIVIL COURTS
NUMBER OF INSTITUTIONS/ PROVIDERS	**71 Ombudsmen and complaints bodies** • National: 22 • States/territories: 49	**58 tribunals** • Commonwealth: 22 • States/territories general: 4 • States/territories specialist: 43	**43 courts** • Commonwealth: 4 • States/territories general: 21 • States/territories specialist: 18
NATURE OF SERVICE	• Receive and resolve complaints • Conduct inquiries into individual or systemic cases	• Administrative review • Civil dispute resolution • Binding decision	• Judicial dispute resolution • Binding decision • Some courts provide 'in-house' alternative dispute resolution services
VOLUME OF MATTERS	**Total 542 000 complaints** arising from 3 709 000 contacts • National: 277 000 • States/territories: 265 000	**Total 395 000** • Commonwealth: 71 000 • States/territories general: 194 000 • States/territories specialist: 130 000	**Total 673 393** • Magistrates: 420 144 • District: 28 214 • Supreme: 28 309 • Probate: 65 787 • Federal: 5 277 • Family: 33 120 • Federal Circuit: 92 542
COST FOR DISPUTANTS	No cost	• Tribunal fees • Expert fees • Cost of attendance • If represented – lawyers' fees	• Court fees • Lawyers' fees • Counsel fees • Expert fees • Cost of attendance • Risk of adverse cost award
FUNDING ARRANGEMENTS – Commonwealth	$232 million	$244 million	$309 million
FUNDING ARRANGEMENTS – States	$136 million	$264 million	$517 million
FUNDING ARRANGEMENTS – Industry	$113 million	–	–

Source: Australian Productivity Commission report, 2014

Source 1 Courts hear a significant number of matters each year, but so do tribunals, complaints bodies and ombudsmen. This diagram shows data for ombudsmen and other complaints bodies and tribunals from 2011 to 2012, and data for courts from 2012 to 2013.

Source 2 The Fair Work Commission is a national tribunal that can hear certain workplace disputes.

This chapter will examine the role of tribunals in resolving civil disputes between parties.

The role of tribunals in resolving disputes

Tribunals are dispute resolution bodies that obtain their power to resolve certain types of disputes from parliament. That is, parliament will pass a statute giving a tribunal the authority to hear and determine certain types of matters and applications. For example, the *Mental Health Act 2014* (Vic), a statute passed by the Victorian Parliament, established the Mental Health Tribunal and gave it certain powers, including the power to hear an application to determine whether neurosurgery for mental illness should be performed on a person. Tribunals develop expertise in particular types of disputes and can make decisions that are binding on the parties.

The purpose of tribunals is to provide individuals with a low-cost, efficient and speedy method of dispute resolution. Therefore, tribunals increase the community's access to justice. Tribunals provide Australians with an alternative to court, which can be a more formal, costly, stressful and lengthy way of resolving disputes (particularly for small disputes that may be best dealt with in a less intensive way).

Tribunals cannot hear every type of dispute. For example, tribunals have no power to hear **representative proceedings** (also known as class actions).

representative proceeding
a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person (also called a class action or a group proceeding)

Some tribunals have similar characteristics to courts. For example, as in a court, an independent third party will hear the dispute and make a binding decision on the parties. Also, the parties are often referred to a form of dispute resolution method (e.g. mediation) to try to resolve the dispute before the final hearing.

However, there are significant differences between tribunals and courts. For example, the cost of having a dispute resolved at a tribunal can often be much less than the cost of resolving the dispute in court.

Tribunals in Australia

In Australia, there are both Commonwealth and state tribunals. Some of the Commonwealth tribunals are listed in Source 3 below.

COMMONWEALTH TRIBUNAL	DESCRIPTION
Administrative Appeals Tribunal (AAT)	The AAT hears cases in which a party is seeking an independent review of a decision made by the Commonwealth Government. For example, a party can seek a review of a decision made by a government body about taxation, child support or passports. The AAT also has specialist divisions such as the Migration and Refugee Division, which reviews decisions about the refusal or cancellation of visas.
Fair Work Commission (FWC)	The FWC is the national workplace relations tribunal. It has the power to carry out a range of functions, including resolving workplace disputes through mediation and/or conciliation and, in some cases, through public hearings.
National Native Title Tribunal	The National Native Title Tribunal can hear and determine native title claims, which are applications in relation to the recognition of land title unique to Indigenous people.

Source 3 Types of Commonwealth tribunals

Some of the Victorian tribunals are listed in Source 4 below.

VICTORIAN TRIBUNAL	DESCRIPTION
Victims of Crime Assistance Tribunal (VOCAT)	VOCAT was established to provide financial assistance to victims of violent crime. Victims include not only those who were injured or died as a result of a crime, but also people who were close to a deceased victim, or to a person who was present at the scene. VOCAT hears and determines applications made by victims and decide on what financial assistance should be awarded, if any, to the victim.
Victorian Civil and Administrative Tribunal (VCAT)	VCAT is a 'one-stop shop' for parties and deals with a broad range of civil disputes, including small civil claims, residential tenancy disputes, discrimination claims, and guardianship issues.
Mental Health Tribunal	The Mental Health Tribunal seeks to protect people with mental illness. One of its functions is to hear applications made by mental health patients who wish to challenge a treatment order that has been made against them or who wish to be transferred to another designated mental health service.

Source 4 Types of Victorian tribunals

Focus on the Victorian Civil and Administrative Tribunal

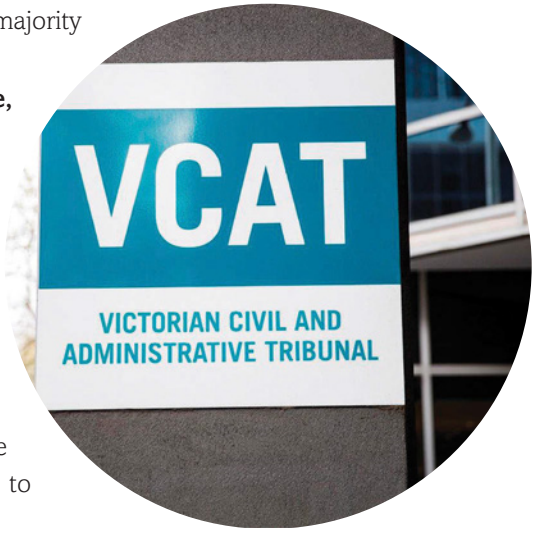
The **Victorian Civil and Administrative Tribunal (VCAT)** deals with a large number, and a large variety, of civil disputes. VCAT is made up of five divisions:

- Administrative Division
- Civil Division
- Human Rights Division
- Planning and Environment Division
- Residential Tenancies Division.

Victorian Civil and Administrative Tribunal (VCAT) a tribunal that deals with disputes relating to a range of civil issues that are heard by various 'lists' (i.e. sections) of the tribunal. These lists include the Human Rights List, the Civil Claims List and the Residential Tenancies List

Each division is divided into one or more 'lists' (or sections) that hears particular types of disputes. For example, the Residential Tenancies Division has one list, the Residential Tenancies List, which hears a range of disputes between tenants and landlords about claims related to renting a property (e.g. where the tenant has failed to pay rent, or where the landlord has failed or refused to repair the property).

VCAT's President (who must be a sitting Supreme Court judge) and vice-presidents (who must be sitting County Court judges) are responsible for the administration and management of VCAT. It is one of Australia's busiest tribunals, receiving over 85 000 claims per year, the majority of which are lodged in the Residential Tenancies List.



VCAT's purpose is to provide Victorians with a **low-cost, accessible, efficient and independent tribunal that delivers high-quality dispute resolution**. VCAT does this by:

- generally charging low fees for a person to file their claim and have their matter heard, and by disallowing legal representation except in certain circumstances
- having a variety of locations in Victoria. While VCAT's main centre is in Melbourne, it has several venues across the state, many of which are in rural areas
- aiming to have cases heard within weeks of the application being filed. The Residential Tenancies List has a median wait time of around two weeks to have an application heard and determined

member
the person who presides over final hearings and compulsory conferences at the Victorian Civil and Administrative Tribunal (VCAT). Members include the VCAT President, vice-presidents, deputy presidents, senior members and ordinary members

- having cases heard and determined by an independent third party, known as a VCAT **member**, who has no affiliation with either party to the dispute
- providing a less formal setting than courts. VCAT is required to conduct cases with as little formality and technicality as possible, thus ensuring it is accessible to ordinary Australians with limited or no experience of the legal system
- offering dispute resolution methods – such as mediation and compulsory conferences (which use a conciliation process) – before making a binding decision on the parties.

The person who makes an application to VCAT is known as the applicant. The other party is known as the respondent (being the person who is responding to the claim or application).

In the scenario below, a civil dispute involving sexual harassment was settled before the VCAT hearing.

ACTUAL SCENARIO

Confidential settlement reached after sexual harassment claims against Melbourne real estate agency

Melissa Heagney, *Domain*, 31 January 2020

A confidential settlement has been reached between Melbourne real estate agency Sweeney Estate Agents and a former director of the company, after a years-long case alleged sexual harassment in the workplace.

Summer Salvato, who was a director of Sweeney Real Estate's Yarraville office, had accused the agency and its male directors of overseeing a misogynistic and sexually inappropriate culture.

In a claim lodged with the Victorian Civil and Administrative Tribunal in 2018, Ms Salvato made a number of accusations of inappropriate behaviour against directors of the company.

All were rejected by Sweeney Estate Agents and former chief executive and founding partner Darren Dean, who said in 2018 that Ms Salvato's claims would be denied and defended in court.

Though the matter was due to be heard by VCAT next week, a confidential settlement was reached and the tribunal dismissed the case on 14 January, a spokeswoman for VCAT confirmed.

Ms Salvato had made a number of claims against the agency's directors.

Source 5 Summer Salvato lodged a claim with VCAT in 2018.

...

Ms Salvato was set to argue she had been diagnosed with post-traumatic stress disorder and acute stress and declared unfit for work.

At the time, Ms Salvato's lawyer, Maurice Blackburn's Josh Bornstein, said she would be seeking 'substantial compensation' after making the claims against her former employer.

He said he wanted to send a loud message that the male-dominated real estate industry needed a cultural change.

'This sort of behaviour is prehistoric, brutal and abusive and it's got to stop,' Mr Bornstein said in 2018.

...

While it is generally quicker and less expensive to resolve a dispute by taking it to VCAT than to a court, in recent times VCAT's fees have increased, particularly in relation to disputes where a party challenges a planning decision made by a local council. Also, in some of its lists, it can now take up to six months for a matter to be heard and determined. Issues such as these have caused some people to question whether VCAT is still accessible to all individuals in all of its lists.

13.4 CHECK YOUR LEARNING

Define and explain

1 Identify four types of dispute resolution bodies.
2 What are tribunals?
3 What is the purpose of VCAT?
4 Suggest two reasons why tribunals are an important means by which people can resolve their disputes.
5 Explain one way that VCAT aims to be accessible to all Victorians.

Synthesise and apply

6 Using the data provided in Source 1 on page 427, create a pie graph that shows the percentage of matters or complaints that ombudsmen and complaints bodies, tribunals and courts hear per year.
7 For each of the following scenarios, suggest the most appropriate tribunal to hear the dispute or claim.
   a Janie has failed to pay rent for her property in West Footscray for the past four months despite constant demands by her landlord.
   b Hugo recently witnessed the murder of a person on the streets of Toorak and has suffered anxiety and depression ever since.
   c Osama works for a government agency and has recently become aware of the fact that he is not being paid the minimum award wage.
   d Thierry has just had his work visa cancelled and has been told he has 30 days to leave Australia.
   e Eduardo has been suffering discrimination in the workplace for some time and has been called various names that make him feel vilified.
   f Yolanda has suffered from a mental illness for some time. An order has just been made in relation to her treatment, and her mother believes it is not the right order.
8 Read the scenario 'Confidential settlement reached after sexual harassment claims against Melbourne real estate agency'.
   a What happened in this case?
   b Who applied to VCAT and who was the respondent?
   c Which VCAT list would have heard this case?
   d Explain two advantages of VCAT hearing and determining this case.

Analyse and evaluate

9 In class, form pairs or small groups and complete the following tasks.
   a Choose one Commonwealth tribunal or one Victorian tribunal (other than VCAT). Make sure every group or pair has chosen a different tribunal.
   b Conduct some research on the tribunal to find the following information:
      i which statute the tribunal gets its powers from
      ii the tribunal's role and purpose
      iii what dispute resolution methods the tribunal uses
      iv whether the tribunal has online services (e.g. if application forms can be lodged online)
      v one recent case that the tribunal has heard or determined, or an article about a claim that has recently been made to the tribunal
      vi the benefits of having this tribunal in Australia
      vii any disadvantages or weaknesses of this tribunal.
   c Prepare a PowerPoint presentation summarising your findings for the rest of the class.
   d Prepare a quiz or assessment for your classmates about your chosen tribunal. Include the information discussed in your presentation.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 13.4 Check your learning
- **Weblink** Victorian Civil and Administrative Tribunal (VCAT)
- **Weblink** Administrative Appeals Tribunal (AAT)
- **Weblink** Fair Work Commission (FWC)

13.5 OMBUDSMEN

Source 1
Sandra Parker is currently the Fair Work Ombudsman.

An ombudsman is an official appointed by the government to investigate complaints made by individuals against certain bodies or institutions. Like tribunals, an ombudsman obtains the power to hear and determine complaints through parliament. The parliament grants the ombudsman powers by passing a statute. For example, the Victorian Ombudsman was established by the *Ombudsman Act 1973* (Vic).

Role of an ombudsman

The role of an ombudsman is to provide individuals and small businesses with an independent, timely and accessible dispute resolution service to resolve disputes in relation to certain agencies and industries. Ombudsmen provide a fair, free and independent way of handling complaints and resolving disputes. There are two types of ombudsmen:

- **a government ombudsman**, who deals with disputes or complaints about government agencies
- **an industry ombudsman**, who deals with disputes between consumers and businesses in particular industries such as telecommunications, financial services, public transport, and energy and water.

An ombudsman is not a court or a tribunal. Therefore, the power of the office is often limited to the industries and businesses or government agencies over which the ombudsman has power to hear complaints. In many instances, an ombudsman will not hear a complaint unless the individual has first tried to resolve the complaint directly with the business or government agency.

Unlike courts and tribunals, an ombudsman's services are free. Further, unlike courts and tribunals, most ombudsmen hear complaints from individuals against industry providers, agencies and businesses (and not vice versa). That is, ombudsmen are set up to provide individuals and small businesses with a service to hear and determine complaints about services that have been provided to them. This helps to overcome the power imbalance of individuals dealing with large service providers or government agencies.

An ombudsman will first try and resolve the complaint by working with the two parties. Where an agreement cannot be reached, the ombudsman *may* have the power to make a binding decision on the parties (not every ombudsman has this power).

Although every ombudsman is appointed by government, they act impartially and independently of government when handling claims. One of the key features of ombudsmen is that they ensure procedural fairness by giving parties an opportunity to respond to a complaint, and by giving reasons for any decision that is made.

Did you know?

The word 'ombudsman' has been borrowed from the Swedish language and has been used in English since 1959. The word in Swedish literally means 'commission man' and refers to a complaints office called the *justitieombudsmannen*, which hears and investigates complaints made by individuals about abuses of the state. The office of ombudsman is always held by a single person. Because the word is a direct borrowing from another language, it is never turned into 'ombudsperson' in English.

Ombudsmen in Australia

In Australia, there are ombudsmen at both federal and state levels. Some of the industries that have a federal ombudsman are listed in Source 2 below.

OMBUDSMAN AT THE FEDERAL LEVEL	DESCRIPTION OF THE OMBUDSMAN'S ROLE
Commonwealth Ombudsman	The Commonwealth Ombudsman investigates complaints made about the actions of federal government departments. The Commonwealth Ombudsman has different specialist roles; for example, they are also the ombudsman for the private health insurance industry, overseas students, the postal industry, the defence force, immigration, and law enforcement.
Telecommunications Industry Ombudsman	The Telecommunications Industry Ombudsman provides individuals with a dispute resolution service to help them resolve their complaints about their telephone or internet service in Australia.

OMBUDSMAN AT THE FEDERAL LEVEL	DESCRIPTION OF THE OMBUDSMAN'S ROLE
Fair Work Ombudsman	The Fair Work Ombudsman provides services to workers and employers. This ombudsman assesses complaints, investigates suspected breaches of workplace laws and, in some instances, enforces workplace laws (including those related to pay and work conditions).
Australian Small Business and Family Enterprise Ombudsman (ASBFEO)	The ASBFEO supports small businesses and family enterprises by providing dispute resolution services to them when they are involved in a disagreement. For example, a small business operating a franchise that has a dispute with the franchisor may be able to use the ASBFEO's services.

Source 2 Ombudsmen at the federal level

Some of the ombudsmen that exist at a Victorian level are listed in Source 3 below.

OMBUDSMAN AT A STATE (VICTORIAN) LEVEL	DESCRIPTION OF THE OMBUDSMAN'S ROLE
Victorian Ombudsman	The Victorian Ombudsman has the power to enquire into or investigate any administrative action (e.g. decisions made) by any Victorian Government department or administrative office. The Victorian Ombudsman does not have the power to investigate actions taken by certain people, such as police personnel, judges, magistrates or officers of the Governor of Victoria.
Energy and Water Ombudsman Victoria	The Energy and Water Ombudsman hears complaints about energy and water companies operating in Victoria. Complaints may be about high bills or billing mistakes, energy disconnections, outages, power surges or water meters.
Public Transport Ombudsman	The Public Transport Ombudsman investigates and resolves complaints about certain public transport operators, including Public Transport Victoria (which operates myki), Metro Trains Melbourne, V/Line and Yarra Trams. This ombudsman considers issues such as ticketing, penalties, customer service and the conduct of public transport staff.

Source 3 Ombudsmen at a state (Victorian) level

Focus on the Public Transport Ombudsman

The Victorian Public Transport Ombudsman (PTO) investigates and resolves complaints about Victorian public transport operators. To be able to investigate a complaint, the public transport operator needs to be a member of the PTO scheme. Members include Rail Projects Victoria, Metro Trains Melbourne, Public Transport Victoria (including myki), Southern Cross Station, V/Line and Yarra Trams.

The PTO's **jurisdiction** is set out in its Charter. The PTO can investigate and facilitate the resolution of complaints that relate to:

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

- the supply of (or the failure to supply) public transport
- the sale of tickets including ticketing machines and ticket refunds
- infrastructure, vandalism (including graffiti) and the cleanliness of the transport
- the conduct or behaviour of staff members
- the use by the public transport operator of land or premises, or its impact on that land or premises.

The PTO only has jurisdiction to review a complaint if the public transport operator has first investigated and considered the complaint, and it remains unresolved. That is, the public transport operator must first have the opportunity to resolve the dispute before the PTO hears it.

The PTO does not have jurisdiction to hear certain complaints, including complaints about the setting of prices for public transport, the routes of operation, the frequency of services, and complaints that have already been heard and determined by a court or tribunal.

The Charter states that the PTO must handle complaints in a **fair, reasonable, just, informal and expeditious manner**. The PTO is independent and unbiased, has the power to gather documents from the parties so it can make a fair decision, and aims to conduct dispute resolution in an informal way.

The PTO can require the individual making the complaint (known as the complainant) and the public transport operator to attend conciliation. If the matter cannot be resolved between the parties through conciliation, the PTO has the power to make a determination, including a determination that:

- the public transport operator pay compensation or provide a service to the complainant
- corrective or other work be undertaken to resolve the complaint
- the operator does not do a certain act.

The PTO does not have authority to order compensation beyond $10 000.

The determination of the PTO is binding on the public transport operator, but the complainant can choose whether to accept the decision of the PTO within 21 days of the decision being made. If the decision is accepted, it is binding on the parties and the complainant cannot make any further claims against the operator in relation to that complaint. However, if the complainant does not accept the decision, they may choose to pursue remedies in any other forum (e.g. through a court or tribunal).

The scenario below highlights the types of complaints lodged with the PTO.

ACTUAL SCENARIO

Complaints about public transport staff more than double

Timna Jacks, *The Age*, 22 October 2019

Complaints about public transport staff have doubled as rolling rail shutdowns to build the state's major transport projects trigger a wave of commuter backlash.

Unprofessional conduct, customer service failings and poor responsiveness to complaints are fuelling the surge in frustration, according to the Public Transport Ombudsman, with public transport staff the top source of commuter complaints.

Complaints about drivers and customer service staff spiked from 886 last financial year to 2035 this year, the watchdog's latest annual report reveals.

Dissatisfaction with public transport staff overtook service delivery as the top source of complaints this year. However, changes to the way the Ombudsman records staff complaints also played a key role.

Complaints about disruptions and late and mismanaged replacement services rose by 54 per cent to 212 this year.

Source 4 Commuters queuing during train delays in Melbourne on 15 April 2019 after a woman was hit and killed by a train during peak hour.

Ombudsman Treasure Jennings said public transport operators could improve the way they trained and supported their employees, with customer service staff and drivers increasingly relied upon to provide information and assistance during disruptions.

'People who are caught up in unplanned public transport disruptions need to be provided with clear and consistent information about what is going on and their alternative travel options,' Ms Jennings said.

Many commuters had a particular gripe with drivers, especially those driving buses and coaches, who had to deal with changing road conditions, passenger queries and ticket sales.

Bus and coach driver conduct made up 52 of the 87 driver-related issues investigated by the Ombudsman. Concerns included dangerous driving and failure to pick up or drop off passengers.

Nearly 1300 complaints were also made about myki this year, with commuters complaining about delays in processing refunds and mobile myki systems.

A government spokesman said more than 600 million trips were taken on public transport last financial year, and while there were only 3600 approaches to the Ombudsman, 'there is always room for improvement'.

'Victorians rightly expect our public transport operators to have the best customer service – we expect operators to do all they can to improve passenger experience.'

Public Transport Users Association's spokesman Daniel Bowen said planned shutdowns were now commonplace and commuters expected more from the crowded and slow bus replacement services they were enduring.

...

13.5 CHECK YOUR LEARNING

Define and explain

1 What is an ombudsman?

2 Describe two similarities and two differences between an ombudsman and a tribunal.

3 In what ways might ordinary Australians benefit from the existence of an ombudsman?

4 What sorts of complaints does the Public Transport Ombudsman hear?

Synthesise and apply

5 For each of the following scenarios, identify the ombudsman that is most likely to have jurisdiction to hear the complaint.

- **a** Bernie has been waiting seven months to receive a copy of her child's birth certificate from the Victorian Registry of Births, Deaths and Marriages.
- **b** Wayne Shawn has just realised that he has been overcharged for his internet for the past six months; his service provider is refusing to refund him the money.
- **c** Verity was fined for not having 'tapped on' her myki card when she got on a tram, but all of the tram's myki readers were broken.
- **d** Oren is an overseas student; he has been suffering discrimination from one of his teachers.
- **e** Kourtney's application for welfare benefits has been refused.

6 Read the scenario 'Complaints about public transport staff more than double'.

- **a** Provide a summary of the types of claims lodged with the Public Transport Ombudsman (PTO) and the complaints that were made.
- **b** If you had a complaint with a public transport operator, would you lodge it with the PTO? Be prepared to discuss your views with your classmates.

Analyse and evaluate

7 Provide two strengths and two weaknesses of the office of an ombudsman as a dispute resolution body.

8 Conduct some research into one ombudsman other than the Public Transport Ombudsman.

- **a** Find an article or report about one type of complaint that the ombudsman has heard.
- **b** Provide a summary of this matter.
- **c** In your view, is the ombudsman an effective dispute resolution body? Give reasons for your answer, making reference to the complaint that you have identified.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 13.5 Check your learning
- **Going further** Telecommunications Ombudsman
- **Weblink** Victorian Ombudsman
- **Weblink** Public Transport Ombudsman

13.6 COMPLAINTS BODIES

Other than tribunals, courts and ombudsmen, there are a number of complaints bodies that can help individuals who have a complaint about goods, services or a particular industry body. Similar to a tribunal or an ombudsman, complaints bodies obtain their power through parliament.

The role of a complaints body

Complaints bodies deal with complaints about the provision of goods and services, or decisions made by certain bodies or authorities. They are intended to provide a free complaints and dispute resolution service so that ordinary Australians can access dispute resolution services.

Most dispute resolution services focus on a particular industry or service. For example, the Disability Services Commissioner can hear complaints about disability service providers but cannot hear and determine disputes about legal services (complaints about the legal services provided by lawyers are heard by the Legal Services Commissioner).

Like an ombudsman, complaints bodies are designed to hear complaints from individuals and small businesses about services or goods provided to them. Complaints bodies generally do not hear disputes about individuals. However, unlike an ombudsman, complaints bodies generally do not have the power to conduct a hearing or make binding decisions on the parties. That is, complaints bodies are limited to offering free or low-cost dispute resolution services where the parties agree to settle the dispute between them.

Complaints bodies do not use formal procedures to resolve disputes, and most offer flexible services so that they are accessible to everyone. For example, many complaints bodies allow people to make complaints online or over the phone.

In addition to providing dispute resolution services, many complaints bodies can take enforcement action against individuals or companies that do not comply with certain laws. For example, in 2016 and 2017, Consumer Affairs Victoria, a Victorian complaints body, took action against Belle Gibson in the Federal Court. This legal case is explored in the scenario below.

ACTUAL SCENARIO

Blogger lies to cancer sufferers

Director of Consumer Affairs Victoria v Gibson [2017] FCA 240 (15 March 2017)

Belle Gibson was a blogger, app publisher and promoter of alternative health treatments. Her company developed, promoted and sold a successful app and book, both called *The Whole Pantry*. While developing and promoting these products, Gibson made statements claiming she had been diagnosed with brain cancer in 2009, and that she had pursued natural remedies to treat the cancer. Various social media posts referred to Gibson as having had brain cancer. Gibson also made various statements about how she would give the proceeds of the sales of the app and the book to charities and to people in need.

From around March 2015, newspaper articles questioned Gibson's claims about her brain cancer diagnosis and about the donations she claimed to have made. As a result, Gibson's book and app were withdrawn from sale and her social media accounts were taken offline. An interview with Gibson in June 2015 on the television program, *60 Minutes*,

revealed that she had never had brain cancer. A charity Gibson allegedly donated to subsequently made a claim with Consumer Affairs Victoria.

Consumer Affairs Victoria commenced its investigation in April 2015 and issued a proceeding in the Federal Court of Australia in May 2016. Consumer Affairs Victoria claimed Gibson had engaged in misleading and deceptive conduct, and had made misrepresentations to consumers about her health and about her company's charitable donations. The Federal Court ruled in favour of Consumer Affairs Victoria on 15 May 2017, and in September 2017 fined Gibson $410000. Gibson has failed to pay the fine, and in early 2020 her house was raided in a bid to recoup the money.

Source 1 Belle Gibson was found to have contravened consumer legislation by misleading and deceiving consumers and making misrepresentations.

Complaints bodies in Australia

In Australia, there are both Commonwealth and state complaints bodies. Some of the Commonwealth complaints bodies are listed in Source 2 below. Other Commonwealth complaints bodies include the Australian Human Rights Commission and Airservices Australia (which hears aviation complaints).

COMMONWEALTH COMPLAINTS BODY	DESCRIPTION
Office of the eSafety Commissioner	The Office of the eSafety Commissioner was established to provide education to young people about online safety, and to provide a complaints service for young people who have suffered serious cyberbullying. Applications for the Commissioner to hear complaints can be made online.
Inspector-General of Taxation	The Inspector-General of Taxation can hear complaints about the Australian Taxation Office (ATO). This includes complaints about administrative actions taken by the ATO, such as the timeliness of responses to requests made to the ATO. Complaints can also be made about the conduct of ATO officers.
Inspector-General of Intelligence and Security (IGIS)	Members of the public can make complaints to the IGIS about certain Australian security agencies, including the Australian Intelligence Community, the Australian Security Intelligence Organisation, and the Australian Secret Intelligence Service.

Source 2 Commonwealth complaints bodies

Some of the complaints bodies in Victoria are listed in Source 3 below. Other Victorian complaints bodies include the Victorian Information Commissioner, the Legal Services Commissioner, and the Mental Health Complaints Commissioner.

VICTORIAN COMPLAINTS BODY	DESCRIPTION
Consumer Affairs Victoria (CAV)	CAV has the power to conciliate disputes between consumers and traders, and tenants and landlords, about the provision of goods and services and the provision of tenancy. CAV also has jurisdiction to hear disputes in relation to retirement villages.
Disability Services Commissioner (DSC)	The DSC helps people with a disability resolve their complaints about disability service providers. The DSC offers conciliation services to parties, and has the power to investigate complaints where conciliation has failed or is not suitable. Where a complaint is justified, the DSC has the power to issue an action to remedy the situation.
Health Complaints Commissioner (HCC)	The HCC hears complaints about health service providers (e.g. doctors, dentists and surgeons) if the complaint has not been resolved directly with the health service provider.
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	The VEOHRC hears disputes in relation to equal opportunity, discrimination and any infringement of human rights.

Source 3 Victorian complaints bodies

Focus on the Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is an independent body. It offers a free, fair and timely dispute resolution service.

Various Victorian statutes give the VEOHRC the power to help individuals resolve their complaints about discrimination, sexual harassment, victimisation and vilification. The two main statutes that confer power on the VEOHRC are the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic). Each of these statutes, in various ways, seeks to protect human rights and to prevent people from being discriminated against, harassed or vilified.

Source 4 In September 2017, VCAT ruled that a Sikh boy had been discriminated against because he was unable to wear his patka to school. The VEOHRC intervened in the family's case to VCAT. The case was seen as a win for the VEOHRC and the position it took.

The *Equal Opportunity Act* is the main statute in Victoria that makes it unlawful for a person to be discriminated against. The Act sets out the attributes for which a person cannot be discriminated against (e.g. age, breastfeeding, gender identity, parental status, physical features and disability), and the areas or activities in which a person cannot be discriminated against (e.g. in employment, education, sport, or the provision of goods or services).

The *Racial and Religious Tolerance Act* makes it unlawful for a person to incite hatred against or to ridicule a person or a group of people based on race or religion. This Act also makes it unlawful for one person to victimise another person.

The services provided by the VEOHRC include a free, fair and timely dispute resolution service for people who believe that they have been harassed, vilified, victimised or discriminated against.

The complaint process used by the VEOHRC is conciliation. A conciliator assists the parties in dispute to talk through the issues with the aim of reaching an agreement on how the dispute can be resolved. This can involve financial compensation, an apology, job reinstatement (where a person has lost their job on the basis of discrimination) or an agreement that the behaviour will stop.

The VEOHRC has no powers to make orders, award compensation or make binding decisions on the parties. If conciliation does not resolve a dispute, then the parties need to consider alternative options, such as issuing a claim at VCAT, or abandoning the claim.

The scenario below is an example of the type of discrimination claim that can be heard by the VEOHRC.

ACTUAL SCENARIO

Changes to school uniform policies may be discriminatory

In 2017, the Victorian Government overhauled uniform policies in state schools so that girls could wear pants and shorts to school if they wanted to, and were no longer required to wear dresses and skirts.

This new policy aligns Victoria with Western Australia, which also announced changes to its uniform policy in 2017. Kristen Hilton, the VEOHRC Commissioner, said that if girls are prevented from wearing shorts and pants to school, this could amount to unlawful discrimination. The VEOHRC has also said that school policies should allow girls to choose what uniform they wish to wear, including pants or shorts. Discrimination claims relating to uniform school policies can be lodged with the VEOHRC.

Source 5 Girls attending state schools in Victoria can now choose to wear pants and shorts to school rather than skirts and dresses.

Strengths and weaknesses of tribunals, ombudsmen and complaints bodies

Now that you have considered three types of dispute resolution bodies (tribunals, ombudsmen, and complaints bodies), it is useful to consider their strengths and weaknesses in light of the three principles of justice (fairness, equality and access). Note that some of the strengths and weaknesses are applicable to all three of these dispute resolution bodies, whereas some are applicable to one or two of them.

STRENGTHS OF DISPUTE RESOLUTION BODIES	WEAKNESSES OF DISPUTE RESOLUTION BODIES
Tribunals, ombudsmen and complaints bodies increase access to justice by providing **alternative methods** of making complaints or resolving disputes other than through the courts.	Many individuals are **not aware** that ombudsmen and complaints bodies are available to help resolve disputes.
The cost of taking a dispute to a tribunal, ombudsman or complaints body is generally lower than taking a dispute to court. In fact, ombudsmen and complaints bodies often resolve disputes for free, which increases the availability of the civil justice system, and makes it accessible for people who cannot afford to take their matter to court.	Given the large number of tribunals, complaints bodies and ombudsmen, some members of the public **may find it difficult** to find the right service to help them, and so they may not pursue their claim or complaint.
Generally, complaints bodies resolve complaints and applications relatively **quickly**: generally, complaints are usually resolved between one month and six months from a complaint or application being made.	Some of the services **are not free of charge**. For some VCAT matters, the hearing and application fees are high, and parties may still need to hire a lawyer to help them.
The services are **freely available**, which increases the accessibility of the services. This accessibility is enhanced by most of the bodies having websites, information online about the application process, and telephone and online services.	An ombudsman or a complaints body has **limited power** to make binding decisions. In some instances the individual may choose not to follow the decision, thus meaning there is no certainty in whether the dispute has been finally resolved.
The **informality** of the processes enables parties to feel more at ease, thus upholding equality.	Dispute resolution bodies are **not appropriate for large, complex claims.**
Ombudsmen and complaints bodies provide an avenue for individuals to resolve disputes with large service providers and government agencies **without fear of intimidation**, thus upholding equality.	Dispute resolution bodies are not appropriate where **large sums of money** are sought as compensation. Some bodies have a limit on the amount of compensation they can award, and other bodies are unable to award compensation at all.
All of the dispute resolution bodies ensure that whoever is assisting the parties is **independent and impartial**.	Ombudsmen and complaints bodies, in particular, are specialised in particular areas or industries. This means that for certain types of complaints, there is **no option but to issue a claim in a court.**
The dispute resolution bodies are often **specialised** in a particular industry or area of law, thus increasing fairness in the process.	Tribunals, ombudsmen and complaints bodies **cannot create binding precedents**, and so there may be inconsistency in the way that matters are decided or dealt with.
The dispute resolution bodies ensure procedural fairness by **giving parties the opportunity to present their case**.	Certain bodies, such as some complaints bodies and ombudsmen, **are not available for everyone**. For example, Consumer Affairs Victoria can only hear disputes from consumers, not vendors.

Source 6 The strengths and weaknesses of tribunals, ombudsmen, and complaints bodies

Source 7 Similar to a tribunal or an ombudsman, complaints bodies obtain their power through parliament.

13.6 CHECK YOUR LEARNING

Define and explain

1 What are complaints bodies?
2 Explain two ways that complaints bodies aim to help ordinary Australians.
3 What is the Victorian Equal Opportunity and Human Rights Commission (VEOHRC)? What sort of complaints does it hear?
4 Describe the dispute resolution method used by the VEOHRC.
5 Does the VEOHRC have the power to make a decision for the parties involved in a dispute? What other options do the parties have to reach an agreement?
6 Identify two statutes in Victoria that make it unlawful to discriminate against or to vilify people.

Synthesise and apply

7 For each of the following scenarios, identify a complaints body that could help resolve the dispute.
   a Magdeline has waited weeks for a response from the taxation office about her taxes.
   b Randall believes that he is being spied on by a security intelligence officer.
   c Cassius believes that he was inappropriately treated by his physiotherapist.
   d Every time Zina goes to work, she hears the receptionist say under her breath, 'monkey'. Zina believes it is because of her race.
   e Indiana recently bought a television from a store in Maribyrnong. The television is now no longer working and the store refuses to refund the amount Indiana paid for it.
   f Perez has been seriously bullied on Snapchat.
8 Conduct some research about the ruling VCAT made in September 2017 that a Sikh boy had been discriminated against because he was unable to wear his patka to school. Describe the position that the VEOHRC took on this case, and the reasons why the VEOHRC took this position.

Analyse and evaluate

9 Discuss the following statement, indicating whether you agree or disagree with it. In your discussion, refer to at least one complaints body, one tribunal and one ombudsman.
   'Complaints bodies and ombudsmen are confusing and pointless. There should just be two dispute resolution bodies: courts and tribunals.'
10 Engage in a class debate about the following statement:
   'There should be no uniform policies so that students are free to wear what they want – this will avoid discrimination entirely'.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 13.6 Check your learning
- **Weblink** Consumer Affairs Victoria
- **Weblink** Office of the eSafety Commissioner
- **Weblink** Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

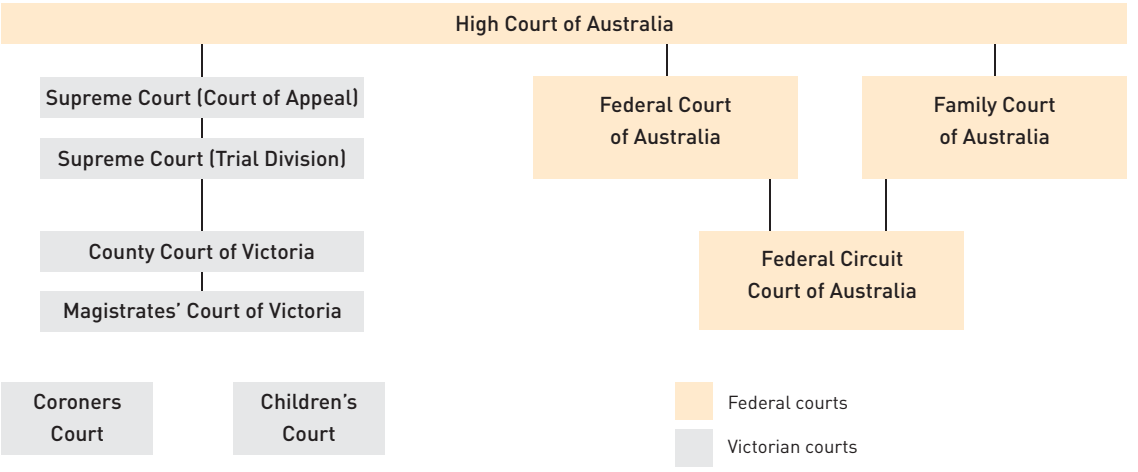
13.7 THE ROLE AND CIVIL JURISDICTIONS OF THE VICTORIAN COURTS

Study tip

Trials and hearings in Victorian courts are open to the public. Your teacher may arrange a visit to a court, or you may wish to arrange your own visit. Visiting a court will help you to be more specific in your answers to questions in assessment tasks about the role of the courts.

As you explored in Chapter 11, some courts can hear both criminal cases and civil disputes. Both state and federal courts have **jurisdiction** to hear certain types of civil disputes. Because civil disputes often involve a combination of both state and federal law, many of the state courts have jurisdiction to hear matters arising under federal law.

The courts in Victoria and Australia are arranged in a **court hierarchy**.



Source 1 The hierarchies of the Victorian and Commonwealth court systems

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

court hierarchy
the ranking of courts from lowest to highest according to the seriousness and complexity of the matters they deal with

The role of Victorian courts in civil disputes

Civil disputes often arise, even though there are laws that set down guidelines for acceptable behaviour. When civil disputes arise, they need to be resolved.

The courts are the main dispute resolution body in Victoria. However, taking a civil dispute to court is often a last resort. This is due to the range of dispute resolution bodies and methods available to the parties to help them resolve a civil dispute, and the high costs involved in using the court system.

In general, there are two features to the role played by the Victorian courts in resolving disputes:

- determining the liability of a party
- deciding on the remedy (if required).

Determining liability

If a plaintiff sues a defendant in court, then it is the role of the court to determine whether the defendant is liable and, if so, to what extent the defendant is liable. This means that the judge or magistrate (or jury if there is one) will consider the evidence presented to the court during the trial. Then, they will determine whether the plaintiff, on the **balance of probabilities** (being the **standard of proof** in civil disputes), has established or proven that the defendant caused the loss or harm suffered by the plaintiff. This is often called deciding the facts, and the judge or magistrate (or jury) is the **decider of facts**.

The decider of facts may also have to determine whether the defendant is 100 per cent liable for the plaintiff's loss or harm. For example, if the defendant has claimed that the plaintiff is partly responsible for the loss or harm, this may reduce the defendant's liability. Similarly, if the plaintiff has sued more than one party, then the decider of facts may have to determine whether all of the defendants are liable and, if so, for what portion they are liable.

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

standard of proof
the degree or extent to which a case must be proved in court

If the defendant has made a **counterclaim**, the judge or magistrate (or jury) also needs to determine whether the plaintiff is liable for that claim.

A court, in hearing a dispute, adopts formal rules of procedure. For example, there are rules governing which party presents their case first (generally, the plaintiff). However, a judge does have the power to change the rules of procedure. The *Evidence Act 2008* (Vic) also governs what evidence can be accepted by a court. For example, a witness cannot give evidence of an opinion to prove a fact. At a final hearing or trial, witnesses give evidence either orally or in writing.

As part of the court's role in determining liability, it will:

- **provide specialisation and expertise** in the type of dispute it is hearing – for example, the Supreme Court, being the highest court in the Victorian court hierarchy, deals with major complex cases such as large commercial disputes and class actions, whereas the Magistrates' Court deals with minor civil disputes
- **manage the case** – judges have significant powers of **case management**, which means they can give **orders** and **directions** to the parties. That is, a court can assist the parties through the stages of the proceeding before it reaches the final hearing or trial. These stages may include requiring the parties to disclose relevant documents through the process of **discovery of documents**, or requiring the parties to attend mediation before the trial
- **hear appeals** – some of the courts in Victoria, including the Supreme Court, have the power to hear **appeals**. If a party is dissatisfied with a decision of the judge or magistrate, that party may be able to appeal the decision if there are grounds to do so. The higher court will then review the decision.

Source 2 The Supreme Court can hear complex and large class actions. It has courtrooms (such as this one) that cater for e-trials and multiple parties.

Deciding on a remedy

If the plaintiff establishes that the defendant is liable, or the defendant establishes that the plaintiff is liable for the counterclaim, then it is the role of the court to decide on the remedy. A remedy is a way in which a court can right the wrong that has occurred to the party who has suffered loss. The most common remedy is damages (an amount of money paid by one party to the other party – usually the defendant to the plaintiff). You will explore remedies in Topic 13.9. The court can also award the successful party their costs (although, usually not all a party's costs are recoverable), and interest that might have accrued on the damages amount/loss suffered.

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

case management
a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (e.g. an order that the parties attend mediation)

orders
the way in which the instructions, decisions or directions of a court or tribunal are described. They can be given during the course of a proceeding or at the end of a proceeding

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

discovery of documents
a pre-trial procedure that requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

In a civil dispute, the judge or the jury may be required to assess damages. This means that the judge or jury needs to calculate the amount of damages to be paid. This amount is based on evidence that is presented by both parties about what would be a suitable damages amount. However, in **defamation** cases (where a plaintiff sues a defendant for publishing untrue statements about them that have lowered the plaintiff's standing in the community), only the judge can assess damages.

It is often the case that a court will provide a written judgment that outlines the reasons why it came to its decision. Many of these judgments are publicly available.

If the parties settle their dispute, they may either obtain an order from the court that dismisses or discontinues the case, or they may ask the judge to make an order in the terms they have agreed. Although, the judge can refuse to make an order as requested by the parties. In the case of a class action, the judge must approve any terms of settlement.

The scenario below is an example of a class action dispute that reached a settlement agreement before a remedy was ordered by the court.

ACTUAL SCENARIO

Settlement after trial but before judgment

Clarke v Great Southern Finance Pty Ltd (in liquidation) [2014] VSC 516 (11 December 2014)

In 2010, a class action was commenced on behalf of a group people who had invested in a managed investment scheme and lost money as a result of the investment. The trial commenced in the Supreme Court of Victoria on 29 October 2012 and concluded on 24 October 2013.

