Legal Studies for Queensland

LEGAL EAGLE
PUBLICATIONS

Roger Woodgate
Jeff Biggs
Kirsten Murray

Legal Studies 2025 - General Senior Syllabus

3 & 4 UNITS

TEACHER SOLUTIONS & RESOURCES MANUAL

TEACHER SOLUTION AND RESOURCES MANUAL

Legal Studies for Queensland

Volume 2—Ninth Edition

Curriculum

Legal Studies 2025, General senior syllabus—Unit 3: Law, governance and change and Unit 4: Human rights in legal contexts

Authors

Roger Woodgate BA (Hons), B. Econ., LLB, Dip. Ed. (Qld); Solicitor of the Supreme Court of Queensland; former Accredited Mediator; former Law Society Accredited Family Law Specialist; Teacher

Jeff Biggs B. Econ., LLB, Dip. Ed, BA; Solicitor of the Supreme Court of Queensland; Law Society; Accredited Family Law Specialist; Secondary Humanities Teacher

Kirsten Murray BA Justice Studies (Criminology), BA Ed. (Secondary), Grad. Dip. Comm; former Legal Studies and Humanities Teacher

---

Published by Legal Eagle Publications, Brisbane (2025)

© Ninth Edition 2025 Roger Woodgate

This publication has copyright. Except as permitted under the *Copyright Act 1968* (Cth), **no part of this publication may be reproduced** by any process, electronic or otherwise, without the specific written permission of the copyright owners. Neither may information be stored electronically in any form whatsoever without such permission. Enquiries in this regard should be addressed to the publishers.

Legal Studies for Queensland

Complete teaching package

Volume 1 (Units 1 and 2), Ninth Edition Textbook (2023)

+

Teacher Solutions and Resources Manual for Volume 1 (2024)

+

Volume 2 (Units 3 and 4), Ninth Edition Textbook (2025)

+

Teacher Solutions and Resources Manual for Volume 2 (2025)

Orders and enquires

Roger Woodgate

Legal Eagle Publications

PO Box 192

Clayfield Qld 4011

Phone: 0431 314 241

Email: info@legalstudiesqld.com.au

Web: legalstudiesqld.com.au

CONTENTS

CHAPTER 1: WHAT IS GOVERNANCE? 5

CHAPTER 2: THE AUSTRALIAN CONSTITUTION 11

CHAPTER 3: AUSTRALIAN PARLIAMENTARY DEMOCRACY—REPRESENTATIVE GOVERNMENT 18

CHAPTER 4: RESPONSIBLE GOVERNMENT 36

CHAPTER 5: MAKING LAW IN PARLIAMENT 46

CHAPTER 6: GOVERNANCE IN ACTION—THE JUDICIAL SYSTEM 56

CHAPTER 7: GOVERNANCE IN ACTION—ACCOUNTABILITY 63

CHAPTER 8: WHY DO LAWS CHANGE? 75

CHAPTER 9: LEGAL INSTITUTIONS AND LAW REFORM 106

CHAPTER 10: CORONIAL INQUESTS AND INVESTIGATIONS 117

CHAPTER 11: CURRENT AND EMERGING LEGAL ISSUES 123

CHAPTER 12: THE HUMAN RIGHTS BACKGROUND TO INTERNATIONAL LAW 129

CHAPTER 13: INTERNATIONAL LAW 137

CHAPTER 14: HUMAN RIGHTS OF CHILDREN AND PRISONERS 147

CHAPTER 15: HUMAN RIGHTS AND DISCRIMINATION 158

CHAPTER 16: MONITORING HUMAN RIGHTS 171

CHAPTER 17: THE ROLE OF INTERNATIONAL INSTITUTIONS IN UPHOLDING RIGHTS 184

CHAPTER 18: REFUGEES, ABDUCTION OF CHILDREN, CONDUCT OF WAR 192

CHAPTER 19: HUMAN RIGHTS IN AUSTRALIAN LAW 208

CHAPTER 20: RESOLVING HUMAN RIGHTS COMPLAINTS 218

CHAPTER 21: PROTECTING AND ADVOCATING FOR HUMAN RIGHTS IN AUSTRALIA 231

CHAPTER 22: HUMAN RIGHTS PRINCIPLES IN AUSTRALIAN CASE STUDIES 242

Chapter 1: What is Governance?

1.1 Introduction

Practical Application (Pages 9 - 10)

1. 'Coherent' according to the *Macquarie Dictionary* means 'having a natural or due agreement of parts, connected, logical. We interpret this to mean that a coherent system of governance is one in which all the arrangements are logical and connected, so that each part makes sense and contributes to an overall objective or outcome.

   'Performance' according to the *Macquarie Dictionary* means the 'execution or doing of work, acts, or feats. A particular action, deed or proceeding'. We therefore interpret 'performance framework' to mean the structures set up to enable 'Commonwealth entities' to carry out their obligations in a way which meets the requirements of the *Public Governance and Accountability Act 2013 (*Cth).

2. The Commonwealth and Commonwealth entities and companies are required to
   - meet high standards of governance, performance and accountability,
   - provide meaningful information to the parliament and the public,
   - use and manage public resources properly, and
   - work cooperatively with others to achieve common objectives, where practicable.

3. **Source 1:**
   a. The issue is whether or not Health Minister Sussan Ley has complied with the ministerial code of conduct.
   b. b. When a Minister is subject to allegations of improper conduct, he or she is expected to stand aside while there is an investigation into the circumstances.
   c. Minister Ley allegedly used taxpayer money for her own private purposes, so she clearly was allegedly misusing and mismanaging public resources.

   Source 2:

   a. Mike Pezzullo allegedly attempted through private conversations to influence the government of the day on policy matters in private conversations, which is not allowed under the public service code of conduct.
   b. At the time of the allegations, Mr Pezzullo was still decide by the Home Affairs Minister Claire O'Neill, while the matter was referred to the Australian Public Service Commission to investigate.
   c. The Australian Public Service Commission inquiry found that Mr Pezzullo had broken the public service code of conduct by at least 14 occasions. Mr Pezzullo did not meet the standards of governance, performance, and accountability required by the Public Governance and Accountability Act 2013 (Cth).

   Source 3:

   a. Decisions about the distribution of GST revenue to the states are made by the independent Commonwealth Grants Commission. The basis on which the GST is distributed were questioned by some states which felt they were not getting a fair amount.
   b. The process by which the Commonwealth Grants Commission makes its recommendations establishes a coherent and accountable system states can question and which can be reviewed by the Commonwealth government.

c. As a Commonwealth entity, the Commonwealth Grants Commission, is subject to the requirement of the Public Governance and Accountability Act 2013 (Cth) to meet high standards of governance, performance and accountability.

Research Task (Page 12)

No answer is provided here because the outcome of the Research Task will depend on the choice that teachers and students make to conduct their research.

1.2 Australia's gun laws: governance in action

Practical Application (Pages 13 - 15)

1. The Stakeholders were: the Commonwealth Government of Australia, the State Governments and Territories of Australia, the entire Australian public, the various political parties and their members Australia wide, the victims and their families, and the retailers and wholesalers of guns (the gun lobby).

2. The massacre at Port Arthur occurred on 28 April 1996. The day after, on 29 April 1996, the Prime Minister of Australia, John Howard, announced proposed gun reform laws. By 10 May 1996, all state governments and territories had agreed to cooperate and introduce the same legislation. A campaign then ensued throughout the whole country to convince the public, particularly those members of the public who owned guns, such as farmers, and members of shooting clubs and various voluntary 'shooters and fishers' associations to cooperate.

   The media was on board with gun law reform from the start. Overwhelmingly the voice of the media favoured reform in the area. The voices of persons who communicated their positions to the media were also overwhelmingly in favour of reform.

   A measure of the success of gun law reform was that once the legislation was enacted, the owners of guns which became prohibited responded positively to handing in their weapons to receive compensation. Gun law reform ticks all the boxes, including the one which measures outcome, which is successful legislation supported by the public and able to be satisfactorily enforced.

Review

Comprehend (Page 15)

1. The objects of the Act are to:
   - establish a coherent system of governance and accountability;
   - establish a performance framework;
   - require Commonwealth and Commonwealth entities to:
     - meet high standards of performance, performance and accountability:
     - provide meaningful information to the Parliament and the public;
     - use and manage public resources properly; and
     - work cooperatively with others to achieve common objectives where practicable;
   - require Commonwealth companies to meet high standards of governance, performance, and accountability.