Source 3 The Great Southern Finance class action is a good example of the size and magnitude of the cases the Supreme Court hears, and the way out-of-court settlements can resolve disputes.

On 23 July 2014, Justice Croft of the Supreme Court notified the parties that he intended to deliver his judgment on 25 July 2014. However, within hours of that notification, the parties notified Justice Croft that they had entered into a settlement agreement.

Former Chief Justice Marilyn Warren, in a speech delivered at Monash University on 17 February 2016, commented on the magnitude of the case. The civil dispute had involved 10 million documents, 90 days of court hearings, 104 witnesses and, on average, 13 barristers and 15 solicitors in court each day.

The civil jurisdiction of Victorian courts

Each of the Victorian courts has specific jurisdiction or power (i.e. authority) to hear and determine civil disputes. There are two types of jurisdiction: **original jurisdiction** and **appellate jurisdiction**. When a court is hearing a dispute for the first time, it is operating in its original jurisdiction. When a court is hearing an appeal, it is operating in its appellate jurisdiction.

A summary of the civil jurisdiction of the Victorian courts is set out in Source 4 below.

original jurisdiction the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

appellate jurisdiction the power of a court to hear a case on appeal

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court of Victoria	Claims up to $100 000	No appellate jurisdiction
County Court of Victoria	Unlimited	No appellate jurisdiction, unless given under a specific Act of Parliament
Supreme Court of Victoria (Trial Division)	Unlimited	Appeals on a question of law from the Magistrates' Court and from VCAT
Supreme Court of Victoria (Court of Appeal)	No original jurisdiction	Appeals from the County Court, Supreme Court (Trial Division) and VCAT (when constituted by VCAT's President or a vice-president)

Source 4 The civil jurisdiction of Victorian courts

Study tip

Think of a way that will help you remember which court hears appeals from which courts. For example, try to turn it into a song or a rhyme, or use a visual diagram. Alternatively, to help fix the information in your memory, you could access as many appeal cases as you can, taking particular note of which court heard the case first.

Magistrates' Court of Victoria

Original jurisdiction

The Magistrates' Court hears minor civil disputes of up to $100 000. This means that the Magistrates' Court cannot award damages greater than $100 000 to a plaintiff. If a plaintiff is seeking damages over $100 000, they have to file their claim in a higher court (the County Court or Supreme Court).

When the amount sought in civil damages is less than $10 000, the Magistrates' Court may refer the matter to arbitration (see Topic 13.3).

Appellate jurisdiction

As the Magistrates' Court is the lowest court in the Victorian court hierarchy, it has no appellate jurisdiction. This means it cannot hear any appeals from other courts.

County Court of Victoria

Original jurisdiction

The jurisdiction of the County Court for civil claims is **unlimited**. This means that there is no upper or lower limit to its jurisdiction, and it can hear claims of any amount.

Parties can choose to have their matter heard in either the County Court or the Supreme Court. In civil disputes, parties have a choice of trial by a judge alone, or trial by a judge and jury (six jurors). Many cases, in particular personal injury cases, are heard in the County Court because it is generally more expensive to take a case to the Supreme Court; although many of the more complex cases are heard in the Supreme Court.

Did you know?

If a plaintiff has a claim for more than $100 000 but wants to issue the claim in the Magistrates' Court, they can still file their claim with the Magistrates' Court but they must not seek any more than $100 000, and they will not be awarded any more than that amount.

Appellate jurisdiction

The County Court does not have the jurisdiction to hear appeals in civil matters except where an Act of Parliament specifically provides for appeals to be heard in the County Court. For example, certain appeals

Did you know?

Class actions (also known as group proceedings or representative proceedings) are cases that are usually brought by one individual on behalf of a group of people who have suffered similar injuries caused by the same individual or group.

under the *Children, Youth and Families Act 2005* (Vic) can be made to the County Court (such as an appeal against an order made by the Children's Court in relation to a therapeutic treatment order, which requires a child to participate in a treatment program).

Supreme Court of Victoria (Trial Division)

Original jurisdiction

The Trial Division's jurisdiction for civil claims is **unlimited**. This means that, like the County Court, the Supreme Court can hear claims of any amount. As in the County Court, a jury of six is optional in civil cases.

The Supreme Court is used for many complex and large civil disputes, such as class actions, matters involving complex areas of law, and disputes between large corporations.

Appellate jurisdiction

In civil disputes, a single judge in the Supreme Court can hear appeals from the Magistrates' Court on a point of law. A single judge can also hear appeals from VCAT (although when the tribunal is constituted for the purpose of an order being made by the President or a vice-president, an appeal from that order goes to the Court of Appeal).

In the scenario below, the Supreme Court heard an appeal from a VCAT decision.

ACTUAL SCENARIO

DJ successful in discrimination claim

Obudho v Patty Malones Bar Pty Ltd [2017] VSC 28 (9 February 2017)

Antony Kwenda Obudho, who was of African descent, operated a business that organised or promoted music events with an African theme. At these events, Obudho often appeared as a DJ. In 2011, Obudho's wife and business partner contacted Patty Malones Bar Pty Ltd, the owner of Inflation Nightclub, about hiring the club's basement for a night in October 2011. Five days before the event, Patty Malones cancelled the booking after learning that the proposed event was to be an African music event.

Obudho and two others issued a claim in VCAT, claiming that Patty Malones had discriminated against them, having cancelled the booking based on race. VCAT ultimately held that Patty Malones had discriminated against Obudho and the two other applicants, but dismissed the claims for compensation. Obudho appealed to the Trial Division of the Supreme Court (as did Patty Malones against VCAT's decision). One of the grounds for appeal by Obudho was that VCAT had failed to consider his claim for economic and non-economic loss, including loss because of personal upset and humiliation that he suffered as a result of the discrimination.

Justice Emerton of the Supreme Court upheld Obudho's appeal and found there was evidence of both economic and non-economic loss. She ordered that Patty Malones pay Obudho $13 000 for loss suffered by him. She dismissed Patty Malones' appeal.

Supreme Court of Victoria (Court of Appeal)

The Court of Appeal, in its appellate jurisdiction, hears appeals from the County Court and the Supreme Court on questions of law, questions of fact, or the amount of damages awarded. It also hears appeals from decisions of the President and vice-presidents of VCAT.

In almost all civil disputes, leave (permission) of the Court of Appeal is required to appeal a decision. The Court of Appeal can hear and determine leave applications 'on the papers'; that is, without the need for an oral hearing.

An appeal on a question of fact in a civil dispute looks at whether the facts of the case had been applied appropriately to reach the decision that was given – either that the defendant was in the wrong or was not in the wrong. An appeal on a question of law looks at whether the law was appropriately applied to the case.

Did you know?

The first female High Court justice was Justice Mary Gaudron, who was appointed to the High Court in 1987.

Strengths and weaknesses of courts as dispute resolution bodies

Courts have both strengths and weaknesses as dispute resolution bodies. These are set out in Source 5 below.

STRENGTHS OF COURTS AS DISPUTE RESOLUTION BODIES	WEAKNESSES OF COURTS AS DISPUTE RESOLUTION BODIES
Judges are **impartial** referees who make decisions based on fact and law, not on bias, thus helping to ensure equality and fairness in decision-making	Courts are **too expensive** for many Australians, largely due to the need for legal representation and the costs involved in undertaking procedures such as discovery
Courts aim to reduce delays and costs through **active judicial case management** and giving directions or orders to the parties	Despite reforms to civil procedure in relation to case management, there can still be **delays** in a matter being resolved
Because of the court hierarchy, judges and court personnel are **specialised**, thus helping to ensure fairness and expertise in the way that proceedings are managed	The **formalities** of the court process can result in parties feeling stressed, intimidated or nervous
Encouraging parties to **attend mediation** and enter into an out-of-court settlement before trial assists in matters being resolved more quickly and more cheaply than having a full trial or hearing	The onus on the parties to prove their case can mean that they are **inconvenienced** by having to gather evidence and produce documents
Formal court processes, the way in which cases are managed, and rules of evidence help to ensure **procedural fairness** by allowing a party to present their case and rebut the other party's case	**Without legal representation**, which can be expensive, a party may be at a disadvantage in presenting their case; this means they are not equal to a party who has legal representation
Many courts have adopted practices to **reduce delays**, such as 'fast tracking' some matters and reducing pre-trial procedures	Some courts have been slow to adopt and embrace technology in some areas (e.g. e-filing), which reduces some people's **access to justice**, particularly people living in rural areas
Courts can make **binding decisions** that help to ensure certainty in the outcome	The courts and the way they resolve disputes are **difficult to understand** for parties, particularly those who are from culturally and linguistically diverse backgrounds, those with a cognitive impairment, or those with little to no education, thereby risking a lack of equality and access
The **doctrine of precedent** applies in court cases, therefore enabling consistency in decisions in similar cases	The **doctrine of precedent is difficult to understand** and precedents are hard to find, therefore making access to the courts and understanding the way they might resolve a dispute difficult
The court hierarchy allows for a party to **appeal** a case	The right to appeal is **not automatic in many cases** – for example, the Court of Appeal needs to give leave (permission) for a party to appeal a decision

Source 5 The strengths and weaknesses of courts as dispute resolution bodies

13.7 CHECK YOUR LEARNING

Define and explain

1 Identify and explain the two main roles of Victorian courts in hearing civil disputes.
2 Outline the civil jurisdiction of the Magistrates' Court.
3 In which court can a civil matter be appealed from the Magistrates' Court?
4 Can a $50 000 claim be issued in more than one court? Explain your answer.

Synthesise and apply

5 Identify which court would most likely hear each of the following disputes. Justify your answers.
   a Joobin's fence has been damaged by a man who lives two houses down from him. Joobin has received a quote to fix the fence, which is $9900. The main dispute is liability, not the amount.
   b Noah has lost his case against his employer for damages for a serious injury suffered at work. He was seeking $3 million in the County Court. He wants to appeal the case.
   c Marianna was a defendant in an action in VCAT, which was heard by the President. She wants to appeal.
   d Andrew is looking to start a class action against a large corporation for misleading or deceptive conduct. He is seeking an unknown amount of damages.
   e Mohamed is seeking $6 million in damages for a breach of contract with a property developer.
6 Read the scenario *Clarke v Great Southern Finance Pty Ltd (in liquidation)*.
   a What is a class action?
   b How long did this trial go for?
   c What does 'deliver judgment' mean? Why was there such a long period of time in between the trial concluding and the judgment being delivered?
   d What happened shortly before the judgment was due to be delivered? How and why do you think this happened?
   e Do you think it is a benefit to the parties and to the court that the parties entered into a settlement agreement? Discuss.
7 Read the scenario *Obudho v Patty Malones Bar Pty Ltd*.
   a What was Obudho's claim?
   b Where was the claim issued and what was the outcome?
   c Why did Obudho appeal to the Trial Division of the Supreme Court and not to the Court of Appeal?
   d Who was the appellant in the appeal case?
   e What was the Supreme Court's decision?
   f Do you think this case demonstrates that all of the principles of justice are achieved in a civil dispute? Give reasons for your answer.
8 Conduct some research into the current status of the Ruby Princess class action.
   a What type of proceeding is this? Explain the nature of this proceeding.
   b Who is the plaintiff? Who is representing the plaintiff?
   c What allegations have been made in this proceeding?
   d Has there been a resolution in this dispute? If so, how was the matter resolved? If not, what is the current status of the proceeding?

Analyse and evaluate

9 In your view, should the courts be treated as a last resort for resolving civil disputes? Give reasons for your answer, referring to the principles of justice.

Check your Student obook assess for these additional resources and more:

Student book questions
13.7 Check your learning

Video tutorial
How to answer scenario-based questions

Going further
Federal courts

Weblink
Court Services Victoria

Going further
Appeals to the High Court

13.8 THE ROLE OF THE JURY IN A CIVIL TRIAL

As discussed in Chapter 11, the jury system is a trial by peers. In a civil dispute, the jury considers the evidence – having regard to the law that is explained to them by the judge – and decides who is in the wrong.

When is a jury used in civil trials?

Unlike some criminal cases, there is no automatic right to a jury in a civil trial. For example:

- in the Magistrates' Court, and in appeal cases, there is no jury
- in the County Court and the Supreme Court, a jury is optional. If either party wants a jury, they must request a jury trial. The party who has requested a jury trial must pay the fees associated with having a jury (although a judge can still order that the trial be by judge alone).

It is also possible for the judge to require a jury for a civil trial. If this is the case, the state pays for the jury. It is not common for a judge to request a jury trial.

Civil jury trials are rare, largely because of the fees involved, and often because civil trials are so complex that parties elect to have a trial by judge alone. Juries, however, are sometimes used in defamation cases. In the scenario below, a jury was requested by the plaintiffs.

ACTUAL SCENARIO

Jury trial despite complex issues in the case

Humphris v ConnectEast Nominee Company Pty Ltd (No 2) [2016] VSC 419 (27 July 2016)

In this case, the plaintiffs requested that the trial be heard by a judge and jury. The claim brought by the plaintiffs related to negligence and nuisance caused by EastLink (a toll road in Melbourne's eastern suburbs). The plaintiffs in the case were self-represented.

The defendants requested that the trial be heard by a judge alone. The defendants referred to the complex issues of law and fact, the large volumes of written material that needed to be considered, and the length of time and resources that would be spent if the jury needed to be discharged.

Associate Justice Daly of the Supreme Court, 'with some hesitation', dismissed the defendants' application. She decided she would not lightly interfere with the right of a self-represented party to a trial by jury. Her Honour referred to the fact that previous juries had been able to deal with complex and detailed evidence.

Composition of a civil trial

There are six jurors in a civil jury in the County Court and the Supreme Court. Each juror is randomly selected from the Victorian electoral roll. Up to two extra jurors can be selected if the trial is expected to be lengthy, although two jurors will be discharged once it comes to deliberating. This means that only six jurors will be involved in deciding the verdict.

unanimous verdict
a jury vote or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty). In a criminal case, this means all 12 jurors are in agreement

majority verdict
a jury vote or decision where all but one of the members of the jury agree with the decision. In a criminal trial, this means 11 of the 12 jurors are in agreement

Role of a civil jury

The role of a civil jury is to consider the facts of the case and to decide who is most likely to be in the wrong. The jury's decision is made on the balance of probabilities. If a **unanimous verdict** cannot be reached (i.e. one in which all six jurors agree), then a **majority verdict** of five out of six jurors will

be accepted. A civil jury may also be required to decide on the amount of damages to be awarded. In defamation cases, only a judge can decide the amount of damages.

Jurors are not required to give reasons for their decision (unlike a judge or magistrate). Therefore, the parties will not know the basis upon which the jurors made their decision, or even know whether the jurors understood the evidence, the legal issues, or the submissions made by the parties.

Like criminal juries, there are obligations on civil juries in relation to gathering research and evidence. Penalties apply to jurors who make enquiries for the purposes of obtaining information about anything related to the trial (e.g. using the internet to search for information, or viewing or inspecting a place that is relevant to the trial).

In conducting their role, juries are seen to ensure that justice is administered in line with community standards, rather than in line with the views of a small number of people (that is, judges). The use of the jury system also enables the community to participate in the administration of justice, which can enhance the confidence of the community that justice is being achieved.

In addition, the jury system aims to uphold equality and impartiality. It does this by seeking to ensure that jury members have no knowledge of a party or a witness, have no biases or preconceived notions, and make a decision based on facts.

The scenario below is an example of a negligence case that was heard by a jury.

ACTUAL SCENARIO

Jury rules against man who tried to sue police over finger injury

Adam Cooper, *The Age*, 5 September 2019

A Melbourne man who had part of his finger amputated following an arrest has failed in an attempt to sue police over claims they used excessive force.

Taddis Gebrehiwot claimed in the County Court a police officer slung him to the ground by the neck in Maddern Square in Footscray on November 17, 2014, and that he heard a crack when he landed on his right index finger.

In the months afterwards he had part of the finger amputated when doctors discovered a bone infection.

Source 1 Taddis Gebrehiwot tried to sue the state of Victoria. A jury decided the state was not liable.

At the civil trial police defended their actions and said Mr Gebrehiwot was not slung but taken to the ground lawfully by an officer in a movement that was quick and controlled.

A six-person jury recently found Mr Gebrehiwot had not successfully made out claims the police's use of force was excessive, and found against him. The former refugee must pay legal costs for the police.

Mr Gebrehiwot told the trial the amputation created daily difficulties when writing, using a knife in cooking and when handling a screwdriver and other tools.

...

Source 3 In a civil trial, the jury is made up of only six people. This is different to a criminal trial, where the jury is made up of twelve people.

Strengths and weaknesses of the jury system

Some of the strengths and weaknesses of the jury system are listed in Source 2 below.

STRENGTHS OF THE JURY SYSTEM	WEAKNESSES OF THE JURY SYSTEM
Jurors are **independent and impartial**; in particular, they are independent of the legal and political systems, thus helping to ensure equality and fairness in their decision	Juries do not give reasons for their decisions, and deliberations occur behind **closed doors**, which raises questions about whether there is procedural fairness in juries' decisions
The jury system **allows the community to be involved** in the legal system and in the administration of justice. This increases the community's confidence in the legal system	The task is **difficult**, particularly where there is complicated evidence or a significant amount of evidence. This raises the question of whether ordinary members of the public can understand this evidence and can arrive at the right decision based on the evidence
The jury system helps to ensure **fairness** by requiring the jury to deliberate based on the evidence and facts presented to the court and not on their own independent research or investigations	Jurors may be **unduly influenced** by skilled lawyers or by the emotional elements of a trial and, although unlawful, may conduct their own online investigation into the facts and parties involved in a case, which may bias their decision
The jury system **spreads the responsibility of making a decision across several jurors**	Jurors **may have biases** that may play a role in their deliberation, even if they aren't aware of those biases
Research suggests that the professional training and expertise of judges does not give them an enhanced ability to determine whether a witness is telling the truth, and that **jurors can effectively make this decision**	A jury is **expensive**, and in a civil trial the party requesting it must pay for it, therefore decreasing access to justice
Jurors are **selected at random** and jurors with connections to the parties cannot participate, therefore helping to ensure impartiality	A jury trial may result in **delays** because legal terms have to be explained and the judge must give directions to the jury
Verdicts reached by juries **reflect community values** and not the values of a single judge, which may not represent those of the community	Civil juries have often been criticised for **inconsistency in the assessment of damages**

Source 2 The strengths and weaknesses of the jury system

13.8 CHECK YOUR LEARNING

Define and explain

1 Does a jury always determine liability in civil disputes? Explain your answer, referring to each of the following courts: the Magistrates' Court, County Court and Supreme Court.
2 Describe the circumstances in which a civil trial may be heard by a jury.
3 If a jury cannot reach a unanimous decision, will the case be dismissed? Explain your answer.
4 What does a civil jury have to decide? How do they decide this?

Synthesise and apply

5 Read the scenario *Humphris v ConnectEast Nominee Company Pty Ltd (No 2)*.
   a Who requested the jury hear this case?
   b Which party resisted the jury hearing this case? Why?
   c What was the judge's decision?
   d Do you think that judges should have the power to interfere with the right of a party to request a jury? Give reasons for your answer.
6 Read the scenario 'Jury rules against man who tried to sue police over finger injury'.
   a Who is the plaintiff in this case?
   b What did the plaintiff allege occurred?
   c Discuss two strengths of using a jury in a trial such as this.
   d Discuss the benefits and downsides of using a jury to determine liability in cases such as these.

Analyse and evaluate

7 'Jurors should not be able to deliberate behind closed doors. Deliberations should be made public so that the parties can feel confident that the decision has been properly made.' Do you agree? Give reasons for your answer.
8 Evaluate the ability of the jury system to achieve fairness in a civil trial.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 13.8 Check your learning
- **Going further** Jury reforms
- **Worksheet** The role of a jury
- **Weblink** Jury trials in Victoria
- **Going further** Jury challenges

13.9 THE PURPOSES AND TYPES OF REMEDIES

In a civil case, the plaintiff normally seeks a remedy. Put simply, a remedy is a way in which a court can right the wrong that has occurred to the plaintiff.

The purposes of remedies

The general purpose of civil remedies is to **restore (as much as possible) the party who has suffered loss or injury to the position they were in before the loss or injury occurred**. This is usually in the form of a payment of money, known as damages. If a person is owed an amount of money, they can make a claim through the courts. An injured person may claim a sum (amount) of money to compensate them for any pain or suffering they incurred as a result of the civil wrong.

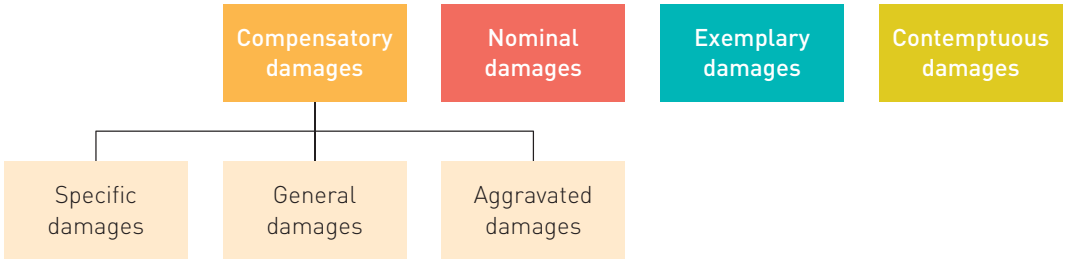
There are two main types of remedies: damages and injunctions. These will be further explored in this topic.

Damages

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

Damages is an amount of money to be paid by the defendant to the plaintiff, in satisfaction of a claim made by the plaintiff (it can also be sought by a defendant who makes a counterclaim). The main purpose of damages is to compensate the plaintiff for losses they have suffered. If there is any permanent damage (e.g. the loss of a limb), it is not possible to physically restore the injured party to how they were before the injury. Therefore, damages try and make up for that physical loss by compensating the plaintiff with an amount of money that represents the actual loss suffered.

As shown in Source 1 below, there are four main types of damages.



Source 1 The four types of damages are compensatory damages, nominal damages, exemplary damages and contemptuous damages.

Compensatory damages

Compensatory damages are the main type of damages usually sought. There are three types of compensatory damages:

- **special or specific damages** – these are awarded to compensate the injured party (usually the plaintiff) for items that can be calculated objectively and exactly; for example, loss of wages, medical expenses and hospital expenses
- **general damages** – these are awarded to compensate the plaintiff for pain and suffering. These cannot be calculated objectively because they include consideration of the extent of the plaintiff's emotional suffering and loss of enjoyment of life. The plaintiff's **counsel** may make submissions about the appropriate amount
- **aggravated damages** – aggravated damages are awarded to compensate the plaintiff further if the court believes that the defendant's conduct injured the plaintiff's feelings by causing humiliation and insult.

counsel
a lawyer appearing in court to represent a party

Nominal damages

Nominal damages are awarded by a court if the court believes that the defendant has infringed the rights of the plaintiff, but the plaintiff did not suffer any actual loss. Therefore, the court awards a very small amount of damages as compensation.

The scenario below is an example of nominal damages being awarded in a case involving breach of contract.

ACTUAL SCENARIO

$100 awarded in contract case

Coleston v Carney [2019] VCC 177 (26 February 2019)

The plaintiffs (Shane and Rachel Coleston) entered into a contract to sell their house to the defendant for a price of over $1 million. The defendant paid a deposit, and the plaintiffs allowed him to move in prior to the completion of the purchase, in a spirit of cooperation with the defendant.

Ultimately, the defendant did not pay the balance of the purchase price when he was supposed to and refused to move out of the house, despite the plaintiffs demanding that he leave. The plaintiffs commenced legal proceedings, and finally regained their house over a year later. The Colestons ultimately resold their house for more than what they were going to get from the defendant. They also kept the $50 000 deposit that the defendant had paid for the house.

The Victorian County Court noted that the plaintiffs had undoubtedly been put through extraordinary and unjustified inconvenience and stress. When assessing the damages sought, the Judge awarded the plaintiffs' legal costs, expenses and fees, and $20 000 damages for the loss of use of the purchase price and for the number of repairs needed to the property.

However, the Judge did not find that the plaintiffs had established any other financial loss as a result of the defendant's breaches. Therefore, while the Court considered it appropriate that there be some acknowledgment of the defendant's prolonged infringement of the plaintiffs' rights, it only awarded nominal damages of $100.

Exemplary damages

Exemplary damages, sometimes known as punitive damages, is the only example in civil law of a court seeking to punish a defendant. Exemplary damages may be awarded if a defendant's action was so outrageous that the court wishes to deter others from similar action and to show disapproval of the defendant's action. Exemplary damages cannot be awarded in defamation cases.

A court may also decide to award exemplary damages if the defendant has shown total disrespect for the plaintiff's wishes.

The scenario on the following page is an example of a court awarding exemplary damages.

Source 2 In the case of *Cruse v State of Victoria* [2019] VSC 574 (27 August 2019), the plaintiff was awarded $100 000 in exemplary damages to signify the Court's disapproval of the treatment afforded to him by police officers during his arrest.

Exemplary damages in case against Victoria Police

ACTUAL SCENARIO

Cruse v State of Victoria [2019] VSC 574 (27 August 2019)

In 2015, police officers carried out raids at six locations in Melbourne. The raids were prompted by intelligence the police had obtained about a planned terrorist attack that involved killing a police office and members of the public during ANZAC Day commemorations that were to take place the following week.

The plaintiff, Eathan Cruse, was a person of interest and his home was raided. During the raid, Cruse sustained injuries to his head and upper body, and he was left bloodied, bruised and concussed. At one stage, after Cruse had been struck and was lying on the floor, a police officer held him by the hair and said, 'There's more to come' or 'There's more where that came from'. Cruse was later diagnosed with post-traumatic stress disorder and major depression. He has never been charged with a terrorism offence.

Cruse sued the state of Victoria in the Supreme Court, claiming that the injuries he sustained were a result of vicious battery and assault by one or more police officers. The state of Victoria defended the claim, stating that the force used by the police officers was reasonable and necessary.

The Supreme Court accepted Cruse's account of the force used by police officers against him. The Court found that the arrest was not lawful as there were no reasonable grounds to suspect that Cruse had committed, or was committing, a terrorism offence. The Court also found that the force used to arrest Cruse was neither necessary nor reasonable.

The Court awarded damages of $20 000 for pain and suffering and loss of enjoyment in life, $20 000 for the cost of future medical treatment, $80 000 in aggravated damages, and $100 000 in exemplary damages. The Court found that while exemplary damages is an exceptional remedy, in this case it was justified. The Court said that the award would mark the Court's disapproval of the treatment of Cruse by individual police officers, which was a shocking departure from both the standards set for police officers and what is expected of police officers by the community. The Court also said that the decision to arrest Cruse involved a misuse of the considerable powers given to police to combat terrorist activity.

Source 3 Eathan Cruse was successful in his case against the state of Victoria.

Contemptuous damages

A court might think that a plaintiff has a legal right to damages but does not have a moral right; that is, the plaintiff does not deserve to be paid damages. In such a situation, a small sum of damages might be awarded to show contempt for the claim that is made, while admitting the plaintiff's legal right to make the claim. An example of a case where contemptuous damages was awarded can be found in your obook assess.

Study tip

Draw a table in your notebook that shows the four main types of damages, the purpose of each type, and an example of when each type might be awarded. This will help you distinguish between the different types of damages.

Effectiveness of damages

As a remedy, are damages effective in achieving their purposes? This largely depends on the facts of each case, and the loss that a plaintiff has suffered.

When assessing the effectiveness of damages, some of the factors to consider are:

- the type of loss that has been suffered (e.g. economic or non-economic loss)
- whether the plaintiff suffered significant physical injury or irreparable damage
- whether there been loss of life
- the accuracy of the estimate for future loss (e.g. loss of future earning capacity)
- the injuries suffered following the award of damages (e.g. pain or suffering)
- whether there is another remedy that is better for the plaintiff
- whether damages can adequately compensate for the time, stress and inconvenience of court proceedings
- whether the defendant has the capacity to pay.

Injunctions

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

Injunctions are a type of civil remedy where the court makes an order for the defendant to undertake an action or do something (or refrain from undertaking an action or from doing something) in an attempt to restore the plaintiff to the position they were in prior to the loss or harm they suffered. Injunctions can be granted on a temporary or long-term basis. There are two types of injunction:

- **restrictive injunction** – this injunction stops someone from doing something; for example, a person could apply for a restrictive injunction to stop a building being destroyed if it was in the interests of the nation to preserve it
- **mandatory injunction** – this injunction is sought when a person wishes to compel someone to do a particular act; for example, to remove something from their land.

The scenario below is an example of a court ordering an injunction.

ACTUAL SCENARIO

Temporary halt to logging due to impact of Gippsland bushfires

In January 2020, the Supreme Court of Victoria ordered a temporary halt to timber logging in the state due to the impact of the summer's bushfires. An environmental group argued that the fires had placed strain on threatened species in Victoria, and that logging should be halted. The Supreme Court ordered an interim injunction and ordered a full hearing in February 2020. The Court noted that there was a real threat of serious or irreversible damage to threatened species.

Source 3 Some species rely on particular trees to survive, particularly during bushfires.

Effectiveness of injunctions

Like damages, whether an injunction is effective depends on the facts of the case, and the loss that the plaintiff has suffered.

When assessing the effectiveness of an injunction, some of the factors to consider are:

- whether the defendant has already caused too much damage
- whether the defendant will stop their actions or whether they may do other things to cause the plaintiff loss
- whether the defendant will comply with the injunction
- whether the plaintiff will be returned to their original position (e.g. if the defendant is stopped from publishing any more defamatory material, will that rectify the loss suffered to the plaintiff's reputation?)
- whether there is another remedy that is better for the plaintiff
- whether an injunction can adequately compensate for the time, stress and inconvenience of court proceedings.

13.9 CHECK YOUR LEARNING

Define and explain

1 What are the purposes of remedies?
2 Identify and describe three types of damages.
3 What is a mandatory injunction? How is this different from a restrictive injunction?
4 Distinguish between specific damages and general damages.

Synthesise and apply

5 Identify two scenarios in which you think a mandatory injunction may be a useful remedy. Now identify scenarios for which you think damages is more appropriate.
6 Read the scenario *Cruse v State of Victoria*.
   a What was the nature of the plaintiff's claim?
   b What was the amount of damages awarded to the plaintiff?
   c For each of the damages that the plaintiff was awarded, describe the nature of these damages.
7 Read the scenario 'Temporary halt to logging due to impact of Gippsland bushfires'. Conduct some research about the case before answering the questions below.
   a Who were the parties in this case?
   b What did the plaintiff want to stop from happening?
   c Why is an injunction (rather than damages) the appropriate remedy in this instance?
   d Find the outcome of the case. As a class, discuss whether you agree. In your discussion, consider the interests of each of the parties.

Analyse and evaluate

8 Do you think that damages will ever be able to be a suitable remedy? Give reasons for your answer, referencing at least two cases that you have studied or that you have identified through your studies.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 13.9 Check your learning
- **Going further** Other types of remedies
- **Going further** Contemptuous damages case
- **Weblink** Damages (Australian Law Reform Commission)

TOP TIPS FROM CHAPTER 13

1 Tables and diagrams are a great way to show similarities and differences, and strengths and weaknesses. There is a lot to learn in this chapter in particular, so try colour coding your tables or diagrams to distinguish what you're comparing or evaluating.

2 There are different types of damages. In Unit 2, you don't need to know the specifics of the different types of damages, but you will need to know this in Unit 3. It's a good idea to start working your way through each the different types of damages now so that you can be more familiar with them in your studies next year.

3 Many students get confused between dispute resolution methods (mediation, conciliation and arbitration) and dispute resolution bodies (ombudsmen, tribunals, complaints bodies and courts). It's a good idea to start distinguishing between the two now, as they come up again in Unit 3.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Distinguish** between a tribunal and a complaints body. Give an example of each.

(4 marks)

Difficulty: medium

2 For each of the following scenarios, **identify** the most appropriate remedy. **Comment on** whether you think the remedy can achieve its purpose.

- **a** Jennifer is about to knock down her neighbour's fence.
- **b** Minami fell two storeys on a construction site and has suffered significant back pain ever since.
- **c** Ashika was recently offered a job by Firm 1, but two weeks later the employer withdrew the offer. A couple of days later, Ashika got a job at Firm 2 earning less than she would have earned at Firm 1.
- **d** Cindy has been waiting months for her employer to pay her the annual leave she is owed.
- **e** While Xavier was walking in a shopping mall, he slipped on a hot chip and suffered extensive injuries. Xavier has had to pay significant medical expenses and is expected to pay a lot more.

(15 marks)

Difficulty: high

3 'Taking a matter to an ombudsman or to a complaints body is always a better way to resolve disputes than taking the matter to a court or a tribunal.' Do you agree with this statement? Justify your answer. In your answer, make reference to two principles of justice.

(8 marks)

PRACTICE ASSESSMENT TASK

You are required to undertake research and collect information from hard-copy and electronic sources for the purposes of preparing a report. The report can either be in writing or oral, with or without the use of technology. For example, your report may be:

- a PowerPoint presentation
- a webpage
- a written report
- a speech.

Points to address

Your report needs to address the following points. You must make reference to at least one case for each of the points:

1 the role of complaints bodies and the ombudsman in 'filling the gaps' left by courts and tribunals

(5 marks)

2 the cost of pursuing legal remedies

(3 marks)

3 the role of a civil jury

(4 marks)

4 the ability of remedies to achieve their purposes

(5 marks)

5 the ability of dispute resolution methods and institutions to achieve the three principles of justice.

(8 marks)

Total: 25 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 13

Revision notes
Revision notes for Chapter 13

assess quiz
Chapter 13
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 14

RECENT CIVIL CASES

Source 1 Is justice always achieved in civil cases? In this chapter, you will explore in detail two recent civil cases and consider the extent to which the principles of justice (fairness, equality and access) were or could be upheld in each case. One of these cases involves the class action launched against Uber on behalf of individuals who were taxi drivers, hire-car drivers, operators or licence holders between 2014 and 2017 (pictured protesting here).

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

Quizlet Live
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 2 – Area of Study 2** (i.e. Chapters 13 and 14), you should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.

KEY KNOWLEDGE

In this chapter, you will learn about two recent civil cases. For each case, you will learn about:

- an overview of the claim and the central facts of the case
- dispute resolution bodies that may be or were involved
- methods of dispute resolution and their appropriateness
- remedies that could be or were awarded and their appropriateness
- possible avenues of appeal
- the extent to which the principles of justice were or could be achieved.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research, analyse and apply information in relation to civil law and two recent civil cases
- analyse the extent to which the principles of justice were or could be achieved in two recent civil cases.

KEY LEGAL TERMS

access one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

appeal an application to have a higher court review a ruling (i.e. a decision) made by a lower court

damages an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

equality one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

fairness one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

loss a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

mediation a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

KEY LEGAL CASES

A list of the legal cases discussed in this chapter is provided on pages vi–vii of this student book.

ADVICE TO TEACHERS AND STUDENTS

In **Unit 2 – Area of Study 2** (i.e. Chapters 13 and 14) you are required to study **two recent civil cases** in detail. Recent cases are cases that took place within the past four years. You may choose cases that have already been heard and determined by a dispute resolution body, or cases where a claim is either threatened or has just been initiated.

YOU MAY CHOOSE TWO CIVIL CASES FROM THE FOLLOWING OPTIONS		PAGE
14.1	Recent civil case 1: The crime reporter who sued *The Age* *YZ (a pseudonym) v The Age Company Limited* [2019] VCC 148 (22 February 2019); *The Age Company Limited v YZ (a pseudonym)* [2019] VSCA 313 (19 December 2019)	462
14.2	Recent civil case 2: Uber success drives taxis to class action *Andrianakis v Uber Technologies Inc.* S ECI 2019 01926	471
14.3	Recent civil case 3: Docklands high-rise fire earns $5m in damages *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd* (Building and Property) [2019] VCAT 286 (28 February 2019)	478
14.4	Recent civil case 4: The shocking revelations of Lawyer X *Orman v State of Victoria* (2020)	485
14.5	Recent civil case 5: Rebel with a cause *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 (13 September 2017); *Bauer Media Pty Ltd v Wilson (No 2) [2018]* VSCA 154 (14 June 2018)	obook

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14.1 RECENT CIVIL CASE 1: THE CRIME REPORTER WHO SUED *THE AGE*

Source 1 *The Age* newspaper was at the centre of a negligence claim made by one of its journalists who covered distressing crime stories.

YZ (a pseudonym) v The Age Company Limited [2019] VCC 148 (22 February 2019); *The Age Company Limited v YZ (a pseudonym)* [2019] VSCA 313 (19 December 2019)

Introduction

The case of *YZ (a pseudonym) v The Age Company Limited* [2019] VCC 148 (22 February 2019); *The Age Company Limited v YZ (a pseudonym)* [2019] VSCA 313 (19 December 2019) ('YZ case') is a negligence case that was heard in the Victorian County Court and Court of Appeal.

In this case, a journalist (YZ) successfully sued a major Melbourne newspaper (*The Age*) for the psychological injuries she suffered as a result of investigating and reporting distressing crime. In the claim, the journalist alleged that in the course of her job she was exposed to vicarious trauma (trauma suffered as a result of being exposed to other people's trauma, stories or events) and trauma, injuries and deaths. YZ claimed that the newspaper failed to have a system in place to help her deal with this exposure to trauma.

This case will help you understand how **negligence** can apply to people who are injured by *witnessing* or *reporting on* events such as murder, death and rape crime scenes, funerals, police searches and sentencing hearings. That is, negligence claims cannot only be made by people who are *directly* injured by another person's actions, but also by those who are *indirectly* injured.

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

In this topic, we explore the following aspects of the YZ case in detail:

- an overview of the claim and the central facts of the case
- the dispute resolution bodies involved in the case
- methods of dispute resolution and their appropriateness
- the remedies awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice were achieved.

Overview of the claim and the central facts of the case

Study tip

The YZ case was last dealt with by the courts in 2019 and likely beyond, so this case will remain 'recent' until at least 2023.

Background to the parties

The plaintiff: YZ

The plaintiff in this case (YZ) was employed for 10 years from 2003 to 2013 as a journalist for the Victorian newspaper, *The Age*. She worked as a crime reporter from 2003 to 2009, and then as a Supreme Court reporter from 2010 to 2013. She investigated and reported on crime, injuries and deaths. YZ was exposed to trauma as a result of attending murder, death and rape crime scenes. She also attended funerals of

high-profile people, police searches, criminal trials and sentences involving violence, historical sexual abuse, and the Black Saturday bushfires.

The defendant: The Age Company Limited

The defendant in this case was The Age Company Limited, YZ's employer and a media company that publishes *The Age* newspaper.

Crimes reported by YZ during her employment

While employed by *The Age* newspaper, YZ investigated and reported on various crimes and events in Melbourne. Some of the crimes that YZ reported on include:

- various crimes that were part of the 'gangland wars' (2003–2007), including shootings and crimes involving high-profile crime figures such as Carl Williams
- a family drowning in 2005 – YZ was expected to speak to family members at the family's funeral
- a murder of a pregnant mother – YZ attended the woman's funeral and a court hearing
- a police shooting of a young man – YZ arrived at the scene and saw the man's body under a sheet
- the Black Saturday bushfires – YZ was sent to a community meeting and witnessed distressing scenes, including a man who had lost his wife collapsing near her.

By the time YZ was asked to cover the murder of Darcey Freeman in 2009, YZ had attended the scenes of 32 murders. In 2007, YZ attended *The Age*'s Employee Assistance Program, a counselling program available to employees. At the time, she was not sleeping well, had regular nightmares about death, was abusing alcohol, and would become distressed and cry easily.

The murder of Darcey Freeman

YZ was particularly affected by crimes involving children. One of the crimes she reported on was the murder of four-year-old Darcey Freeman. In one of the most tragic crimes in Melbourne in recent history, on 29 January 2009, Darcey was thrown off the Westgate Bridge by her father. YZ was sent to the scene by the news desk. When she arrived, YZ saw (from a distance) Darcey's body being placed in an ambulance. The scene was horrific. In court, YZ said it was the worst day of her life – she said she could still see the faces of the distressed people at the scene. YZ then had to spend several hours investigating the murder. Although she was in shock and in tears, she completed writing the story.

After covering Darcey's death, YZ told everyone 'on the news desk' that she just couldn't deal with death and destruction anymore, and that she wasn't sleeping and wasn't coping. YZ went to see a local doctor in about June 2009 and then she went to see a psychotherapist.

Source 2 The death of four-year-old Darcey Freeman was covered by YZ, a journalist working for *The Age*. YZ later sued her employer for injuries suffered as a result of reporting this and other distressing crimes.

Court reporter role

As a result of YZ telling the news desk that she was unable to go on with crime reporting, YZ was transferred to sports journalism, but then was asked to take over Supreme Court reporting. YZ didn't want to report on cases heard in the Supreme Court; she was happy covering sport. YZ was pressed to take on the court reporter role and eventually, she agreed.

In the court reporter role, YZ covered the trial of Darcey Freeman's father and listened to evidence about the death. She said she felt traumatised after reporting on the trial.

Did you know?

Vicarious trauma can be suffered by somebody reading about another person's trauma or hearing about a traumatic event – for example, listening to someone talking about a distressing bushfire that affected them directly.

In the court reporter role, YZ also covered:

- the trial of a Christian Brother who admitted molesting and raping young boys
- the trial of a man who killed his children by driving his car into a lake
- the trial of a mother who had killed her two sons
- the trial about a young mother of two children who was stabbed, shot and decapitated.

YZ left *The Age* in 2013.

Claim issued in the County Court

In 2017, YZ sued The Age Company Limited for breach of contract and for negligence. YZ claimed she had sustained psychological injuries while employed to write for *The Age*, including post-traumatic stress disorder (PTSD). PTSD is a form of mental illness suffered by people who have experienced a traumatic event. Some of the symptoms of PTSD include reliving the event through unwanted and recurring memories, having difficulty sleeping and concentrating, avoiding reminders that trigger memories of the event, and being in a state of constant fear or panic.

In particular, the plaintiff alleged that she was repeatedly exposed to traumatic events and traumatic stress, and that her employer knew or ought to have known that because of that exposure, she could develop a psychological injury. YZ claimed that her employer breached its **duty of care** by, among other things:

duty of care
(in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

- failing to provide a safe system and place of work
- failing to have in place adequate educational programs or peer-support programs
- failing to have in place adequate policies or procedures for following-up on the welfare of employees after they experience traumatic events
- failing to provide appropriate training to employees or their managers about counselling, peer support and monitoring each other's wellbeing
- failing to provide YZ with counselling, peer support, supervision, monitoring and follow-up screening to identify any symptoms of psychological injury.

YZ claimed that as a result of her employer breaching its duty of care, she was injured and had suffered **loss**.

loss
a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

To establish a claim for negligence, YZ needed to prove that:

- her employer owed her a duty of care
- her employer had breached that duty of care
- that breach had caused her loss and damage.

Although YZ also sued The Age Company Limited for breach of contract, the County Court Judge treated the claim as purely a negligence claim because similar legal principles were applicable in both breach of contract and negligence claims.

As for the **damages** sought, the plaintiff sought damages for pain and suffering only – the plaintiff did not seek damages for economic loss (being financial loss, such as a loss of wages). YZ's lawyers suggested that a proper assessment of damages was $250 000.

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

Dispute resolution bodies involved in the case

YZ issued her claim in the County Court, which has unlimited jurisdiction to hear civil disputes. Because YZ was claiming $250 000 in damages, the Magistrates' Court did not have jurisdiction to hear this dispute (because the Magistrates' Court can only hear civil disputes where the damages sought are $100 000 and under).