2. **Governance** is the way that organisations or countries are managed at the highest level, and the systems for doing this. Governance is the establishment of policies, and continuous monitoring of the proper implementation, by the members of the governing body of an organisation. It includes the mechanisms required to balance the powers of the members (with the associated accountability) and their primary duty of enhancing the prosperity and viability of the organisation.

   No model essay is provided. Students should provide a definition of governance which is able to be applied both to the meaning of the word and to its relevance the Australian political and legal systems. They should illustrate the meaning by reference to political and legal activities which are studied this topic and to which they can refer. Refer to the Wikipedia additional resource for a discussion of **good and bad governance**.

Analyse and evaluation (Page 15)

3. The answer to this question is essentially the same as the answer to question 2 of the practical application on page 15.

   The Commonwealth government announced it intended to introduce gun laws. For this to have an effect it meant that all state and territory governments needed to pass the same legislation and implement it with the support of the community. This is what happened.

   Less than a fortnight after the Port Arthur massacre, all governments in Australia supported the introduction of gun laws which would prohibit the ownership of guns except where needed for specific purposes, on the granting of a licence. There was a coherent system of proposed legislation which was agreed to, and there was a legal framework which the states could enforce making gun owners surrender their guns in return for compensation. There was a public campaign, supported by the media, and gun laws were effectively introduced in Australia. It is no accident that in our country we have very few of the types of incidents which occur elsewhere, particularly in the United States.

   The legal framework of the gun laws consisted of the same laws at the Commonwealth, State, and Territory level in Australia. This provided a consistent, fair, and transparent framework, ensuring that everyone was treated equally before the law. It upheld the principle of the rule of law, involved all stakeholders, and everyone was treated fairly.

   Australians lost the right to own guns except carefully defined circumstances. It is an important question to ask about the loss of this right, as to whether it meets the legal test which the High Court of Australia applies when legislation restricts a human right or legal

right. Is the legislation proportionate in the circumstances? Does it take away too much of a particular right which people currently enjoy? The author's position is that the extent to which gun laws have been challenged since the Port Arthur massacre in 1996 shows that there continues to be wide support for the principles enshrined in the legislation.

Additional Resources

Governance Institute of Australia, '*What Is Governance?* (Online) <governanceinstitute.com.au/resources/what-is-governance?>.

What is governance?

There is not one conclusive definition of corporate governance. Governance Institute, for example, defines it in these terms:

Governance encompasses the system by which an organisation is controlled and operates, and the mechanisms by which it, and its people, are held to account. Ethics, risk management, compliance and administration are all elements of governance.

Other useful definitions of governance are provided below.

Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.

Organisation for Economic Co-operation and Development (OECD)

Corporate governance is 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations'. It encompasses the mechanisms by which companies, and those in control, are held to account.

Wikipedia, Governance (Online) <https://en.wikipedia.org/wiki/Governance>.

Governance

Governance comprises all of the processes of governing – whether undertaken by the government of a state, by a market or by a network – over a social system (family, tribe, formal or informal organization, a territory or across territories) and whether through the laws, norms, power or language of an organized society.[1] It relates to "the processes of interaction and decision-making among the actors involved in a collective problem that lead to the creation, reinforcement, or reproduction of social norms and institutions".[2] In lay terms, it could be described as the political processes that exist in and between formal institutions.

A variety of entities (known generically as governing bodies) can govern. The most formal is a government, a body whose sole responsibility and authority is to make binding decisions in a given geopolitical system (such as a state) by establishing laws. Other types of governing include an organization (such as a corporation recognized as a legal entity by a government), a socio-political group (chiefdom, tribe, gang, family, religious denomination, etc.), or another, informal group of people. In business and outsourcing relationships, Governance Frameworks are built [by whom?] into relational contracts that foster long-term collaboration and innovation. [citation needed]

Governance is the way rules, norms and actions are structured, sustained, regulated and held accountable. [citation needed] The degree of formality depends on the internal rules of a given organization and, externally, with its business partners. As such, governance may take many forms, driven by many different motivations and with many different results. For instance, a government may operate as a democracy where citizens vote on who should govern and the public good is the goal, while a non-profit organization or a corporation may be governed by a small board of directors and pursue more specific aims.

In addition, a variety of external actors without decision-making power can influence the process of governing. These include lobbies, think tanks, political parties, non-government organizations, community and media.

Chapter 2: The Australian Constitution

2.1 The need for an Australian Constitution

What do you think? (Page 21)

[Answer asks for an opinion.] The adoption of the dictation test in the early 20th century as part of Australia's immigration procedures was 'overtly racist' as it was biased against non-English speaking people who wished to reside in Australia. Making a dictation test part of the granting of citizenship or residence was unfair – as there was little prospect of success for people who did not speak English prior to their arrival in Australia or had not grown up in an English colony. The statistics referred to in the textbook demonstrate the limited prospect of success – in 1902-1903 it was administered 805 times, with only 46 people passing. And then from 1904-1909 it was administered 554 times, with only 6 people passing the test. The test itself was biased against non-English speaking peoples and did not take into account an individual's circumstances or provide them with enough time to realistically learn English. The test was administered most frequently before the migrant entered Australia and could be administered at any time during the immigrants first year of residence.

2. There is available to you from National Archives of Australia – Record Search examples of test passages used under the *Immigration Act* for the dictation test. Examples of dictation tests used in 1925 are set out in those national archives. There are 4 of them. You will instantly see the difficulty in the wording of, and then trying to remember the words said of the dictation test. This applies even for a person skilled in English, let alone someone who isn't (see www.naa.gov.au-migrationandmulticulturalism dictation test passages used in 1925).

Practical Application (Page 22 - 23)

1. Ports and coastal shipping areas that were inadequately defended or entirely undefended were a temptation to other naval powers –especially in gold colonies.

2. [*Answers may vary due to research*.]

Event	Relationship between Britain and Russia
The Crimean War	• An alliance formed between Britain and France (also involving Turkey and Sardinia) to challenge Russian expansion into the Danube region. • Britain and France feared Russia would continue to expand its territory if unchecked, threatening British India through Afghanistan. • Battles lead to more than 200,000 people being killed. • The Treaty of Paris saw the war end, with Russia initiating a peace treaty.
The Russo-Turkish War (1877 to 1878)	• Refers to a series of wars between Russia and the Ottoman Empire – Russia was becoming more powerful. • In 1877 Russia and Serbia came to the aid of Bosnia, Herzegovina and Bulgaria who were rebelling against Turkish rule. A treaty reached at the end of the war gave autonomy or freedom to these areas.

	• Russia was able to extend its European frontiers. • Britain and Austria-Hungary compelled Russia to accept the Treaty of Berlin that restricted Russia's military gains from the war.
The Panjdeh Incident of 1885	• A diplomatic crisis between Russia and Britain after the Russians captured an Afghanistan border fort that was close to British India. • The incident was settled diplomatically when Russia committed to respecting the territorial rights of Afghanistan.

3. [*Answers may vary due to personal opinion*] The close relationship felt by Australians as part of the British Empire, caused many to fear that an attack against Britain was, by extension, an attack against Australia. As part of the British Empire, Australia could be called on to protect British interests. Our initial isolation prior to a telegraph link with Britain meant that we were suspicious of foreign warships. After a link was established, the reporting of the news in Europe clearly showed that tensions were being raised between Russia and Britain. This made Australian fear attack, as Russia had already colonised parts of the Pacific and the colonies' small navies were no match against a superpower like Russia. This was especially so if the British navy that we relied upon to protect our borders was called away to a war in Europe or elsewhere.
4. [Answer asks for an opinion.]Federation would allow a single, strong centralised defence force to be established. If the colonies joined together, they could form a consistent defence strategy that protected the entire continent instead of benefiting a single colony. Costs could be shared, making more efficient and effective use of resources.

2.5 The role of the High Court

Case Study (Pages 27 – 28)

1. The *Commonwealth of Australia Constitution Act 1901* (Cth) s109 states that, 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'
2. When a valid Act of Parliament is passed by the Commonwealth in an area in which it has the exclusive power to legislate, any State government's laws (in this case the Tasmanian Government) which are inconsistent with the provisions of the statute law of the Commonwealth, become invalid. The usual way of stating that consequence is that the Commonwealth law prevails over the State law. In this case the inconsistency was clear. The Tasmanian statute authorised the construction of a dam on the Gordon River. The Commonwealth statute made it unlawful to construct a dam without the consent of a Commonwealth Minister (which of course was never going to be given).
3. [Answer asks for an opinion.] The extracts of Justice Brennan and Justice Mason's reasons highlight the importance placed on the Commonwealth's ability to make laws to ratify any international treaties or obligations that the Commonwealth Government enters. If the Commonwealth could not ratify these international agreements, there would be little value in signing them and it would weaken Australia's standing in international discussions about global issues. Thus, to ensure the Commonwealth Government can ratify our international obligations, it is important that a Commonwealth law overrides State laws in these