The dispute could have been heard in the Supreme Court (it also has unlimited jurisdiction to hear civil disputes). However, the County Court is sometimes the preferred court to hear smaller claims involving personal injury, such as that suffered by YZ.

It was not appropriate for this case to be heard by bodies such as Consumer Affairs Victoria or the Victorian Civil and Administrative Tribunal because this dispute involved an employer–employee relationship.

Overview of the County Court trial

This dispute was resolved in court. A trial was held in the County Court over 15 days in November and December 2018 and January 2019. There was no jury. Therefore, the judge (Judge O'Neill) was the decider of facts. This means Judge O'Neill had the responsibility to hear the evidence and to decide whether YZ had proven her claim. He also had to decide whether The Age Company Limited was successful in any defence it raised. Further, Judge O'Neill was responsible for determining the damages to be paid to the plaintiff if successful.

Source 3 The trial involving Robert Farquharson was one that YZ covered. Farquharson was convicted of the murder of his three sons after he deliberately drove his car into a dam.

The plaintiff gave evidence about her exposure to trauma. She was examined and cross-examined over five or so days. The Judge described her evidence as 'chilling'. She was regularly distressed while giving evidence and at times she was unable to go on because of the PTSD she suffered. She said the investigations and cases that had the greatest impact on her were those involving children. She found it difficult to understand how parents could be so violent towards their children.

Other people gave evidence, including former employees of *The Age*. These employees acknowledged that journalists, at various times, worked in stressful environments when covering big stories, and that reporters were exposed to trauma and could suffer psychiatric injuries as a result.

Generally, the defendant denied the plaintiff's allegations. The Age Company Limited contested that it was foreseeable that YZ could suffer psychological injury as a result of her work. The defendant also took issue with the nature and extent of its duty of care to YZ, denied breaching any duty of care, and denied **causation**. The defendant further said that even if the plaintiff suffered an injury, the injury was relatively mild and was not PTSD.

The defendant further alleged **contributory negligence**, claiming that the plaintiff had contributed to the harm she experienced. In particular, the defendant submitted that contributory negligence was relevant if YZ was aware of her condition and failed to take appropriate actions (e.g. seeking a rotation of duties or leaving her employment). If contributory negligence was established, then the defendant submitted it should reduce the damages amount by at least 50 per cent.

causation
the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

contributory negligence
a formal defence to negligence that claims the plaintiff contributed to the harm caused by the defendant. If proved, this reduces the damages the defendant has to pay

Methods of dispute resolution and their appropriateness

It is not clear whether the parties attempted to resolve their dispute through **mediation** before the trial. However, the County Court generally requires parties to attend mediation before a trial, so it is possible that mediation occurred. Whatever the case, it is clear that mediation was not successful. Since the parties were unable to settle the dispute using dispute resolution methods such as mediation, the only available option was to proceed to a trial.

Judgment was handed down by Judge O'Neill on 22 February 2019. Reasons for the decision are in writing and are publicly available (a link to Judge O'Neill's judgment is available in your obook assess).

This was a highly complex case involving difficult legal principles in relation to psychological injury, duty of care, a breach of a duty of care, and causation. Therefore, it is arguable that in this case,

mediation
a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

Source 4 Judge O'Neill of the County Court was the decider of facts for the YZ case.

having a judge be the decider of facts, rather than a jury, was a more favourable option.

Judge O'Neill was also required to determine the amount of damages to be paid by the defendant to the successful plaintiff. In this case, the defendant arranged for YZ to be examined by a psychiatrist and his report was given to the County Court as evidence. The psychiatrist concluded that YZ had PTSD. Various other medical and psychiatric reports were given to the Court in relation to the injuries suffered by YZ.

Remedies awarded and their appropriateness

YZ sought damages as a remedy. The purpose of damages is to compensate the plaintiff for losses suffered. Damages are intended to return a plaintiff to the position they were in before the defendant caused them harm.

Damages can be sought for financial loss, physical loss, mental loss, and/or reputational loss. Damages are most commonly sought for financial loss. As stated above, YZ sought damages for mental loss (i.e. psychological pain and suffering); she did not seek damages for economic loss (e.g. loss of wages). YZ's lawyer estimated that $250 000 was an appropriate amount of damages. Damages such as these are called **compensatory damages** and, more specifically, **general damages**. The amount to be awarded to a plaintiff to compensate them for their pain and suffering is normally assessed by a court according to the magnitude of the wrong and the long-term consequences of the wrong, taking into account future and past pain and suffering. This amount is a general estimate.

compensatory damages
a type of remedy that requires the payment of a sum of money to compensate for actual loss or damage suffered. It includes special damages, general damages and aggravated damages

general damages
a type of remedy that requires the payment of a sum of money to compensate for loss or damage that cannot easily be quantified (e.g. pain and suffering)

In the YZ case, the defendant submitted that if damages were to be awarded, the amount should be in the $10 000s, and no more than $50 000.

Judge O'Neill found in favour of the plaintiff. He accepted YZ's evidence and that of the other witnesses. He was satisfied that she gave honest answers and that the way she gave evidence reflected the psychological disorder she suffered. Judge O'Neill was also satisfied that the defendant had breached a duty of care owed to YZ, and that breach caused the injuries suffered, which included PTSD. Part of Judge O'Neill's comments on causation are included in the extract below. (Note that the 'steps' His Honour refers to are summarised on the next page.)

EXTRACT

YZ (a pseudonym) v The Age Company Limited [2019] VCC 148 (22 February 2019)

185 I am satisfied, taking a common-sense and practical approach to the question of causation, that had these steps been implemented, it was more probable than not that the plaintiff would not have suffered injury.

186 Had these steps been taken, then at the outset, with appropriate training, and the implementation of a formal peer support system, the plaintiff would have been aware that exposure to the sort of trauma she was likely to encounter as a crime reporter may lead to the development of psychological injury. Had she known, through proper training and advice, she could have taken steps at an earlier time either to move into another area, or to seek treatment from a health professional experienced in that area. Alternatively, trained peers, had they been available on a regular basis, could have identified that her tearfulness and distress was a harbinger of the development of psychological injury. Thus, again, allowing understanding and early treatment.

187 Likewise, early identification, either by the plaintiff, or trained peers, would, at the very least, have resulted in an offer for her to move to another area or, if her symptoms were sufficiently severe, for that to be a requirement. If proper protocols and boundaries were set in respect of 'intrusion' and dealing with criminal elements, that would have resulted in less stress and concern to the plaintiff in how to deal with them. Further, a changed environment, more sympathetic to those who are struggling with emotional issues, would have encouraged early identification and treatment.

188 While it is impossible to say with certainty that even with all these steps put in place at The Age the plaintiff would not have suffered the exposure to the trauma as she did and thus suffered psychological injury, I am of the view, on the balance of probabilities, that while she may have suffered some distress or emotional reaction, that would not have developed into the PTSD that she suffers from today.

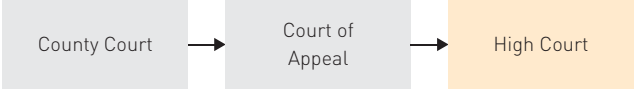
189 In these circumstances, I am satisfied that the defendant's breach of duty was causatively related to her injury.

In concluding what steps the defendant should have taken, Judge O'Neill found that The Age Company Limited should have, among other things, trained the plaintiff's colleagues to identify symptoms that may indicate psychological injury, implemented a formal peer support program, taken steps to change the culture at the workplace so that it was appropriate to talk openly about symptoms and signs such as depression, anxiety and stress, and if necessary, removed the reporter from the area of trauma to which they were exposed. Judge O'Neill further found that the defendant should have provided support in the form of peer support and access to a counselling program so that journalists could access trained mental health professionals immediately and without delay. Judge O'Neill also found that the defendant should not have transferred YZ to court reporting, and should have considered rotating or removing employees who showed psychological symptoms as a result of their work.

Judge O'Neill rejected the defendant's contributory negligence claim. The Judge was of the view that no blame could be attributed to YZ for failing to take earlier or better steps to get treatment for her condition.

Judge O'Neill assessed damages at $180 000. He accepted that there had been significant improvement in YZ's condition since she stopped reporting for *The Age*, evidenced by her recent return to work. However, the Judge accepted that YZ was significantly psychologically harmed because of her work at *The Age* and that harm was likely to remain in the future.

Possible avenues of appeal



Source 5 The appeal route for the YZ case

Either party could appeal the County Court's decision to the Court of Appeal. However, in accordance with section 14A of the *Supreme Court Act 1986* (Vic), the Court of Appeal must give leave (i.e. permission) to appeal the case. All applications for leave to appeal must be filed within 28 days from the date the relevant judgment was handed down.

The defendant appealed the decision, and a hearing took place in the Court of Appeal on 30 October 2019. The defendant challenged Judge O'Neill's formulation of the duty of care and also challenged the finding that The Age Company Limited had caused YZ's injuries.

The decision was handed down by the Court of Appeal on 19 December 2019. It granted leave to appeal and allowed the appeal in part. It found that when the plaintiff was moved to court reporting in 2010, it was clear that she was reluctant to move and that she was unable to cope with exposure to trauma. The decision to move the plaintiff caused a significant deterioration in her health and constituted a breach of duty. However, the Court of Appeal came to a different opinion to that of the County Court about breach and causation, as demonstrated in the extract on the following page.

EXTRACT

The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 (19 December 2019)

205 However, we are not satisfied that, before 2009, The Age breached its duty of care in a way that caused the injury to the plaintiff by failing to train staff, including the plaintiff, providing a formal peer support program, providing more ready access to the [Employee Assistance Program] or a more informed rotation policy. That is because we are not persuaded that, had those matters been provided by the employer, the plaintiff would have been rotated away from crime reporting before 2009. We are not persuaded that she would have requested such a rotation, nor would those matters have resulted in the employer, at its own initiative, rotating the plaintiff.

206 As recognised by the judge, his findings on causation were arrived at applying a common sense and practical approach. We do not regard his Honour's findings as to what would have occurred before 2009, had training, formal peer support and the other steps identified by the judge been implemented by the employer, as findings of fact based on his assessment of the credibility of the witnesses. We note that the judge found the plaintiff to be a credible witness.

207 In our view, they are not findings of a kind that this Court can overturn only if satisfied that they are glaringly improbable or contrary to compelling inferences. Rather, they involve an assessment of what is likely to have happened had steps been taken by the employer. The facts upon which we have reached our conclusion are not facts of a kind which depended on the judge's assessment of the credibility of individual witnesses.

208 As already observed, the position changed in 2010. The breach which we are satisfied occurred did not involve the employer failing to rotate an employee to avoid traumatic events, but involved the decision to transfer an employee, who had already suffered as a result of exposure to traumatic events, to an area of work that was inevitably associated with very traumatic and violent matters.

The Court of Appeal found that the assessment of damages needed to be based on two periods of time – before and after YZ was working as a court reporter – and therefore sent the matter back down to the County Court for a reassessment of damages. At the time of writing, this assessment of damages was not available.

All appeals from the Court of Appeal are heard by the High Court. The High Court has to grant leave to appeal.

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

The extent to which the principles of justice were achieved in this case

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were or could be achieved in the YZ case is provided below. For each principle, this assessment is made on the evidence available.

Fairness

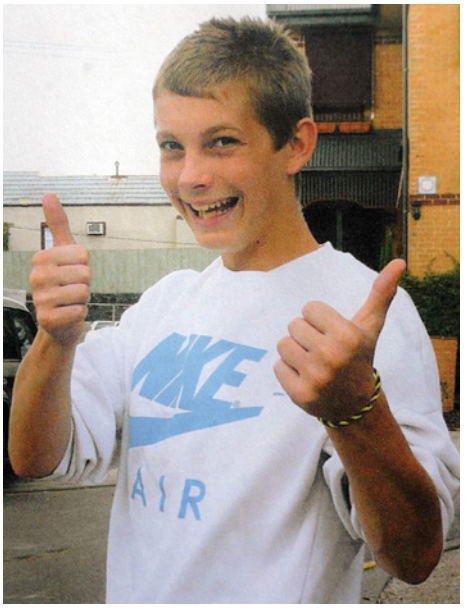
The principle of **fairness** suggests that the law should be properly applied to all people regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.

In the YZ case:

- The **directions** and **orders** likely given by the County Court gave each party **an opportunity to present their case** and to rebut the other side's case. For example, a number of medical reports were filed about the plaintiff's injuries. These documents would have been shared between the parties to ensure that both sides had fair access to the evidence.
- The defendant also had their own psychiatrist **examine** the plaintiff, therefore allowing them to test the extent of the plaintiff's injuries.
- The **rules of procedure** allowed both sides to present their case. There are general rules of procedure about which party presents their case first at a trial (although the Court has the power to decide on the rules in each particular case). Each party was entitled to, and did, call evidence, make submissions to the Court and address the Judge. Substantial submissions were made by each party about various factors about the case.
- There was a **timely resolution** of the case in terms of when the hearing was held and when the judgment was handed down (approximately two months). However, the plaintiff's injuries were suffered in 2003–2013, the claim was issued in 2017, and the Court of Appeal handed down its judgment in 2019. Some may see this as an unfair amount of time to wait for justice.
- The Judge was the **decider of facts**. The Judge was required to **consider the evidence** and the law to come to a **verdict**. This was appropriate given the complexity of the legal principles involved.
- Both parties had **adequate legal representation**. This assisted in ensuring a fair trial.

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

orders
the way in which the instructions, decisions or directions of a court or tribunal are described. They can be given during the course of a proceeding or at the end of a proceeding



Source 6 The shooting of 15-year-old Tyler Cassidy by two Victorian police officers was one of the crimes covered by YZ.

Equality

The principle of **equality** suggests that all people should be equal before the law regardless of who they are. For equality to be achieved, every person in society who is involved in a civil dispute should have the same opportunity to present their case without advantage or disadvantage.

In the YZ case:

- The Judge was required to **act impartially and without bias** and to have no connections with the parties. In overseeing the trial, Judge O'Neill was required to make decisions in an unbiased manner.
- The plaintiff and the defendant both had experienced **legal representation**. The availability of legal representation to both parties helps to ensure that they equally have the ability to present their case. If one party is unrepresented, this can result in significant inequality between the parties.
- There was **no jury** and so there was less risk of any possible bias in the decision that was made.
- There was no suggestion on **appeal**, or in the judgment, that either party suffered discrimination. In particular, the grounds of appeal were not in relation to how the trial was conducted, but rather the application of legal principles and the findings made in the original decision.

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

Access

The principle of **access** suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and to pursue their legal claims in court. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who are eligible for assistance from Victoria Legal Aid can have legal representation for little or no charge. This is essential for parties attempting to navigate their way through complex legal processes.

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

Study tip

Consider the extent to which the principles of justice were achieved in the YZ case. Can you think of other ways that fairness, equality and access were or were not achieved?

A civil trial includes strict processes for sharing evidence between the parties, especially for the key documents that are used as evidence in the trial. This helps the legal counsel on both sides prepare for the trial.

In the YZ case:

- The use of **mediation** increases access to justice, as it provides the parties with an alternative method of resolving the dispute other than a trial. However, it is not clear if mediation was used in this case, although it is possible given the general process of the courts to require parties to mediate before trial.
- The **costs** associated with a civil dispute may be a factor in determining whether access to justice can be achieved. In this case, both parties are likely to be out of pocket for their own legal costs. While it is possible that both the parties had the funds to pay for their costs, another person in their position may not have had the money to do so.
- Both parties had a **right to appeal**, therefore allowing access to a higher court to review the lower court's decision.
- The trial was conducted by way of an **open hearing**. Open hearings ensure that the parties and members of the community can access information about the way a dispute was resolved, thus ensuring transparency in the process. Open hearings also show members of the community how courts work.
- The reasons for the original decision and the decision of the Court of Appeal have been made available to the parties and to the public, therefore **ensuring access to the reasons** why the Court made its decision.

14.1 CHECK YOUR LEARNING

Define and explain

1 Describe the claim that YZ made against the defendant.

2 What remedies did YZ seek? In particular, why do you think YZ did not seek compensation for economic loss?

3 Explain the role of each of the following parties in this case:
   - **a** YZ
   - **b** Judge O'Neill
   - **c** *The Age* newspaper.

4 Identify one other dispute resolution body that could have heard this dispute. Give reasons for your answer.

Synthesise and apply

5 Identify whether each of the following statements is true or false. Justify your answers.
   - **a** The Magistrates' Court would have first been required to determine whether there was enough evidence for YZ to succeed.
   - **b** An injunction would have been an appropriate remedy in this case.
   - **c** The County Court still has a role to play in this case.

6 Why was a pseudonym used for the plaintiff?

7 Conduct some research on whether there has been a further assessment of damages. Provide a summary of your findings.

Analyse and evaluate

8 Access the Court of Appeal's judgment (a link is provided in your obook assess) and read paragraphs 210–212. As a class, discuss what these paragraphs mean.

9 'There is no way that a jury would have been able to assess liability and damages in this case, and so it was right that this case was determined by a judge.' Engage in a class discussion about the extent to which each of you agree or disagree with this statement.

Check your Student obook assess for these additional resources and more:

Student book questions
14.1 Check your learning

Video tutorial
Overview of *The Age Company Limited v YZ (a pseudonym)* [2019] VSCA 313 (19 December 2019)

Weblink
YZ (a pseudonym) v The Age Company Limited [2019] VCC 148 (22 February 2019) – judgment

Weblink
The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 (19 December 2019) – judgment

14.2 RECENT CIVIL CASE 2: UBER SUCCESS DRIVES TAXIS TO CLASS ACTION

Study tip

As this case was ongoing in 2020, this case will remain 'recent' until at least 2024.

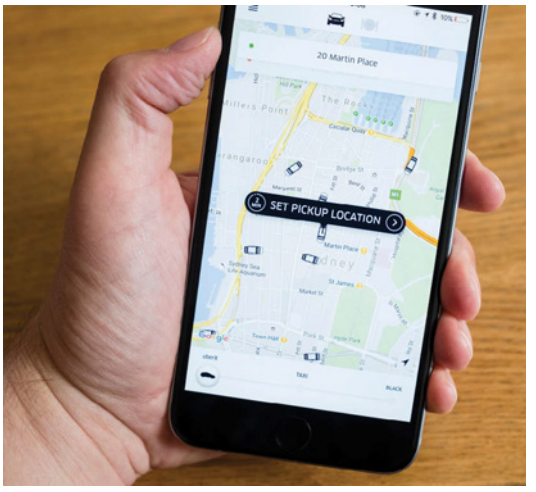
Andrianakis v Uber Technologies Inc. S ECI 2019 01926

Note that as this is an ongoing case, the details in this topic are based on information available at the time of writing and the allegations made by the plaintiff.

Introduction

The case of *Andrianakis v Uber Technologies Inc.* S ECI 2019 01926 ('Uber case') is a recent Victorian class action issued in the Supreme Court.

In 2019, a **representative proceeding** (also known as a class action or a group proceeding) was commenced on behalf of individuals who were taxi drivers, hire-car drivers, operators or licence holders between 2014 and 2017. This class action was brought against a group of Australian and international Uber entities, alleging that they engaged in a conspiracy by unlawful means, and caused the **group members** to suffer the **loss** of the value of their taxi licences, and a loss of income. At the time of writing, this class action is ongoing.



Source 1 Uber was launched in Australia in October 2012 and has been enthusiastically embraced by Australian consumers.

Uber was launched in Australia in October 2012 and has been enthusiastically embraced by Australian consumers. However, Uber has reportedly had a significant, negative impact on Australia's taxi industry, such as a reduction or loss of income for many taxi drivers.

This case provides an excellent opportunity to learn about the features of a representative proceeding. The Uber case is also an example of how a **third party litigation funder** can fund a civil claim.

In this topic, we explore the following aspects of the Uber case in detail:

- an overview of the claim and the central facts of the case
- the dispute resolution bodies involved in the case
- methods of dispute resolution and their appropriateness
- the remedies awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice were achieved.

representative proceeding
a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person (also called a class action or a group proceeding)

group member
a member of a group of people who is part of a representative proceeding (i.e. a class action)

loss
a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

third party litigation funder
an entity that agrees to meet the costs of a civil proceeding in return for a share of any amount recovered if the proceeding is successful

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

Overview of the claim and the central facts of the case

Background to the parties

The lead plaintiff: Nicos Andrianakis

Nicos Andrianakis has three taxi licences. He purchased his first licence in 1985 for $65 000, his second licence in 1988 for $108 000, and his third licence in the mid-1990s for $120 000. Andrianakis has worked as a taxi driver and also allows third parties to drive his taxis. In Victoria, taxi operators are required to hold a licence to operate a taxi service, and drivers are required to be accredited under the *Transport (Compliance and Miscellaneous) Act 1983* (Vic).

Source 2 Uber is a popular ride-sharing alternative, now with pick up zones at airports around Australia.

Andrianakis has commenced this class action on behalf of a number of group members, who include taxi drivers and taxi licence holders. Further details about the group members are set out on the next page.

The defendant: Uber

Uber is now a household name in Australia, but it wasn't 10 years ago. Uber Technologies Inc. is an American company that offers a ride-sharing service (i.e. operating like a taxi and transporting people from one place to the next in a car, with the service being accessed via a phone app). Uber also offers services including UberPOOL, a carpooling service, and Uber Eats, a food-delivery service.

Uber was first established in 2009 in the United States by Garrett Camp who wanted to find a way to reduce the cost of direct transportation. His idea morphed into Uber. Garrett was joined by friends and advisers, and their services and mobile app were officially launched in the United States in 2011.

Uber's services were considered to be revolutionary in comparison to the services of traditional taxis for many reasons:

- an Uber ride was seen to be generally cheaper than a normal taxi ride
- riders can book an Uber via a free downloadable app
- payment is made at the end of each trip using stored card details, rather than in-person payment
- riders are provided with their driver's name and registration through the app for each trip, giving them a greater sense of security when using a ride-sharing service
- Uber drivers are private drivers using their own car.

Uber was launched in Australia in October 2012. It has several companies around the world, including Uber Australia Pty Ltd, which manages operations in Australia. Uber is now one of the best-known brands in Australia.

The introduction of Uber into Australia

When Uber was introduced into Australia in October 2012, it was not subject to the regulations and laws that applied to taxi operators and taxi drivers. That is, Uber drivers were not accredited like taxi drivers and Uber did not have a licence to operate a taxi service. Also, while some taxi drivers had paid substantial fees to obtain a licence to be able to drive a taxi, this was not the case for Uber drivers.

As a result of the introduction of Uber, it was reported that taxi drivers were nearly forced out of business. There were widespread reports that the annual profits from operating taxis fell, and there was a substantial reduction in the value of taxi licences.

Claim issued in the Supreme Court

lead plaintiff
the person named as the plaintiff in a representative proceeding (i.e. a class action) and who represents the group members

statement of claim
a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

In May 2019, Andrianakis commenced a representative proceeding in the Supreme Court against Uber Technologies Inc. (the American company) and various other Uber entities, including Uber Australia Pty Ltd. Andrianakis was the **lead plaintiff** in this proceeding, which meant that he was representing group members in their claim against Uber.

The further amended **statement of claim** describes the group members as being any person who was a taxi licence holder, operator or driver, or hire car licence holder, car operator or driver during the periods of:

- 1 April 2014 to 23 August 2017 in Victoria (see the extract on the next page)
- 7 April 2014 to 18 December 2015 in New South Wales
- 17 April 2014 to 9 June 2017 in Queensland
- 10 October 2014 to 4 July 2016 in Western Australia.

EXTRACT

Andrianakis v Uber Technologies Inc. S ECI 2019 01926 – statement of claim

2 This proceeding is commenced as a group proceeding pursuant to Part IVA of the *Supreme Court Act 1986* (Vic) by the plaintiff on his own behalf and on behalf of all persons who:

a at any point in the period 1 April 2014 to 23 August 2017 (the Victorian Claim Period) were:

i a taxi-cab licence holder

ii an accredited taxi-cab operator

iii an accredited taxi-cab driver or

iv an accredited provider of taxi-cab network services or

i – iv above, the Victorian Taxi Group Members

v a hire car licence holder

vi a hire car operator or

vii an accredited hire car driver

v – vii above, the Victorian Hire Car Group Members

The plaintiff's claim was that Uber drivers had committed offences in Victoria and in other Australian states because only accredited drivers can operate commercial passenger vehicles, and Uber drivers were not accredited. The plaintiff alleged that Uber knew that the offences were occurring and aided, abetted, counselled or procured the offences (in short, assisting in the commission of the offences) to occur. The plaintiff also alleged that Uber assisted, encouraged or directed the offences to occur.

To establish the claim, the plaintiff needed to prove that the offences were committed, that Uber was involved in those offences, and that those offences caused the group members loss and damage.

In relation to the **damages** sought, they will vary depending on the group member. For example, the lead plaintiff claimed that he had suffered the loss of the value of each of his three taxi licences (which he assessed as being approximately $275 000 per licence), plus loss of income for operating the taxis (over $79 000). Maurice Blackburn Lawyers, which represents the plaintiff, has said that Uber's conduct led to 'horrible losses' suffered by the group members and was targeting Uber to provide redress to those affected.

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

ACTUAL SCENARIO

Uber set for epic Supreme Court showdown as class action is filed

Maurice Blackburn Lawyers media release, 3 May 2019

Global ridesharing giant Uber will face potentially one of Australia's biggest class actions, as thousands of taxi, hire car, charter vehicle and limousine drivers and licence owners across the country join forces to hold Uber accountable for destroying their livelihoods.

The highly anticipated class action was officially filed today in the Victorian Supreme Court by Australia's leading class action law firm, Maurice Blackburn Lawyers.

National Head of Class Actions, Andrew Watson, said the case had been about 18 months in the making, involving public meetings across the country, thousands of registered participants, and is backed by one of the world's largest litigation funders, Harbour.

'Make no mistake, this will be a landmark case regarding the alleged illegal operations of Uber in Australia and the devastating impact that has had on the lives of hard-working and law-abiding citizens here,' Mr Watson said.

'The sheer scale of the case means it is shaping as one of the largest class actions in Australian history.

'It is not acceptable for a business to place itself above the law and operate illegally to the disadvantage of others. We've got a strong case, a strong team and substantial support from thousands of drivers, operators and licence owners nationwide.'

The class action covers drivers, operators and licence owners from Victoria, New South Wales, Queensland and Western Australia, with more than 6000 participants having already registered for the action via the simple online form at www.mauriceblackburn.com.au/uberclassaction.

One of those people is the class action's lead plaintiff, Nick Andrianakis, a taxi driver, operator and licence owner from Brunswick in Melbourne's inner-north.

'My father owned and drove cabs, so it's been an industry and job that's in my blood and that I've loved my whole life – then suddenly that was all taken away because of the impact of Uber's illegal activities,' Mr Andrianakis said.

'I can clearly remember the day it all became too much – I just stopped driving that day and had to go home to be with my wife. It's a shocking thing to think of a life's work being stripped away from you, but this is what's happened to thousands of people nationwide.

'The way this all happened was not right, so now I am standing up along with thousands of other Australians [who] have been devastated by Uber's alleged illegal operations to hold Uber to account.'

...

disbursements
out of pocket expenses or fees (other than legal fees) incurred as part of a legal case. They include fees paid to expert witnesses, court fees, and other third-party costs such as photocopying costs

Interestingly, a litigation funder is involved in this case. This is a third party who has agreed to pay a proportion of the case's legal costs and all the **disbursements**. In return, the third party (in this case, Harbour Fund III, L.P.), if there is a successful outcome, is entitled to recover both the legal costs and disbursements paid, plus a percentage of any damages awarded in the case. In this case, the litigation funder may be entitled to 25–30 per cent of damages. For example, if the group members received $3 million in damages, Harbour may be entitled to up to $900 000 of that amount. This means that the actual damages that the group members receive is less than their actual loss.

A litigation funder is often used in class actions. They share the risks involved in commencing a claim, and also save the plaintiff and group members from having to pay for the class action. In return, they share the benefit of a successful claim.

Source 3 In 2016, angry protesters demonstrated in Melbourne about Uber.

Dispute resolution bodies involved in the case

The Uber class action was issued in the Supreme Court of Victoria. The Supreme Court is the only Victorian court that can hear class actions. Bodies such as Consumer Affairs Victoria and the Victorian Civil and Administrative Tribunal cannot hear class actions.

At the time of writing, the Uber class action had not been set down for trial. However, it is likely to be one of the largest and most high-profile class actions seen in Victoria.

Methods of dispute resolution and their appropriateness

The parties may be required to attend mediation to resolve the dispute out of court. **Mediation** can be effective in resolving complex and large claims, including class actions. There have been a number of cases where class actions have been resolved by the parties outside of a trial, even after the trial. They include class actions over the Great Southern investment scheme and the Black Saturday bushfires.

mediation
a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

As explained above, because this claim is a class action, the Supreme Court is the only Victorian court that can hear the dispute and make a binding decision as to liability. However, the Supreme Court only needs to make a binding decision if the parties cannot reach agreement before or after the trial.

Remedies awarded and their appropriateness

The plaintiff is seeking damages for loss and injury suffered by the group members. It is not yet clear exactly how much will be sought in damages, as this depends on the number of group members, and the loss that each of them has allegedly suffered. Therefore, the below information is only speculative.

If settlement is reached before or after the trial, the settlement agreement must be approved by the Supreme Court. This is because the dispute is a class action, and under the *Supreme Court Act 1986* (Vic), the Supreme Court must approve any settlement of class actions, including the way money is distributed among the group members.

The purpose of damages is to return the lead plaintiff and the group members to the position they were in before the loss occurred. Whether the damages, if approved by the Supreme Court, can achieve this purpose in this case will in part depend on how much loss each group member has suffered, if any. In addition, the group members may not receive the entire amount of damages if successful, because the litigation funder (Harbour) may be entitled to some of the damages as a result of funding the claim.

Possible avenues of appeal

If the Uber case goes to trial, any appeal would be heard by the Court of Appeal. However, in accordance with section 14A of the *Supreme Court Act*, the Court of Appeal must give leave (i.e. permission) to appeal the case. All applications for leave to appeal must be filed within 28 days from the date the relevant judgment was handed down.

All appeals from the Court of Appeal are heard by the High Court. The High Court has to grant leave to appeal.

Source 4 The avenues of appeal for the Uber case

The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – could be achieved in the Uber case is provided on the following pages. For each principle, this assessment is made on the evidence available.

Fairness

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

The principle of **fairness** suggests that the law should be properly applied to all people regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.

In the Uber case:

- In class actions, the Supreme Court uses **case management powers** to ensure fairness and the efficient use of the Court's resources in resolving the dispute. This may include, for example, sending the parties to mediation, or ordering the parties to attend a pre-trial conference to narrow the issues in dispute.
- In class actions, **various steps** must be completed to ensure fairness for both parties, particularly for group members. For example, as at the time of writing, the lead plaintiff has issued two summary statements to provide group members with information about the funding of the claim so they can make an informed decision about whether to 'opt out' of the claim. In many class actions, a person who falls within the definition of a group member will be considered to be part of the class action unless they state otherwise (known as 'opting out'). This means that they will be able to pursue their own separate claim, and will not take part in the class action.

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

orders
a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

- The **directions** and **orders** given by the Supreme Court give each party **an opportunity to present their case** and to rebut the other side's case. This also means that the parties will be required to discover (make available) all their documents that are relevant to this case. In the case of the plaintiff, this involves establishing what loss the group members have suffered. In relation to Uber, it may also include documents about their operations in Australia.
- Some may consider it to be unfair that group members have to **share any damages** amount with a litigation funder, and that they should be entitled to the full amount of their damages for the loss they have suffered. However, the class action may not have been able to proceed without the litigation funder if the plaintiff and the group members were unable to afford to pay the legal costs themselves.

Equality

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

The principle of **equality** suggests that all people should be equal before the law, regardless of who they are. For equality to be achieved, every person in society who is involved in a civil dispute should have the same opportunity to present their case without advantage or disadvantage.

In the Uber case:

- The judge, in overseeing the management of the case and the pre-trial procedures, needs to act **impartially and without bias**.
- The plaintiff and the defendant have **legal representation**. The availability of legal representation to both parties helps to ensure that they equally have the ability to present their case. If one party is unrepresented, this can result in significant inequality between the parties.
- There is no suggestion that the parties are on an unequal footing when it comes to their legal representation. The plaintiff is represented by Maurice Blackburn Lawyers, a prominent plaintiff law firm with significant experience in class actions. Uber is also represented by an experienced law firm.

Access

The principle of **access** suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who are eligible for assistance from Victoria Legal Aid can have legal representation for little or no charge. This is essential for parties attempting to navigate their way through complex legal processes.

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

A civil trial includes strict processes for sharing evidence between the parties, especially for the key documents that are used as evidence in the trial. This helps the legal counsel on both sides prepare for the trial.

In the Uber case:

- **Class actions** are an effective way of accessing justice. Individuals who become a member of the 'class' get access to the courts and to a possible remedy when they might otherwise not be able to do so.
- The use of a **litigation funder** increases access to justice by providing potential plaintiffs with the opportunity to pursue their claim. The group members may not have been able to afford to bring a claim on their own. On the other hand, some people see access to justice as not being achieved, given how much of a share a litigation funder may take of any damages received.
- If the Supreme Court provides access to the trial or to directions hearings on their website (for example, by **telecasting** it online), then this increases access to the Court and to the progress of the proceeding. This has occurred in previous proceedings, including other class actions.
- The Supreme Court website has **information about this class action**, which allows group members to obtain details about the progress of the case. Maurice Blackburn Lawyers also has a dedicated page on its website about the class action. This online information increases the access to information for members of the class involved in the class action. Links to these websites are provided in your obook assess.

Study tip

Consider the extent to which the principles of justice have so far been achieved in this case. Can you think of other ways that fairness, equality and access may or may not be achieved?

14.2 CHECK YOUR LEARNING

Define and explain

1 Define the following terms:
   - **a** class action
   - **b** litigation funder
   - **c** group member
   - **d** lead plaintiff.

2 What is Uber? What services does this company provide?

3 What is the nature of the claim made in this class action? Who are the defendants?

4 Describe the damages that the plaintiff is seeking.

Synthesise and apply

5 Create a timeline of events that are relevant to this class action.

6 Comment on how the Supreme Court of Victoria can uphold the principle of fairness during a trial.

Analyse and evaluate

7 Discuss the extent to which class actions and the use of litigation funders achieve fairness and access.

8 'Class actions are important for claims like this – otherwise, taxi drivers have no other access to justice.' Discuss this statement as a class.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 14.2 Check your learning
- **Video tutorial** Overview of *Andrianakis v Uber Technologies Inc.* S ECI 2019 01926
- **Weblink** Maurice Blackburn Lawyers website – Uber class action webpage
- **Weblink** Supreme Court of Victoria website – Uber class action webpage

14.3 RECENT CIVIL CASE 3: DOCKLANDS HIGH-RISE FIRE EARNS $5M IN DAMAGES

Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286 (28 February 2019)

Study tip

This case was last dealt with by VCAT in 2019, so therefore this case will remain 'recent' until 2023.

Introduction

Source 1 The Lacrosse tower in Docklands, Melbourne

The case of *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* (Building and Property) [2019] VCAT 286 (28 February 2019) ('flammable cladding case') is a negligence claim that was heard by the Victorian Civil and Administrative Tribunal (VCAT).

VCAT usually hears and determines small claims that are resolved in a short and informal hearing where the parties do not have legal representation. For example, over 60 per cent of cases heard by VCAT are small residential tenancy claims, where landlords and tenants are in dispute about issues such as rent increases, failure to repair premises, or failure to pay rent.

However, in the flammable cladding case, VCAT demonstrated that not only does it have the power and jurisdiction to hear large, complex cases, but it also has the power to award significant damages – in this case, over $5 million.

The flammable cladding case involved a terrible fire at the Lacrosse tower in Docklands, Melbourne, in November 2014. The fire started from a cigarette left to burn in a plastic container, and then was fuelled by the building's flammable cladding and caused significant damage. While nobody was physically hurt, significant **loss** was suffered by the owners of the apartments in the building. This loss prompted the apartment owners to commence a **negligence** claim against the builder and others for **damages** suffered.

loss
a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

In this topic, we explore the following aspects of the flammable cladding case in detail:

- an overview of the claim and the central facts of the case
- the dispute resolution bodies involved in the case
- methods of dispute resolution and their appropriateness
- the remedies awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice were achieved.

Overview of the claim and the central facts of the case

Background to the parties

The applicants

In the flammable cladding case, there were 211 applicants (plaintiffs are known as applicants for matters heard by VCAT). The applicants were:

- three owners corporations that managed various common parts of the Lacrosse tower (one owners corporation is the parent company of another)
- 209 owners of individual apartments.

The respondents

In the flammable cladding case, there were eight respondents (defendants are known as respondents for matters heard by VCAT). The respondents were:

- the builder: LU Simon Pty Ltd
- the building surveyor and its employee: Gardner Group Pty Ltd
- the architect: Elenberg Fraser Pty Ltd
- the fire engineer: Tanah Merah Pty Ltd, trading as Thomas Nicolas
- the owner of apartment 805 (Gyeyoung Kim) and the resident of the apartment (Jean-Francois Gubitta)
- the superintendent (a settlement was reached with the superintendent before the VCAT hearing).

Background to the Lacrosse tower and the building's cladding

The Lacrosse tower is a 21-storey building located on La Trobe Street in Melbourne's Docklands. It is a mixed-use building that includes 15 levels of residential apartments, as well as retail floors and a carpark. The tower's façade had been clad in aluminium composite panel. Cladding is a type of 'skin' or extra layer on the outside of a building that is mainly used to stop wind and rain from entering a building. It can also make a building's exterior look more attractive. Cladding can be made from bricks, weatherboards, aluminium or timber, among other materials. In Australia, aluminium composite panel is regularly used as cladding by builders and architects.

Many companies were involved in the design and construction of the Lacrosse tower, including the builder (LU Simon Pty Ltd), the architect (Elenberg Fraser Pty Ltd), the building surveyor (Gardner Group Pty Ltd) and the fire engineer (Tanah Merah Pty Ltd).

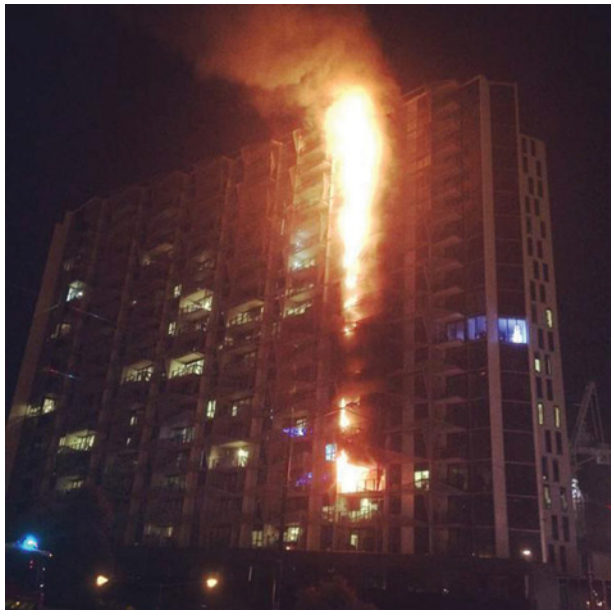
The Lacrosse tower was completed in 2012. After it was finished, residents and other occupants moved in.

The fire

At about midnight on Monday 24 November 2014, Jean-Francois Gubitta returned home from work. He was on a working holiday from France and was living in apartment 805 of the Lacrosse tower. He dropped his backpack and jacket on the bed and went out on to the apartment's balcony to smoke a cigarette. Once finished, he left his cigarette butt in a plastic food container sitting on the timber-topped balcony table.

Just before 2:30 am, the smoke detector in the hallway outside the front door of apartment 805 activated and sent an automatic alarm to the Metropolitan Fire Brigade. When the firefighters arrived, a fire was rapidly travelling up the tower's external wall cladding and spreading onto the balcony on each level. The fire was already up to level 14 when the firefighters arrived, and within six minutes it had reached the tower's roof. All of the occupants were evacuated. By about 2:55 am, the fire was reported to be under control.

As a result of the fire sprinkler system, and the quick work of the firefighters and other first responders, all 400 occupants of the building were safely evacuated without any personal damage or physical injuries. This included Gubitta and his five flatmates. However, the damage to the Lacrosse tower was extensive.



Source 2 The Lacrosse tower in Docklands, Melbourne went up in flames in 2014. This raised major concerns about the use of aluminium cladding.

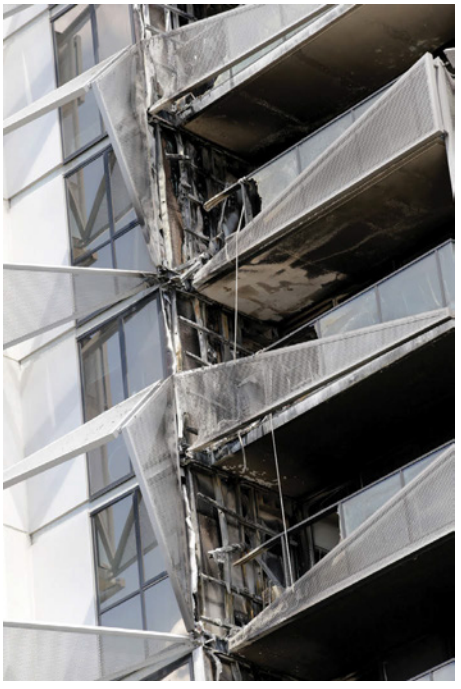
Study tip

The Australasian Legal Information Institute (AustLII) is an excellent resource. You can find recent court judgments on AustLII's website. To find a particular case, identify the relevant jurisdiction (e.g. Victoria), the court or tribunal that heard the case, and the year the case was heard in court. Final judgments are always the best way to get accurate details of claims, the facts of cases, and court decisions. A link to the AustLII website is provided in your obook assess.

Claim issued in VCAT

The applicants issued a claim in VCAT, seeking current and anticipated future losses exceeding $12 million. The primary focus of the claim was on the selection, approval and installation of aluminium composite panel as cladding that carried the fire across so many levels. The claim was a mix of contract claims, breaches of warranties, and negligence. Negligence was the primary cause of action.

Dispute resolution bodies involved in the case



Source 3 The Lacrosse tower was extensively damaged by the fire.

The applicants issued their claim in VCAT (a tribunal), not in a court. This is because VCAT has jurisdiction to hear matters involving building and property matters. Bodies such as Consumer Affairs Victoria and the Victorian Ombudsman do not have the jurisdiction to hear these sorts of claims.

The hearing was heard by one of the vice-presidents of VCAT, Judge Woodward, who is also a County Court judge.

Except for three of the respondents (including Gubitta), all of the parties had legal representation. During the hearing, the parties were also represented by two barristers (one of whom is a senior counsel, or QC).

The hearing ran over 22 sitting days between 3 September and 11 October 2018. For this matter, the tribunal book (a book of all the relevant documents for a hearing) ran up to 91 volumes. The applicants relied on 56 witness statements. Various other witnesses (e.g. expert witnesses) gave evidence at the hearing. The hearing also involved an inspection of the exterior of the Lacrosse tower and a visit to two of its apartments.

A significant part of the hearing involved expert witnesses giving evidence. These expert witnesses included architects, building surveyors, fire engineers, a fire investigator, and a materials scientist. This was because a central part of this dispute was whether the aluminium composite panel used to clad the Lacrosse tower was compliant with relevant building regulations and, if so, to what extent each of the respondents was responsible for the loss suffered by the applicants.

Methods of dispute resolution and their appropriateness

mediation
a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

compulsory conference
a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their differences

It is not clear whether the parties attempted to resolve the dispute through **mediation** before the VCAT hearing, or whether another form of dispute resolution was used, such as a **compulsory conference** (these are often used by VCAT to resolve disputes). However, it is clear that the dispute could not be resolved outside of a hearing.