circumstances where there is a conflict. Bearing in mind that the Commonwealth Government is a government elected by the whole of Australia then the trust that the Australians have placed in the Commonwealth Government to enter international treaties is in place. It follows from this, that most international treaties and declarations entered into by the Commonwealth would be agreed to in any event by State or Territory Governments and by the majority of Australian citizens. Therefore, the potential conflict is not as great as being suggested.

2.6 Changing the Australian Constitution

What do you think? (Page 30)

[*Answers may vary due to personal opinion*] The arguments for and against changing *Commonwealth of Australia Constitution Act 1901* (Cth) s127 are similar. If the words were removed from the constitution it could lead to negative implications – such as the Commonwealth losing the ability to make specific laws which address Indigenous inequality or disadvantage. It meant that the Commonwealth Parliament had no power to make laws for the benefit of Aboriginal people. The Commonwealth was unable to pass positive discriminatory legislation to provide for special treatment of Aboriginal people. Instead, the State Governments would then be responsible for creating laws that respond to specific issues affecting Indigenous people. However, retaining these words in the Constitution could also lead to unequal treatment. The Commonwealth Government was specifically empowered then to make a whole raft of laws dealing with Aboriginals which would be discriminatory – irrespective of whether such laws could be described as beneficial of not.

2.7 Separation of Powers

Case Study (Pages 32 – 33)

1. Hindmarsh Island is in South Australia, at the mouth of the Murray River.
2. Ministers hold executive power and in this case the Minster had the power to make a declaration to protect and preserve areas from injury or desecration. To make this decision the Minster required a report to be written about the environmental and cultural issues specific to the island – thus the report would be used as the basis of any decision.
3. The political decisions that would have been made by the reporter include, 'the extent of the area that should be protected', 'the prohibitions and restrictions to be made' and 'the duration of the period of the declaration'. These decisions do not involve the interpretation or application of an Act, but are political decisions given to a Minister to make.
4. [Answer asks for an opinion.] There could be many advantages to ask a judge to act as a reporter (as opposed to acting as a judicial officer) in these circumstances, as judges can understand highly complex evidence provided by experts. They listen to the arguments raised by different parties without bias and make an impartial decision. However, ultimately any decision made by a Minister might be reviewed by a Court. Therefore, it is inappropriate for judges to make the type of political decisions to be made here as such decisions may be required ultimately to be reviewed by a court. This gives a perception that the involvement of a judge might influence a court's ability to review a decision, and in that review, decide against the government. Therefore, to uphold the separation of powers, the judge should not have acted as a reporter in this case.

Review

Comprehend (Page 34)

a. The Australian Constitution: A set of rules by which Australia is governed.

b. There were many different factors that supported the current federation. For example, prior to federation each State had its own defence force. After a series of 'scares' caused by the expansion of other powers like Germany, France and Russia in the Asian region, the colonies realised their smaller defence forces were inadequate. By combining these armed forces under a single command, our defences would be more coordinated, efficient, cost-effective and stronger.

   Immigration was also a principal driver. There was a discerned need for a unified approach to immigration into Australia. It arose because of the problems perceived by the influx of Chinese into Australia after the discovery of gold and the use of Pacific Islanders as a cheap workforce in Australia.

   The other principal driver was the need for having uniform tariffs. There was a large disparity in tariffs being placed on imported goods as between the states. Because tariffs were the principal revenue raiser for the states then competition between the states on the placement of tariffs was a real problem. If different tariffs were raised on goods coming into the country by different states, then further problems arose within Australia at the borders between the states. That problem needed to be solved.

c. The dictation test was specifically adopted by the Commonwealth Government to restrict unwanted immigrants coming into Australia. In particular the immigrants that were unwanted were those that could not speak English. It has often been described as racist and was referred to as a White Australia Policy.