Since the parties were unable to settle the dispute between themselves, the only available option was to proceed to a VCAT hearing. In this instance, Judge Woodward was the decider of facts.

On 28 February 2019, Judge Woodward handed down his decision. He found that the aluminium composite panel used to clad the Lacrosse tower did not meet the relevant legislation and therefore was not safe. He found that the builder (LU Simon Pty Ltd) was primarily liable to pay damages to the applicants. However, Judge Woodward also found that the builder did not fail to exercise reasonable care in the construction of the Lacrosse tower by installing the aluminium composite panel.

Judge Woodward further found that the other respondents were concurrent wrongdoers as a result of their own conduct. Gubitta was found to have owed a duty to take care in the disposal of the cigarette, and he was found to have breached that duty by failing to ensure the cigarette was fully extinguished before

leaving it in the plastic container. The other wrongdoers were the building surveyor, the architect, and the fire engineer for allowing the aluminium composite panel to be installed, for designing the tower such that aluminium composite panel was to be used, or for approving aluminium composite panel to be used.

Judge Woodward decided that the total sum to be paid to the applicants was $5 748 233.28. Each of the respondents was ordered to reimburse the builder (LU Simon Pty Ltd) the percentage for which they were responsible for the damage. Judge Woodward found the responsibility of the respondents to be split as follows:

- the building surveyor (Gardner Group Pty Ltd): 33 per cent
- the architect (Elenberg Fraser Pty Ltd): 25 per cent
- the fire engineer (Tanah Merah Pty Ltd): 39 per cent
- Gubitta (the resident of apartment 805): 3 per cent.

The builder (LU Simon Pty Ltd) was required to pay Gubitta's portion because Gubitta had not taken part in the hearing and nobody had sought judgment against him.

The ruling sent shockwaves through the building industry because of the impact it could have on future cases involving buildings that are also clad in aluminium composite panel. This is further explained in the article below.

ACTUAL SCENARIO

Lacrosse fire ruling sends shudders through building industry consultants and governments

Geoff Hanmer, *The Conversation*, 5 March 2019

On the last day of summer for 2019, the Victorian Civil and Administrative Tribunal (VCAT) delivered a burst of sunshine to apartment owners at the high-rise Lacrosse building in the Melbourne Docklands precinct. Lacrosse suffered a serious cladding fire on 24 November 2014, started by a single cigarette on a balcony. Last Thursday, Judge Ted Woodward ordered the owners be immediately paid A$5.7 million in damages.

[Judge Woodward] also indicated that the owners would receive most of the balance of their A$12.7 million claim – including nearly A$6 million in calculated costs of compliance with building codes.

However, in our adversarial legal system, there are losers as well as winners. The losers in this case are the fire engineer, the certifier and the architects.

The builder, LU Simon, was ordered to pay more than A$5.7 million to apartment owners. However, the architect, fire engineer and building certifier who worked on the project would pay most of that to LU Simon after Judge Woodward found they had breached contractual obligations.

Fire engineer Thomas Nicholas was ordered to pay 39 per cent of the damages, certifier Gardner Group 35 per cent and architects Elenberg Fraser 25 per cent. Incredibly, the builder, LU Simon, is a winner, assessed to pay only three per cent of the damages.

So shocking is the VCAT decision to architects that the national president of the Australian Institute of Architects suggested in an email to members last Friday that they might need to seek counselling.

The decision reminds architects and other consultants that abiding by common practice is no defence if that practice is inadequate. Even though an architect may work for the builder and be employed on a limited commission during construction, they still bear primary responsibility for the safety of the building as the 'lead consultant'. According to the decision, architects and consultants are required to exercise high standards of professional judgement and skill even if their commissioning arrangements and fees militate this.

...

Remedies awarded and their appropriateness

The applicants had claimed $12 million in damages. This included the cost of repairing the parts of the Lacrosse tower damaged by the fire, the cost of additional insurance premiums, compliance costs including the cost of replacing non-compliant cladding, and the loss of rent as a result of owners not being able to rent out their apartments.

The Judge could only assess and quantify $5 748 233.28. However, the ultimate sum is likely to be higher. This is because the parties could not agree on the total amount of compliance costs. Judge Woodward made no order about the amount of compliance costs and noted that the parties were to negotiate further about this after the hearing.

Possible avenues of appeal

Source 4 The appeal route for the flammable cladding case

Because one of the vice-presidents of VCAT heard and determined this dispute, any appeal by the parties needed to be made to the Court of Appeal. The Court of Appeal must grant leave (i.e. permission) to appeal.

Any appeals from VCAT are limited to appeals on questions of law. That is, a party who is unhappy with a VCAT decision cannot appeal based on the facts of the case, as found by VCAT. A party can only appeal based on the way VCAT applied the law to the facts.

The building surveyor (Gardner Group Pty Ltd), the fire engineer (Tanah Merah Pty Ltd, trading as Thomas Nicolas), and the architect (Elenberg Fraser Pty Ltd) lodged an application with the Court of Appeal to appeal VCAT's decision. At the time of writing, no appeal had yet been heard.

It was highly anticipated that an appeal would be lodged by one or more of the respondents. This is because VCAT's decision in this matter was significant in that it was one of the first of its kind in Australia to consider the issue of combustible cladding. In particular, there might be a concern that the decision could open the doors for other building professionals to be found liable in the event of a fire as a result of the type of cladding used.

All appeals from the Court of Appeal are heard by the High Court. The High Court has to grant leave to appeal.

The extent to which the principles of justice were achieved

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

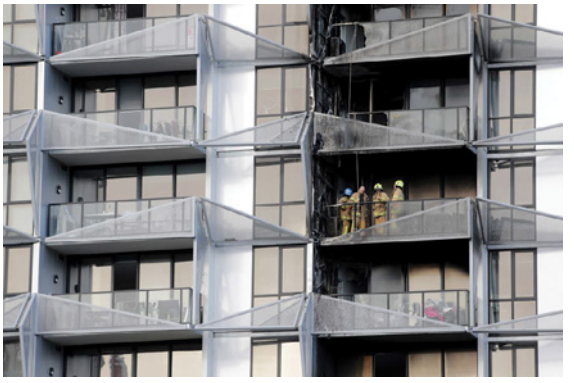
An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were or could be achieved in the flammable cladding case is provided below. For each principle, this assessment is made on the evidence available.

Fairness

The principle of **fairness** suggests that the law should be properly applied to all people, regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.

In the flammable cladding case:

- The parties had **adequate legal representation**. This assisted in ensuring a fair hearing.
- The **directions** and **orders** given by VCAT gave each party **an opportunity to present their case** and to rebut the other side's case. For example, it was noted that the parties showed commendable cooperation in the management of documents, and that VCAT and witnesses worked from electronic copies and had access to all the documents. The parties had an opportunity to make **discovery of documents**, inspect documents, file submissions, file written statements, and were entitled to, and did, call their own witnesses and **cross-examine** other witnesses.
- The **rules of procedure** allowed both sides to present their case. There are general rules of procedure about which party presents their case first at a tribunal hearing (although VCAT has the power to decide on the rules in each particular case). Each party was entitled to, and did, call evidence, make submissions to VCAT and address Judge Woodward.
- Judge Woodward was the **decider of facts**. He was required to **consider the evidence** and the law to come to a **verdict**. Judge Woodward provided a lengthy judgment – 227 pages – that set out in considerable detail the claim and the reasons for his decision.
- There was **some delay** in hearing the case. The claim was issued in 2016, and a final judgment was handed down in February 2019. However, this may be seen to be timely, considering the complexity and size of the dispute, but, some may see this as too long to reach a decision, even in this complex case. The impact of a delay can be greater for some parties than for others. Also, as the fire occurred in 2014, the applicants had to wait just under five years for their loss to be redressed.



Source 5 The Lacrosse tower after the fire

Equality

The principle of **equality** suggests that all people should be equal before the law, regardless of who they are. For equality to be achieved, every person in society who is involved in a civil dispute should have the same opportunity to present their case without advantage or disadvantage.

In the flammable cladding case:

- Judge Woodward was required to **act impartially and without bias** and to have no connections with the parties. In overseeing the hearing, Judge Woodward was required to make decisions in an unbiased manner.
- Most of the applicants and the respondents had experienced **legal representation**. The availability of legal representation to most of the parties helps to ensure that they equally have the ability to present their case. If one party is unrepresented, this can result in significant inequality between the parties.
- The parties had the **right to appeal**, and three respondents have exercised their right to do so.

Access

The principle of **access** suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court or in a tribunal. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who are eligible for assistance from Victoria Legal Aid can have legal representation for little or no charge. This is essential for parties attempting to navigate their way through complex legal processes.

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

orders
a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

discovery of documents
a pre-trial procedure that requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their legal case

Study tip

When you are discussing the principles of justice, it is important that you explain *how* a particular principle of justice is achieved for each point you make. Avoid simply saying 'legal representation achieves equality'. Instead, say something like 'legal representation achieves equality by allowing both parties to present their case through a legal representative'.

Study tip

Consider the extent to which the principles of justice were achieved in this case. Can you think of other ways that fairness, equality and access were or were not achieved?

A civil tribunal hearing includes strict processes for sharing evidence between the parties, especially for sharing the key documents that are used as evidence in the hearing. This helps the legal counsel on both sides prepare for the hearing.

In the flammable cladding case:

- The use of **mediation** or a compulsory conference can increase access to justice, as it provides the parties with an alternative method of resolving the dispute other than a hearing. However, it is not known whether mediation or a compulsory conference was held for this matter.
- Costs may be a factor in determining whether access to justice has been achieved. The parties will be out of pocket for their legal costs. Other parties may not have been able to **afford the costs** and therefore may not have pursued the case.
- The hearing was conducted by way of an **open hearing**. Open hearings ensure that the parties and members of the community can access information about the way a dispute was resolved, thus ensuring transparency in the process. Open hearings also show members of the community how tribunals work.
- The parties had a **right to appeal**, ensuring access to a higher court to review the tribunal's decision.

14.3 CHECK YOUR LEARNING

Define and explain

1 Describe the background to this claim.
2 Prepare a visual representation of the names of the parties in this case, and their role in the claim.
3 Describe the nature of the damages sought by the applicants.

Synthesise and apply

4 Identify whether each of the following statements is true or false. Justify your answers.
   - **a** VCAT needed special leave to hear this case, given the amount of damages sought by the applicants.
   - **b** Gubitta was required to pay three per cent of the damages awarded.
   - **c** Only the respondents are entitled to appeal the decision, as they lost the case.

5 Conduct some research and find out whether the Supreme Court had jurisdiction to hear this claim.
6 Conduct some research on the appeal. Provide a summary of your findings about the final decision in this case.

Analyse and evaluate

7 'The reasons for this decision span 227 pages. This demonstrates how courts and tribunals are *not* accessible.' Discuss this statement as a class.
8 'VCAT should not be able to hear these large and complex cases because it doesn't have the jurisdiction or ability to do so.' Discuss the extent to which you agree with this statement.

Check your Student obook assess for these additional resources and more:

Student book questions
14.3 Check your learning

Video tutorial
Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286 (28 February 2019) – overview

Weblink
Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286 (28 February 2019) – judgment

14.4 RECENT CIVIL CASE 4: THE SHOCKING REVELATIONS OF LAWYER X

Orman v State of Victoria (2020)

Note that as this is an ongoing case, the details in this topic are based on information available at the time of writing and the allegations made by the plaintiff.

Introduction

In 2018, the Victorian legal profession and community at large were shocked by revelations that came to light regarding criminal defence **barrister** Nicola Gobbo, also known as 'Lawyer X' and 'Informant 3838'. At various times between 1995 and 2010, Gobbo provided information to Victoria Police about accused people in an attempt to secure criminal convictions against them. She provided this information about her clients, their associates and others while also *acting* for her clients. This means that many criminal convictions were obtained from information that she received in acting as a lawyer. Many of Gobbo's clients and their associates were involved in the Melbourne 'gangland wars', and included Tony Mokbel and his criminal associates.

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

The revelations sent shockwaves throughout Victoria, not only because Gobbo's conduct had jeopardised the integrity of the criminal justice system, but also because that same conduct could result in many convicted criminals' convictions being overturned. Following the revelations, the Victorian government commenced a **royal commission** to inquire into the conduct of Gobbo and Victoria Police.

royal commission
the highest form of inquiry into matters of public concern and importance. Royal commissions are established by the government and are given wide powers to investigate and report on an important matter of public concern

As of September 2020 it was reported that 124 people may be able to have their cases re-examined as a result of the information passed on by Gobbo as a police informant. One of those people was Faruk Orman, who spent 12 years in prison for murder that he says he never committed. Orman appealed his conviction once it was revealed that Gobbo, whilst acting for Orman, was giving information to Victoria Police which helped secure his conviction. Orman's appeal was successful, and he was subsequently released from prison. He then sued the state of Victoria for **damages** for the 12 years he spent in prison.

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

The Orman case is an excellent example of the interrelationship between criminal cases and civil disputes, and the issues that have arisen as a result of a barrister acting as a police informant.

In this topic, we explore the following aspects of the Orman case in detail:

- an overview of the claim and the central facts of the case
- the dispute resolution bodies involved in the case
- methods of dispute resolution and their appropriateness
- the remedies awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice were achieved.

Source 1 Faruk Orman was imprisoned for a crime he says he never committed and is now suing the state of Victoria for damages.

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

Study tip

This case was reported to have commenced in 2020, so this case will remain 'recent' until at least 2024.

Overview of the claim and the central facts of the case

This is a complex case which is still ongoing at the time of writing. To understand Orman's civil claim against the state of Victoria, it is important to understand the many key facts and events that led to him issuing the claim in 2020.

Study tip

This case is ongoing at the time of writing. More information is provided on your obook assess.

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

Background to the parties

The plaintiff: Faruk Orman

On 29 September 2009, the plaintiff in this case, Faruk Orman, was found guilty by a Supreme Court **jury** of the murder of Victor Peirce. Peirce was shot dead in a parked car in Port Melbourne on 1 May 2002. Peirce was a career criminal with ties to various individuals and groups involved in the Melbourne gangland wars.

The Melbourne 'gangland wars' is a term used to describe a series of violent disputes and murders between rival criminal gangs which involved drug trafficking and other illegal conduct. They occurred in Melbourne between 1998 and 2010, and involved various underworld groups and individual criminals such as Tony Mokbel, Carl Williams, Jason Moran, Mark Moran and Alphonse Gangitano. A drama series about the gangland wars called *Underbelly* debuted on Chanel 9 in 2008 and was highly successful.

Source 2 *Underbelly* (season 1) was a series about the Melbourne gangland wars, and featured many of the criminals who were caught up in the Lawyer X scandal. At the time of writing, it is available to stream on Stan Australia.

In June 2007, Victoria Police arrested Orman. Victoria Police alleged that Peirce had been shot by a man named Andrew 'Benji' Veniamin, and that Orman had driven the getaway car. Veniamin himself was shot dead in 2004 and never convicted of Peirce's murder.

Orman pleaded not guilty to the crime. On 29 September 2009, he was found guilty by a jury and was sentenced to 20 years' imprisonment for the murder, with a fixed non-parole period of 14 years. On 21 September 2010, Orman's appeal to the Court of Appeal was refused. He was refused special leave to the High Court to appeal his conviction.

Orman spent 12 years in prison before he was released (details of his release are set out below).

The defendant: State of Victoria

It is reported that Orman is suing the state of Victoria for false imprisonment for the time that he spent in prison. This is because of the role that Nicola Gobbo played in his case, both as a criminal barrister and police informant (explored further below).

The state of Victoria is the appropriate defendant when a person sues for the conduct of a government body or authority – in this case, Victoria Police. It is not known whether there are other defendants in the claim, as at the time of writing it was before the courts.

Nicola Gobbo

Nicola Gobbo became a lawyer in 1997 and started practising as a criminal defence barrister in late 1998. Between 1997 and 2010, Gobbo represented or provided legal advice to over 1000 individuals, many of whom were involved in Melbourne's gangland wars. Some of Gobbo's clients included Tony Mokbel, Carl Williams and Faruk Orman.

Because she was a lawyer, Gobbo owed various duties to her clients, to the court, and to the administration of justice. As a lawyer, Gobbo had:

- a duty not to mislead the court or other legal practitioners
- a duty to provide independent legal advice
- a duty to act ethically and in the best interests of her clients

- a duty to ensure that any communications between her and her clients remained confidential.

Separate to these duties, Gobbo's clients had various rights when charged with a crime, including the right to a fair trial, the right to receive information upon which the prosecution intends to rely in proving their guilt, and the right to ensure any information they provide to their lawyer remains confidential.

Gobbo's role as an informant

In 1995, Gobbo was formally registered as a 'human source' for Victoria Police. A human source, also known as an 'informant', refers to a person who covertly (i.e. secretly) provides information about crime or people involved in criminal activity to enforcement agencies such as the police. The information is then used to investigate and prosecute crimes.

Between 1996 and 2009, Gobbo was registered and deregistered as a human source for Victoria Police multiple times. During this time, Gobbo provided significant information to Victoria Police to help with their investigations and prosecutions.

Gobbo stopped practising as a barrister in 2009, and in 2010 commenced civil proceedings against Victoria Police, which were later settled.

Source 3 Nicola Gobbo, also known as 'Lawyer X' or 'Informant 3838', acted as an informant to Victoria Police over a number of years.

Orman's conviction

On 11 October 2006, Orman engaged Gobbo as his lawyer to represent him in relation to charges he was then facing in Queensland. She continued to represent Orman until December 2008. Gobbo did not act as Orman's lawyer in defending the murder charge with respect to Victor Peirce.

She did, however, represent 'Witness Q' between October 2002 and August 2008. The murder case against Orman relied heavily on the evidence that Witness Q was to give in the case. It was reported that Witness Q's evidence would place Orman at the scene of Peirce's murder, and demonstrate that Orman had confessed to being the getaway driver.

Ahead of Orman's trial, Witness Q began to second-guess whether or not they wanted to give evidence against Orman in court. Gobbo apparently made contact with Victoria Police to warn them that the star witness in their case against Orman was considering no longer acting as a witness, and that the police needed to do something about this. At this time, Gobbo was also acting as Orman's lawyer in relation to separate charges.

Eventually, Witness Q did give evidence against Orman in the murder trial, and Orman was found guilty and convicted of the murder.

Did you know?

It is estimated that 36 criminal underworld figures died in Melbourne over a 12-year period as a result of the gangland wars.

Revelations about Gobbo acting as an informant

The use of Gobbo as a police informant was the subject of various reviews and inquiries, but they were undertaken confidentially and without public knowledge.

The fact that Gobbo acted as a police informant for many years was revealed after a 2018 High Court proceeding in which the **Director of Public Prosecutions (DPP)** sought to disclose Gobbo's identity to Tony Mokbel and six other individuals, to tell them that Gobbo was informing on them to Victoria Police.

Director of Public Prosecutions (DPP) the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

At the time, Gobbo's anonymity was considered critical, particularly to ensure the protection of her two children from harm. Following the High Court proceeding, however, Gobbo's identity was ultimately revealed, and the DPP was allowed to disclose to the seven individuals that Gobbo had acted as a police informant.

The High Court, in its judgment, was highly critical of the fact that the police had used Gobbo as an informant, as shown in the extract on the next page. ('EF' in the extract is a reference to Gobbo, and the reference 'Convicted Persons' is a reference to the seven individuals.)

Study tip

The Australasian Legal Information Institute (AustLII) is an excellent resource. To find a particular case, identify the relevant jurisdiction (e.g. Victoria), the court or tribunal that heard the case, and the year the case was heard in court. Final judgments are always the best way to get accurate details of claims, the facts of cases, and court decisions. A link to the AustLII website is provided in your obook assess.

EXTRACT

AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58 (5 November 2018)

10 ... EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.

The revelations sent shockwaves through the Victorian legal profession and wider community. In particular, it was widely reported that Gobbo's conduct could result in the acquittal of many criminals (including convicted perpetrators of violent crimes) because of a miscarriage of justice. It has been widely recognised that Gobbo should have given her clients a safe space to communicate freely with her, as their lawyer, and that a miscarriage of justice could occur if an accused's lawyer is not properly representing their client.

Source 4 Margaret McMurdo AC was appointed as the Commissioner in the Royal Commission into the Management of Police Informants.

Royal Commission

On 5 December 2018, a Victorian royal commission was ordered into the conduct of Gobbo and Victoria Police to determine the number of cases that may have been affected by their conduct. A royal commission is a public inquiry which has wide-ranging powers to investigate and report on matters set out in the terms of reference. A commissioner is appointed (in this case, Margaret McMurdo AC).

The Royal Commission into the Management of Police Informants released a progress report in July 2019, and is due to deliver its final report on 30 November 2020. At the time of writing, the final report had not been released.

Orman's acquittal

On 4 February 2019, Faruk Orman filed a petition of mercy with the Attorney-General. A petition of mercy can be filed by a person who has been convicted to seek the Queen's mercy in relation to the conviction. Once filed, the Attorney-General may refer the whole case to the Court of Appeal, which will hear and determine the case as if it were an appeal. A petition of mercy could only be filed by Orman because he had already exhausted all avenues of appeal, more than nine years earlier.

On 25 June 2019, the Attorney-General decided to refer the whole case to the Court of Appeal. Following that, the DPP made a number of factual concessions (meaning that they clarified a number of facts of the case), including that:

- Gobbo acted for both Witness Q and Orman
- Gobbo improperly took active steps to ensure that Witness Q gave evidence against Orman in Orman's murder trial.

The DPP also explained that the conduct of Gobbo and Victoria Police meant that there had been a substantial miscarriage of justice in Orman's case and, therefore, the appeal should be allowed.

In particular, it was stated that Gobbo's conduct had undermined Orman's right to a fair trial, which is one of the very founding principles of our criminal justice system. Because of those concessions, the Court of Appeal (in *Orman v The Queen*) did not need to undertake any factual analysis about what had happened.

The DPP said that Witness Q's statement was still available and, in theory, could still be used against Orman. However, the DPP conceded that it would be unjust to order a re-trial, because significant time had already elapsed since the events took place, and because Orman had already served a substantial amount of time in jail. The Court of Appeal therefore allowed the appeal, set aside the conviction for murder, and acquitted Orman for the offence of murder. Orman was immediately released from prison on 26 July 2019.

Source 5 Faruk Orman, second from right, after his conviction was overturned

Claim issued in the Supreme Court

In May 2020, it was reported that Orman was suing Victoria Police for damages, alleging that they had 'falsely imprisoned' him. The scenario below explains this in more detail.

ACTUAL SCENARIO

Victoria Police facing lawsuit from acquitted gangland figure Faruk Orman over false imprisonment

Danny Tran, *ABC News*, 5 May 2020

Faruk Orman, who spent 12 years in prison for murder after his own lawyer encouraged a key gangland witness to give evidence against him, is suing Victoria Police for unspecified damages, alleging the force 'falsely imprisoned' him.

Mr Orman, whose conviction was quashed last year because of the Lawyer X scandal, has filed a **writ** in the Supreme Court, claiming more than a dozen major failings by the police force.

He is accusing police of **breaching** their **duty of care** to him, failing to properly supervise, control or train their officers and 'maliciously' prosecuting him.

'As a consequence of the above, the plaintiff has suffered injury, loss and damage,' the writ said.

Mr Orman is seeking unspecified damages, interest and costs but the suit, if successful, could leave Victoria Police on the hook for millions of dollars as it continues to grapple with the fallout from using criminal barrister Nicola Gobbo as a human source. ...

writ
usually the first document filed by the plaintiff to start a civil proceeding in court. A writ explains the action being taken against the defendant and the place and mode of the trial

breach
breaking or failing to fulfil a duty or obligation

The scenario above, taken from an *ABC News* report, suggests that Orman had issued a writ in the Supreme Court. Based on the report, it is possible that Orman is suing for **negligence** and false imprisonment. The following information speculates on the possible claims based on the information available.

To establish a claim for negligence, Orman will need to prove that:

- the police owed a duty of care to him
- that duty of care was breached
- the breach caused Orman to suffer harm
- Orman suffered injury, loss and/or damage.

A false imprisonment claim is a **tort**, and in particular a type of trespass. To establish a claim for false imprisonment, Orman was must establish that:

duty of care
(in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

tort
a term that literally means 'wrong'; a wrong that interferes with a person's legally protected interests

- the defendant intended to imprison, confine or restrain the plaintiff
- that imprisonment was against the plaintiff's will
- the imprisonment was total (that is, it was a complete imprisonment not a partial one)
- as a result, the plaintiff suffered an infringement upon his liberty, or his dignity or reputation was adversely affected, or he suffered psychological injury or mental harm as a result.

'Imprisonment' means the confinement or restraint of a person so as to prevent them from exercising their right to leave. It does not necessarily mean that a person is imprisoned in a jail – a person can be imprisoned in a car, or even in an open space, so long as there is a restraint of movement in that space. The onus will be on the defendant to prove the imprisonment was justified.

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

The amount of **damages** sought by Orman was unspecified, which means that Orman will likely give evidence to specify the amount that he would seek based on the type of loss or damage suffered. It was reported in one newspaper article that the amount sought could be as much as $10 million.

Dispute resolution bodies involved in the case

Source 6 Faruk Orman spent time in Barwon Prison, a maximum security prison for males.

Orman is reported to have issued the claim in the Supreme Court of Victoria, which has unlimited jurisdiction to hear civil disputes. The County Court also has unlimited jurisdiction to hear civil disputes, but the Magistrates' Court does not.

Bodies such as Consumer Affairs Victoria and the Victorian Ombudsman do not have the jurisdiction (the power) to hear these sorts of claims, nor does the Victorian Civil and Administrative Tribunal.

It is not clear whether a jury will be decided to hear this claim, but either both parties are entitled to request a trial by jury. The judge can also require the trial to be heard by a jury, but it is rare for a judge to do so.

If the matter proceeds to trial, it will likely take place in the Supreme Court in Melbourne. Evidence will likely be given by witnesses, and Orman could give evidence about the harm and injury he has suffered as a result of his 12 years in prison.

Methods of dispute resolution and their appropriateness

mediation
a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

conciliation
a method of dispute resolution that uses an independent third party (i.e. a conciliator) to help the disputing parties reach a resolution

arbitration
a method of dispute resolution in which an independent person (an arbitrator) is appointed to listen to both sides of a dispute and to make a decision that is legally binding on the parties. An arbitrator's decision is known as an arbitral award

It is not clear whether the parties will attempt to resolve their dispute through **mediation** before the trial. However, the Supreme Court generally requires parties to attend mediation before a trial, so it is possible that the parties will attend mediation at some point.

In general, the Supreme Court does not order parties to participate in **conciliation** to resolve a dispute (preferring mediation). Given there was no contract between the parties, the parties would not have been required to participate in **arbitration** to resolve the dispute, unless they agreed to do so themselves.

As noted above, it is not clear whether a jury or judge will be the decider of facts in this case. A jury trial can be an appropriate means of resolving a dispute, and it is often used in cases involving personal injury (such as this case). A strong argument in favour of using a jury is that a jury ensures that justice is administered in line with community standards, rather than in line with the views of a small number of people (i.e. judges).

The fact that members of the community form the jury and participate in the trial helps to ensure fairness and equality. The decision is made by people who are not connected with any of the parties, which reduces the chances of bias.

Remedies and their appropriateness

The amount of damages sought by Orman is unspecified. This is often the case where the calculation of damages has not yet been completed. Orman is also seeking interest and costs. The amount of interest will depend on the damages awarded, if any, and the period of time during which the damages accrued (the longer the time, the more the interest).

In cases where personal injury, including mental harm, has been sustained, damages is an appropriate remedy. While a plaintiff may never be able to return to the position they were in before the harm occurred, damages is intended to compensate the plaintiff as much as possible.

Source 7 Tony Mokbel was one of Gobbo's clients. Mokbel and Gobbo are seen here, during a period Gobbo represented him.

In particular, time in prison is often seen by many as causing significant harm to those who are put there. Prisons are secure facilities where daily routines are regimented, and prisoners are required to spend long periods of time by themselves or in a locked cell. Their movement and entitlements are strictly limited, as are their personal possessions and their right to visitors. It is often said that imprisonment does more harm than good. In the case of Orman, who was imprisoned for a crime that he says he never committed, and who did not receive a fair trial, it is very possible that the mental harm that he suffered was significant. It is therefore questionable how far damages can compensate him for any loss he has suffered.

No **injunction** was sought, and an injunction is unlikely to be an appropriate remedy given the circumstances (that is, there is no conduct that needs to be stopped, or required).

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify a wrong

Possible avenues of appeal

Source 8 The appeal route for the Orman case

If the matter is determined by trial, either party is able to appeal the Supreme Court's decision to the Court of Appeal. However, in accordance with section 14A of the *Supreme Court Act 1986* (Vic), the Court of Appeal must give leave (i.e. permission) to appeal the case. All applications for leave to appeal must be filed within 28 days from the date the relevant judgment was handed down.

All appeals from the Court of Appeal are heard by the High Court. The High Court has to grant leave to appeal.

The extent to which the principles of justice could be achieved

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – could be achieved in the Orman case is provided on the following pages. For each principle, this assessment is made on the evidence available.

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

Fairness

The principle of **fairness** suggests that the law should be properly applied to all people, regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.

Source 9 Faruk Orman outside the Melbourne Magistrates' Court in 2004

In the Orman case:

- The **directions** and **orders** given by the Supreme Court will give each party **an opportunity to present their case** and to rebut the other side's case. For example, the Supreme Court may order that Orman provide evidence and details about the injury or loss that he has suffered. This evidence will be seen by the defendant before trial and will allow them the opportunity to make submissions about that evidence.
- The **rules of procedure** will allow both sides to present their case. There are general rules of procedure about which party presents their case first at a trial (although the court has the power to decide on the rules in each particular case). Each party will be entitled to give evidence, make submissions to the court and address the judge and the jury (if there is one).
- One of the factors that can impede on fairness is whether there is a **timely resolution** of the case. The claim was reportedly issued by May 2020. It is not known whether the matter has been set down for trial. However, due to the restrictions implemented in response to the COVID-19 pandemic, there are delays with courts being able to hear and determine cases.
- Another factor that can impact on fairness is whether the parties have **adequate legal representation**. The courts have recognised that legal representation can assist in parties having a fair trial, and that a self-represented party is at a greater disadvantage than a represented party in being able to understand court processes and language.

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

orders
a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

Equality

The principle of **equality** suggests that all people should be equal before the law regardless of who they are. For equality to be achieved, every person in society who is involved in a civil claim should have the same opportunity to present their case without advantage or disadvantage.

In the Orman case:

- The judge will be required to **act impartially and without bias** and to have no connections with the parties.
- If the plaintiff and the defendant both have experienced **legal representation**, this can help to ensure the parties are on an equal footing. In particular, the availability of legal representation to both parties helps to ensure that they equally have the ability to present their case. If one party is unrepresented, this can result in significant inequality between the parties.
- Both parties will have the **right to appeal** if the matter goes to trial.

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

Access

The principle of **access** suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and to pursue their legal claims in court. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

are eligible for assistance from Victoria Legal Aid can have legal representation for little or no charge. This is essential for parties attempting to navigate their way through complex legal processes.

A civil trial includes strict processes for sharing evidence between the parties, especially for the key documents that are used as evidence in the trial. This helps the legal counsel on both sides to prepare for the trial.

In the Orman case:

- The use of **mediation** can increase access to justice, as it provides the parties with an alternative method of resolving their dispute other than a trial. However, it is not clear if mediation will be used in this case.
- The **costs** associated with a civil dispute may be a factor in determining whether access to justice can be achieved.
- The **delays** in a civil dispute can also impact on access, as they can result in a party abandoning their claim, or wanting to settle it early if a trial date is far away.
- The trial, if there is one, will likely be conducted by way of an **open hearing**. Open hearings ensure that the parties and members of the community can access information about the way a dispute was resolved, thus ensuring transparency in the process. Open hearings also show members of the community how courts work.
- If the matter goes to trial and proceeds to a final judgment, both parties will have the **right to appeal**, therefore allowing access to a higher court to review the lower court's decision.

Study tip

Try to explain *how* a particular principle of justice is or is not achieved in your answers to questions. Don't just say 'legal representation achieves equality'. *How* does legal representation achieve equality?

Study tip

Consider this assessment of the extent to which the principles of justice were achieved in this case. Can you think of other ways that fairness, equality and access were achieved?

14.4 CHECK YOUR LEARNING

Define and explain

1 Describe the background facts to the Orman case.

2 What remedy is Faruk Orman seeking? What is the purpose of this remedy?

3 Explain the role of each of the following parties in this case:
   - **a** Faruk Orman
   - **b** Victoria Police
   - **c** State of Victoria
   - **d** Nicola Gobbo.

4 Identify one other dispute resolution body that could hear this dispute. Give reasons for your answer.

Synthesise and apply

5 Identify whether each of the following statements is true or false. Justify your answers.
   - **a** The Magistrates' Court is first required to determine whether there is enough evidence for Faruk Orman to succeed.
   - **b** In the false imprisonment case, the burden is on the defendant to prove that the imprisonment was legally justified.
   - **c** Only the defendant is entitled to appeal any decision.

6 Create a visual diagram or chronology setting out the main facts in this case.

Analyse and evaluate

7 'Damages will never be able to compensate the plaintiff.' Discuss the extent to which you agree with this statement.

8 Evaluate the ability of legal practitioners in this case to assist in achieving fairness and equality.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 14.4 Check your learning
- **Video tutorial** *Orman v State of Victoria* (2020) – overview
- **Weblink** *Orman v State of Victoria* (2020) – judgment
- **Weblink** *Orman v The Queen* [2019] VSCA 163 (26 July 2019)]

14.5 RECENT CIVIL CASE 5: REBEL WITH A CAUSE

Study tip

This case was last dealt with by the courts in 2018, so this case will remain recent until 2022.

Wilson v Bauer Media Pty Ltd [2017] VSC 521 (13 September 2017); *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 (14 June 2018)

Source 1 A poster promoting the Hollywood blockbuster, *Pitch Perfect*, showing Rebel Wilson as the character of 'Fat Amy'. In May 2017, Wilson commenced proceedings in the Supreme Court of Victoria against Bauer Media for defamation

Introduction

The case of *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 (13 September 2017); *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 (14 June 2018) ('Wilson case') is a defamation case that was heard in the Victorian Supreme Court and Court of Appeal.

In 2016, the Australian actor and comedian Rebel Wilson brought an action for **defamation** in the Supreme Court. Wilson – best known for her work in popular Hollywood blockbusters such as *Bridesmaids*, *Pitch Perfect* and *Cats* – sued Bauer Media Pty Ltd over a series of articles it published in 2015. Wilson claimed the articles contained incorrect and untrue statements about her. When the **jury** considered its verdict, it found in favour of Wilson, agreeing that she had been defamed. The Judge awarded Wilson $4 567 472 in **damages**. This amount was substantially reduced on appeal in 2018. The High Court refused an application to reconsider the case again.

As one of only a few high-profile legal cases in recent years involving a civil jury, the Wilson case provides an excellent opportunity to learn about the features of a civil trial, including:

- the role of the judge and the jury
- the remedies that may be awarded to compensate a plaintiff for loss suffered.

In this topic, we explore the following aspects of the Wilson case in detail:

- an overview of the claim and the central facts of the case
- the dispute resolution bodies involved in the case
- methods of dispute resolution and their appropriateness
- the remedies awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice were achieved.

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

Overview of the claim and the central facts of the case

Background to the parties

The plaintiff: Rebel Wilson

The plaintiff in this case, Rebel Wilson (birth name Melanie Elizabeth Bownds), is an Australian actor and comedian born in New South Wales on 2 March 1980. Wilson first became known in Australia for

her appearances in television series including *Pizza*, *The Wedge, Bogan Pride*, and *Thank God You're Here*. She went on to gain international fame after acting in Hollywood films including *Bridesmaids*, *Pitch Perfect, How to Be Single* and *Isn't It Romantic*. Wilson has also written and produced episodes for television series such as *Super Fun Night* and *Nasty Women*.

The defendants: Bauer Media

The defendants in the Wilson case were Bauer Media Pty Ltd and Bauer Media Australia Pty Ltd ('Bauer Media'). Bauer Media manages a portfolio of more than 600 magazines, 400 digital products, and 50 radio and television stations around the world. Its Australian division publishes a number of well-known magazines, including *The Australian Women's Weekly*, *Woman's Day, Cosmopolitan*, and *Australian Gourmet Traveller*.

Source 2 The plaintiff in the case, Rebel Wilson, is an Australian comedian and actress who has achieved international success.

Information sought about Rebel Wilson

From mid-2012, Bauer Media staff members began researching Wilson in preparation to write and publish magazine articles about various aspects of Wilson's life. At that time, a *Woman's Day* reporter, Shari Nementzik, contacted a person who had left a comment on the magazine's website about Wilson. The person who left the comment claimed to have attended school with Wilson, and said that Wilson had lied about various details of her life (including her age). The comment (posted on 25 October 2012) suggested that Wilson was actually 33 years old rather than 26. Nementzik sent an email to the anonymous person (referred to as a 'source') who left the comment, asking if she was interested in having a chat (see Source 3 below).

On 25/10/2012, at 4:05 PM, "Nementzik, Shari" [redacted] wrote:

Hi there,
How are you? I read your comment on the Woman's Day site and I would LOVE to know more!
Would you be interested in having a chat?
Thank you so much,
Shari x

Original Comments

Rebel Wilson is not 26 she is 33 and her real name is Melanie Bounds.. She was in my year at school, and everything she has said about her life is a lie.. She went to an exclusive private girls school in Paramatta, and di not grow up in the bush like she has said.... what a lier she has become!!

Source 3 One of the exchanges between *Woman's Day* reporter Shari Nementzik and an anonymous commenter

Over the following months, a number of emails were exchanged between Nementzik and the source. In one, the source wrote that she wanted maximum payment for the information she would give about Wilson. In another, Nementzik referred to some research she had conducted that indicated Wilson may indeed be 33 (and queried whether Wilson was lying). During the Supreme Court case, it was revealed that at some stage Bauer Media raised concerns about publishing the articles as it was questionable whether Wilson had in fact lied.

Publication of articles

Despite concerns raised in 2013 about the accuracy of the information provided by the source, in 2015 Bauer Media published eight articles about Wilson in *Woman's Day* and in other online publications. According to Bauer Media's website, *Woman's Day* has a weekly readership of more than 1.3 million people, which makes it 'Australia's number one weekly magazine'.

Study tip

The Australasian Legal Information Institute (AustLII) is an excellent resource. You can find recent court judgments on AustLII's website. To find a particular case, identify the relevant jurisdiction (e.g. Victoria), the court or tribunal that heard the case, and the year the case was heard in court. Final judgments are always the best way to get accurate details of claims, the facts of cases, and court decisions. A link to the AustLII website is provided in your obook assess.

In an article titled, 'Just who is the REAL Rebel?' (published in May 2015), Nementzik quoted a source and claimed that Wilson's real name was Melanie Elizabeth Bownds and that she was 36 years of age. The article also claimed that Wilson had said she was 29 years of age and that she had fabricated many other aspects of her life, including key facts about her upbringing.

The publication of this and other articles (a total of eight publications) coincided with the release of the movie *Pitch Perfect 2* (a sequel to the popular 2012 release, *Pitch Perfect*).

It was later revealed that in the days leading up to the publication of the articles, concerns had been raised within Bauer Media about calling Wilson a liar.

Claim issued in the Supreme Court

writ
usually the first document filed by the plaintiff to start a civil proceeding in court. A writ explains the action being taken against the defendant and the place and mode of the trial

statement of claim
a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify a wrong

In May 2016, Wilson issued a **writ** in the Supreme Court identifying Bauer Media Pty Ltd and Bauer Media Australia Pty Ltd as defendants. In a **statement of claim** accompanying the writ, Wilson claimed she had been defamed. The purpose of defamation laws is to protect character and reputation. A person whose reputation has been damaged (that is, a person who has been defamed) can sue for defamation.

To establish a claim for defamation, Wilson needed to prove that:

- the statements made in the articles published about her were defamatory (i.e. the statements defamed her)
- the articles contained false statements about her that injured her reputation
- the statements referred directly to her
- the statements had been published (communicated to other people) by the defendants.

Wilson claimed the articles portrayed her as a liar who had invented stories about herself to become successful. Wilson also claimed that the articles had ruined her reputation, and that she had been publicly humiliated and embarrassed by them. In particular, Wilson said that because of the articles, she had lost the opportunity to earn income by acting in feature films in the United States.

Wilson sought $5.893 million in special damages (i.e. money awarded to compensate for items that can be calculated objectively, such as lost earnings) and $1.2 million in general damages (i.e. for pain and suffering). In total, Wilson sought just over $7 million in damages. She also sought interest and costs.

Finally, in addition to damages, Wilson sought a permanent **injunction** to stop Bauer Media from publishing the articles again.

Source 4 Wilson with members of her legal team in Melbourne during her trial

Dispute resolution bodies involved in the case

Wilson issued her claim in the Supreme Court of Victoria, which has unlimited jurisdiction to hear civil disputes. The County Court has jurisdiction to hear a $7 million claim, but the Magistrates' Court does not.

Bodies such as Consumer Affairs Victoria and the Victorian Ombudsman do not have the jurisdiction (i.e. the power) to hear a defamation claim, nor does the Victorian Civil and Administrative Tribunal.

This dispute was resolved in court. A trial was held in May and June 2017, with a jury of six members. In this case, the jury was the decider of facts. This means that the jury had the responsibility to hear the evidence, and to decide whether Wilson had proved her claim and whether the defendants were successful in relation to any defence raised.

Juries in defamation cases decide on liability, but they do not determine the remedy. This is because of section 22 of the *Defamation Act 2005* (Vic), which states that a judge, and not a jury, is to determine damages (in the past, juries did award damages, but the amounts were inconsistent, and sometimes extremely high, so parliament gave judges the task of setting a reasonable amount of damages).

The trial took place over three weeks in the Supreme Court in Melbourne. Wilson gave evidence during the trial and was **cross-examined** by Bauer Media's legal counsel. She broke down while giving evidence about the alleged lies contained in the articles, saying 'this group of people who don't know me want to rip me to shreds on information they know is false'.

The daily events of the trial were reported enthusiastically by the media. Wilson's behaviour during the trial was at times reported to be 'bizarre' (e.g. she briefly rapped an Oscar acceptance speech while giving evidence and told personal anecdotes about her interest in boys).

The defendants denied the allegations made by Wilson on various grounds. Bauer Media argued that Wilson was not fired from her movie roles as a result of the articles. They also denied that Wilson had actually suffered any loss.

Bauer Media raised a number of defences in relation to one or more of the publications. These include the defence of justification and triviality:

- The **justification defence** can be used where a statement is substantially true.
- The **triviality defence** can be used where a defendant believes that the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.

cross-examination
the questioning of a witness called by the other side in a legal case

mediation
a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

conciliation
a method of dispute resolution that uses an independent third party (i.e. a conciliator) to help the disputing parties reach a resolution

arbitration
a method of dispute resolution in which an independent person (an arbitrator) is appointed to listen to both sides of a dispute and to make a decision that is legally binding on the parties. An arbitrator's decision is known as an arbitral award

Methods of dispute resolution and their appropriateness

It is not clear whether the parties attempted to resolve their dispute through **mediation** before the trial. However, the Supreme Court generally requires parties to attend mediation before a trial, so it is possible that mediation occurred. Whatever the case, it is clear that mediation was not successful.

In general, the Supreme Court does not order parties to participate in **conciliation** to resolve a dispute (preferring mediation). Given there was no contract between the parties, the parties would not have been required to participate in **arbitration** to resolve the dispute, unless they agreed to do so themselves.