d. There was an act of parliament passed by the Commonwealth Government to prevent Pacific Islander labourers coming into Australia. The reason for that was that the Pacific Islander labourers had been brought to work in the sugar industry in Australia for very low pay. That gave rise to the feeling among Australians that such an event meant that Australians had to unfairly compete with that form of low paid labour. The *Pacific Islander Labourers Act 1901* (Cth) effectively placed a prohibition on any Pacific Islander labourer entering Australia. This law was subsequently amended to allow the minister in charge of immigration to exempt from deportation a small number of categories of Pacific Islanders which included those owning freehold land in Queensland and those that had resided continuously in Australia for not less than 20 years prior to 31 December 1906.

e. The exclusive powers of the Commonwealth parliament in the Constitution: The *Constitution* tells us which powers are given to the Commonwealth, and which are to remain with the States. There are three different types of powers that exist because of the Australian *Constitution*: exclusive power that may only be exercised by the Commonwealth Parliament, concurrent power which can be exercised by both the Commonwealth and State Parliaments and residual powers which can only be exercised by the States. S51 of the *Constitution* lists in 39 sub-paragraphs (referred to as placitum in the singular and placita in the plural) which lists powers that can be exercised by the Commonwealth parliament. These are not all exclusive powers. Legislation with respect to each of these

powers can be passed by both the Commonwealth parliament and State parliaments. However, where there is any inconsistency between the legislation and the Commonwealth parliament and the State parliaments, the Commonwealth legislation prevails (see s109 of the *Constitution*). There are however exclusive powers set out in the *Constitution* which can only be exercised by the Commonwealth parliament. They are:

- s115 which prevents a State from making its own money.
- s90 giving exclusive power to the Commonwealth to make laws on customs and exercise duties.
- s114 which prohibits States from having their own armed forces.
- s52 which gives a Commonwealth parliament exclusive powers to make laws with respect to the seat of Government of the Commonwealth and matters relating to any Department of the Public Service of the Commonwealth and any other matter declared by the *Constitution* to be within the exclusive power of the Commonwealth Parliament.

f. Concurrent powers: This is a reference not to current powers but to concurrent powers. The word current is a typographical error and should be concurrent. Concurrent powers are powers which can be exercised by the Commonwealth and by the States. Most law-making powers in the *Constitution* are concurrent. If the Commonwealth Government does not pass any laws with respect to those concurrent powers, then they remain laws passed by the States and the power to pass such laws remains within the province of the States of Australia. These concurrent powers are set out in s51 of the *Constitution* (save for those exclusive powers referred to above).

g. The High Court of Australia was established by the *Constitution* (Chapter 3). Its principal role is to enforce the sharing of powers set out in the *Constitution*. Principally it deals with interpreting the meaning of the words in the *Constitution* in thus deciding disputes between the States and the Commonwealth as to which Government has the power to deal with any area of activity in Australia, especially, in regulating that area of activity. The most important decisions that it makes therefore acting in its principal role are the decisions which decide on whether an area of activity is a Commonwealth or State responsibility.

It has a secondary role as an ultimate Court of Appeal for all Australian Courts which ultimately determines the state of the law in Australia which binds every citizen of Australia.

h. The referendum of 1967 was a referendum on whether to remove from the *Constitution of Australia* s127 of the Constitution and whether to change s51(xxvi) of the *Constitution* to remove the words *'other than the Aboriginal race in any State'*. The changes to the *Constitution* were made. It was the most successful referendum ever held in Australia. There was a majority in every State of Australia and almost 91% of Australia voters voted yes to the changes proposed.

i. The most recent referendum is commonly known as The Voice Referendum. The referendum was to see if there should be included in the *Constitution* a new chapter and section. The name of the new chapter and the section (s629 is set out on page 30 of the text). The purpose of the change was to establish a body called the Aboriginal and Torres Strait Islander Voice. It then went on to propose that the voice could make representations to the parliament and executive government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples. The referendum was unsuccessful.