Since the parties were unable to settle the dispute between themselves, the only available option was to proceed to a trial. In this case, a jury was the decider of facts.

After two days of deliberation, the jury found in favour of Wilson. Juries do not have to provide reasons for their decision, so the reasons why they found in favour of Wilson are not clear.

A jury trial can be an appropriate means of resolving a dispute, and it is often used in defamation cases. A strong argument in favour of using a jury is that a jury ensures that justice is administered in line with community standards, rather than in line with the views of a small number of people (i.e. judges).

The fact that members of the community form the jury and participate in the trial helps to ensure fairness and equality. The decision is made by people who are not connected with any of the parties, which reduces the chances of bias.

Source 5 After two days of deliberation, the jury found in favour of Wilson. Here, Wilson talks to the media after receiving the jury's verdict.

Remedies awarded and their appropriateness

Wilson sought over $7 million in damages (a combination of special damages and general damages), as well as interest and costs. She also sought a permanent injunction to prevent Bauer Media publishing articles of this nature in future.

After her win, Wilson tweeted that she would give any damages awarded to her to charity or scholarships, and that some would be invested back into the Australian film industry.

On 1 July 2017, damages for non-economic loss (i.e. general damages) in defamation proceedings were capped at $389 500 (unless the court allows otherwise). In defamation proceedings, a plaintiff cannot be awarded exemplary damages (i.e. damages aimed at punishing the defendant).

Bauer Media claimed that Wilson had not proved that she had lost money or movie roles as a result of the published articles. The defendants also claimed that because the articles were published in Australia, they had not come to the attention of people in the United States.

On 13 September 2017, Justice John Dixon handed down his judgment. He awarded Wilson $650 000 in general damages (this included aggravated damages) and $3 917 472 in special damages. Special damages were calculated to be 20 per cent of US$15 million for the possible income that Wilson could have received for featuring in films. That amounted to US$3 million. The discount was to take into account the possibility that the lost opportunity was not entirely caused by the defendants.

Did you know?

An earlier Bauer Media publication about Rebel Wilson (published in February 2015) stated that Wilson claimed she was distantly related to Walt Disney by marriage. The defendants wanted to rely on the evidence of a genealogist to prove that this wasn't true. The Judge declined to allow this evidence, saying that whether or not Wilson was related to Walt was not a relevant issue during the trial.

Possible avenues of appeal

Source 6 The appeal route for the Wilson case

Either party was able to appeal the Supreme Court's decision to the Court of Appeal. However, in accordance with section 14A of the *Supreme Court Act 1986* (Vic), the Court of Appeal must give leave (i.e. permission) to appeal the case. All applications for leave to appeal must be filed within 28 days from the date the relevant judgment was handed down.

The defendants appealed the decision to the Court of Appeal. They believed it was important that the amount of damages awarded be reviewed by a higher court. The Court of Appeal reassessed the damages awarded to Wilson and found that the amount for general damages should be reduced to $600 000 (from $650 000).

In relation to special damages, the Court of Appeal concluded that the amount of $3 917 472 should not be awarded at all. The Court found that, among other things, the valuable opportunities that Wilson said existed had not been lost, and that there was not a loss of opportunity to earn US$15 million from being cast in lead or co-lead roles. Therefore, the total amount that Wilson ultimately received in damages was $600 000.

All appeals from the Court of Appeal are heard by the High Court. The High Court has to grant leave to appeal. Wilson sought leave to appeal to the High Court, but leave was refused. That is, the High Court did not find sufficient grounds for it to hear an appeal.

This civil case is now concluded as no further steps can be taken.

The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in the Wilson case is provided below. For each principle, this assessment is made on the evidence available.

Fairness

The principle of **fairness** suggests that the law should be properly applied to all people, regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

Source 7 Rebel Wilson with some of her legal representatives during the trial

In the Wilson case:

- The **directions** and **orders** given by the Supreme Court gave each party **an opportunity to present their case** and to rebut the other side's case. For example, a number of emails were used as evidence about Bauer Media's concerns at the time they decided to publish the articles (e.g. whether there was any risk associated with publishing the articles). Those emails would have been seen by Wilson and her legal team before the trial during the process of **discovery of documents**. The discovery process ensures that relevant documents are not withheld from the plaintiff.
- The **rules of procedure** allowed both sides to present their case. There are general rules of procedure about which party presents their case first at a trial (although the Court has the power to decide on the rules in each particular case). Each party was entitled to, and did, call evidence, make submissions to the Court and address the judge and the jury.
- A jury was the **decider of facts**. The jury was required to **consider the evidence** and the law to come to a **verdict**. However, juries do not have to give reasons for their decisions, therefore it is unclear whether the jury properly considered the evidence, or understood the law, when arriving at a verdict. This may be seen by some to be unfair.
- The laws relating to defamation were properly applied. This includes the fact that the judge decided on the **amount of damages**. This means the most legally experienced person in the courtroom, the judge, decided on the remedy.
- There was a **timely resolution** of the case. The claim was issued in May 2016 and a final judgment was handed down in September 2017. This may be seen as timely considering the complexity and

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

orders
a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

discovery of documents
a pre-trial procedure that requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

size of the dispute. Some, however, may see this as too long to reach a decision, even in this complex case. The impact of a delay can be greater for some parties than for others.

- Both parties had **adequate legal representation**. This assisted in ensuring a fair trial.
- Justice Dixon handed down a number of **rulings** during the trial. For example, the parties had to file **expert evidence** (evidence that is given by a person who is a specialist in their field) by a certain date. The defendants tried to rely on an expert's report that was not filed by this date. Justice Dixon decided that the defendants were not permitted to rely on this particular expert's report, partly because filing the report so late hampered the plaintiff's opportunity to consider the report and to respond to it.

Equality

The principle of **equality** suggests that all people should be equal before the law, regardless of who they are. For equality to be achieved, every person in society who is involved in a civil claim should have the same opportunity to present their case without advantage or disadvantage.

In the Wilson case:

- The judge was required to **act impartially and without bias** and to have no connections with the parties. In overseeing the trial, Justice Dixon was required to make decisions in an unbiased manner.
- The plaintiff and the defendants had experienced **legal representation**. The availability of legal representation to both parties ensures that they equally have the ability to present their case. If one party is unrepresented, this can result in significant inequality between the parties.
- The jurors were required to have had no connection or relationship with the parties, and were required to **decide on the facts** and not on any other matter. However, given the high profile of this case, and the high profile of the plaintiff, it is possible that one or more of the jurors would have known of Wilson or of the publications in question before the trial. This prior knowledge could have influenced the jurors but given they do not have to give reasons for their decision, there is no way of knowing whether any prior knowledge influenced their decision.
- Both parties had the **right to appeal**, which was exercised by both parties.

Access

The principle of **access** suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and to pursue their legal claims in court. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who are eligible for assistance from Victoria Legal Aid can have legal representation for little or no charge. This is essential for parties attempting to navigate their way through complex legal processes.

A civil trial includes strict processes for sharing evidence between the parties, especially for the key documents that are used as evidence in the trial. This helps the legal counsel on both sides to prepare for the trial.

In the Wilson case:

- The use of **mediation** can increase access to justice, as it provides the parties with an alternative method of resolving their dispute other than a trial. However, it is not clear if mediation was used in this case.
- The costs associated with a civil dispute may be a factor in determining whether access to justice can be achieved. In this case, both parties are likely to be out of pocket for their own legal costs. While it is likely that both the parties had the funds to pay for their costs, another person in Wilson's situation may not have been able to **afford the costs** and therefore may not have pursued the case.

Study tip

When you are discussing the principles of justice, it is important that you explain *how* a particular principle of justice is achieved for each point you make. Avoid simply saying 'legal representation achieves equality'. Instead, say something like 'legal representation achieves equality by allowing both parties to present their case through a legal representative'.

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

Did you know?

During the trial, Rebel Wilson made personal remarks about defence counsel Georgina Schoff QC, accusing her of leaking Wilson's financial details. She also said, 'I understand you're being paid per day and you're trying to drag this out as much as possible.' The Judge warned Wilson that the defendants' barrister was 'just doing her job ... she is speaking on her clients' behalf and with their instructions'.

- During the trial, Wilson gave **evidence** in person, in Melbourne. Although courts are using technology (including video links) in cases, most **witnesses** still have to attend a trial in person to give evidence. This can be problematic for people who are unable to attend personally. Although, the Court did allow at least two witnesses, including Wilson's talent agent, to give evidence via video link.
- The trial was conducted by way of an **open hearing**. Open hearings ensure that the parties and members of the community can access information about the way a dispute was resolved, thus ensuring transparency in the process. Open hearings also show members of the community how courts work.
- Justice Dixon's ruling has been made available to the parties and to the public, therefore **ensuring access to the reasons** why the Court made its decision.
- Both parties had a **right to appeal**, therefore allowing access to a higher court to review the lower court's decision. In this case, the Court of Appeal reviewed the Supreme Court's decision, found that the assessment of damages was incorrect, and corrected the amunt of damages awarded to Wilson.

Study tip

Consider this assessment of the extent to which the principles of justice were achieved in this case. Can you think of other ways that fairness, equality and access were achieved?

14.5 CHECK YOUR LEARNING

Define and explain

1 Describe the claim that Wilson made against the defendants.
2 What remedies did Wilson seek? What was the purpose of seeking an injunction as the articles had already been published?
3 Explain the role of each of the following parties in this case:
   a Rebel Wilson
   b Justice Dixon
   c Georgina Schoff QC
   d the jury.
4 Identify one other dispute resolution body that could have heard this dispute. Give reasons for your answer.

Synthesise and apply

5 Identify whether each of the following statements is true or false. Justify your answers.
   a The Magistrates' Court would have first been required to determine whether there was enough evidence for Wilson to succeed.
   b Any income that Wilson could have earned would be compensated through special damages.
   c Only the defendants were entitled to appeal the decision, as they lost the case.
6 Why do you think the claim was made against the publisher and not the journalist who wrote the articles?

Analyse and evaluate

7 Wilson indicated that she would give any damages to charity, scholarships, or to invest back into the Australian film industry. In your view, should damages be awarded if they are not retained by the plaintiff? Give reasons for your answer.
8 'There is no way that a jury would have acted impartially in this case. It was too high profile. A jury should not be used in these sorts of cases.' Engage in a class discussion about this statement. Indicate the extent to which you agree or disagree with the statement.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 14.5 Check your learning
- **Video tutorial** *Wilson v Bauer Media* [2017] VSC 521 (13 September 2017) – overview
- **Weblink** *Wilson v Bauer Media* [2017] VSC 521 (13 September 2017) – judgment
- **Weblink** *Defamation Act 2005* (Vic)
- **Weblink** AustLii

CHAPTER 14

REVIEW

TOP TIPS FROM CHAPTER 14

1 Sometimes you will be asked to discuss whether the principles of justice (fairness, equality and access) were upheld in a particular case and you will only be given limited facts of the case. Try to formulate your response with the facts you have available. For example, state at the start of your answer, 'Based on the facts available …'

2 The *VCE Legal Studies Study Design* requires you to know the 'central facts' of the cases that you study. This is a key skill you develop in Unit 2 and will hold you in good stead if you study Legal Studies Units 3 and 4. Remember that not every fact of a case is central. For example, in the flammable cladding case, the exact location of the tower or names of the parties are not central facts. Start developing your skills in being able to identify which facts are central and which are not.

3 The word 'appropriateness' is used in Unit 2 – Area of Study 2 in relation to methods of dispute resolution and remedies. Appropriateness is how suitable something is; for example, whether mediation is suited to a case or not. Appropriateness is not always about strengths and weaknesses, although the strengths and weaknesses of something can be used as part of a discussion about appropriateness.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Identify** two different dispute resolution bodies that were used in two recent civil cases you have studied in this chapter. For each body, **describe** the role it played in the case.

(6 marks)

Difficulty: medium

2 Were any of the cases you have studied heard and determined by the High Court of Australia? **Explain** why this is so.

(4 marks)

Difficulty: high

3 'Each of these cases shows that nobody wins in a civil dispute, and justice can never be achieved.' **Discuss** this statement, referring to two of the cases in this chapter.

(10 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Part one

You are a journalist reporting on one of the civil cases you have studied in this chapter. You have been asked to appear on a prominent television show addressing the plaintiff's claim, the outcome, and your view on whether justice has been achieved in the case.

Prepare a script of the likely questions and your answers. Make sure the script addresses who the questions are coming from (choose a prominent television show host), what you think their views are likely to be, any challenges they put to you, and your own views on justice.

In particular, your script must address:

1. the central facts of the case, including the parties
2. the nature of the claim and the remedies sought
3. the dispute resolution bodies and methods used
4. the remedies sought and their appropriateness
5. the outcome of the case (if there is any)
6. your views on the extent to which justice was or could be achieved.

Your teacher may require you to submit the script in a written format. Alternatively, you could act the script with the assistance of another class member.

(25 marks)

Part two

You are a journalist who works for a prominent newspaper. Your boss tells you that the newspaper will feature an editorial about recent civil cases, and about whether justice can be achieved in civil disputes.

Your boss asks you to contribute to the editorial by reporting on a recent civil case (a case that is not featured in this chapter). The case must be from the last four years.

You first need to find an appropriate civil case. Possible sources include:

- the Supreme Court of Victoria class action website
- the class action websites of law firms such as Slater & Gordon and Maurice Blackburn Lawyers
- judgments from the AustLII website
- High Court case summaries, located on its website
- good newspaper articles
- media releases on the websites of an organisation that is suing or is being sued.

Your boss tells you that your report needs to focus on all of the following points, but must be prepared in the most succinct way possible, because they have limited space in the editorial. She has asked you to think of the best way to present the information – in dot-point form, as a timeline of events, as a brief snapshot of the case, through pictures or even as a video. She's left the format up to you, noting that it needs to be succinct, brief and to the point.

You must address:

1. the central facts of the case, including the parties
2. the nature of the claim and the remedies sought
3. the dispute resolution bodies and methods used
4. the remedies sought and their appropriateness
5. the outcome of the case (if there is any)
6. your views on the extent to which justice was or could be achieved.

(25 marks)

Total: 50 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 14

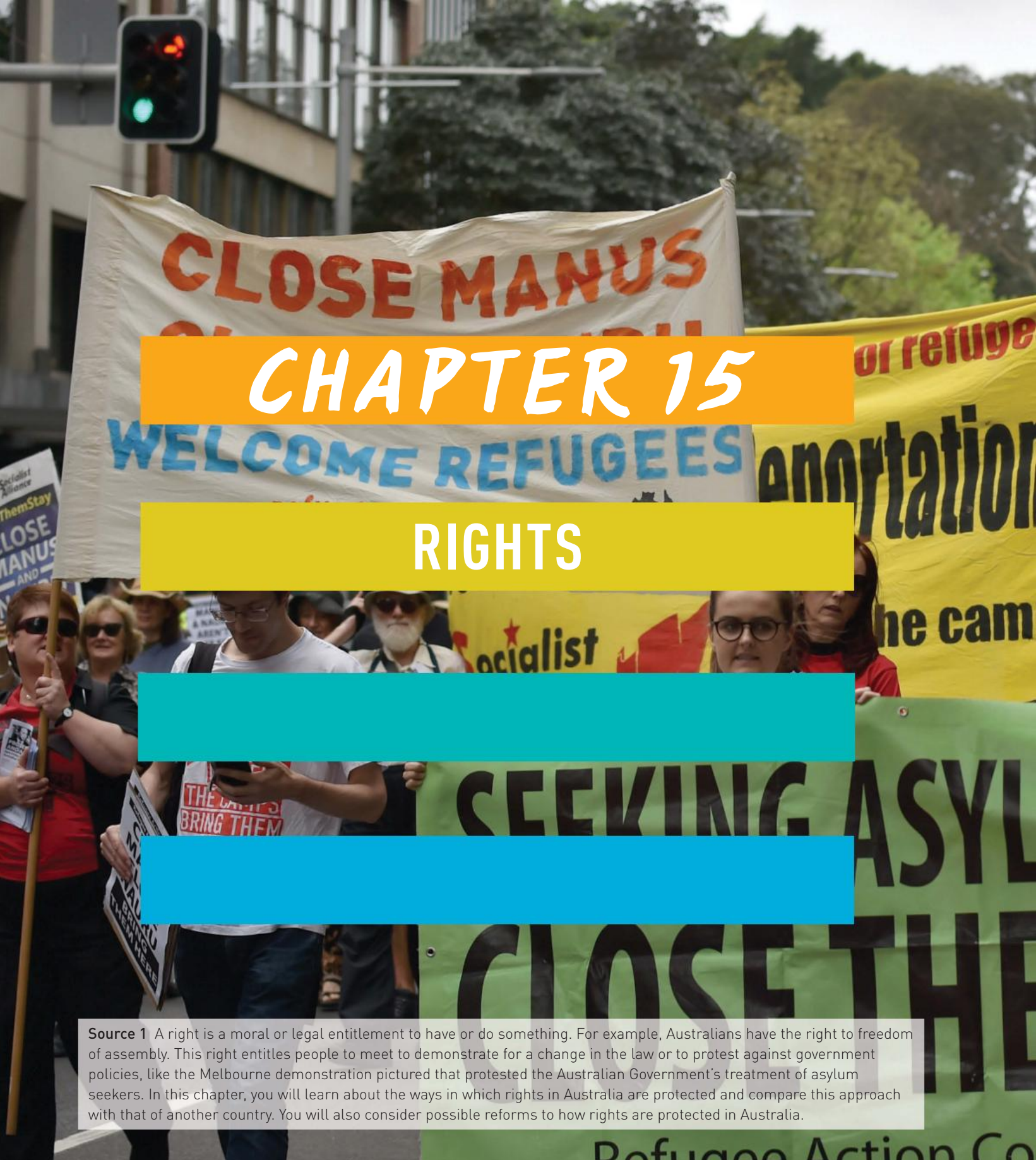
Revision notes
Revision notes for Chapter 14

assess quiz
Chapter 14
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

CHAPTER 15

RIGHTS



Source 1 A right is a moral or legal entitlement to have or do something. For example, Australians have the right to freedom of assembly. This right entitles people to meet to demonstrate for a change in the law or to protest against government policies, like the Melbourne demonstration pictured that protested the Australian Government's treatment of asylum seekers. In this chapter, you will learn about the ways in which rights in Australia are protected and compare this approach with that of another country. You will also consider possible reforms to how rights are protected in Australia.

Check your Student obook assess for these resources and more:

Quizlet
Test your knowledge of this topic by working individually or in teams

Check your Teacher obook assess for these resources and more:

QuizletLive
Launch a game of Quizlet live for your students

OUTCOME

By the end of **Unit 2 – Area of Study 3** (i.e. Chapter 15), you should be able to evaluate the ways in which rights are protected in Australia, compare this approach with that adopted by another country and discuss the impact of an Australian case on the rights of individuals and the legal system.

KEY KNOWLEDGE

In the chapter, you will learn about:

- an overview of the ways in which rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law
- the influence of international declarations and treaties on the protection of rights in Australia
- the approach adopted by one other country in protecting rights
- possible reforms to the protection of rights in Australia
- one Australian case that has had an impact on the protection of rights in Australia, including:
  - –the role of the individual in taking a case to court
  - –the facts and issues central to the case, including the rights in question
  - –the laws that applied to the case
  - –the outcome of the case and its impact on the rights of individuals and on the legal system
  - –possible conflicting attitudes in relation to the case.

KEY SKILLS

By the end of this chapter, you should be able to:

- define and use legal terminology
- research and analyse relevant information about the protection of rights
- compare Australia's approach to the protection of rights with the approach of another country
- evaluate the ways in which rights are protected in Australia
- discuss possible reforms to the protection of rights in Australia
- describe the role of individuals in bringing about changes in the protection of rights through cases
- analyse the impact of a case on the rights of individuals and on the legal system
- apply legal principles to actual cases.

KEY LEGAL TERMS

charter or bill of rights a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

express rights rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

Human Rights Charter the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The main purpose of this Act is to protect and promote human rights

implied rights rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

international declaration a non-binding agreement between countries that sets out the aspirations (i.e. hopes) of the parties to the agreement

international treaty a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

locus standi a Latin term meaning 'standing in a case'; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

statute law law made by parliament, also known as Acts of Parliament or legislation (as opposed to common law)

ultra vires a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

KEY LEGAL CASES

A list of the key legal cases discussed in this chapter is provided on pages vi–vii of this student book.

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Please note

Aboriginal and Torres Strait Islander readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of people who have died.

15.1 INTRODUCTION TO RIGHTS

One of the aims of the Australian legal system is to protect the rights of the Australian people. But what is a right, and what types of rights should be maintained and guaranteed by law?

What is a right?

right
a moral or legal entitlement to have or do something

A **right** is a moral or legal entitlement to have or do something. In other words, a right is a basic freedom or standard that promotes and upholds the dignity of all people, and is guaranteed by a moral sense of duty or by the law.

What people consider to be rights can vary a great deal depending on who they are, what they believe, and what country they live in. Although people's understanding of rights can vary, most rights include some common themes such as the promotion of respect, dignity, equality and justice.

Rights protect basic freedoms. In democratic societies, these basic freedoms generally include:

- the right to life
- the right to access clean water, food and shelter
- freedom from slavery, cruel punishment and **discrimination**
- freedom of speech and religion
- the right to a fair and unbiased legal system
- the right to vote.

discrimination
the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or gender identity). Discrimination can be direct or indirect

The five fundamental freedoms of the Australian people

The Australian Government is responsible for making laws to ensure the wellbeing and protection of all Australians.

In accordance with Australia's commitment to a range of **international treaties**, various Australian Government departments state that all Australians are entitled to five fundamental freedoms. These are:

international treaty
a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

political party
an organisation that represents a group of people with shared values and ideas, and which aims to have its members elected to parliament

- **freedom of speech** – being free, subject to some legal restrictions, to speak or write about any topic, including criticising the government, without fear of being arrested, provided the remarks are true and do not cause harm
- **freedom of association** – being free to join any lawful group or organisation (including **political parties** or trade unions) to discuss and debate views
- **freedom of assembly** – being free to meet with other people in private and public spaces, including meeting in groups to peacefully demonstrate for a change in the law or to protest against government policies
- **freedom of religion** – being free to practise any lawful religion and not have any religion imposed upon them by the government
- **freedom of movement** – generally being free to move from one Australian state or territory to another, and being able to leave and enter Australia at any time.

Source 1 On 10 December 1948, 48 countries agreed to adopt the United Nations' *The Universal Declaration of Human Rights* (1948), a document that sets out the basic human rights for all citizens. Each year on 10 December, many people around the world celebrate International Human Rights Day.

How are the rights of Australians protected?

The rights of Australian citizens are protected in a number of ways, including through:

- **statute law** – the Commonwealth, state and territory parliaments have passed Acts (legislation) to protect a wide range of rights, including passing legislation to uphold international treaties. Victoria, the Australian Capital Territory and Queensland have also passed specific human rights legislation to ensure the protection of basic human rights within their state or territory
- **common law** – over the years, Australian courts have enforced various rights in their judgments and precedents. These include the right to silence (the general right of an accused not to be required to answer police questions or give evidence at their trial) and the right to a fair trial
- the **Australian Constitution** – the Australian Constitution protects a limited number of rights. For example, as explored in this chapter, the Australian Constitution guarantees five express rights of the Australian people, which are specifically written in the Constitution.

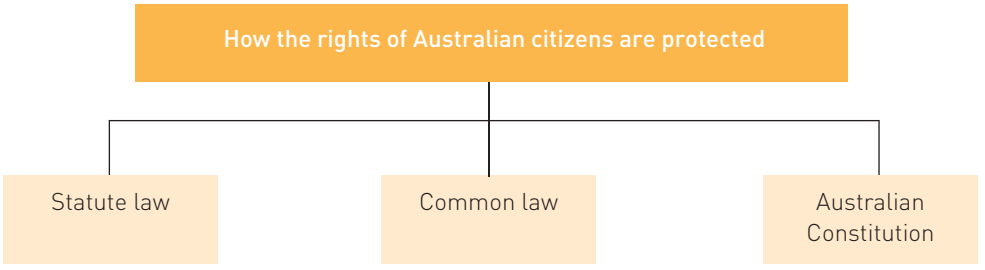
Australia's commitment to the protection of rights is often influenced by **international treaties** and **international declarations**. For example, as one of the founding members of the United Nations, Australia was involved in drafting, and adopted, *The Universal Declaration of Human Rights* (1948) after the end of World War II. This Declaration sets out most of the basic human rights that all nations and governments, including Australia, should strive to promote and uphold. In this chapter, you will examine the way in which Australia protects the rights of its people, including the influence of international treaties and declarations, and consider whether this protection of rights could be improved.

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

Australian Constitution
a set of rules and principles that guide the way Australia is governed. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

international declaration
a non-binding agreement between countries that sets out the aspirations (i.e. hopes) of the parties to the agreement



Source 2 There are three ways in which the rights of Australian citizens are protected.

15.1 CHECK YOUR LEARNING

Define and explain

1 Australians have five fundamental freedoms that are guaranteed by the Australian Government. Describe two of these freedoms.
2 Outline the three main ways that rights are protected in Australia.

Synthesise and apply

3 Using the internet, find a definition and an example of each of the following types of rights:
   a political rights
   b economic rights
   c social rights.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 15.1 Check your learning
- **Video tutorial** Introduction to Chapter 15
- **Worksheet** What are rights?
- **Weblink** *The Universal Declaration of Human Rights* (1948)

15.2

THE PROTECTION OF RIGHTS THROUGH STATUTE LAW AND THE VICTORIAN CHARTER

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

Human Rights Charter
the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The main purpose of this Act is to protect and promote human rights

In this topic, you will explore how the rights of Australians are protected by **statute law**, and how the rights of Victorians are protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic), also known as the **Human Rights Charter**.

Statute law

Most rights in Australia are protected by Commonwealth, state and territory legislation. Over the years, Australian parliaments have passed many statutes (Acts) that outline and protect a broad range of rights. The Commonwealth Parliament has the power to pass legislation that applies to and protects the rights of all Australians. Each state and territory parliament has the power to pass laws that protect the rights of the residents of that state or territory.

Source 1 below provides some examples of rights that are protected by Victorian and Commonwealth legislation.

RIGHTS	EXAMPLES OF LEGISLATION THAT PROTECTS THIS RIGHT
• **The right to privacy** Various Acts regulate the use, storage and disclosure of private information by the government and by private organisations	• *Freedom of Information Act 1982* (Cth) • *Freedom of Information Act 1982* (Vic) • *Privacy Act 1988* (Cth) • *Privacy and Data Protection Act 2014* (Vic)
• **The right to security of person** Many Acts protect the right of Australian citizens to feel secure and safe. These Acts include legislation that defines and prohibits crime, outlines minimum and maximum sanctions for criminal offenders, and aims to prevent and reduce the risk of terrorism	• *Crimes Act 1914* (Cth) • *Crimes Act 1958* (Vic) • *Road Safety Act 1986* (Vic) • *Sentencing Act 1991* (Vic) • *Terrorism (Community Protection) Act 2003* (Vic) • *Child Wellbeing and Safety Act 2005* (Vic) • *Family Violence Protection Act 2008* (Vic)
• **The right to freedom from discrimination** A range of Acts protect individuals from being discriminated against on the basis of race, religion, ethnicity, sex, sexual orientation, gender identity, age, disability and other characteristics in various areas including the workplace, schools, accommodation, and sporting and religious organisations	• *Racial Discrimination Act 1975* (Cth) • *Sex Discrimination Act 1984* (Cth) • *Australian Human Rights Commission Act 1986* (Cth) • *Disability Discrimination Act 1992* (Cth) • *Racial and Religious Tolerance Act 2001* (Vic) • *Age Discrimination Act 2004* (Cth) • *Equal Opportunity Act 2010* (Vic)
• **The right to vote** One Commonwealth Act protects the rights of Australian citizens to vote in elections. One Victorian Act protects the rights of Victorians to vote in elections	• *Commonwealth Electoral Act 1918* (Cth) • *Electoral Act 2002* (Vic)

Source 1 An example of four rights protected by specific state (Victorian) and Commonwealth legislation

Victorian Equal Opportunity & Human Rights Commission

Source 2 The Victorian Equal Opportunity and Human Rights Commission was set up by the Victorian Government to resolve complaints of discrimination and victimisation.

One problem with rights being protected by legislation is that these rights are not permanently guaranteed. That is, as the **supreme law-making body**, parliament can pass legislation to change an existing right that is protected by statute law. This is explored further in the scenario below, which outlines the introduction of the Religious Discrimination Bill 2020 (Cth) to the Commonwealth Parliament.

supreme law-making body
the body (i.e. the parliament) that has the ultimate law-making power, meaning it can make or change any law within its power and pass legislation to abrogate (cancel) common law

Freedom from religious discrimination

ACTUAL SCENARIO

Religious Discrimination Bill 2019 (Cth)

In 2019, the Commonwealth Government, under the leadership of Liberal Prime Minister, Scott Morrison, introduced new legislation, the Religious Discrimination Bill 2019 (Cth), to the Commonwealth Parliament.

This Bill proposes to prohibit (i.e. ban) discrimination, in specified areas, on the grounds of religious belief or activity. For example, under the proposed law, it would be unlawful for an individual or organisation (e.g. an employer or a service provider like a school, hospital, or conference centre) to discriminate against a person for *holding* a religious belief (e.g. for practising and holding beliefs of a particular religion such as Catholicism or Judaism) or for *not holding* a religious belief. For example, the Bill proposes to make it unlawful for an employer to dismiss an employee on the basis of their religious beliefs.

While the Bill was designed to protect the right of individuals to hold religious beliefs, it became controversial because it would have allowed religious-based organisations (e.g. religious schools, hospitals, aged-care facilities, and conference centres) to refuse prospective customers on the basis that the organisation's 'religious beliefs' or ethos needed to be preserved. For example, a conference centre or camp owned by a religious organisation would be able to refuse to allow members of the LGBTIQA+ community to hire their conference centre or camp facilities if they believed the conference attendees would discuss issues that were against its 'beliefs' or ethos.

Opponents of the Bill also claim that the difficulty in defining 'religious beliefs' would lead to an increase in discrimination against individuals, particularly those who are members of minority groups (e.g. LGBTIQA+ people, people with disability, and people from diverse cultural backgrounds). This increased discrimination would occur as religious organisations would be allowed to refuse to accept or employ people who do not uphold or adhere to the faith and religious views of the organisation.

Source 3 Attorney-General Christian Porter and Prime Minister Scott Morison after releasing the second draft of the Religious Discrimination Bill 2019 (Cth) to the public in December 2019

Protecting rights through statute law as a result of international treaties

In addition to passing legislation to protect the human rights that are valued by the Australian people, our Commonwealth, state and territory parliaments also pass human rights legislation to uphold their obligations after Australia becomes a **signatory** to an **international treaty**.

signatory
a state or organisation that has signed an international treaty to demonstrate a nation's intent to adopt the treaty and incorporate it into their law

international treaty
a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

Becoming a signatory to an international treaty demonstrates the intention of the Commonwealth Government to adopt the treaty and incorporate it into Australian law. However, being a signatory to an international treaty is not enough to make its rights and standards part of the signatory nation's law. For that to happen, the signatory nation must specifically pass legislation to approve and adopt the various rights outlined in the international treaty. This is called **ratification** of the treaty. When a nation ratifies a treaty, it is legally bound to accept and implement the rights contained within that treaty.

Over the years, the Commonwealth Parliament has passed various Acts to incorporate the rights and principles included in international treaties into Australian law. For example, in 1975 Australia adopted and ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), which aimed to abolish any laws that discriminated against people on the basis of their race, colour, descent or ethnicity, and to introduce laws and policies that promote racial tolerance and understanding. This was achieved by the Commonwealth Parliament passing the *Racial Discrimination Act 1975* (Cth) to give effect to Australia's obligations under that treaty. This Act was important because it was the first Commonwealth statute to promote equality before the law for all individuals, irrespective of their race, colour, or national or ethnic origin. The Act also made it unlawful to discriminate against people on the basis of their race, colour, descent, or national or ethnic origin.

ratification
confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires it by law to adopt the various rights and responsibilities set out in the treaty

The influence of international treaties on Australia's protection of rights is examined in more detail later in this chapter.

The Victorian Charter of Human Rights and Responsibilities

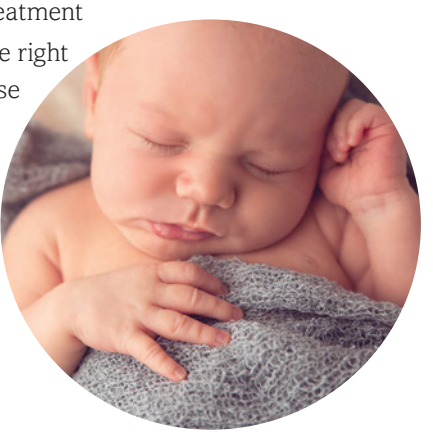
While Australia does not have a national **charter or bill of rights**, the parliaments of Victoria, the Australian Capital Territory and Queensland have each passed an Act to promote and protect the basic rights of the people of that state or territory.

charter or bill of rights
a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

In Victoria, the state parliament has passed the Human Rights Charter, which sets out the basic rights, freedoms and responsibilities of the Victorian people. The Charter requires certain bodies – such as the Victorian Parliament, state and local government departments and organisations (including the Victorian Government Department of Health and Human Services, the Victorian Government Department of Education and Training, VicRoads, Victoria Police and local councils) – and people delivering government services to act in a manner that complies with and upholds the basic human rights in the Human Rights Charter.

The Human Rights Charter outlines 20 basic rights that belong to the Victorian people, including:

- the right to life
- the right to protection from torture and cruel, inhuman or degrading treatment
- freedom of movement (e.g. people who live lawfully in Victoria have the right to leave and return to the state whenever they desire, and can choose where they live)
- freedom of thought, conscience, religion and belief (e.g. people are free to hold their own beliefs and practise a religion of their choice)



Source 4 The Human Rights Charter protects the rights of children and families to ensure they are best protected.

- the right to take part in public life (e.g. people have the right to vote or run as a candidate in state or local government elections).

Among the 20 rights protected by the Human Rights Charter are rights that help to ensure our legal system achieves justice. For example, the Human Rights Charter protects:

- **the right to recognition and equality before the law** – every person must be regarded as equal before the law, is entitled to the equal protection of the law without discrimination, and has the right to equal and effective protection against discrimination
- **the right to a fair hearing** – a person charged with a criminal offence or a person who is a party to a civil proceeding has the right to have their case decided by a competent, independent and impartial court or tribunal. This includes having the right to a fair and public hearing, although in some circumstances a court or tribunal may lawfully exclude members of media organisations, other persons, or members of the general public
- **the right to not be tried or punished more than once** – a person must not be tried or punished more than once for an offence for which they have already been finally convicted or acquitted in accordance with the law, although a re-trial can be ordered in limited circumstances.

The Human Rights Charter also sets out the rights of adults and children in criminal proceedings. For example, all Victorians are entitled to minimum guarantees once they have been charged with committing a criminal offence. These include:

- the right to be provided with **legal aid** if the denial of such assistance would lead to an unfair hearing or trial (provided the accused meets Victoria Legal Aid's eligibility criteria)
- the right to free assistance from an interpreter if necessary
- the right to not be compelled to give evidence against himself or herself (i.e. the right to silence) or to confess guilt.

In addition, any person convicted (found guilty) of committing a criminal offence has the right to have the **conviction** and any sentence imposed reviewed by a higher court (i.e. the right to appeal the decision).

Strengths and weaknesses of statute law in protecting rights

Some of the strengths and weaknesses of statute law (in particular, the Human Rights Charter) in protecting rights are set out in Source 5 below.

STRENGTHS OF STATUTE LAW IN PROTECTING RIGHTS	WEAKNESSES OF STATUTE LAW IN PROTECTING RIGHTS
Parliament can amend statutes to incorporate further rights, particularly as society changes	As the supreme law-making body, parliament can amend statutes, so rights may become limited or no longer exist
Statutes are often detailed and precise, and protect human rights specifically, rather than being implied	Parliament can include limitations or restrictions in statutes, so protected rights are not always absolute
Rights contained in statutes are generally enforceable and need to be recognised by government organisations	Statutes do not always enable a person to be awarded any damages if their rights are breached
Parliament has the ability to pass laws quickly if there is a need to promptly protect additional rights	The rights protected in statute law are not as well protected as rights contained in a constitution, as constitutional rights can only be altered or removed with public approval

Source 5 A summary of the strengths and weaknesses of statute law in protecting rights

Study tip

The *VCE Legal Studies Study Design* requires you to evaluate the ways in which rights are protected. To do this, consider the strengths and weaknesses of the ways in which rights are protected. Then, provide a concluding judgment about the overall benefit or worth of each protection.

legal aid
free or low-cost legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

Did you know?

Up until 1956, a woman employed as a teacher in a public school had to give up her job once she was married, forcing women to choose between their job and being married. In the 1950s, a movement began that ultimately led to this 'marriage bar' being repealed in 1956.

Source 6 The Victorian Human Rights Charter guarantees Victorians freedom of movement. However, this right was temporarily suspended in 2020 when state borders were closed during the COVID-19 pandemic.

15.2 CHECK YOUR LEARNING

Define and explain

1 What is statute law?

2 Explain the relationship between signing a treaty and ratifying a treaty.

3 **a** What is the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Human Rights Charter')?

b Identify five rights that are protected by the Human Rights Charter.

c Describe two rights in the Human Rights Charter that help to ensure the justice system upholds the rights of individuals.

Synthesise and apply

4 Read the scenario 'Freedom from religious discrimination'.

a Explain how the Religious Discrimination Bill 2019 (Cth) proposes to protect individuals and organisations from being discriminated against on the basis of their religious beliefs.

b Suggest how the Bill, if passed, could indirectly increase discrimination against members of minority and disadvantaged groups.

c In a small group, conduct more research about the Bill. Discuss whether you support or oppose the Bill. Propose possible amendments (changes) that could be made to improve the Bill (if any).

5 Prepare a PowerPoint presentation, poster or brochure that identifies and briefly explains the main ways the rights of Australians are protected.

6 Research two Victorian and two Commonwealth Acts that aim to protect the rights of the Australian people. For each Act, briefly summarise the rights it aims to protect.

Analyse and evaluate

7 Use the internet to research one international treaty adopted by Australia. Prepare a report that includes:

a the name of the treaty, when it was created, when it was signed and ratified by Australia, and four other countries that have also adopted the treaty

b the basic rights protected by the treaty

c any Australian legislation that protects the rights contained in the treaty

d a discussion of the extent to which Australia protects the rights guaranteed by the treaty.

8 Evaluate the ability of statute law to protect Australians from discrimination.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 15.2 Check your learning
- **Worksheet** Discrimination laws
- **Weblink** Victorian Equal Opportunity and Human Rights Commission
- **Weblink** *Charter of Human Rights and Responsibilities Act 2006* (Vic)

15.3 THE PROTECTION OF RIGHTS THROUGH COMMON LAW

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

precedent
a principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

common law rights
rights established by judges when making decisions to resolve disputes

In Australia, many rights are protected by **common law**; that is, law that has been established and developed over the years through decisions made by judges in state and federal courts.

Judges can play a significant role in protecting rights when resolving disputes in which there has been an alleged breach of human rights. Judges also have an important role in interpreting the meaning of Commonwealth and state legislation that protects human rights. When giving their decisions in human rights disputes (or possibly other kinds of disputes), judges may establish a legal principle (referred to as a **precedent**) that protects rights. Legal rights that are established in this way are referred to as **common law rights**.

Some of the rights that have been established by the courts overlap with rights contained in statute law. For example, the right to a fair trial is not only protected by statute law, but also by common law.

In this topic, you will explore four ways in which rights can be protected through common law:

- through the courts establishing new rights, independent of what is contained in statute law (known as common law rights)
- through the courts recognising and upholding rights contained in statute law
- where the courts declare that a statute that restricts rights has been made beyond the powers of parliament.

Common law rights

Some examples of common law rights include:

- the right to silence (i.e. the general right of an accused not to have to answer police questions or give evidence and be subject to **cross-examination** during a trial, to protect them against self-incrimination)
- the right to a fair trial (e.g. a court may stay (i.e. stop) a trial from proceeding if it considers the trial to be unfair)
- the right to freedom of movement
- the right to a limited freedom of speech.

cross-examination
the questioning of a witness called by the other side in a legal case

In this topic, we explore the following further rights that have been established by the courts:

- the right to legal representation
- the right of transgender people to marry
- the rights of Indigenous people.

Source 1 The right to silence was established by common law. It ensures that an accused cannot be forced to give evidence that may incriminate them.

The right to legal representation

Being charged with an indictable offence is a serious matter. Many common law cases have recognised the right of an accused to have legal representation (a lawyer) for a criminal trial. In some instances, a judge has adjourned (i.e. paused) a trial to give an accused time to access legal representation.

The right of an accused to have legal representation was recognised by the High Court in *Dietrich v The Queen*. This case is discussed in the scenario on the following page.

ACTUAL SCENARIO

The right to legal representation

Dietrich v The Queen (1992) 177 CLR 262

In December 1986, Olaf Dietrich was charged with smuggling 70 grams of heroin into Australia. Before his trial, Dietrich applied for legal assistance from **Victoria Legal Aid** but was told he would not receive legal assistance unless he agreed to plead guilty. Dietrich did not want to plead guilty and so his case went to trial without him having legal representation. Dietrich was found guilty of three charges and sentenced to a term of imprisonment.

After the verdict, Dietrich lodged an **appeal** in the Supreme Court. This was denied. Ultimately, Dietrich appealed to the High Court. The High Court ruled that Dietrich had a right to a fair trial and that this right was breached because he had no legal representation. In its ruling, the High Court upheld the principles outlined in the *International Covenant on Civil and Political Rights* (1966) and established a common law right (through its judgment) that an individual who is charged with a serious offence has a right to legal representation. The High Court also ruled that a trial judge can delay a trial until a person charged with a serious offence has a lawyer.

Source 2 Olaf Dietrich was charged with smuggling 70 grams of heroin into Australia.

Interestingly, in 2009, 23 years after he was charged with importing heroin, Dietrich (who was by this time aged 52 years old and had changed his name to Hugo Rich) was sentenced to life imprisonment with a non-parole period of 30 years. Dietrich was found guilty of murdering a security guard during an armed robbery at Blackburn North Shopping Centre in Melbourne's eastern suburbs (*R v Rich* [2009] VSC 515 (13 November 2009)).

Victoria Legal Aid
a government agency that provides free legal advice to all members of the community and low-cost or no-cost legal representation to some people who cannot afford a lawyer

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

The right of transgender people to marry

In a 2003 case, the Family Court of Australia had to consider whether a person who was born as female, and who had full gender reassignment surgery to transition to male, was considered to be a man for the purposes of Australian marriage laws (which at the time banned same-sex marriage). The ruling in this case, explored in the scenario below, was important in relation to establishing the rights of transgender people to marry.

ACTUAL SCENARIO

The Kevin and Jennifer case

Attorney-General for the Commonwealth v Kevin & Jennifer (2003) 172 FLR 300

In this well-known case, the Full Court of the Family Court of Australia made a ruling that helped establish the rights of transgender people.

In 1999, Kevin and Jennifer married. Kevin was registered at birth as female, although after identifying as male from an early age, Kevin underwent gender reassignment surgery to fully transition to a man in 1997. The Commonwealth Government (through the federal Attorney-General) challenged the validity of their marriage in the Family Court on the basis that Kevin – despite undergoing successful gender reassignment surgery prior to their marriage – was not a man for the purposes of the *Marriage Act 1961* (Cth). This would have made their marriage invalid as, at the time of the case, same-sex marriages were not recognised as valid marriages.

In October 1999, the couple had their marriage validated (confirmed) by the Family Court. The Commonwealth Government appealed the decision.

In 2003, the Full Court of the Family Court dismissed the Attorney-General's appeal and upheld the validity of Kevin and Jennifer's marriage. The Court ruled that the meaning of the term 'man' for the purpose of the *Marriage Act* was a person who was a man at the time of the marriage, including a post-operative transgender person. In doing so, the Court established the right of post-operative transgender people to lawfully marry in Australia.

Interestingly, it took until 2017 for the *Marriage Act* to be challenged to allow for marriage equality (i.e. to allow same-sex couple to marry).

Source 3 The Kevin and Jennifer case was a landmark case for the rights of transgender people.

The rights of Indigenous people

Over the years, a number of High Court cases have established and developed the rights of Aboriginal and Torres Strait Islander peoples. Most recently, in 2020, the High Court considered whether Indigenous Australian people were subject to Commonwealth immigration laws. The High Court's ruling in the case, explored in the scenario below, is significant because it recognises the rights of Indigenous Australians, and what it means to be Indigenous and connected to the land.

ACTUAL SCENARIO

High Court rules on deportation of Indigenous Australians

Love v Commonwealth; Thoms v Commonwealth [2020] HCA 3 (11 February 2020)

In this landmark case, the High Court of Australia clarified and expanded the rights of Indigenous Australians by ruling that they have a sense of identity and belonging to Australia that cannot be changed or denied by the Commonwealth Parliament. In having an undeniable connection to the land, Indigenous Australians cannot be considered to belong to another place. Therefore, they cannot be subject to Commonwealth immigration laws and cannot be deported from Australia.

This case – which required the High Court to consider what it means to be an Indigenous Australian – arose after two Indigenous men, who had been convicted of serious (indictable) offences, faced being deported from Australia by the Australian Government. This was because, although they were Indigenous Australians, they were both born overseas and only held permanent residency visas, despite having lived in Australia since they were children. After they had been found guilty of committing serious criminal offences, the Australian Government – relying on its constitutional power to make laws relating to immigrants – commenced proceedings to cancel the two men's visas and deport them to the country of their birth.

However, the two men challenged the Australian Government's decision to deport them on the basis that, despite being born overseas, they were Indigenous Australians and therefore

could not be considered to be immigrants (or 'aliens', being the term used in the Australian Constitution). Therefore, they could not be deported.

Four of the seven High Court justices agreed that Indigenous Australians cannot be considered to be immigrants (or 'alien' to Australia) because they have an undeniable connection to the land, and a sense of 'kinship' and ancestry that cannot be extinguished or denied. As such, Commonwealth immigration laws, including deportation laws, cannot apply to Indigenous Australians because they cannot be considered to belong to another place.

Upholding rights contained in statutes

In addition to creating common law rights, the courts can also recognise and uphold the various rights are available to people under statute law, including the Human Rights Charter. These rights include the right to equality before the law, and the right to effective protection against discrimination.

In the case explored in the scenario below, the Supreme Court of Victoria ruled that holding youth offenders at Barwon Prison (an adult prison) was a breach of children's rights, which are protected by various statutes, including the Human Rights Charter.

ACTUAL SCENARIO

Holding children at Barwon Prison breaches rights

Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families & Children (2016) 51 VR 473

In November 2016, a group of approximately 40 teenage offenders were transferred to Barwon Prison (a maximum-security prison for adult men). This transfer occurred after a group of youth offenders held at the Melbourne Youth Justice Centre damaged sections of the facility during riots that took place over an 18-month period.

In December 2016, the Supreme Court of Victoria ruled that the Victorian Government's policy to detain children who had committed serious offences at Barwon Prison was a breach of the children's rights.

During the case, the children's lawyers alleged that some of the children held at Barwon Prison were locked in their cells for up to 23 hours a day and were handcuffed during the one hour a day they were released from their cells. It was also alleged that some children suffered bruising from an overuse of force by the prison's security officers.

Source 4 In 2016, a Supreme Court justice ruled that holding youth offenders at Barwon Prison (an adult prison) was a breach of their rights and was unlawful.

The Victorian Government claimed it had no option other than housing some young offenders at Barwon Prison – in a section of the prison that is completely separate from the adult section of the prison – after the series of riots had left sections of the Melbourne Youth Justice Centre damaged, and because all other youth facilities were full.

In his judgment, Supreme Court Justice Garde ruled that the decision to transfer young offenders to Barwon Prison for 'emergency accommodation' did not take into account various rights of children as outlined in the *Children, Youth and Families Act 2005* (Vic) and the Human Rights Charter, and as such was unlawful. This decision was upheld by the Court of Appeal.

Declaring Acts to be invalid

The courts can protect the rights of the Australian people by using their power to declare that Acts are invalid if they are made outside or beyond the parliament's law-making powers (i.e. ***ultra vires***).

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

For example, if the Commonwealth Parliament passes an Act that is beyond its law-making powers (which are outlined in the Australian Constitution), the party who alleges their rights have been breached may challenge the legislation in the High Court of Australia. The High Court can declare the legislation to be invalid if it considers the Act to have been made outside the Commonwealth Parliament's powers. Furthermore, parliament cannot override any ruling made by the High Court in relation to constitutional matters. As we examine later in this chapter, the High Court can also declare legislation to be invalid if the Act breaches a right protected by the Australian Constitution.

In 2020, when the various parliaments in Australia passed laws restricting the movement of Australians to prevent the spread of a new coronavirus, COVID-19, questions were raised about whether any of the laws were beyond the law-making powers of parliament, or whether they were inconsistent with the Human Rights Charter. For example, in May 2020 a group of tourism operators challenged the decision of the Queensland Government to close the Queensland borders. The operators claimed the closure breached section 92 of the Australian Constitution, which guarantees that trade, commerce and intercourse (travel) between the states shall be absolutely free. At the time of writing, this case was still before the Court.

Codification or abrogation of court decisions

Court judgments (i.e. precedents) that establish, uphold or recognise human rights can be **codified** (i.e. confirmed) by parliament. This means that parliament passes legislation that reinforces and endorses the legal principles established by a court in its ruling.

codify (codification)
to collect all law on one topic together into a single statute

For example, in 1993, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth) to reinforce and enshrine the principles established in the case of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('Mabo case'), which recognised land rights for Indigenous Australians. The Mabo case is examined in more detail later in this chapter.

As the supreme law-making body, parliament may be able to **abrogate** (cancel) human rights that have been established in common law, although it cannot override rights established in High Court matters involving the interpretation of the Australian Constitution.

abrogate (abrogation)
to cancel or abolish a court-made law by passing an Act of Parliament

Strengths and weaknesses of common law in protecting rights

Some of the strengths and weaknesses of common law in protecting rights are summarised in Source 5 below.

STRENGTHS OF COMMON LAW IN PROTECTING RIGHTS	WEAKNESSES OF COMMON LAW IN PROTECTING RIGHTS
Courts are independent of parliament and can establish precedent free from political pressures	Common law rights are not always easy to define or identify (as opposed to statutory rights)
Courts can make decisions to establish rights in areas where parliament has not established rights	Courts must wait for a case to come before them to be able to declare the existence of rights
Courts are able to infer rights without needing to consider how those rights may need to be limited	Parliament, as the supreme law-making body, can abrogate common law rights
Courts are able to highlight to parliament gaps in the law that protects rights, which may encourage parliament to change the law to further protect rights	Often courts are reluctant to recognise certain rights (e.g. the right to privacy), leaving it up to parliament to protect those rights
Historically, courts have been able to protect rights and parliament has not overly interfered with common law rights by abrogating them	Judges are limited in applying the law to the case that is before them and cannot extend their decision to rights or issues that are not in dispute in the case

Source 5 A summary of the strengths and weaknesses of common law in protecting rights

Source 6 In Australia, many of our rights are protected by common law. Common law is established and developed over the years through decisions made by judges in state and federal courts such as the County Court in Victoria.

15.3 CHECK YOUR LEARNING

Define and explain

1 Define the terms 'abrogate' and '*ultra vires*'.

2 Read the scenario *Dietrich v The Queen*.
   - **a** What offence was Olaf Dietrich charged with in 1986?
   - **b** On what grounds did Dietrich lodge an appeal against his conviction?
   - **c** What was the High Court's ruling? Identify the international treaty the Court ruled had been infringed.

Synthesise and apply

3 Read the scenario *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children*.
   - **a** State the names of the parties in this case.
   - **b** Outline the basic facts of the case and identify the Acts that were allegedly infringed.

4 Read the scenario *Attorney-General for the Commonwealth v Kevin & Jennifer*.
   - **a** Explain why Kevin and Jennifer believed their rights had been infringed.
   - **b** Describe the ruling of the Family Court.
   - **c** Discuss the Family Court's ability to establish the rights of people to marry.

5 Read the scenario *Love v Commonwealth*; *Thoms v Commonwealth*.
   - **a** Explain why the government believed it had the right to deport the two Indigenous Australian men.
   - **b** Describe the ruling of the High Court and its impact on the rights of Indigenous Australians.

Analyse and evaluate

6 Examine one feature of the relationship between the courts and parliament in relation to protecting rights.

7 Discuss the extent to which common law can protect the rights of Australians.

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- **Student book questions** 15.3 Check your learning
- **Video** Free speech
- **Video worksheet** Free speech
- **Weblink** Rights and freedoms under common law

15.4 THE PROTECTION OF RIGHTS THROUGH THE AUSTRALIAN CONSTITUTION

The Australian Constitution (formally referred to as the *Commonwealth of Australia Constitution Act 1900* (UK)) is one of the most important documents in Australia's legal system. The Constitution outlines how Australia is to be governed. In addition to creating and outlining the structure and law-making powers of the Commonwealth Parliament, the Constitution also establishes some basic rights for Australian citizens. However, the Australian Constitution does not contain a charter or bill of rights; that is, a comprehensive list of the basic rights of the Australian people.

The Constitution protects the rights of the Australian people in two main ways, being through:

- express rights, and
- implied rights.

express rights
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australian people in a public vote by a double majority

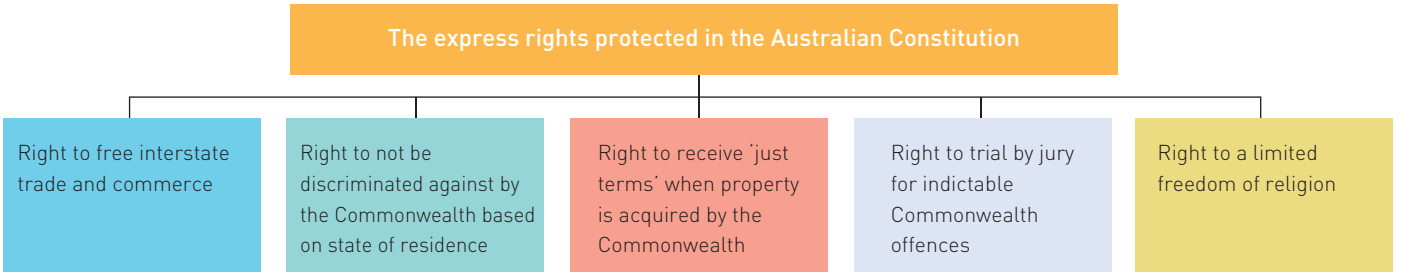
double majority
a voting system that requires a national majority of all voters in Australia and a majority of electors in a majority of states (i.e. at least four states) to vote in favour of a proposal. A double majority is required for a change to be made to the wording of the Australian Constitution at a referendum

Express rights

The Australian Constitution protects five **express rights** of the Australian people. An express right is explicitly stated (or entrenched) in the wording of the Constitution. It can only be removed or altered by changing the wording of the Constitution. In Australia, the Constitution can only be changed through a successful **referendum**. This differs from rights that exist in common law or in statute law, which can be abolished or altered at any time by parliament passing a law to override them.

The five express rights protected in the Australian Constitution are:

- **the right to free interstate trade and commerce (section 92)** – this right ensures that trade and commerce between the states and territories is free. For example, it restricts the imposition of taxes on goods moving from one state to another
- **the right to not be discriminated against by the Commonwealth on the basis of the state where you reside (section 117)** – this right makes it unlawful for the Commonwealth to discriminate against someone based on the state in which they live. This means, for example, that residents of Victoria cannot be subject to a Commonwealth law that would treat them less favourably that people living in New South Wales
- **the right to receive 'just terms' when property is acquired by the Commonwealth (section 51(xxxi))** – this right ensures that the Commonwealth pays fair and reasonable compensation for any property that they compulsorily acquire (or gain). Also, the Commonwealth can only obtain property for a purpose or area for which it has the power to make laws (e.g. for airports)
- **the right to a trial by jury for indictable Commonwealth offences (section 80)** – this right ensures that people who are charged with indictable (serious) Commonwealth offences (e.g. terrorism offences, people smuggling, and importing illegal drugs) have a trial by jury
- **the right to freedom of religion (section 116)** – this right provides citizens with a limited right to freedom of religion. This right prohibits the Commonwealth from making laws that establish a religion or that ban people from practising their religion.



Source 1 The Australian Constitution protects five express rights.

Focus on the freedom of religion

Section 116 of the Australian Constitution provides the Australian people with a limited right to freedom of religion. This section prevents the Commonwealth Parliament from passing a law that:

Source 2 The Australian Constitution protects the right of Australians to practise their religion.

- establishes a state religion (i.e. it cannot declare a particular religion as the official national religion)
- imposes any religious observance (i.e. requires people to recognise a religious ceremony or formality)
- prohibits the free exercise of any religion (i.e. prevents people from practising their religion, although this can be limited in situations where the practising of a religion may breach Australian law or threaten national security)
- requires a religious test as a requirement for holding any Commonwealth office (e.g. working as a member of the Australian Federal Police).

An extract from section 116 of the Australian Constitution is provided below.

Did you know?

The iconic Australian film, *The Castle* (1997), was based on a fictional story about the Kerrigan family's property, which was to be compulsory acquired by the Commonwealth to expand Melbourne's airport. The film provides a quirky and insightful look into the constitutional protection of the acquisition of property.

EXTRACT

Commonwealth of Australia Constitution Act 1900 (UK) – section 116

Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Section 116 of the Australian Constitution only protects freedom of religion to a limited extent because it only applies to and restricts the powers of the Commonwealth Parliament with respect to religion. It does not apply to the parliaments of the states or territories.

Over the years, when resolving disputes in which individuals or organisations have alleged that Commonwealth law breaches the express right to freedom of religion, the High Court has interpreted the meaning of 'religion' in different ways. For example, in the 1943 case of *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, the High Court broadly interpreted the meaning of section 116 by ruling the term 'religion' to include non-believers and provided for the right of a person 'to have no religion'.

By contrast, in other cases, the High Court has interpreted other parts of section 116 narrowly. This occurred in *Attorney-General (Vic); Ex Rel Black v Commonwealth*, where the High Court ruled that the Commonwealth Government can provide funding to religious schools. This case is explored further in the scenario on the following page.

The Defence of Government Schools (DOGS) case

ACTUAL SCENARIO

Attorney-General (Vic); Ex Rel Black v Commonwealth (1981) 146 CLR 559

In this case (known as the 'DOGS case') the plaintiffs claimed that legislation passed by the Commonwealth Parliament that allowed the Commonwealth Government to give financial assistance to non-government schools in Australia's states and territories was invalid. The plaintiffs claimed that giving money to independent schools (including religious schools) was in breach of section 116 of the Constitution, which bans the Commonwealth from establishing any religion or imposing any religious observance.

In its decision, the High Court reinforced the right to freedom of religion and confirmed that the Commonwealth cannot establish a religion. However, the High Court ruled that the legislation was valid. The High Court also ruled that allowing the Commonwealth Government to give grants (money) to the states to be used to provide financial assistance to non-government schools did not breach the right to freedom of religion as stated in section 116.

More precisely, the High Court ruled that there was no religious inequality, because the grants did not differentiate between different schools based on religion. Therefore, the High Court's decision allowed the Commonwealth to give financial assistance to non-government schools, including religious schools.

Implied rights

An **implied right** is a right that is not explicitly stated in the wording of the Australian Constitution. However, it is considered (or implied) to exist by the High Court's interpretation of the Constitution's meaning.

The High Court is able to imply the existence of rights when resolving disputes between individuals and the state or Commonwealth governments over the meaning of the Constitution. When resolving a dispute over whether or not the Constitution protects a particular right, the High Court justices can decide that a word or phrase within the Constitution implies that a right exists even though it might not be explicitly stated. For example, although the Constitution does not explicitly state that Australians have the right to freely discuss and debate political issues, referred to as the **freedom of political communication**, in various cases throughout the years, the High Court has decided that this freedom is implied in the Constitution.

implied rights
rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

freedom of political communication
the right of the Australian people to freely discuss and debate political issues, subject to certain restrictions

Focus on the freedom of political communication

The High Court has ruled that sections 7 and 24 of the Constitution, which expressly require the houses of the Commonwealth Parliament (i.e. the **Senate** and the **House of Representatives**) to be 'directly chosen by the people', indirectly implies the existence of freedom of political communication. This is because, for citizens to make an informed decision to elect members of parliament, they must be able to obtain information about the political views and opinions of the candidates. In other words, both candidates and citizens must be able to make and discuss political statements and issues (i.e. freely communicate with one another about political issues).

The first case to recognise the implied freedom of political communication was *Australian Capital Television Pty Ltd v Commonwealth*. This case is discussed on the following page.

Senate
the upper house of the Commonwealth Parliament

House of Representatives
the lower house of the Commonwealth Parliament

ACTUAL SCENARIO

High Court implies the freedom of political communication

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

In this case, the High Court was required to determine whether the Commonwealth Parliament's *Political Broadcasts and Political Disclosures Act 1991* (Cth) – which banned individuals and organisations from making political broadcasts and from advertising on radio and television during election campaigns – was unfair and in breach of the Australian Constitution.

The justices of the High Court ruled that while our Constitution does not expressly mention or protect the right to freedom of speech, it does (in sections 7 and 24) recognise that the Australian parliamentary system is based on the principle of **representative government**, which requires freedom of political communication. In accordance with the principle of representative government, the parliament must make laws that reflect the views and values of the people. This means that Australians should be able to advertise and discuss their views, policies and opinions in a public forum (e.g. on television or radio) prior to an election so that voters can make an informed decision when electing the government.

representative government
a political system in which the people elect members of parliament to represent them in government

Once a right is implied by the High Court, it may be made clearer or confirmed in later cases. For example, the freedom of political communication implied in the Australian Capital Television case was considered again in two High Court cases: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96. These cases confirmed the existence of the right to political communication. The Theophanous case extended the implied right to allow comments about members of parliament and their suitability for office. The Lange case went further, stating that **the right to freedom of political communication exists at all times, not just prior to an election**. This right is not a general right to free speech, but only a right to free communication on matters relating to political issues.

The High Court has ruled in various cases that Australians have freedom of political communication. But should this right be unlimited (i.e. absolute)?

While we have a right to freely discuss and debate political issues, some people think that we should not have the right to make cruel or offensive public comments on political issues such as same-sex marriage, adoption, abortion, or euthanasia. In other words, they believe the freedom of political communication should be restricted.

Other people believe the right to free political speech should never be restricted. They generally argue that free speech has a higher value than people's hurt feelings.

However, in various cases, the High Court has decided that the implied freedom of political communication can be restricted when it is reasonable to do so (e.g. if it offends against a person's privacy, or if the communication ruins a person's reputation).

The scenario on the next page is an example of the High Court making a ruling involving the right of an anti-abortion protestor to protest outside a fertility clinic that performs, among other services, lawful pregnancy terminations.

Source 3 Euthanasia, also known as voluntary assisted dying, is one highly debated political issue in Australia. In 2017, Victoria became the first state to pass legislation for voluntary assisted dying for the terminally ill.

Anti-abortion protesters restricted

ACTUAL SCENARIO

Clubb v Edwards; Preston v Avery (2019) 366 ALR 1

In this 2019 case, the High Court had to decide whether laws that prevent anti-abortion protestors from demonstrating within 150 metres of fertility clinics – clinics that provide, among other health services, lawful pregnancy terminations (i.e. abortions) – were invalid because they breached the constitutionally implied freedom of political communication.

The case arose after the Victorian and Tasmanian governments passed legislation banning anti-abortion protestors from being (and/or demonstrating) within 150 metres of fertility clinics (these laws are known as the 'safe access zone' laws). These laws aim to protect clients and staff of fertility clinics from being intimidated and harassed by anti-abortion protesters, who regularly wait outside fertility clinics to urge women not to proceed with terminations.

After being charged and convicted under the state safe access zone laws, two anti-abortion protesters (one in Victoria and one in Tasmania) challenged the validity of the state legislation. Their challenge was based on the argument that the safe access zone laws breached the implied freedom of political communication by impeding their right to publicly express their views on a political issue (i.e. abortion).

In April 2019, the High Court rejected the appeal lodged by the anti-abortionists and ordered them to pay the opposing parties' costs. In making this ruling, the High Court confirmed that while Australians have freedom of political communication, this does not give individuals and groups the right to force political messages on other people if that message is 'inconsistent with the human dignity of that person'. In particular, the High Court established a test to determine whether a statute impacted disproportionately on the implied freedom of communication.

Source 4 In 2019, the High Court upheld the validity of Victorian legislation that bans anti-abortion activists from protesting within 150 metres of fertility clinics.

Enforcement of constitutional rights

All rights protected by the Australian Constitution are fully enforceable by the High Court. If a party (e.g. an individual or state government) believes the Commonwealth Parliament has passed legislation that infringes a constitutionally protected right, they can challenge the law in the High Court.

When resolving disputes about an alleged breach of a right protected by the Constitution (i.e. any express or implied right) the High Court can declare the Commonwealth's law unconstitutional and invalid.

If the High Court declares legislation to be invalid, the parliament's options are to:

- amend the legislation to remove the unconstitutional provisions (or sections)
- try to change the Constitution by holding a referendum or public vote – according to section 128 of the Constitution, this is the only way its actual wording can be changed.

Strengths and weaknesses of the Australian Constitution in protecting rights

Some of the strengths and weaknesses of protecting rights through the Australian Constitution are set out in Source 5 on the next page.

STRENGTHS OF THE AUSTRALIAN CONSTITUTION IN PROTECTING RIGHTS	WEAKNESSES OF THE AUSTRALIAN CONSTITUTION IN PROTECTING RIGHTS
Express rights cannot be changed unless through a referendum; that is, with the support of registered voters via a public vote	Rights contained in the Constitution are difficult to change due to the referendum process. Therefore, rights may lag behind changes in community attitudes
The implied freedom of political communication shows that rights can be implied or recognised by the High Court even though they may not be expressly written in the Constitution	Very few rights are expressly protected by the Constitution. The rights that are expressly protected are very limited in scope (e.g. the limited right to a trial by jury) and act more as a restriction on parliament than a positive right
All rights protected by the Constitution are fully enforceable through the High Court, and any statute found to breach those rights can be declared invalid	It is expensive and time-consuming to take a case to the High Court to challenge a statute that breaches a right contained in the Constitution
The High Court can interpret the meaning of the words and phrases in the Australian Constitution so it can keep pace with changes in community values and remain relevant over time	The High Court cannot interpret the meaning of the Constitution and declare an infringement of rights until a case is brought before it

Source 5 A summary of the strengths and weaknesses of the Australian Constitution in protecting rights

15.4 CHECK YOUR LEARNING

Define and explain

1 Define the following key terms and provide an example of each:
   - **a** express rights
   - **b** implied rights.

2 What is the principle of representative government? How does this principle protect the rights of the Australian people?

3 Explain how an independent High Court is able to protect the rights of the Australian people.

4 Identify two rights that are explicitly stated in the Australian Constitution. Describe how these rights can be altered.

Synthesise and apply

5 Read the scenario *Attorney-General (Vic); Ex Rel Black v Commonwealth*.
   - **a** Explain how this case is relevant to the protection of constitutional rights.
   - **b** Explain the significance of the case in relation to the protection of rights in Australia.

6 Describe the implied freedom of political communication. Do you agree with the decision in *Australian Capital Television Pty Ltd v Commonwealth*? Give reasons for your response.

7 Read the scenario *Clubb v Edwards; Preston v Avery*.
   - **a** Describe the basic facts of this case. In your response, explain why the anti-abortionists pursued this High Court action.
   - **b** Explain whether the High Court ruling expanded or restricted the freedom of political communication.
   - **c** Do you think anti-abortion protestors should be allowed to protest outside fertility clinics? Justify your response.

Analyse and evaluate

8 Evaluate the ability of the Australian Constitution to protect rights through express rights.

9 'Statute law is a better way to protect rights than the Australian Constitution.' Do you agree with this statement? Justify your answer.

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Student book questions
15.4 Check your learning

Actual scenario
Attorney-General (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1

Weblink
Lange v Australian Broadcasting Corporation (1997) 145 ALR 96

15.5 INTERNATIONAL TREATIES, DECLARATIONS AND THE RIGHTS OF AUSTRALIANS

Increasingly, we live in an interconnected world where the actions of people living in one or a few countries can have a global impact. For example, increased trade and a greater ability to communicate and travel mean that a natural disaster, an armed conflict or economic downturn that occurs in one country can significantly affect the rest of the world. More than any other time in history, the issues and problems we face – like climate change, terrorism, and humanitarian and health emergencies – must be addressed at a global level. One way that nations can work together to tackle these global threats and issues is through signing and adopting international treaties and declarations.

United Nations (UN) an international organisation formed in 1945 made up of various countries. The UN aims to take action on issues facing humanity

international treaty a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

signatory a state or organisation that has signed an international treaty to demonstrate a nation's intent to adopt the treaty and incorporate it into their law

ratification confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires it by law to adopt the various rights and responsibilities set out in the treaty

international declaration a non-binding agreement between countries that sets out the aspirations (i.e. hopes) of the parties to the agreement

Source 1 The **United Nations** General Assembly in New York, 2016

What are international treaties and declarations?

International treaties

An **international treaty** is an agreement between countries (or other organisations, such as the World Bank) to be bound by international law. When a nation signs a treaty (referred to as becoming a **signatory**), the nation demonstrates its intention to adopt the treaty and incorporate its requirements and conditions into the nation's law. However, the requirements and conditions of a treaty do not become part of a nation's law until the treaty has been **ratified**. This means the nation's parliament must pass specific legislation to give effect to the obligations of the treaty and to make the obligations a legally binding part of the nation's law.

International declarations

An **international declaration** is a document that outlines a set of standards that nations (or other organisations, such as the World Bank) voluntarily agree to, but are not legally bound to uphold or implement. An international declaration sets out certain 'aspirations' or 'intentions' of the parties to the agreement. Countries can include those aspirations or intentions in their own law. A declaration can lead to a treaty being made on the topic.

Study tip

In your responses to assessment task questions, you can use acronyms, but make sure you first define the acronym, as many are not universally known. You can do this by writing out the full name of the word or phrase first, then putting the acronym in brackets. For example, the *International Covenant on Civil and Political Rights* (ICCPR).

Examples of declarations and treaties supported by Australia

Over the years, as part of its commitment to global peace and security, Australia has signed and ratified a number of major international treaties, and supported a number of declarations. While many of these treaties and declarations are trade agreements, many also involve the protection of human rights and the environment.

Some of the international treaties and declarations related to human rights that Australia has supported are listed in Source 2 below. Source 2 includes the general purpose of each international treaty or declaration. Also provided are examples of legislation that have been passed by the federal and Victorian parliaments to incorporate the rights contained in treaties and declarations into Australian law.

INTERNATIONAL DECLARATION OR TREATY	PURPOSE OF THE DECLARATION OR TREATY	CORRESPONDING AUSTRALIAN LEGISLATION
The Universal Declaration of Human Rights (1948)	This declaration sets out the basic human rights that all nations, governments and people should strive to uphold and promote. It includes: • the right to life, liberty and security of person • the right to not be held in slavery or subjected to torture or to cruel, inhuman or degrading treatment or punishment • the right to be treated equally before the law • the right to a fair and public hearing by an independent and impartial tribunal • the right to seek asylum from persecution in other countries • the right to freedom of opinion and expression.	• *Crimes Act 1958* (Vic) • *Migration Act 1958* (Cth) • *Criminal Code Act 1995* (Cth) • *Charter of Human Rights and Responsibilities Act 2006* (Vic)
Convention on the Rights of the Child (1989)	This treaty aims to protect the rights of all children. Australia ratified this treaty in 1990. However, our Commonwealth Parliament and Commonwealth Government have been criticised for breaching this treaty (e.g. by allowing refugee children to be detained in detention centres).	• *Migration Act 1958* (Cth) • *Family Law Act 1975* (Cth) • *Australian Human Rights Commission Act 1986* (Cth) • *Child Wellbeing and Safety Act 2005* (Vic) • *Working with Children Act 2005* (Vic) • *Charter of Human Rights and Responsibilities Act 2006* (Vic) • *Commission for Children and Young People Act 2012* (Vic)

INTERNATIONAL DECLARATION OR TREATY	PURPOSE OF THE DECLARATION OR TREATY	CORRESPONDING AUSTRALIAN LEGISLATION
Convention on the Elimination of All Forms of Discrimination against Women (1979)	This treaty aims to protect the human rights of women. It requires signatory nations to commit to implementing laws and systems that ensure that women are equal under the law and not discriminated against on the basis of their sex. This treaty was ratified by Australia in 1983.	• *Sex Discrimination Act 1984* (Cth) • *Family Violence Protection Act 2008* (Vic) • *Fair Work Act 2009* (Cth) • *Equal Opportunity Act 2010* (Vic) • *Workplace Gender Equality Act 2012* (Cth)
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	This treaty aims to abolish any laws that discriminate against people on the basis of their race, colour, descent or ethnicity. It also aims to introduce laws and policies that promote racial tolerance and understanding. It was ratified by Australia in 1975.	• *Racial Discrimination Act 1975* (Cth) • *Racial and Religious Tolerance Act 2001* (Vic) • *Fair Work Act 2009* (Cth) • *Equal Opportunity Act 2010* (Vic)
Convention relating to the Status of Refugees (1950)	This treaty establishes a set of legal responsibilities for the treatment of refugees and asylum seekers that member nations agree to uphold. For example, refugees cannot be sent to a place where they will be exposed to persecution (e.g. maltreatment, harassment and torture). Further, refugees should have the same rights as citizens with respect to basic rights such as freedom of religion, the provision of basic education and social security, and access to the legal system. Refugees also have the right to be issued with identity and travel documents.	• *Migration Act 1958* (Cth)

Source 2 Some of the international treaties and declarations adopted by Australia

Legislation must be passed in Australia to ratify and give effect to the rights and obligations in an international treaty. However, our Commonwealth and state parliaments already have legislation in place that protects many of the rights contained in a treaty. For example, the *Convention on the Rights of Persons with Disabilities* (2006) (CRPD) was adopted by the United Nations and became available for nations to sign in 2006. Years earlier, in 1992, Australia's Commonwealth Parliament passed the *Disability Discrimination Act 1992* (Cth), which protected many of the rights contained in the CRPD.

However, since Australia has adopted the CRPD, our Commonwealth, state and territory parliaments have continued to pass legislation to uphold the broad aim of the treaty, which is to:

> promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedom by all persons with disabilities, and to promote respect for their inherent dignity.

Source 3 In recent years, many Australians have attended demonstrations demanding the Commonwealth Government improve its treatment of people seeking asylum in Australia by closing offshore detention centres and processing asylum seekers in Australia.

For example, in 2013 the Commonwealth Parliament passed the *National Disability Insurance Scheme Act 2013* (Cth) to reinforce many of the rights and obligations included in the CRPD by improving the support offered to people with a disability and their families and carers. The following scenario is an example of a case involving the National Disability Insurance Agency.

ACTUAL SCENARIO

Challenging the National Disability Insurance Scheme

McGarrigle v National Disability Insurance Agency (2017) 252 FCR 121

In July 2013, the *National Disability Insurance Scheme Act 2013* (Cth) ('NDIS Act') was passed by the Commonwealth Parliament to introduce the National Disability Insurance Scheme (NDIS). The NDIS assists people with a permanent or significant disability to participate in the community and the workplace, and to access a range of services including health, education, housing, and legal and community services.

Under the NDIS, the Commonwealth Government pays some of the transport costs for people with disability and their family and carers. The NDIS Act states that the National Disability Insurance Agency (NDIA) – the independent statutory authority responsible for implementing the NDIS – is *only required to fund reasonable and necessary supports*, taking into account 'what is reasonable to expect families, carers, informal networks and the community to provide'.

In 2017, this part of the NDIS Act was challenged in the Federal Court by Liam McGarrigle. McGarrigle is a young man who qualifies for the NDIS due to having an intellectual disability and autism spectrum disorder. McGarrigle, who was represented by Victoria Legal Aid, challenged the fact that the NDIA only partially pays for transport costs.

McGarrigle also challenged the meaning of what is a 'reasonable' amount of money to expect people with a disability and their families, carers and support groups to contribute to the funding of 'necessary supports'. In McGarrigle's case, the NDIA would only pay 75 per cent of the total transport costs ($16 000) he incurred in getting to and from work and support programs. This left McGarrigle to pay the balance, which placed a great financial strain on him and his family. Living in a small country town 25 kilometres from Geelong, McGarrigle was unable to drive or access public transport.

McGarrigle was successful. The judge ruled that, provided all necessary criteria are met, people who live in rural areas and who are unable to drive or use public transport should have the full cost of their transport needs (e.g. taxi fares) paid by the NDIA, and not just receive partial funding.

Source 4 Liam McGarrigle successful challenged the NDIS Act in the Federal Court.

In addition to requiring the NDIA to pay the full amount of costs incurred by McGarrigle in accessing his workplace and appropriate support services, this Federal Court decision also potentially allows other people with a disability to seek full, rather than partial, funding for their transport costs.

The NDIA applied for leave to appeal the decision to the Full Court of the Federal Court. On 21 August 2017, this application was dismissed.

Enforcement of international treaties

There is no one global court or single international legal system to monitor nations' compliance with international treaties and to impose sanctions or penalties on nations that infringe an international treaty. However, various bodies monitor nations' compliance with treaties, and encourage or pressure nations to comply with treaties.

International Court of Justice

The International Court of Justice (ICJ) was established by the United Nations to resolve legal disputes between nations that are members of the United Nations. As part of these disputes, the ICJ may consider the extent to which a country has violated provisions of a human rights treaty. However, there are limitations in taking a case to the ICJ to be resolved. One of these limitations is that nations cannot be compelled to attend the ICJ.

Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights (OHCHR) encourages nations to uphold their commitments under various human rights treaties by offering education and assistance to member nations. In 2006, the OHCHR set up a system called the Universal Periodic Review to review the human rights records of all 192 United Nations member states and highlight areas where breaches have occurred.

International human rights committees

Many of the main international human rights treaties include terms that establish committees to monitor nations' compliance with treaties, and to encourage nations that may be breaching a treaty to implement changes and comply with it. For example, the United Nations Human Rights Committee was established to monitor the implementation of the *International Covenant on Civil and Political Rights* (1966). Similarly, the Committee on the Elimination of Discrimination against Women was set up to monitor the implementation of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

An example of an international committee in action is provided in the scenario below.

Did you know?

The International Declaration on the Protection of Journalists (2016) was created to promote a culture of safety within the media industry. It raises awareness among journalists about international standards and encourages best practice for dangerous assignments or hostile environments. It also emphasises the responsibilities of states to guarantee journalists' safety.

Australian prison conditions – a human rights issue

ACTUAL SCENARIO

Brough v Australia (2006) Communication No. 1184/2003 (27 April 2006)

Corey Brough is an Aboriginal man with a mild mental intellectual disability who was held in Parklea Correctional Centre, a prison in New South Wales. The United Nations Human Rights Committee ruled that Brough's human rights were breached by the ill treatment he received at the hands of Parklea's prison officials. These human rights are enshrined in the *Optional Protocol to the International Covenant on Civil and Political Rights* (1966), which has been adopted by Australia.

In particular, the committee found that the treatment of Brough infringed both article 10 of the Protocol, which requires the humane treatment of persons deprived of their liberty, and article 24, which relates to the special protection of children.

Australian governments

In Australia, the Commonwealth, state and territory governments have also committed to providing a range of organisations and systems to enforce human rights legislation and to resolve alleged breaches of human rights. For example, when an alleged human right has been breached, the affected

Source 5 A scene from a 2016 *Four Corners* episode titled 'Australia's Shame' shows a young offender being mistreated by staff inside Don Dale Youth Detention Centre, Northern Territory.

individual may seek to have their rights enforced through the Australian court system or through various other organisations. This includes the Australian Human Rights Commission (which can investigate and resolve complaints under various Commonwealth statutes such as the *Age Discrimination Act 2004* (Cth)) and the Victorian Equal Opportunity and Human Rights Commission.

For example, in August 2016 a Police Youth Detention Task Force was set up to investigate allegations that young offenders, as young as 10 years of age, were being denied their basic rights, were detained in poor and cruel conditions, and were subjected to maltreatment while held in the Don Dale and Alice Springs Youth Detention Centres in the Northern Territory.

International human rights organisations

International human rights organisations can also place pressure on nations, including Australia, to enforce legally protected human rights. Two global organisations that are devoted to exposing human rights abuses are Amnesty International and Human Rights Watch. These organisations draw the media's attention to nations that allegedly breach or ignore human rights abuses, petition governments on human rights matters, and advocate for the release of individual prisoners. Human rights organisations use a variety of methods and activities to achieve their aims, including reporting and publishing human rights abuses and undertaking large-scale awareness campaigns.

For example, Amnesty International uses both the traditional media (e.g. television and print media) and social media to raise local, national and global awareness of human rights abuses. The organisation hopes that negative attention and widespread public pressure will force governments and bodies to undertake action to stop or at least minimise the occurrence of such abuses.

imprisonment
a sanction that involves removing the offender from society for a stated period of time and placing them in prison

In recent years, the Australian Government has been criticised by various international human rights organisations in relation to a number of human rights issues, as highlighted in the scenario below. These include its treatment of asylum seekers in offshore detention centres, the treatment of Indigenous Australian children held in youth detention centres, and the high **imprisonment** rates of Aboriginal and Torres Strait Islander peoples.

ACTUAL SCENARIO

Human Rights Watch highlights human rights issues in Australia

Australia is a vibrant multicultural democracy with a strong record of protecting civil and political rights. However, the treatment of certain groups of people in Australia (e.g. asylum seekers, Indigenous peoples, and people with disabilities) raises serious concerns about whether these vulnerable people's rights have been breached.

For example, in 2019 the Human Rights Watch's *World Report* criticised the Australian Government's policy of processing asylum seekers in offshore detention centres. The report also criticised the government's position that asylum seekers who arrive in Australia by boat will not be resettled in Australia.

Source 6 Organisations including Human Rights Watch raise awareness of human rights abuses.

The *World Report* further criticised the Australian Government for failing to implement sufficient reforms to address the overrepresentation of Indigenous offenders in Australia's criminal justice system, as well as the abuse and neglect of Indigenous prisoners.

Concern was also raised about certain government activities, including raids on journalists that impede freedom of expression.

In addition, the *World Report* expressed concern about the treatment of people with disabilities and people in aged-care facilities.

15.5 CHECK YOUR LEARNING

Define and explain

1 Distinguish between an international treaty and an international declaration.

2 Explain two ways in which Australia's signing of international treaties and declarations has influenced the protection of rights in Australia.

Synthesise and apply

3 Read the scenario *McGarrigle v National Disability Insurance Agency.*

- **a** Explain the general purpose of the *National Disability Insurance Scheme Act 2013* (Cth). State what international treaty this Act helps to uphold.
- **b** Explain why McGarrigle commenced civil action against the National Disability Insurance Agency (NDIA).
- **c** Describe the outcome of this dispute.
- **d** Suggest some of the difficulties McGarrigle may have faced in undertaking this civil action.

4 Read the scenario *Brough v Australia*.

- **a** What body was responsible for resolving this complaint?
- **b** Why was the complaint taken to this body?

5 Conduct some research on the Australian Human Rights Commission (AHRC).

- **a** What is the role of the AHRC?
- **b** List five different areas of human rights monitored by the AHRC.
- **c** Outline three current human rights issues highlighted on the AHRC's website.
- **d** Explain the dispute resolution method used by the AHRC to resolve complaints.
- **e** Suggest some difficulties that individuals might face who wish to challenge an alleged breach of their rights.

Analyse and evaluate

6 Using the internet, research one international treaty or declaration that has been signed and adopted by Australia.

- **a** Describe the purpose of this treaty or declaration.
- **b** Explain at least two ways that Australia upholds this treaty or declaration.
- **c** Explain one way that Australia could improve its commitment to this treaty or declaration.

7 Discuss the ability of international treaties and declarations to influence the protection of rights in Australia.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 15.5 Check your learning
- **Worksheet** Australian Human Rights Commission (AHRC)
- **Weblink** *International Covenant on Civil and Political Rights* (1966)
- **Weblink** International Court of Justice

15.6 THE APPROACH ADOPTED BY THE UNITED STATES IN PROTECTING RIGHTS

There are various ways that countries can protect the rights of their citizens. Different countries around the world have adopted different approaches, and protect the rights of their people to varying degrees.

As we have examined, Australia mainly protects rights through Commonwealth and state legislation (including passing Acts to uphold the rights contained in international treaties) and through common law. Australia's approach to the protection of rights differs from many other countries. All the other Western democracies in the world have a national charter or bill of rights.

What is a charter or bill of rights?

A national charter or bill of rights lists and protects the basic rights of the people. This charter or bill is either contained within a country's national constitution (a 'constitutional charter or bill of rights') or passed as a separate Act (a 'statutory charter or bill of rights').

Source 1 below provides a snapshot of the difference between a constitutional charter or bill of rights, and a statutory charter or bill of rights.

CONSTITUTIONAL CHARTER OR BILL OF RIGHTS	STATUTORY CHARTER OR BILL OF RIGHTS
• A nation's constitution includes a comprehensive list of the basic rights of the people (referred to as a charter or bill of rights) • As the rights are contained or entrenched within the constitution, they are express rights that can only be removed or altered by changing the constitution. The rights cannot be changed by an ordinary Act of Parliament.	• A nation protects a comprehensive list of basic rights of the people (often referred to as a charter or bill of human rights Act) through an Act of Parliament • The Act is not part of the nation's constitution but is a separate statute that can be changed by the parliament at any time.

Source 1 Key features of a constitutional charter or bill of rights and a statutory charter or bill of rights

Source 2 below provides examples of countries that have a constitutional charter or bill of rights, and countries that have a statutory charter or bill of rights.

COUNTRIES WITH A CONSTITUTIONAL CHARTER OR BILL OF RIGHTS	COUNTRIES WITH A STATUTORY CHARTER OR BILL OF RIGHTS
United States – Bill of Rights 1791 (US)	**United Kingdom** – *Human Rights Act 1998* (UK)
Canada – Bill of Rights 1960 (Can)	**New Zealand** – *New Zealand Bill of Rights Act 1990* (NZ)
South Africa – Bill of Rights 1996 (RSA)	**Hong Kong** – *Hong Kong Bill of Rights Ordinance 1991* (HK)
India – Fundamental Rights 1950 (IN)	**European Union** – *Charter of Fundamental Rights of the European Union 2000* (EU)

Source 2 Examples of countries that have either a constitutional or a statutory charter or bill of rights

In some countries that have adopted a constitutional approach to the protection of rights, the parliament may pass legislation to override or cancel a right protected by the charter or bill of rights. But in these cases, full consideration must be given to the benefits and problems associated with the right

before changes are permitted to take place. Similarly, some charters and bills of rights also contain a limitation clause; that is, a clause that restricts the application of the rights. For example, the South African Bill of Rights 1996 (RSA) includes a clause that states that the rights may be limited if it is reasonable and justifiable to do so in an open and democratic society.