Evaluate (Page 34)

1. [Answer asks for an opinion.] The principle of the separation of powers is a legal principle that establishes the proposition that there should be discrete and distinct powers to be exercised separately and apart by parliament, by the executive and by the judiciary. It is important that each of those 3 groups work within its own area of responsibility. This acts as a check on the exercise of the powers of the others. It is a system designed to keep separate the powers of making laws (the parliament), implementing the laws (the executive government) and interpreting the law (the judiciary).

a. There are obvious failures in the system in keeping these institutions separate. For example, making of the law, that is the legislative power of the parliament is carried out by elected members of parliament. Ministers are charged to introduce into parliament legislation which is to be voted on by the parliament. The Prime Minister and ministers are members of parliament. The ministers are appointed by the Prime Minister who is elected from the ranks of the political party which gains a greater number of seats in parliament after election. The ministers therefore largely to the exclusion of other members of parliament control what laws will be proposed and passed in parliament. At the same time, they are responsible for overseeing public servants and their execution of their duties which result from those laws being passed. This is an obvious overlapping of powers and responsibilities. The executive arm of government is responsible for overseeing public servants in their execution of their duties. At the same time, they are the primary movers in the legislative arm of government. It is difficult to regard them as being separate. But lip service is continually paid to the existence of separation.

   Similarly, the judiciary exercise judicial power and make decisions as to whether laws are valid or invalid and interpret the meaning of statutes which have been passed by the law makers. They are prohibited from being members of parliament or being part of the executive arm of government. To that extent they are separable. However, their appointment is made by the executive arm of government (namely the Attorney-General). To that extent the judiciary and executive arms of the government are not separated. A particular political party who achieves government through election could choose judicial officials most sympathetic to their political aims. This has been a very big problem in the appointment of judges to the Supreme Court in the United States of America. The level of accusations about the most senior judicial officers in America being appointed for party political purposes is rife. That doesn't exist in Australia at this time. However, the fact that judicial officers are appointed by the executive arm of government can give rise to the appearance of non-separation.

b. This is an expression of opinion as to whether the failures referred to above are significant defects. With respect to the fact that ministers are part of the executive arm of government and part of the legislature is mitigated by the fact that the power to remove a minister usually remains with the Prime Minister of Australia. If the Prime Minister of Australia sees a minister as being incompetent or inadequate in the performance of the executive government role that he exercises (for example the government departments that he

controls are being hopelessly administered) then the Prime Minister can and should remove that person from the ministry and therefore take him away from any executive government role. However, the Prime Minister has appointed the ministers as people that he views favourably. If the system got to the stage where the Prime Minister simply wouldn't remove ministers exercising an executive role in the government and being obviously incompetent, then the system would be failing to work. That could conceivably occur if the minister was strongly entrenched and had support in the political party forming government. This would be a significant defect in our system of government. Similarly, if judicial officers were being appointed for reasons other than merit and competence and for political reasons then that would be a very serious defect in our system of government. At this stage of Australian life this has not reached such a stage.

A means of reducing a defect in the first of the above problems namely having ministers of the Crown exercising executive functions of government as well as being part of the legislature would be the development of a way of ensuring a minister resigns or is sacked when his level of incompetence in the administration of a government department has reached a certain level. The real difficulty would be setting the parameters of such dismissal or forcing a resignation. With respect to the judicial appointments a solution such as exists now in England could be adopted whereby there could be a panel of past judges or current or past judicial officers who make recommendations to the government for the appointment of judicial officers with the government being bound to nominate one of the suggested judicial officers by such a panel.

Chapter 3: Australian parliamentary democracy—representative government

3.1 The nature of democracy

What do you think? (Page 36)

The drama class example illustrates that when a decision is to be made by a group of people, if the group is small enough to allow the processes of information sharing, discussion of options, prioritizing outcomes, making decisions on behalf the group without alienating someone who disagrees with the majority, then putting the decisions into effect, can be made efficiently and democratically. Everyone can share equally and participate equally in the process of making an informed decision.

As a group gets bigger, more diverse in language, culture, education, and other characteristics that make up the profile of a group of people, the harder it becomes to maintain democratic decisions which meet the needs of the group. For example, problems of communication occur when the members of the group involved are separated geographically, or in the case of international decision-making, by the boundaries of nation states.

Replace the drama class with a local government authority, the State of Queensland, or the Federal Government, and you immediately introduce many other variables including the financial cost of achieving decisions into the process. The ultimate absurdity is that it is possible for rich people to buy power through the ballot box. The best place to see this happening, is the Presidential election in the United States, although it may be beginning in Australia with the Palmer United Party. There is currently a Bill before the Federal Parliament to change the current Electoral Act, the Electoral Legislation Amendment (Electoral Reform) Bill 2024.