Countries that protect rights through a constitutional or statutory charter or bill of rights also have a range of state and federal laws that protect the rights of their citizens. These countries further protect rights through their adoption and commitment to various international treaties and via their court system.

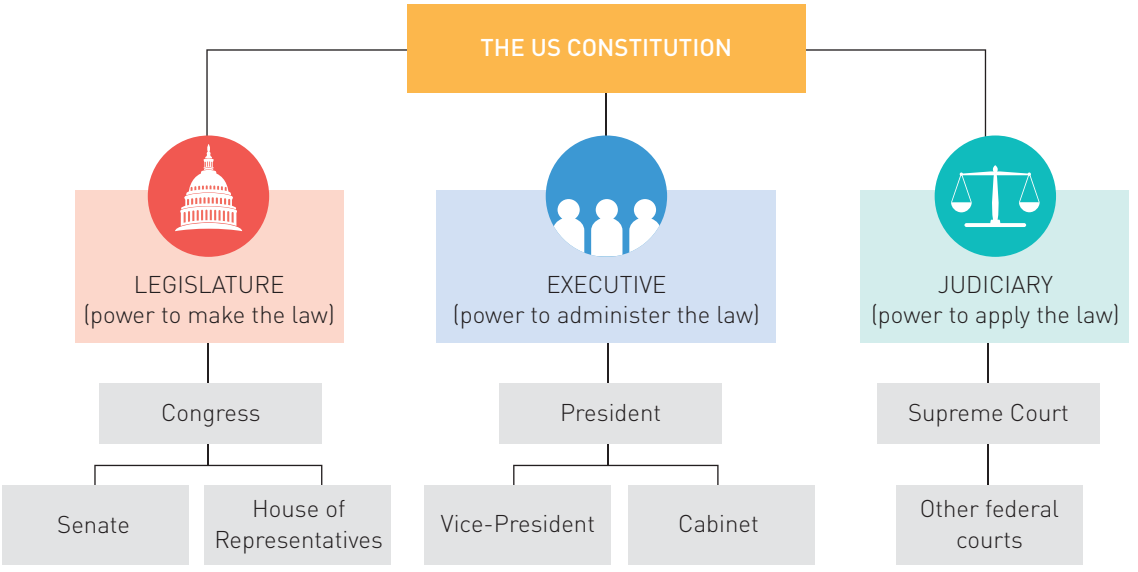
This topic explores the way that the United States protects rights. Before doing so, it is important to gain an understanding of the system of government in the United States.

The system of government in the United States

The system of government in the United States is based on a **federal system**, which is similar to Australia's system of government. The United States is divided into 50 states, each of which has its own legislature (elected law-making body) that makes laws applicable in that state.

The United States has one central or **federal legislature** – referred to as **Congress** – that has the power to make laws that apply to and benefit the entire country. In general, matters that mainly concern the states – such as internal communications, regulations relating to property, industry, business and public utilities (e.g. electricity, water and gas) and **criminal law** – solely belong to the **state legislatures**, while other matters of more national concern belong to the federal legislature (or Congress), such as health, education, welfare, transportation, housing and urban development.

The United States has a number of courts. Its highest court is the Supreme Court. Sitting below the Supreme Court are 13 courts of appeal (called US Courts of Appeal) and 94 district or trial courts (called US District Courts).



Source 3 The federal legislature (or Congress) of the United States has a number of similarities to Australia's Commonwealth Parliament.

The United States protects rights in a variety of ways, some of which are similar to the ways in which Australia protects rights. For example, like Australia, the United States protects rights through Acts passed by the state and federal legislatures (referred to as parliaments in Australia) and through court decisions.

However, unlike Australia, in the United States, there is constitutional protection of rights. The US Constitution contains a Bill of Rights that protects a comprehensive and broad range of rights, whereas the Australian Constitution does not.

federal system
a system of government in which a county is divided into states (each with its own parliament to make laws applicable in that state), in addition to having one central parliament (i.e. a federal parliament) with the power to make laws that apply to the entire country

federal legislature
a national law-making body; for example, the Commonwealth Parliament in Australia and the Congress in the United States

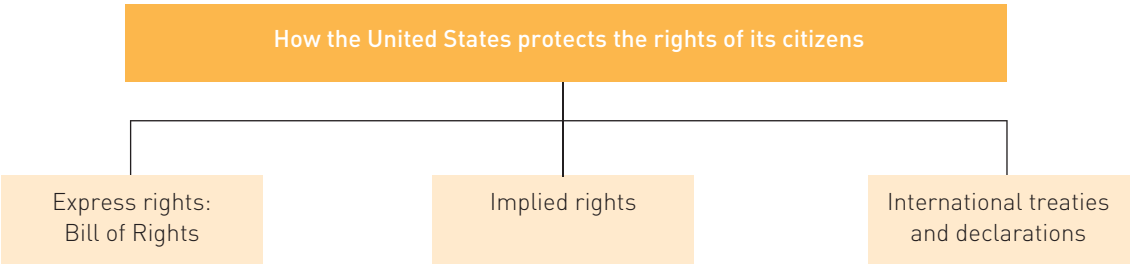
Congress
the federal or national legislature or law-making body in the United States

criminal law
an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

state legislatures
the state law-making bodies in the United States (the equivalent of Australia's state parliaments)

The main ways in which the United States protects rights are as follows:

- in its Constitution, through the Bill of Rights (express rights)
- through implied rights
- through international treaties and declarations.



Source 4 There are three ways in which the United States protects the rights of its citizens.

US Bill of Rights
a US law contained within the US Constitution that establishes the most important basic rights of the people and aims to protect them

Express rights: the US Bill of Rights

The main way in which the United States and Australia differ in their approaches to the protection of rights is that the US Constitution expressly contains a comprehensive list of broad rights of the American people – the **US Bill of Rights** – whereas the Australian Constitution does not.

Source 5 From 1919, the Eighteenth Amendment to the US Constitution banned the sale of alcohol. This was reversed by the Twenty-first Amendment in 1933.

More specifically, the US Bill of Rights is a list of rights given to the American people. This list is known as the first 10 amendments in the US Constitution, which were accepted in 1791. A further 17 amendments have since been added to the US Constitution.

The rights in the US Bill of Rights are fully enforceable by the US Supreme Court. Because they are expressly stated in the Constitution, the rights can only be removed by changing the US Constitution. Changing the US Constitution is not easy. For example, for a right to be added or removed from the Bill of Rights, the proposed change must be passed by two-thirds of both houses of Congress (the House of Representatives and the Senate) and then be passed by three-quarters of the 50 US state legislatures.

Unlike the Australian Constitution, the US Constitution (in the Second Amendment) explicitly gives citizens the right to bear arms (i.e. carry a gun). This is highlighted in the scenario below.

ACTUAL SCENARIO

The right to bear arms

District of Columbia v Heller 54 US 570 (2008) and *McDonald v Chicago* 561 US 742 (2010)

According to the Gun Violence Archive – an independent, not-for-profit organisation that provides information about gun-related violence in the United States – 15 381 people were killed by guns in the United States in 2019 and 29 934 people were injured by gun violence. In addition, there were 418 mass shootings. A mass shooting is where four or more people are shot and/or killed in a single incident; this does not include the perpetrator (the shooter).

Given the high rate of gun violence in the United States, it is not surprising that many state legislatures and the US Congress have, over the last decade, tried to implement gun reform to restrict the sale and purchase of guns.

However, these changes have been difficult to implement because the Second Amendment of the US Bill of Rights protects the right to keep and bear arms (guns). This amendment states that 'a well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed'.

The decisions of US courts have reinforced this Second Amendment right. For example, in the case of *District of Columbia v Heller*, the US Supreme Court ruled that a ban on individuals owing handguns – that had been introduced by various states, including the District of Columbia, which includes the city of Washington and the White House – was unconstitutional and invalid because it infringed the Second Amendment right to bear arms.

In this case, the US Supreme Court also ruled that the right to bear arms extended to the individual – that is, the right to bear arms was not just for states to maintain militias and police forces. The reason for the Court's decision was that a ban on individuals owning handguns interfered with the lawful right of citizens to defend themselves.

The decision in the case of *District of Columbia v Heller* was later strengthened in the case of *McDonald v Chicago*. Otis McDonald challenged a Chicago law, implemented in 1982, that required people to register their possession of a handgun. The Court held the Chicago law breached an individual's right to keep and carry a gun, which was protected by the Bill of Rights.

Unlike the Australian Constitution, the US Constitution (in the First Amendment) explicitly protects the freedom of speech. The case of *Snyder v Phelps*, discussed in the scenario below, provides an example of how US courts have upheld this right.

The right to freedom of speech

ACTUAL SCENARIO

Snyder v Phelps 562 US 443 (2011)

Albert Snyder's son, Matthew Snyder, was a soldier who was killed in Iraq in 2006. In 2010, Albert brought a case against the Westboro Baptist Church (in the US state of Kansas) after members of the church disrupted and ruined Matthew's funeral. Some church members protested outside Matthew's funeral and displayed posters claiming that 'God hates solders' and that Matthew 'deserved to die' as God's vengeance against America's growing acceptance of homosexuality (which the Westboro Baptist Church thinks is a sin).

While Matthew's funeral was not the only service disrupted by members of the Westboro Baptist Church, Albert was the first person to take action against the protest. Albert claimed the protest had invaded his privacy and caused great emotional stress. In response, the church claimed that, under the First Amendment, it had a right to freedom of speech and a right to protest.

Source 6 Members of the Westboro Baptist Church protesting in the United States ('IEDs' means 'improvised explosive devices'). Do these signs represent an exercise of the right to freedom of speech or an abuse of the right to freedom of speech?

In the original trial, the state court found in favour of Albert and the jury awarded him US$10 million in compensatory and punitive damages, which was later reduced to US$5 million.

However, the Westboro Baptist Church ultimately won the case after lodging a successful appeal in the US Court of Appeal (a federal court). The Court of Appeal ruled that the church's right to protest and right to freedom of speech were guaranteed by the First Amendment. In their decision, the judges stated that despite the 'distasteful and repugnant [disgusting] nature of the protests', the church's freedom of speech was constitutionally protected.

Comparison to Australia

As we examined earlier in this chapter, the Australian Constitution only includes five relatively limited express rights, and so the constitutional protection of rights in Australia and the United States is vastly different. For example, while the US Bill of Rights protects the broad and general right of the American people to **freedom of religion**, the Australian Constitution only expressly protects a **limited right to freedom of religion** – in that the Commonwealth Parliament is prohibited (banned) from passing legislation that imposes or restricts religious practice. However, there is no mention of any restrictions on the parliaments of Australian states or territories to make such laws.

Also, the US Constitution expressly protects a broad range of rights that are not mentioned in the Australian Constitution; for example, the right of the American people to freedom of speech, the right to equal protection under the law, the right to keep and bear arms, and the right to not be subject to cruel punishment.

Source 7 The US Constitution indirectly protects the parliamentary principle of representative government, which ensures that Congress must be elected by the people.

Implied rights

In addition to containing a Bill of Rights that protects a relatively large number of express rights, the US Constitution also protects implied rights, in a similar way to the Australian Constitution. That is, the US Supreme Court is able to interpret the words and phrases in the US Constitution to include and establish various systems and parliamentary principles that indirectly protect the rights of the American people. For example, like Australia, the US Constitution indirectly protects the parliamentary principle of representative government, which ensures that Congress must be elected by the people.

Enforcement of the US Constitution and statute law

Study tip

In VCE Legal Studies, you are required to compare Australia's approach to protecting rights with the approach of another country. The task word 'compare' means to consider the similarities and differences between two things.

The US Supreme Court has the power to enforce the rights of the American people, including the rights protected by statute law. The Court can declare any legislation that infringes the basic rights of the American people to be invalid.

The US Supreme Court can fully enforce all constitutional rights and can also imply the existence of rights when resolving constitutional disputes. If the US Supreme Court makes a ruling that legislation has infringed a right protected in the US Constitution, the Court can award a remedy, such as the payment of damages, to the party whose rights have been breached.

In a situation where the US Supreme Court determines that legislation breaches the rights contained in the US Constitution, Congress (like the Australian Parliament) cannot override this decision.

The US right to privacy

ACTUAL SCENARIO

Griswold v Connecticut 381 US 479 (1965) and *Roe v Wade* 410 US 113 (1973)

In 1965 in Connecticut, Dr Griswold was arrested for giving information about contraception to a married couple. At the time, these actions breached Connecticut legislation that banned the use of 'any drug, medicinal article, or instrument for the purpose of preventing conception'.

In its ruling, the US Supreme Court overturned the Connecticut state law. The Court found that the Connecticut law infringed people's right to privacy that – although not explicitly stated in the US Constitution – was implied to exist in various sections of and amendments to the Constitution. In particular, the Fourth Amendment (the right of people to be secure in their persons, houses, papers and effects against unreasonable searches) and the Fifth Amendment (the right against self-incrimination) protected people against government invasion of the sanctity of the home and the privacies of life.

The right to privacy was further extended in the case of *Roe v Wade* to include the right of privacy in a doctor–patient relationship. In this case – which helped to protect the right of a woman to have an abortion – the US Supreme Court found that the discussion and advice given as part of the doctor–patient relationship was a private matter. Accordingly, any state legislation that made certain abortions unlawful interfered with that private relationship.

On this basis, the Supreme Court could declare such state law invalid. In *Roe v Wade*, the Court found that the right of privacy was implied in the Fourteenth Amendment. This amendment provides that no state 'shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'.

International treaties and declarations

Like Australia, the United States protects a range of basic rights by being a signatory to a range of international human rights treaties and declarations. However, many of the major international treaties to which the United States is a signatory have not yet been fully ratified by the United States by passing local, state or federal legislation. For example, President Obama signed the *Convention on the Rights of Persons with Disabilities* (2006) in 2009, but it has not yet been ratified. So, while the United States has its own local, state and federal laws to protect against discrimination, it has been slow to accept the international system of human rights protection, preferring to rely on its own internal laws and protections.

Source 8 Each year in January, millions of people around the world, including hundreds of thousand Americans, join together to demonstrate for the protection of women's rights.

Australia and the United States – a comparison

Source 9 below sets out some of the similarities and differences between how the United States and Australia protect rights.

FEATURES IN EACH COUNTRY	AUSTRALIA	UNITED STATES
Federal government	Australia is divided into six states, each of which has its own elected parliament to make laws applicable in that state. Australia also has the federal Commonwealth Parliament, which has the power to make laws that protect rights that apply to the entire country.	The United States is divided into 50 states, each of which has its own elected legislature to make laws applicable in that state. The United States also has the federal legislature (Congress), which has the power to make laws protecting rights that apply to the entire country.
Signatories to international human rights treaties	Australia has signed and ratified more international human rights treaties than the United States.	While being a signatory to some major international human rights treaties, the United States has not yet ratified some of these treaties.
Common law systems	Australian courts – including the most superior court in Australia, the federal High Court – can establish legal principles or precedents that protect common law rights.	The US courts – including the most superior court in the United States, the federal US Supreme Court – can establish legal principles or precedents that protect common law rights.
Changing the Constitution	The process of changing the Australian Constitution requires a compulsory public vote called a referendum. The referendum takes place on a set day.	The process of changing the US Constitution (including the Bill of Rights) requires support of two-thirds of Congress and three-quarters of the state legislatures. The procedure is complex and can be lengthy.
Power of the highest court to interpret the Constitution and imply the existence of rights	The High Court of Australia has the ability to interpret the Constitution and imply the existence of rights. For example, the High Court has implied the right to freedom of political communication.	The US Supreme Court has the ability to interpret the Constitution and imply the existence of rights. For example, the US Supreme Court has implied the right to privacy.
Constitution indirectly protects citizens' rights by including concepts and principles within the text and structure	The Australian Constitution contains the principle of representative government that indirectly protects the rights of the people to elect the Senate and House of Representatives. It also upholds the principle of the separation of powers, which minimises the risk of one body (that is, parliament, government or the courts) holding all the power.	The US Constitution contains the principle of representative government that indirectly protects the rights of the people to elect Congress. It also upholds the principle of the separation of powers so that no one body or person (that is, Congress, the president or the courts) can hold all the power.

FEATURES IN EACH COUNTRY	AUSTRALIA	UNITED STATES
Constitutional rights are fully enforceable by the courts	The High Court can enforce the rights protected by the Constitution and the parliament cannot override its ruling. The High Court does not award a remedy to the party whose rights have been breached.	The US Supreme Court can enforce the rights protected in the Constitution (and Bill of Rights) and Congress cannot override its ruling. US Supreme Court can award a remedy to the party who has suffered a breach of rights.
Legislation that breaches constitutional rights can be overruled by the courts	The High Court can declare legislation that breaches a constitutionally protected right to be invalid.	The US Supreme Court can declare legislation that breaches the Bill of Rights to be invalid.
Number of express rights in the Constitution	The Australian Constitution only contains five relatively narrow express rights. It does not contain a comprehensive Bill of Rights.	The US Constitution contains a comprehensive list of broad rights in its Bill of Rights.

Source 9 Similarities and differences between how the United States and Australia protects rights

15.6 CHECK YOUR LEARNING

Define and explain

1. Distinguish between a constitutional and a statutory charter or bill of rights.
2. List the three main ways in which rights are protected in the United States.
3. What is the US Bill of Rights?
4. Describe how rights that are explicitly stated in the US Constitution can be changed.

Synthesise and apply

5. Read the scenario *Griswold v Connecticut*. Explain the significant of this case in relation to the protection of rights in the United States.
6. Read the scenario *District of Columbia v Heller* and *McDonald v Chicago*.
   a. According to the US Bill of Rights, what is the 'right to bear arms'?
   b. Describe the two laws that were overridden by the US Supreme Court in these two cases.
7. Read the scenario *Snyder v Phelps*. Outline the facts and outcome of this case. Explain whether you agree with the final decision of the US Supreme Court.
8. Describe two similarities and two differences between the way Australia and the United States protect rights.

Analyse and evaluate

9. In your view, does the comparison of Australians' rights with Americans' rights demonstrate weaknesses or strengths in Australia's protection of rights? Discuss.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 15.6 Check your learning
- **Video tutorial** How to answer comparison questions
- **Weblink** US Bill of Rights
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz

15.7 POSSIBLE REFORMS TO THE PROTECTION OF RIGHTS IN AUSTRALIA

Australia has many laws and systems in place to ensure the rights and freedoms of all Australians are upheld. However, there are often concerns that the rights of particular individuals and groups in the community are not adequately protected. Therefore, it is important that the way we protect and enforce rights is constantly reviewed, and that governments are willing to implement **reforms** to improve the protection of rights.

law reform
the process of constantly updating and changing the law so it remains relevant and effective

Three possible reforms to the protection of rights in Australia are:

- introducing a national charter or bill of rights
- providing increased statutory protection for minority groups
- providing greater access to legal aid and assistance.

Introducing a national charter or bill of rights

Australia is the only Western democracy in the world that does not have a federal constitutional or statutory charter or bill of rights. In fact, as we have examined earlier in this chapter, while the Australian Constitution does provide some protection of rights and the High Court has the ability to imply the existence of rights, the Constitution only contains five express rights. Similarly, while the Victorian and the Australian Capital Territory parliaments have passed legislation to establish statutory protection of rights within their state and territory, the Commonwealth Parliament has not passed legislation to create a charter or bill of rights outlining the basic rights of all Australians.

statutory approach
(in relation to rights) the protection of rights through passing Acts of Parliament

Whether or not Australia should have a charter or bill of rights is a topical issue. If Australia did adopt a charter or bill of rights, it is commonly agreed that it would adopt a **statutory approach**. This means the Commonwealth Parliament would pass an Act that sets out the basic rights of the Australian people. This is because the process of changing the Constitution to include more rights is very difficult, as any change must be supported by a majority of the Australian public in a referendum, and a majority of electors in the majority of states. This makes it unlikely that a proposal to include a comprehensive list of basic rights in the Constitution would be successful.

Source 1 Successive Australian Governments have been criticised by human rights groups – including Amnesty International and Human Rights Watch – for their treatment of people seeking asylum in Australia.

Arguments in favour of adopting a charter or bill of rights

Those in favour of introducing a statutory charter or bill of rights argue it would:

- **strengthen the protection of rights** in Australia by clearly stating the basic rights of all citizens. This would assist in educating the community about their rights, so individuals would be more willing to seek action when their rights have allegedly been breached. It may also discourage possible infringements
- **make governments in Australia more accountable** for the improvement of rights legislation and the provision of services to uphold the rights

- **improve Australia's international image**. As discussed earlier in this chapter, in recent years, international human rights organisations (e.g. Human Rights Watch, Amnesty International and the United Nations) have criticised the Australian Government for breaching human rights. This includes criticism in relation to the government's treatment of asylum seekers being held in detention, its treatment of children being held in youth detention centres, its poor human rights record with respect to Indigenous Australians and other minority groups, and its previous unwillingness to legislate for marriage equality.

Arguments against adopting a charter or bill of rights

Those against introducing a charter or bill of rights argue that:

- the basic rights of Australians are **already adequately protected** by hundreds of Acts, at both the state and Commonwealth levels (e.g. the *Sex Discrimination Act 1984* (Cth), the *Child Wellbeing and Safety Act 2005* (Vic), and Commonwealth legislation that makes slavery and people trafficking a crime). Individuals who believe their rights have been breached can already seek redress for the breach through the court system
- individuals who feel their rights are not protected by the law **can try to influence the government to introduce a change in the law**. If enough people support them, it is likely that changes will occur. However, those in favour of a charter or bill of rights argue there are many minority groups (e.g. Indigenous Australians, people with a disability, children, women who are victims of family violence, and the LGBTIQA+ community) whose rights may be ignored
- the Commonwealth has passed the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which requires all proposed legislation to be checked for **compatibility with rights**, according to various international treaties. However, the parliament can choose to ignore suggestions that a proposed Act contravenes a right
- Australia has already adopted and ratified many **international human rights treaties** and optional protocols that protect a vast range of human rights (e.g. the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984)).

Growing support for a national Australian bill of rights

ACTUAL SCENARIO

Australian Bill of Rights Bill 2019 (Cth)

In September 2019, the independent federal member of parliament, Andrew Wilkie, introduced the Australian Bill of Rights Bill 2019 (Cth) into the House of Representatives (the lower house of the Commonwealth Parliament). The Bill seeks to enshrine and protect the basic rights of the Australian people in one overarching piece of federal legislation, and states what those basic rights are. Many individuals and organisations support the introduction of a national statutory bill of rights, including the Australian Human Rights Commission.

If passed, this Bill will ensure that these fundamental rights cannot be ignored or eroded by the Commonwealth, state and territory parliaments. More specifically, these parliaments would be prevented from passing any legislation that is inconsistent with any of the protected rights contained in the Bill. Furthermore, the Australian Human Rights Commission would be given authority to investigate any legislation that allegedly infringed the rights protected by the Bill.

The Bill would also give greater effect to a range of international treaties that have been signed by the Australian Government, including the *International Covenant on Civil and Political Rights* (1966), the *International Covenant on Economic, Social and Cultural Rights* (1966),

the *Convention on the Rights of the Child* (1989) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).

When introducing the Bill to parliament, Mr Wilkie stated that Australia is one of the only democratic countries in the world that does not have a bill or charter of rights. Mr Wilkie also declared that existing federal legislation does not adequately protect the fundamental rights of the Australian people.

This is evidenced by the fact that in recent years, the Australian Government has introduced a range of policies and actions that have breached people's fundamental rights. For example, some of the Commonwealth Government's immigration and asylum seeker policies have resulted in asylum seekers being held in poor conditions in offshore detention centres.

Similarly, the raid of a journalist's home in June 2019 by the Australian Federal Police is considered by many to be a breach of freedom of expression and freedom of the press. The journalist had written an article about the Commonwealth Government considering increasing the powers of surveillance agencies. The right to freedom of expression and freedom of the press are specifically protected in article 4 of the Bill.

The Bill also aims to protect:

- the right of Aboriginal and Torres Strait Islander peoples 'to revive, maintain and develop their ethnic and cultural characteristics and identities' (article 10)
- the right to life (article 12)
- the right to not be subjected to torture or inhuman treatment and experimentation without consent (article 14)
- the right to vote (article 16)
- the right to an adequate standard of living, including sufficient food and water, housing, access to healthcare services and social security (article 23).

Providing increased statutory protection for minority groups

One other possible reform to improve the protection of rights in Australia is to amend existing legislation to improve legal processes, government policy and the provision of services in a range of areas. This is particularly important in those areas where governments have been accused of neglecting rights and failing to uphold Australia's obligations under international treaties and optional protocols. While Australia protects a vast range of rights, in recent years, the Australian Government has come under pressure to implement changes to improve the protection of rights for:

- Indigenous Australians
- asylum seekers
- people accused of terror-related crimes
- people with a disability.

Indigenous Australians

As demonstrated by the 'Black Lives Matter' protests that first took place throughout Australia in May 2020, the Australian Government has come under pressure to improve the living standards of Indigenous Australians and promote equality. A range of changes could be made to improve the respect for and rights of Indigenous Australians, including re-examining the way Australia has acknowledged, or failed to acknowledge and appropriately respond to, the injustices suffered by Indigenous people since

the colonisation of Australia. Changes could also include implementing legislation to ensure Indigenous people have greater access to health care, education, housing services and the legal system. Indigenous Australians also need to be provided with the ability to make decisions – at local, state and federal level – about how best these aims and services can be achieved.

Alarmingly, Aboriginal and Torres Strait Islander peoples are 13 times more likely to be imprisoned than non-Indigenous Australians. In addition, while Indigenous Australians make up only three per cent of Australia's population, they account for 27 per cent of the adult prison population and approximately 40 per cent of children in youth detention centres.

It has also been recommended that the Australian Constitution be changed to include recognition of the Aboriginal and Torres Strait Islander peoples as the first Australians.

Source 2 Each year, protesters and Indigenous rights activists rally in cities across the country against Australia Day, calling it 'Invasion Day'.

Asylum seekers

The Australian Government has come under pressure to significantly improve its treatment of asylum seekers. This includes abolishing policies and legislation that allow for the indefinite detainment of asylum seekers in offshore detention centres, in extremely harsh conditions (causing distress, conflict and violence). Current Australian Government policies have been criticised for failing to protect vulnerable individuals (especially women and children) and for violating Australia's international responsibilities under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).

People accused of terror-related crimes

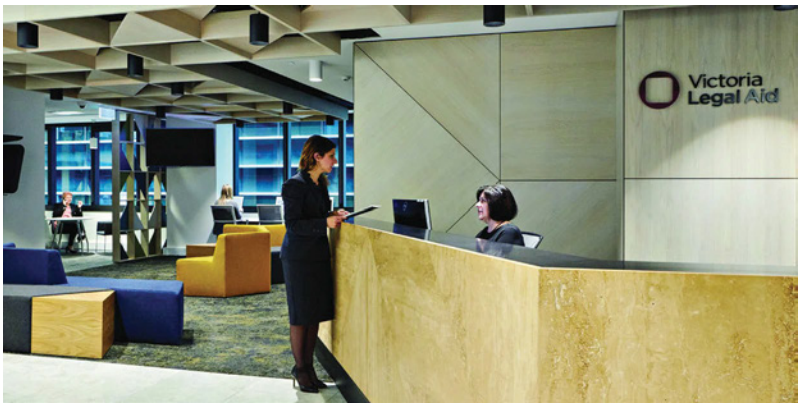
The Australian Government has been called on to ensure that Commonwealth anti-terrorism laws do not breach basic human rights. For example, the *Counter-Terrorism Legislation Amendment Act 2016* (Cth) and the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) amended the Commonwealth Criminal Code (the main legislation that establishes Commonwealth offences) to allow for the indefinite detainment of convicted terrorists who have completed their sentence on the basis of relatively subjective claims. This legislation has been criticised by a number of human rights groups.

People with a disability

The Australian Government is under pressure to continue to implement state and federal reforms to support people with a disability to ensure they have adequate access to a range of basic services like health, education and housing support. Of particular concern is that a 2011 independent investigation estimated that 45 per cent of people with a disability in Australia live near or below the poverty line, which is twice the average of countries that are members of the OECD (Organisation for Economic Co-operation and Development).

Providing greater access to legal aid and assistance

As discussed earlier in this chapter, in Australia, rights are protected by common law and by the High Court by implying the existence of constitutional rights and declaring legislation that infringes a constitutionally protected right to be invalid.



Source 3 Victoria Legal Aid provides legal representation and assistance to vulnerable members of the community.

Yet the ability of an individual or group to pursue a matter can be severely limited by the cost and time involved in taking a case to court. For example, a person may be discouraged from taking a case to court because they cannot afford legal representation or the court fees. Or, a person may be deterred by the prospect of being involved in a lengthy legal battle (that may then be challenged through the appeal process).

To address this issue, more state and federal funding could be allocated to legal aid and assistance bodies, such as Victoria Legal Aid. In addition to providing vital legal representation and assistance to people involved in criminal cases, Victoria Legal Aid could also undertake more civil matters involving the alleged infringements of rights.

Another possible reform is for governments to provide greater funding to organisations such as the Victoria Law Foundation, so that all members of the community – especially those in minority groups who may be more likely to have their rights breached – are aware of their basic rights and the available options to challenge an alleged infringement of these rights. In 2020, the Commonwealth Government provided additional funding to address the serious issues these organisations are facing to assist people. However, that funding is unlikely to be enough to meet demand. There are still vast number of people who are ineligible for legal aid.

15.7 CHECK YOUR LEARNING

Define and explain

1 Explain why it is unlikely that Australia will ever have a constitutionally protected charter of rights.

2 Explain two difficulties that may be faced by an individual who wishes to pursue an alleged breach of rights through the courts. Suggest one reform that could address one of these difficulties.

Synthesise and apply

3 Research one country that has a statutory charter of rights and prepare a summary that:
- identifies the name of the charter and the date it was implemented
- describes the main rights that are protected
- explains how a protected right may be removed or added to the charter
- explains how the charter is enforced
- discusses the benefits of a statutory approach to the protection of rights compared to a constitutional approach.

Analyse and evaluate

4 Read the scenario 'Growing support for a national Australian bill of rights'.
- **a** In small groups, conduct some research on the internet about the advantages and disadvantages of Australia having a federal bill of rights (or charter of rights).
- **b** Conduct a class debate on the following statement: 'Australia needs a constitutional bill of rights to adequately protect the rights of Australians.'

Check your Student obook assess for these additional resources and more:

- **Student book questions** 15.7 Check your learning
- **Going further** Protecting and promoting gender equality
- **Weblink** Does Australia need a bill of rights?

15.8 THE MABO CASE – THE PROTECTION OF RIGHTS IN AUSTRALIA

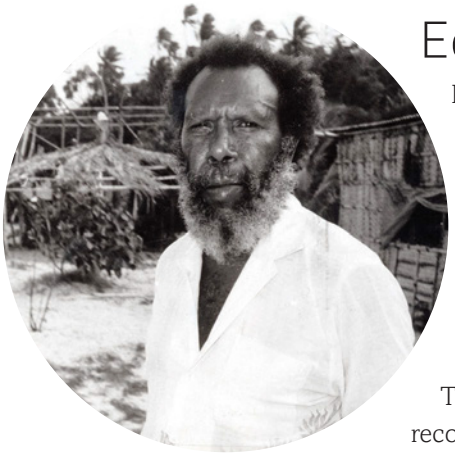
terra nullius
a Latin term meaning 'empty land'; a false common law principle that was used by the British to declare that Australia belonged to no-one when they first arrived in Australia to establish a colony in 1788

test case
a legal action undertaken with the aim of having the court establish a legal principle or precedent that can be followed for future similar cases

Over the years, there have been a number of court cases that have had a significant impact on the protection of rights for Indigenous Australians. For example, in Topic 15.3 you examined the 2020 case of *Love v Commonwealth; Thoms v Commonwealth*, which resulted in the High Court recognising that Aboriginal Australians have a sense of identity and belonging to Australia that cannot be changed or denied by the Commonwealth Parliament.

Perhaps one of the most well-known and important cases to establish the rights of Indigenous Australians is *Mabo v Queensland (No 2)* ('Mabo case'). In this case, the High Court made the historic decision to overrule the long-established false common law principle that Australia was ***terra nullius*** (i.e. an 'empty land') when it was colonised by the British in 1788. In doing so, the High Court recognised land rights for Aboriginal and Torres Strait Islander peoples.

In this topic, you will explore the facts, issues and outcome of the Mabo case, the role of the people involved in this case, how it impacted on the rights of individuals and the legal system, and conflicting attitudes about the case.



Source 1 Eddie Mabo

native title
the legal recognition of the right of Aboriginal and Torres Strait Islander people to be the owners of land and waters based on their traditional ownership of the land (which existed thousands of years before the British colonisation of Australia)

locus standi
a Latin term meaning 'standing in a case'; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

Eddie Mabo

Edward Koiki Sambo was an Indigenous Australian born on 29 June 1936 on a small island in the Torres Strait known as Murray Island. In the language of the native Meriam people, the island is called Mer.

Eddie Mabo dedicated his life to fighting for the land rights of his people. In 1982, Eddie Mabo and four other members of the Meriam people – Sam Passi, David Passi, Celuia Mapo Salee and James Rice – joined together to have their traditional ownership of the island of Mer in the Torres Strait legally recognised. The case was brought as a **test case** to determine the legal rights of the Indigenous Meriam people. The final High Court decision established an important legal principle and precedent that recognised the right of all Aboriginal and Torres Strait Islanders to have **native title** over their traditional land.

Without Eddie Mabo – and the four other members of the Meriam people who joined him – having the courage to initiate court proceedings against the Queensland Government, this case would never have been resolved. It may have taken many more years for Indigenous land rights to be recognised. This is because an individual or party can only take a dispute before the courts for resolution if they have ***locus standi***. This Latin term literally translates to 'place of standing', and means that the issues or matters in the case directly affect them. In relation to the Mabo case, only a member of the Meriam people, whose right to ownership of their traditional land was being denied by the Queensland Government, could have taken the case to court.

The facts and issues central to the case

Before the colonisation of Australian by the British in the late 1700s, Aboriginal and Torres Strait Islander peoples occupied Australia for at least 75 000 years. Indigenous Australians spoke their own languages and had their own laws and customs. An essential part of their laws and customs is a strong connection to the land.

Approximately 100 years after colonisation, in 1889, the British courts applied the doctrine of *terra nullius* to Australia. This meant that the British falsely regarded the land of Australia to be 'nobody's land' or 'empty land' when it was colonised, and did not recognise Indigenous ownership of the land.

The 1960s

Mabo became disillusioned with his lack of human rights throughout his teenage years, began to drink heavily and was exiled from the Torres Strait Islands. As a result of the injustices Mabo suffered in the 1960s, he became involved in a campaign to give Indigenous Australians the right to be counted in the Australian census. This vigorous campaign resulted in a successful referendum being held in 1967 to change the Australian Constitution to allow the Commonwealth Parliament to legislate (make law) in respect of Indigenous Australian people.

During the campaign, Mabo initiated a conference in Townsville called the Inter-Racial Seminar. Mabo urged the conference to address issues of employment, housing, education and Indigenous civil rights.

Public support for land rights grew quickly in the late 1960s with the Australian Labor Party, trade unions and churches supporting the demand for change.

The 1970–1980s

Throughout the 1970s, Mabo became a full-time activist for his Indigenous community. After the election of the Whitlam Labor government in 1972, the Commonwealth Government increased funding for Indigenous programs. By this time, Mabo had become very knowledgeable about the social problems facing Torres Strait Islanders, although it wasn't until the early 1980s that he began to succeed in his fight to change land rights for Indigenous people.

In 1981, Mabo attended the Townsville Land Rights Conference to argue the need for Indigenous Australians to be granted land rights. It was at this conference that Mabo, Flo Kennedy and David Passi decided that a test case needed to be launched through the courts in an effort to establish Indigenous land rights. Mabo, Kennedy and Passi became the plaintiffs in the original case, with the initial support of long-time Indigenous advocates and lawyers Greg McIntyre, Barbara Hocking and Garth Nettheim.

writ
usually the first legal document filed by the plaintiff to start a civil proceeding in court. A writ explains the action being taken against the defendant and the place and mode of the trial

In 1982, Eddie Mabo and other Murray Islanders filed a **writ** in the High Court of Australia. With the financial support of family, friends, a Commonwealth grant, and a group of lawyers who were willing to work for free (i.e. pro bono), the Islanders claimed customary ownership of their ancestral lands on Murray Island. In doing so, they challenged the doctrine of *terra nullius*.

The laws that applied to the case

At the time the Mabo case was initiated, existing law in Australia was based on the principle of *terra nullius*: that Australia was officially considered to be an empty land before British settlement. This meant that Indigenous Australians had no property rights. Even though they had occupied the land for many thousands of years, according to Australian law, they did not own it.

The Mabo case in the Supreme Court of Queensland

In February 1986, Chief Justice Gibbs of the High Court of Australia ordered that the Supreme Court of Queensland hear the Mabo case on its behalf.

On 13 October 1986, court proceedings commenced in Brisbane. Mabo and other Murray Islanders gave evidence about Meriam custom and the sacred laws that underpin their traditional rights and obligations to the land and sea (including that the Meriam people's laws relate to the occupation of the land, and trespass and inheritance are fundamental concepts in relation to their traditional system of ownership). Mabo hoped this evidence would establish the Murray Islanders' claim to those areas of land, sea and reef specified in the court documents.

The Murray Islanders had to fight two entrenched principles of the Australian legal system. These were the concept of *terra nullius* and the principle of sovereignty over all the land of Australia, which it was claimed abolished any native title rights that may have existed before colonisation.

After the completion of the hearings in the Supreme Court, in November 1990, more than four years after Mabo first entered the witness box, Supreme Court Justice Moynihan ruled that Mabo's claims must be denied. This finding shattered Mabo's morale, but it paved the way for taking the case back to the High Court.

The Mabo case in the High Court

After a number of hearings, the High Court handed down its final decision in the Mabo case in June 1992, 10 years after Mabo initiated the case. In a majority decision (six out of seven justices in agreement), the High Court ruled to acknowledge the existence of native title based on the traditional connection to, or occupation of, Indigenous people to the land. In simple terms, the High Court decision said that under Australian law, Indigenous people have rights to land, and that these rights had existed before colonisation and still exist. These rights are called native title. This finding overruled the false notion that when Australia was 'discovered' by Captain Cook in 1788, it was *terra nullius*, an empty land or 'land belonging to no one'.

Sadly, Eddie Mabo died on 21 January 1992, just five months before the High Court's final decision was handed down.

Source 2 Left to right: Greg McIntyre, Ron Castan QC, Eddie Mabo and Bryan Keon-Cohen at the High Court

The impact of the Mabo case on the rights of individuals and the legal system

The High Court's decision in the Mabo case had a profound effect on the whole nation. According to Justice Michael Kirby (a former High Court justice), the basic principles of the Mabo decision are:

- our system of real property law accommodates native title
- native title may be extinguished
- native title may be extinguished in a number of ways by either the Crown or by Indigenous people
- where native title has been extinguished there may (or may not) be a right to compensation.

The High Court's rejection of *terra nullius*, and recognition of native title, has led to legislation being passed to clarify the situation and protect property interests. It has generated intense political debate and vast amounts of academic writing. Media attention was enormous at the time, and the case still creates interest.

The decision fundamentally altered the legal, political and social relations between Indigenous and non-Indigenous people. In recognising the traditional rights of Murray Islanders, the case has also recognised the rights of all Indigenous people who have a continued connection to their land. The decision changed Australia and the Australian legal system forever.

The post-Mabo laws in Australia

In 1993, after the Mabo decision, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth), which confirmed the High Court's decision and established the Native Title Tribunal. The *Native Title Act*:

- provides for the recognition and protection of native title, and sets down some basic principles in relation to native title
- establishes ways in which future dealings affecting native title could proceed and be protected, and
- establishes a mechanism for determining claims to native title.

The *Native Title Amendment Act 2009* (Cth) amended the *Native Title Act* to give the Federal Court a central role in managing native title claims and to expand the provisions for mediation of native title claims.

Interestingly, the Mabo decision and the subsequent *Native Title Act* did not resolve the issues of native title on pastoral leases (agreements where government-owned land is leased for the purpose of grazing livestock) and native title to the seas, and so the courts needed to make a decision about how pastoral leases and native title related to each other.

In 1996, the High Court ruled, in *Wik Peoples v Queensland* (1996) 187 CLR 1 ('Wik case'), that native title rights could coexist with the rights of pastoralists on cattle and sheep stations. In cases where pastoralists and Indigenous rights were in conflict, the pastoralists' rights would prevail. This ruling gave pastoralists certainty to continue with grazing and other related activities.

Following the Wik decision, in 1998, the federal government (under the leadership of Prime Minister John Howard) passed the *Native Title Amendment Act 1998* (Cth), to amend the *Native Title Act* to incorporate a 10-point plan for native title. The plan not only effectively extinguished native title on pastoral leases, but also on other types of landholdings such as Crown land (government land), waterways and airspace.

Since then, a number of changes have been made to the *Native Title Act* to improve its effectiveness and to make it fairer for Indigenous Australians. Other court cases, such as the Timber Creek case (discussed in the scenario below), have clarified and acknowledged Indigenous Australians' land rights.

ACTUAL SCENARIO

The Timber Creek case

Northern Territory v Griffiths (deceased) & Jones on behalf of the Ngaliwurru & Nungali Peoples [2019] HCA 7 (13 March 2019)

In this 2019 case (also known as the 'Timber Creek case'), the High Court awarded the Indigenous Ngaliwurru and Nungali peoples $2.5 million in damages as compensation for the loss of part of their land. This decision is regarded by many as the most significant decision about native title since the Mabo decision.

In 2009, the Ngaliwurru and Nungali peoples were recognised as the native title holders of the land in and surrounding the small town of Timber Creek in the Northern Territory (which is approximately 600 kilometres, via road, south of Darwin). Despite this, the Northern Territory Government constructed roads and other infrastructure on this land. This resulted in the Ngaliwurru and Nungali peoples losing approximately 1.2 square kilometres of their land.

In 2011, the Ngaliwurru and Nungali peoples applied for compensation for the loss of their land from the Northern Territory Government and the Commonwealth Government. This application included being compensated for the spiritual and economic losses associated with the loss of their land.

In 2016, the Ngaliwurru and Nungali peoples won their Federal Court action and were awarded $3.3 million in compensation for their loss; this included $1.3 million for spiritual and cultural loss. However, the Northern Territory and Commonwealth governments challenged this ruling on the basis that the amount awarded for spiritual and cultural loss was excessive.

In 2019, the High Court ruled that the $1.3 million awarded by the Federal Court for spiritual and cultural loss was appropriate. This was an important decision because it further recognised the right of Indigenous peoples to be compensated for the loss of their land, including being compensated for spiritual harm caused by being disconnected from their land.

Possible conflicting attitudes about the Mabo case

Despite the positive impact of the Mabo case on the rights of individuals, there are conflicting attitudes and different responses to this case. For example, sections of the mining and pastoral industries, and conservative politicians, reacted angrily to the High Court's 1992 decision and urged the Commonwealth

Government to overturn it by legislation. Opponents of the Mabo decision even conducted a massive fear campaign against the newly established land rights of Indigenous Australians.

By contrast, Indigenous land councils and other Indigenous organisations throughout Australia lobbied the Commonwealth Government to legislate to protect any native title that had survived 200 years of colonisation.

In 2004, a study seeking public opinion about the Mabo decision found that while 25 per cent of survey respondents felt that change in Indigenous land rights had not gone far enough, most of the respondents were either satisfied with the progress in land rights or were of the view that the progress had gone too far.

Over the past two decades, research has shown that the once-hard attitudes of non-Indigenous Australians to Indigenous land rights have softened remarkably. People have become more aware of the significant connection of Aboriginal and Torres Strait Islander peoples to the land and to water, how important this connection is to their wellbeing and survival, and how being dispossessed from their land inflicts suffering upon them. While attitudes towards Indigenous Australians have improved, much work still needs to be done to fully acknowledge and recognise their rights.

Source 3 The legal ownership of Mer (Murray Island), located in the Torres Strait between Australia and Papua New Guinea, was at the centre of the Mabo case.

15.8 CHECK YOUR LEARNING

Define and explain

1 What is a test case?
2 Explain the legal position of Indigenous people in relation to the ownership of land before the Mabo decision.
3 What led Eddie Mabo to lodge a land rights claim in court?
4 What help did Mabo receive when making his claim in the courts?
5 What is native title?

Synthesise and apply

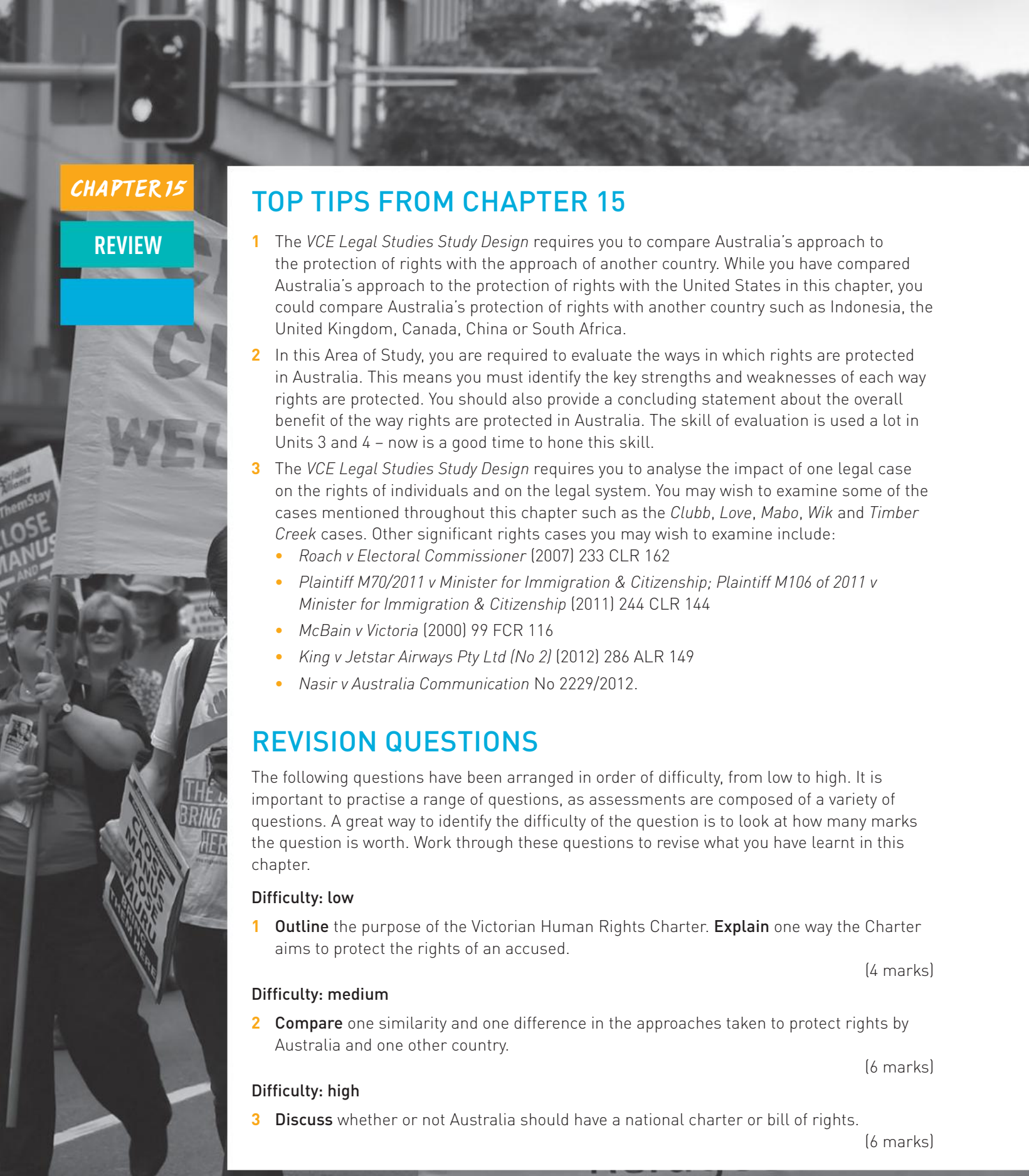
6 Explain the decision in the Mabo case. How did this decision improve the rights of Indigenous people?
7 On 2 June 2017, the twenty-fifth anniversary of the Mabo decision was celebrated. Search the internet to find more information about Indigenous land claims. Be sure to visit the '25 years of native title recognition' page on the National Native Title Tribunal's website. A link is provided in your obook assess. After conducting your research, answer the following questions:
   a How do you think the Mabo case changed the landscape of the Australian legal system?
   b What are the conflicting attitudes about the Mabo decision and Indigenous land rights?
8 Read the scenario *Northern Territory v Griffiths (deceased) & Jones on behalf of the Ngaliwurru & Nungali Peoples*.
   a Explain why the Ngaliwurru and Nungali peoples took legal action against the Northern Territory and Commonwealth governments.
   b Outline the High Court ruling in this case. Explain why this ruling is so important for Indigenous Australians.

Analyse and evaluate

9 'Changing the law surrounding native title was a very complex and important matter that should have been left to the parliament. The courts should not have become involved.' Discuss the extent to which you agree with this statement.
10 Evaluate the ability of people to use the courts to change laws in relation to Indigenous peoples. When responding to this question, refer to the main challenges Mabo and the other plaintiffs had to overcome to launch their court action.

Check your Student obook assess for these additional resources and more:

- **Student book questions** 15.8 Check your learning
- **Weblink** National Native Title Tribunal – 25 years of native title recognition
- **Weblink** *Mabo v Queensland (No 2)* (1992) 175 CLR 1
- **assess quiz** Test your knowledge on this topic with an auto-correcting multiple-choice quiz



CHAPTER 15

REVIEW

TOP TIPS FROM CHAPTER 15

1 The *VCE Legal Studies Study Design* requires you to compare Australia's approach to the protection of rights with the approach of another country. While you have compared Australia's approach to the protection of rights with the United States in this chapter, you could compare Australia's protection of rights with another country such as Indonesia, the United Kingdom, Canada, China or South Africa.

2 In this Area of Study, you are required to evaluate the ways in which rights are protected in Australia. This means you must identify the key strengths and weaknesses of each way rights are protected. You should also provide a concluding statement about the overall benefit of the way rights are protected in Australia. The skill of evaluation is used a lot in Units 3 and 4 – now is a good time to hone this skill.

3 The *VCE Legal Studies Study Design* requires you to analyse the impact of one legal case on the rights of individuals and on the legal system. You may wish to examine some of the cases mentioned throughout this chapter such as the *Clubb*, *Love*, *Mabo*, *Wik* and *Timber Creek* cases. Other significant rights cases you may wish to examine include:

- *Roach v Electoral Commissioner* (2007) 233 CLR 162
- *Plaintiff M70/2011 v Minister for Immigration & Citizenship; Plaintiff M106 of 2011 v Minister for Immigration & Citizenship* (2011) 244 CLR 144
- *McBain v Victoria* (2000) 99 FCR 116
- *King v Jetstar Airways Pty Ltd (No 2)* (2012) 286 ALR 149
- *Nasir v Australia Communication* No 2229/2012.

REVISION QUESTIONS

The following questions have been arranged in order of difficulty, from low to high. It is important to practise a range of questions, as assessments are composed of a variety of questions. A great way to identify the difficulty of the question is to look at how many marks the question is worth. Work through these questions to revise what you have learnt in this chapter.

Difficulty: low

1 **Outline** the purpose of the Victorian Human Rights Charter. **Explain** one way the Charter aims to protect the rights of an accused.

(4 marks)

Difficulty: medium

2 **Compare** one similarity and one difference in the approaches taken to protect rights by Australia and one other country.

(6 marks)

Difficulty: high

3 **Discuss** whether or not Australia should have a national charter or bill of rights.

(6 marks)

PRACTICE ASSESSMENT TASK

Before attempting this practice assessment task, students should re-read the information at the beginning of this chapter about the learning outcome, key knowledge, and key skills.

Use the stimulus material to answer the questions in this section. It is not intended that this material will provide you with all the information you need to answer the questions.

You have been asked to present at a local council function about rights in Australia. The people attending the function have recently become Australian citizens. The mayor thinks that rights against discrimination should be the focus of the speech. You are required to prepare the speech.

Practice assessment task questions

1 What are rights? Support your response with two examples.
(3 marks)

2 What does it mean to be protected from discrimination?
(3 marks)

3 Briefly explain the sources of rights in Australia.
(4 marks)

4 Is the right to be free from discrimination protected by common law, the Human Rights Charter, statute law, the Australian Constitution, or a combination of these sources of law? Justify your response.
(5 marks)

5 Has Australia signed any international treaties that protect Australians from discrimination? If so, have these treaties been ratified by Australia? If so, explain how they have been ratified.
(7 marks)

6 Examine the way rights are protected in Australia.
(8 marks)

7 Compare how Australia and one other country protect the right to be free from discrimination.
(6 marks)

8 Are there any ways we can improve the protection of the rights of asylum seekers and minority groups in Australia?
(6 marks)

9 Discuss the role of Eddie Mabo in gaining recognition of Aboriginal and Torres Strait Islander peoples' rights to their land.
(8 marks)

Total: 50 marks

Check your Student obook assess for these additional resources and more:

Student book questions
Review of Chapter 15

Revision notes
Revision notes for Chapter 15

assess quiz
Chapter 15
Test your knowledge with an auto-correcting multiple-choice quiz

Quizlet
Revise key definitions from this topic

PRACTICE ASSESSMENT TASK

Unit 2 – Area of Study 1

Crime and punishment

Alex, 19, has an addiction to the drug methamphetamine, also known as ice. His use of the drug costs him $500 per day. Alex planned on stalking people and taking their money as they walked to their cars. He asked his mate, Ben, 20, to assist in the commission of this offence. Ben is not a drug user.

One night, Renee and Tony were walking outside when Alex emerged from the shadows, produced a flick knife and demanded money. Renee escaped and ran down the street in the direction of Ben, who was waiting, armed with his knife.

Fortunately for Renee, a taxi drove into a driveway in front of her and she screamed for help. Ben remained in the shadows, unnoticed.

After Alex grabbed Tony's wallet, he ran towards the city, where he had earlier parked a stolen car, and fled. Such was Alex's speed that his car swerved onto the wrong side of the road, and he struck and killed a cyclist who was riding without lights or a helmet.

Alex pleaded not guilty to all charges. He has eight prior convictions, all for property offences.

Practice assessment task questions

1 If Alex ultimately pleads guilty, how might this plea affect sentencing?
(3 marks)

2 Describe two powers that each of the following bodies has, and two rights that Alex has when dealing with these bodies:
   a Victoria Police
   b Corrections Victoria.
(8 marks)

3 Outline the jurisdiction of two courts that may be involved in this case.
(6 marks)

4 a Explain two sanctions that could be imposed on Alex.
(5 marks)
   b For the two sanctions identified in your answer to Question 4a, discuss the appropriateness of these sanctions. In your response, refer to factors that would be taken into account in sentencing.
(6 marks)

5 Explain to Alex the importance of the principles of justice as they apply to criminal cases.
(6 marks)

6 Explain the role of the jury in this case. In your answer, discuss the extent to which the jury helps to ensure fairness and equality.
(8 marks)

7 Discuss the extent to which one therapeutic justice approach to sentencing is appropriate this case.
(8 marks)

Total: 50 marks

PRACTICE ASSESSMENT TASK

Unit 2 – Area of Study 2

Horror trip away for Penny and Manny

Penny works for a local supermarket on Wednesday evenings and on weekends. She's been working at the supermarket for over four years on a casual basis and gets paid by the hour.

On Thursday, Penny left for a cruise with her best friend, Manny. Manny also works at a supermarket, but in a different store to Penny. Manny mentioned a store in which one of the other supermarket employees, Mia, had found out that she was being seriously underpaid. Manny then mentioned to Penny what Mia was getting paid – which is more than Penny is paid, even though Mia is younger.

During the cruise, Penny often felt she was getting overlooked by a particular crew member, Andrew. Andrew ignored Penny when she was at the bar, would stare at her in a condescending and threatening way, and one evening, he refused to let Penny into a theatre room to watch a movie, saying the movie theatre was 'full'. Penny later found out this was not true.

Four days into the cruise, Manny started feeling unwell. Two days later, Penny started vomiting. It was later discovered that more than 80 per cent of the cruise passengers had been struck by the same or similar illness. Penny overheard a crew member saying that they had discovered some of the seafood that had been served at dinner one night was not good quality.

When the cruise ended, Penny tried to disembark but kept on getting pushed back to the end of the queue by Andrew, the crew member. Andrew said, 'You just need to wait your turn. Go back to the end of the line.' She challenged him, and Andrew turned to her and said, 'Listen you wog. Go back to where you came from. Aussies first.' Penny thinks that Andrew said this because she remembers telling him on the first day that she was part Italian.

Practice assessment task questions

1 Identify three civil disputes that could arise from the above case study. Identify the likely plaintiff and defendant in each dispute.
(6 marks)

2 Identify the type of claim that Penny is likely to have for each dispute.
(3 marks)

3 For each of Penny's disputes, identify which dispute resolution body listed below is the best body to hear the dispute. Justify your answers.
- Supreme Court of Victoria
- VCAT
- Fair Work Ombudsman

(6 marks)

4 'There are two possible avenues of appeal from VCAT, depending on who heard the case.' Explain this statement.
(3 marks)

5 In your view, which of Penny's disputes is best suited to mediation, and which is not appropriate for mediation? Give reasons for your response.
(4 marks)

6 Describe the role of the jury in a civil trial. Explain two circumstances that need to exist for a jury to be used in a civil trial.
(6 marks)

7 Is an injunction an appropriate remedy for any of Penny's cases? Why or why not?
(3 marks)

8 Evaluate the ability of damages to achieve one of its purposes in one of these disputes.

(5 marks)

9 Penny is worried that even if she pursues one or more of these disputes, justice is unlikely to be achieved.

a Describe to Penny the three principles of justice.

(6 marks)

b Discuss the ability of the civil justice system to achieve justice in one or more of these disputes.

(8 marks)

Total: 50 marks

PRACTICE ASSESSMENT TASK

Unit 2 – Area of Study 3

Freedom of speech and the *Racial Discrimination Act 1975* (Cth)

One basic feature of our democratic system of government is that citizens have the broad right to freedom of speech.

The First Amendment to the US Bill of Rights guarantees the right of the American people to freedom of speech. But should freedom of speech be limited? For example, should individuals have the right to make offensive or insulting remarks about another person on the basis of their race, or should making such comments be unlawful?

In 1975, the Commonwealth Parliament passed the *Racial Discrimination Act 1975* (Cth) (RDA). The RDA was designed to ensure that all people, regardless of their nationality and background, are treated equally. The RDA made it illegal to discriminate against a person on the basis of their colour, race, or national or ethnic origin. Section 18C of the RDA makes it unlawful for a person to undertake an act that is reasonably likely to 'offend, insult, humiliate or intimidate' another person or group due to their race or ethnicity.

In 2014, the Liberal–National Coalition government created controversy and debate by announcing their intention to, among other changes, alter section 18C of the RDA. The government wanted to remove the words 'offend, insult and humiliate' and add the words 'racial vilification'. This change would mean that it would only be an offence to undertake action that 'intimidates or vilifies' another person or group on the basis of their race or ethnicity.

The proposed changes to the RDA were introduced by the Australian Government in response to a 2011 Federal Court decision. In this case, a judge ruled that controversial journalist Andrew Bolt breached section 18C of the RDA when he wrote a series of columns and a blog (one titled, 'White is the new black').

In his decision, Federal Court Justice Bromberg held that Mr Bolt's comments (and the actions of the publisher of the articles, The Herald and Weekly Times) were reasonably likely to 'offend, insult,

humiliate or intimidate' some Indigenous Australian persons of mixed descent or ancestral heritage.

In November 2013, the newly appointed federal Attorney-General, George Brandis, announced that he would seek to have the Commonwealth Parliament change the RDA to protect freedom of speech and to prevent other similar situations where simply 'expressing an opinion' to encourage community discussion could be regarded as unlawful.

The 2014 proposed changes to the RDA were abandoned by the government because the issue had become too controversial. Also, the government did not want to pursue any changes that could harm our 'national unity' at a time when there was growing conflict in Iraq and terrorism concerns associated with Australia's military and diplomatic role in the middle east.

However, in March 2017, the government announced its intention to once again pursue the changes to the RDA. Interestingly, at the same time, the government announced it would introduce a bill into parliament to amend the *Australian Human Rights Commission Act 1986* (Cth). These amendments aimed to improve the way in which the Australian Human Rights Commission processes and deals with complaints against alleged human rights infringements.

In 2017, the proposed amendments to section 18C of the RDA were struck down by the Senate.

Practice assessment task questions

1 Define the term 'freedom of speech'.

(2 marks)

2 What is the *Racial Discrimination Act 1975* (Cth)? What is the purpose of section 18C of this Act?

(4 marks)

3 Which major international treaties adopted by Australia might be upheld by the *Racial Discrimination Act*?

(4 marks)

4 a Distinguish between an express right and an implied right.

(3 marks)

b Explain how the Australian Constitution protects the right to freedom of speech. Provide an example to support your response.

(4 marks)

c Describe how the US Constitution protects the right to freedom of speech.

(4 marks)

d Evaluate the way in which Australia protects freedom of speech.

(6 marks)

5 Consider the following quotes about the right to freedom of speech. Discuss the extent to which you agree with each quote.

(8 marks)

a 'People do have a right to be bigots (racists), you know. In a free country, people do have rights to say things that other people find offensive, insulting or bigoted': George Brandis.

b 'Section 18C empowers minorities with the ability to fight back, with the force of the law and the sanction of our state, in the face of the outrageous and malign, which could otherwise be the first step down a dark and evil path': Bill Shorten MP.

6 Conduct research into another Australian case that involves freedom of speech. Prepare a report that:

- states the name and legal citation of the case

(1 mark)

- outlines the facts and main issues involved in the case

(5 marks)

- outlines the outcome of the case and any appeals

(4 marks)

- explains whether or not the outcome resulted in the protection of rights.

(5 marks)

Total: 50 marks

GLOSSARY

A

abrogate (abrogation)
to cancel or abolish a court-made law by passing an Act of Parliament

acceptance
(in relation to contract law) a written or oral statement or act that indicates that the person agrees to the offer being made

access
one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case

accessorial liability
the way in which a person can be responsible or liable for the loss or harm suffered by another person because they were directly or indirectly involved in causing the loss or harm (e.g. they encouraged another person to cause the harm)

accessory
a person who knowingly assists another person who has committed a serious indictable offence to avoid being apprehended, prosecuted, convicted or punished

accused
a person charged with a criminal offence

Act of Parliament
a law made by parliament; a bill that has passed through parliament and has received royal assent (also known as a statute)

actus reus
a Latin term meaning 'a guilty act'; the physical element of a crime (i.e. the act itself). See also *mens rea*

aggravated damages
in a civil case, additional compensation to take account of humiliation suffered by a person as a result of another's wrongdoing

aggravating factors
facts or circumstances about an offender or an offence that can lead to a more severe sentence

alternative dispute resolution methods
ways of resolving or settling civil disputes that do not involve a court or tribunal hearing (e.g. mediation, conciliation and arbitration) (also known as appropriate dispute resolution methods)

appeal
an application to have a higher court review a ruling (i.e. a decision) made by a lower court

appellate jurisdiction
the power of a court to hear a case on appeal

arbitral award
a legally binding decision made in arbitration by an arbitrator

arbitration
a method of dispute resolution in which an independent person (an arbitrator) is appointed to listen to both sides of a dispute and to make a decision that is legally binding on the parties. An arbitrator's decision is known as an arbitral award

arbitrator
the independent third party (i.e. person) appointed to settle a dispute during arbitration. Arbitrators have specialised expertise in particular kinds of disputes between parties and make decisions that are legally binding on the parties. An arbitrator's decision is known as an arbitral award

arson
intentionally and without lawful excuse destroying or damaging property by fire. Arson also includes intentionally and unlawfully destroying or damaging property by fire with the intention of endangering another person's life

arson causing death
the intentional and unlawful use of fire to cause death

assault
the intentional or reckless use of force or the threat of force against another person without a lawful excuse

attribute
a quality, feature or characteristic of a person, such as race, gender or disability

Australian Constitution
a set of rules and principles that guide the way Australia is governed. Its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

automatism
a state in which a person has a total loss of control over their bodily movements (i.e. is not

conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

award
the minimum wages and conditions that an employer is legally required to pay a worker for a particular job or occupation

B

bail
the release of an accused person from custody on condition that they will attend a court hearing to answer the charges

bail justice
a volunteer who works within the justice system, generally outside normal court operating hours, to hear applications for bail, remand and interim or temporary accommodation orders relating to children

balance of probabilities
the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that their version of the facts is correct

barrister
a legal professional who is engaged by a party's solicitor. One of the roles of the barrister is to advocate (argue) the party's position at formal hearings

beyond reasonable doubt
the standard of proof in criminal cases. This requires the prosecution to prove there is no reasonable doubt that the accused committed the offence

bicameral parliament
a parliament with two houses (also called chambers). In the Australian Parliament, the two houses are the Senate (the upper house) and the House of Representatives (the lower house). In the Victorian Parliament, the two houses are the Legislative Council (the upper house) and the Legislative Assembly (the lower house)

bill
a proposed law that has not yet been passed by parliament

binding precedent
the legal reasoning for a decision of a higher court that must be followed by a lower court in the same jurisdiction (i.e. court hierarchy) in cases where the material facts are similar

breach
breaking or failing to fulfil a duty or obligation

burden of proof
the obligation (i.e. responsibility) of a party to prove a case. The burden of proof usually rests with the party who initiates the action (i.e. the plaintiff in a civil dispute and the prosecution in a criminal case)

by-laws
local laws or regulations made by local councils that apply to residents in local areas

C

Cabinet
the policy-making body made up of the Prime Minister (or the Premier at a state level) and a range of senior government ministers who are in charge of a range of government departments. Cabinet decides which bills or legislation should be presented to parliament

case management
a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (e.g. an order that the parties attend mediation)

causation
the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

charter or bill of rights
a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

child homicide
the killing of a child under six years of age in circumstances that would normally be manslaughter

civil law
an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)

civil liability
the legal responsibility of a party (i.e. an individual, group or organisation) for loss or harm caused to another party because of a breach of civil law

coalition
an alliance of two or more political parties that join to form government

codify (codification)
to collect all law on one topic together into a single statute

committal hearing
a hearing that is held as part of the committal proceeding. At a committal hearing, a magistrate decides whether there is sufficient evidence to support a conviction for the offence charged

committal proceeding
the processes and hearings that take place in the Magistrates' Court for indictable offences

common law
law made by judges through decisions made in cases. Also known as case law or judge-made law (as opposed to statute law)

common law rights
rights established by judges when making decisions to resolve disputes

community correction order (CCO)
a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

compensation order
an order made by a court for an offender to pay money to a person who has suffered loss or damage as a result of the offence

compensatory damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

complaints body
an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

compulsory conference
a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their differences

conciliation
a method of dispute resolution that uses an independent third party (i.e. a conciliator) to help the disputing parties reach a resolution

conciliator
the independent third party in a conciliation who helps the parties reach an agreement that ends the dispute between them. The conciliator can make suggestions and offer advice to assist in finding a mutually acceptable resolution but the parties reach the decision themselves

Congress
the federal or national legislature or law-making body in the United States

consideration
(in relation to contract law) something of value that passes from one party to the other at which time a contract is complete. Consideration can also be a promise to pay

contract
an agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced through the law

contract law
an area of civil law governing the validity and enforceability of agreements made between two or more parties

contributory negligence
a formal defence to negligence that claims the plaintiff contributed to the harm caused by the defendant. If proved, this reduces the damages the defendant has to pay

conviction
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

counsel
a lawyer appearing in court to represent a party

counterclaim
a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

court hierarchy
the ranking of courts from lowest to highest according to the seriousness and complexity of the matters they deal with

crime
an act or omission that is (1) against an existing law, (2) harmful to an individual or to society as a whole, and (3) punishable by law

crime statistics
information (i.e. data) collected by authorities (e.g. the police) and analysed to track the level of crime or offending in the community. Crime statistics also track the types and levels of sentences given to convicted offenders

criminal law
an area of law that defines behaviours and conduct that are prohibited (i.e. crimes) and outlines sanctions (i.e. penalties) for people who commit them (as opposed to civil law)

cross-examination
the questioning of a witness called by the other side in a legal case

culpable driving causing death
the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or while under the influence of drugs or alcohol

cyber-crime
a criminal offence in which the use of computers or information communication technologies (ICT) is an essential and central part of the offending

D

damages
an amount of money that the court (or tribunal) orders one party to pay to another party. It is the most common remedy in a civil claim

dangerous driving causing death
the act of causing the death of another person while driving a motor vehicle at a speed or in a way that is dangerous to the public, having regard to all the circumstances of the case

dangerous driving causing serious injury
the act of causing serious injury (i.e. life-threatening injury or substantial and long-lasting injury) to another person while driving a motor vehicle at a speed or in way that is dangerous to the public, having regard to all the circumstances of the case

defamation
a type of tort that involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

defence to a crime
a justification or lawful 'excuse' for committing a crime

defendant
(in civil disputes) a party who is alleged to have breached a civil law and who is being sued by a plaintiff

delegated body
an authority or agency given power by parliament to make and/or enforce laws

denunciation
one purpose of a sanction, designed to demonstrate the community's disapproval of the offender's actions

deterrence
one purpose of a sanction, designed to discourage the offender and others in the community from committing similar offences

direct discrimination
a type of discrimination; when an assumption is made about what a

person can or cannot do because of a personal characteristic or attribute

directions
instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

Director of Public Prosecutions (DPP)
the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

disbursements
out of pocket expenses or fees (other than legal fees) incurred as part of a legal case. They include fees paid to expert witnesses, court fees, and other third-party costs such as photocopying costs

discovery of documents
a pre-trial procedure that requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

discrimination
the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or gender identity). Discrimination can be direct or indirect

diversion program
a method used in the Magistrates' Court and Children's Court to divert offenders away from the court and avoid a criminal record by placing them on a plan

doctrine of precedent
the common law principle by which the reasons for the decisions of higher courts are binding on courts ranked lower in the same hierarchy in cases where the material facts are similar

doli incapax
a Latin term meaning 'incapable of evil'; the principle that a child aged between 10 and 13 years is presumed to be incapable of forming *mens rea* (a guilty mind) because they do not have the intellectual or moral capacity to know the difference between right and wrong

double majority
a voting system that requires a national majority of all voters in Australia and a majority of electors in a majority of states (i.e. at least four states) to vote in favour of a proposal. A double majority is required for a change to be made to the wording of the Australian Constitution at a referendum

duress
strong mental pressure on someone to overcome their independent will and force them to do something

duty of care
(in relation to negligence) the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

Drug Court
a specialist court that sentences offenders to a drug treatment order where drugs or alcohol contributed to the commission of the offence

drug treatment order
a type of sanction imposed by the Drug Court that aims to treat the underlying causes of offending, and which includes both the treatment and custody of the offender

E

enterprise agreement
an agreement or contract about wages and conditions between two or more employees and their employer

equality
one of the principles of justice; equality means people should be equal before the law and have an equal opportunity to present their case as anyone else, without advantage or disadvantage

express rights
rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

express terms
(in relation to contract law) provisions or conditions that are written in the contract or are clearly stated or discussed between the parties as forming part of the contract

F

Fair Work Commission
an independent national tribunal that has the power to establish the minimum wages and employment conditions for a particular job or industry

Fair Work Ombudsman
a statutory body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints and ensures compliance with Australia's workplace laws

fairness
one of the principles of justice; fairness means having fair processes and a fair hearing. This means that the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing processes should be fair and impartial

federal legislature
a national law-making body; for example, the Commonwealth Parliament in Australia and the Congress in the United States

federal system
a system of government in which a county is divided into states (each with its own parliament to make laws applicable in that state), in addition to having one central parliament (i.e. a federal parliament) with the power to make laws that apply to the entire country

Federation of Australia
the union of sovereign states that gave up some of their powers to a central authority to form Australia

fine
a sanction that requires the offender to pay an amount of money to the state

freedom of political communication
the right of the Australian people to freely discuss and debate political issues, subject to certain restrictions

G

general damages
a type of remedy that requires the payment of a sum of money to compensate for loss or damage that cannot easily be quantified (e.g. pain and suffering)

general deterrence
one purpose of a sanction, designed to discourage others in the community from committing similar offences

government
the ruling authority with power to govern, formed by the political party or parties (known as a coalition) that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

governor
the Queen's representative at the state level

Governor-General
the Queen's representative at the Commonwealth level

graffiti
any illegal writing, drawing or scratching that defaces (i.e. damages) public property and cannot be removed with a dry cloth

group member
a member of a group of people who is part of a representative proceeding (i.e. a class action)

H

hate crime
a criminal offence motivated by hostility and prejudice towards the victim (e.g. because of their race or religion)

House of Representatives
the lower house of the Commonwealth Parliament

Human Rights Charter
the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The main purpose of this Act is to protect and promote human rights

I

implied rights
rights that are not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

implied terms
(in relation to contract law) provisions or conditions that are not expressed or written down but are assumed and intended to be included in the contract

imprisonment
a sanction that involves removing the offender from society for a stated period of time and placing them in prison

independents
individuals who stand as candidates in an election but do not belong to a political party

indictable offence
a serious offence generally heard before a judge and a jury in the County Court or the Supreme Court of Victoria

indictable offence heard and determined summarily
a serious offence that can be heard and determined as a summary offence if the court and the accused agree

indirect discrimination
a type of discrimination; when there is a rule or policy that is the same for everyone, but it has an unfair effect on some people who share a particular attribute

individual contract
an agreement between an employee and their employer relating to wages and work conditions (which is legally binding and enforceable at law)

infanticide
the killing by a mother of a child under two years old while suffering a mental condition caused by the effects of that child's birth

injunction
a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify a wrong

institutional powers
the authority (i.e. power) given to bodies (i.e. institutions) such as Victoria Police to undertake certain actions

insurers
a person or company that is contracted to compensate another person in the event of damage or loss

intentional
something deliberate; not an accident

intentionally or recklessly causing a bushfire
intentionally or recklessly causing a fire that spreads to vegetation on property belonging to another person

international declaration
a non-binding agreement between countries that sets out the aspirations (i.e. hopes) of the parties to the agreement

international treaty
a legally binding agreement between countries or intergovernmental organisations, in which they undertake to follow the obligations set out in the agreement and include them in their own local laws (also known as an international convention)

J

jurisdiction
the lawful authority (i.e. power) of a court, tribunal or other dispute resolution body to decide legal cases

jury
an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision (i.e. a verdict)

jury directions
instructions given by a judge to a jury either during or at the end of a trial

juvenile crime
a criminal offence undertaken by a young person aged between 10–18 years

K

Koori Court
a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Indigenous people

L

law reform
the process of constantly updating and changing the law so it remains relevant and effective

laws
legal rules made by a legal authority (i.e. the parliament or courts) that are enforceable by the police and other law enforcement agencies

lawyer
a general term used to describe somebody who has been trained in the law and is qualified to give legal advice (e.g. a barrister or a solicitor)

lead plaintiff
the person named as the plaintiff in a representative proceeding (i.e. a class action) and who represents the group members

legal aid
free or low-cost legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

legal citation
the system used to refer to legal documents and sources such as cases and statutes

Legislative Assembly
the lower house of the Victorian Parliament

Legislative Council
the upper house of the Victorian Parliament

limitation of actions
the restriction on bringing a civil law claim after the allowed time

litigation funder
a third party who pays for some or all the costs and expenses associated with initiating a claim in return for a share of the proceeds. Litigation funders are often involved in representative proceedings

locus standi
a Latin term meaning 'standing in a case'; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

loss
a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

M

majority verdict
a jury vote or decision where all but one of the members of the jury agree with the decision. In a criminal trial, this means 11 of the 12 jurors are in agreement

malice aforethought
the intention to kill or cause serious injury to a person. This malicious intention is the mental element (i.e. an intention to inflict harm) necessary for murder

manslaughter
the unlawful killing of a person due to a reckless, dangerous act or negligent behaviour

marking graffiti
the act of writing, drawing, scratching or defacing (i.e. damaging) public property in ways that cannot be removed with a dry cloth

marriage celebrant
a person registered in Australia to perform marriage ceremonies

mediation
a method of dispute resolution that uses an independent third party (i.e. a mediator) to help the disputing parties reach a resolution

mediator
an independent third party who does not interfere or persuade but helps the parties in a mediation as they try to reach a settlement of the matter

member
the person who presides over final hearings and compulsory conferences at the Victorian Civil and Administrative Tribunal (VCAT). Members include the VCAT President, vice-presidents, deputy presidents, senior members and ordinary members

mens rea
a Latin term meaning 'a guilty mind'; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal). See also *actus reus*

mental impairment
a condition of the mind that impacts on a person's ability to know the nature and quality of their conduct, or that the conduct was wrong

minister
a member of parliament who is a member of the party in government and who is in charge of a government department

mitigating factors
facts or circumstances about the offender or the offence that can lead to a less severe sentence

monogamous
the state of being married to only one person at a time

murder
the intentional unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (i.e. 10 years old or older) and of sound mind. Murder is the most serious homicide offence

N

National Employment Standards (NES)
a set of 10 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

native title
the legal recognition of the right of Aboriginal and Torres Strait Islander people to be the owners of land and waters based on their traditional ownership of the land (which existed thousands of years before the British colonisation of Australia)

negligence
a type of tort that involves a breach of a duty of care, causing loss or harm

neighbour principle
(in relation to negligence) the common law rule that a person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their 'neighbours' (i.e. people who would be closely and directly affected by their acts or omissions)

nervous shock
a psychological reaction. It is psychological harm that is more serious than ordinary grief or stress

non-legal rules
rules made by private individuals or groups in society, such as parents and schools, which are not enforceable by the courts

nuisance
a type of tort that involves interference with a person's right to use and enjoy private and/or public property

O

obiter dictum
a Latin term meaning 'by the way'; comments made by the judge in a particular case that may be persuasive in future cases (even though they do not form a part of the reason for the decision and are not binding)

offensive behaviour
conduct that is calculated to wound feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person

offer
(in relation to contract law) a written or oral statement or act that indicates the person is willing to buy or sell goods or services

Office of Public Prosecutions (OPP)
the Victorian public prosecutions office that prepares and conducts criminal proceedings on behalf of the Director of Public Prosecutions

ombudsman
an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

opposition
the political party that holds the second largest number of seats (after the government) in the lower house. The opposition questions the government about policy matters and is responsible for holding the government to account

orders
a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

organised crime
criminal offences undertaken in a planned and ongoing manner by organised syndicates or gangs

original jurisdiction
the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

P

parliament
a formal assembly of representatives of the people that is elected by the people and gathers together to make laws

parole
the supervised and conditional release of a prisoner after the minimum period of imprisonment has been served

persuasive precedent
the legal reasoning behind a decision of a lower (or equal) court within the same jurisdiction, or a court in a different jurisdiction, that may be considered relevant (and therefore used as a source of influence) even though it is not binding (see binding precedent)

plaintiff
(in civil disputes) a party who makes a legal claim against another party (i.e. the defendant) in court

police informant
a person who secretly gives information to police about criminal offending, including information about the people involved in criminal activity, which may be used during the investigation and prosecution of a crime

political party
an organisation that represents a group of people with shared values and ideas, and which aims to have its members elected to parliament

precedent
a principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

presumption of innocence
the right of a person accused of a crime to be presumed not guilty unless proven otherwise

principal offender
a person who has carried out the *actus reus* (guilty act) and has therefore directly committed the offence

private member's bill
a bill introduced into parliament by a member of parliament who is not a government minister

private nuisance
a type of tort involving an act or omission that substantially and unreasonably interferes with the use and enjoyment of land

prosecution
the lawyers who prepare a criminal case and take it to court on behalf of the state, the victim and society

protection
one purpose of a sanction, designed to safeguard the community from an offender by preventing them from committing a further offence (e.g. by

imprisoning the offender)

public nuisance
a type of tort involving an act or omission that interferes with the comfort or convenience of a number of people to a considerable degree

public place
an area or location considered to be open to the public (i.e. anyone in the community has a right to go there)

punishment
one purpose of a sanction, designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

R

rape
the act of intentionally sexually penetrating another person without their consent

ratification
confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires it by law to adopt the various rights and responsibilities set out in the treaty

ratio decidendi
a Latin term meaning 'the reason'; the legal reasoning behind a judge's decision. *Ratio decidendi* forms the binding part of a precedent

reasonable belief
an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity) and in similar circumstances, to be sensible or correct

recidivism
re-offending; returning to crime after already having been convicted and sentenced

reckless
acting, or not acting, with conscious awareness of the potential harm that is likely to be suffered

referendum
the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australia people in a public vote by a double majority

rehabilitation
one purpose of a sanction, designed to reform an offender in order to prevent them from committing offences in the future

remedy
any order made by a court that is designed to address a civil wrong or a breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to the position they were in before they were wronged or their rights were breached

representative government
a political system in which the people elect members of parliament to represent them in government

representative proceeding
a legal proceeding in which a group of people who have a claim based on similar or related facts bring that claim to court in the name of one person (also called a class action or a group proceeding)

right
a moral or legal entitlement to have or do something

right of subrogation
the right to 'step into the shoes' of an insured person and act on their behalf – this includes taking legal actions in their name

royal assent
the formal signing and approval of a bill by the Governor-General (at the Commonwealth level) or a governor (at the state level) after which the bill becomes an Act of Parliament (i.e. a law)

royal commission
the highest form of inquiry into matters of public concern and importance. Royal commissions are established by the government and are given wide powers to investigate and report on an important matter of public concern

rule of law
the principle that everyone in society is bound by law and must obey the law, and that laws should be fair and clear, so people are willing and able to obey them

S

sanction
a penalty (e.g. a fine or prison sentence) imposed by a court on a person guilty of a criminal offence

secondary legislation
rules and regulations made by secondary authorities (e.g. local councils, government departments and statutory authorities) that are given the power to do so by parliament (also called delegated legislation)

secure treatment order
a sanction that requires the accused to be compulsorily detained, and receive treatment, at a mental health service

Senate
the upper house of the Commonwealth Parliament

sentencing hearing
a hearing during which a judge will hand down the sanction imposed on an offender

signatory
a state or organisation that has signed an international treaty to demonstrate a nation's intent to adopt the treaty and incorporate it into their law

social cohesion
a term used to describe the willingness of members of a society to cooperate with each other in order to survive and prosper

solemnised
the act of formalising a lawful marriage in accordance with the requirements of marriage laws in Australia

solicitor
a qualified legal practitioner who gives advice about the law and a person's rights under the law

specific deterrence
one purpose of a sanction, designed to discourage the offender from committing similar offences

standard of care
(in relation to negligence) the degree of caution required by a person who owes a duty of care to another

standard of proof
the degree or extent to which a case must be proved in court

stare decisis
a Latin term meaning 'let the decision stand'; the basic principle underlying the doctrine of precedent

state legislatures
the state law-making bodies in the United States (the equivalent of Australia's state parliaments)

statement of claim
a document filed by the plaintiff in a civil case to notify the defendant of the nature of the claim, the cause of the claim and the remedy sought

statute law
law made by parliament; also known as Acts of Parliament or legislation (as opposed to common law)

statutory approach
(in relation to rights) the protection of rights through passing Acts of Parliament

statutory interpretation
the process by which judges give meaning to the words or phrases in an Act of Parliament (i.e. a statute) so it can be applied to resolve the case before them

stay in proceedings
a court order requiring a criminal trial to be stopped or paused because the continuation of proceedings would threaten the fairness of the trial

strict liability
where culpability or responsibility for committing a crime can be established without having to prove there was *mens rea* (i.e. a guilty mind)

sue
to take civil action against another person, claiming that they infringed some legal right of the plaintiff (or did some legal wrong that negatively affected the plaintiff)

summary offence
a minor offence generally heard in the Magistrates' Court of Victoria

supremacy of parliament
(also known as 'sovereignty of parliament') the concept that the final law-making power rests with parliament, which can repeal and amend its own statutes and pass legislation to override common law

supreme law-making body
the body (i.e. the parliament) that has the final law-making power, meaning it can make or change any law within its power and pass legislation to abrogate (cancel) common law

T

terms of settlement
a document that sets out the terms on which the parties agree to resolve their dispute

terra nullius
a Latin term meaning 'empty land'; a false common law principle that was used by the British to declare that Australia belonged to no-one when they first arrived in Australia to establish a colony in 1788

test case
a legal action undertaken with the aim of having the court establish a legal principle or precedent that can be followed for future similar cases

theft
the act of dishonestly taking property belonging to another person (without their consent) with the intention of permanently depriving that person of it

therapeutic justice
a method used in the criminal justice system to deal with offenders in a way that addresses the underlying causes of crime and seeks to provide offenders with support to avoid further reoffending

third party litigation funder
an entity that agrees to meet the costs of a civil proceeding in return for a share of any amount recovered if the proceeding is successful

tort
a term that literally means 'wrong'; a wrong that interferes with a person's legally protected interests

trespass
a type of tort involving the interference or intrusion of a person's body, property or goods without the consent of that person

trial by jury
a type of trial by peers in which an impartial group of randomly selected people hears evidence and hands down a verdict (i.e. a decision)

trial by ordeal
a type of trial common in early medieval Europe that required an accused person to prove their innocence by being subjected to a painful or unpleasant test (i.e. an ordeal)

tribunal
a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts

U

ultra vires
a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

unanimous verdict
a jury vote or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty). In a criminal case, this means all 12 jurors are in agreement

United Nations (UN)
an international organisation formed in 1945 made up of various countries. The UN aims to take action on issues facing humanity

unlawful homicide
the killing of another person without legal justification. Murder, manslaughter, infanticide (i.e. killing a baby), child homicide, and culpable driving causing death are unlawful homicide offences

US Bill of Rights
a US law contained within the US Constitution that establishes the most important basic rights of the people and aims to protect them

V

vicarious liability
the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

victim impact statement
a statement filed with the court by a victim that is considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

victimless crime
an offence that only involves the offender(s) and where no direct harm is suffered by a victim. The offence also goes against what society considers to be acceptable and can indirectly harm individuals and the wider community

Victoria Legal Aid
a government agency that provides free legal advice to all members of the community and low-cost or no-cost legal representation to some people who cannot afford a lawyer

Victorian Civil and Administrative Tribunal (VCAT)
a tribunal that deals with disputes relating to a range of civil issues that are heard by various 'lists' (i.e. sections) of the tribunal. These lists include the Human Rights List, the Civil Claims List and the Residential Tenancies List

volenti non fit injuria
a Latin term meaning 'to a willing person, injury is not done'; a defence in which the defendant claims that the plaintiff accepted the dangers of a known and understood risk, either expressly or by implication

W

Westminster system
a parliamentary system of government that developed in Britain. Australia's parliamentary system is modelled on this system

white-collar crime
criminal offences undertaken by people who work in government, businesses or in the corporate world

will
a document that specifies how a person would like their assets to be distributed after they die, and who they would like to carry out their wishes

writ
usually the first legal document filed by the plaintiff to start a civil proceeding in court. A writ explains the action being taken against the defendant and the place and mode of the trial

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