The purpose of the Electoral Legislation Amendment (Electoral Reform) Bill 2024 (the Bill) is to amend the Commonwealth Electoral Act 1918 (the Electoral Act) and Referendum (Machinery Provisions) Act 1984, reforming Australia's Commonwealth electoral processes to 'enhance the integrity of federal elections through improved transparency and accountability.'

The Bill responds to recommendations of the Joint Standing Committee on Electoral Matters' (JSCEM) Inquiry into the Conduct of the 2022 Federal Election and Other Matters.

Source: Australian Parliament, Parliamentary Business, (Webpage, n.d.) <aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2425/25bd036#:>.

3.2 The evolution of democracy

Practical Application (Page 38)

1. Prior to Federation (prior to 1901), the example given by Britain to the founding fathers of the Australian Constitution was that only males who were British subjects were entitled to elect the British Parliament, and even then, not all males were entitled to vote. There were various property qualifications which eliminated some male voters. There were no female voters. Universal suffrage (equal voting rights for all people, male and female) was not achieved in England until the introduction of the Representation of the People Act 1918 (UK) which removed property restrictions on male voters and gave women the vote. In fact,

in Australia, the position in South Australia and New Zealand had progressed towards universal suffrage but their example was not immediately followed until after the Constitution was enacted.

2. Giving women the vote clearly did change the gender of parliamentary representatives, because Lady Astor became a parliamentarian two years later in 1920. However, there is no information available in the practical application as to how representation of males and females in the British Parliament subsequently changed over time. We all know that there have been female prime ministers in the British Parliament in the last two decades, Margaret Thatcher, and more recently, Theresa May.

What do you think? (Page 40)

This is not difficult to answer if you lived in South Australia in 1901 and believed that its position was the best policy to have. In 1894, South Australia gave adult women the vote. It also did not restrict male voters by limiting them to property owners as existed elsewhere. If you were convinced that the ideal for a democracy is one vote one value, not limited by any other qualification such as gender or property, surely you would have argued for this position at the time if you had been involved in the debate. One supposes that the question as to why universal suffrage was not achieved immediately is something which students should consider, particularly in relation to the entitlement to vote of Aboriginal Australians.

Supporting the position which existed in 1894 in South Australia as a model for the Australian parliamentary franchise, is justified by the rule of law. Equality before the law demands that the universal suffrage which came later, much later for First Nations peoples, is the position which should have been argued for when the Federation of Australia was established in 1901.

3.3 The Australian electoral system

Practical Application (Pages 41 - 43)

1. The purpose of the *Commonwealth Franchise Act 1902* (Cth) (the Franchise Act) is to provide for 'Uniform Federal Franchise'. This means universal suffrage, one vote one value without any qualification. The question which arises is whether or not the provisions of the Act say this. The purpose of the *Commonwealth Electoral Act 1902* (Cth) is to establish the government organization which will set up the machinery to set the boundaries of electorates, establish an electoral roll of voters, and to conduct elections according to the Act.

2. Section 3 of the *Franchise Act* says that every person over 21, male or female, single or married, is entitled to vote if he or she:
    - has lived in Australia continuously for six months;
    - was born in Australia or become an Australian citizen; and
    - is listed on the Electoral Roll,
    - subject to the disqualifications set out in s4.

    Significantly in s4 no 'Aboriginal native of Australia, Asia, Africa, or of an island of the Pacific excluding New Zealand is entitled to be enrolled on the electoral roll. Other disqualifications include being of unsound mind, committing an act of treason, or been convicted of an offence which attracts a punishment of 1 year or more in prison.

3. Each state in Australia has a number of elected representatives proportional to the total number of potential voters in that State. The State then, according to s12, is divided into a

number of electorates in which the population of voters is as close as possible to the number obtained by dividing the state population by the number of elected representatives to be chosen. Each electorate chooses one representative to attend Parliament.

Section 15 states that a quota of voters for each State electorate is obtained by dividing the total number of electors in the State by the number of representatives chosen in the whole State.

4. There are four factors the Electoral Commissioner can consider when drawing the boundaries of the electorate. These are:
    - community or diversity of interest;
    - means of communication;
    - physical features; and
    - existing boundaries of Divisions.

    The Commissioner may allocate 1/5 more or 1/5 less than the quota when determining the boundaries of an electorate.

5. Once the Commissioner applied s15 and decided on the electoral boundaries, he or she is to draw a map of the electoral divisions, publish it in a public place and invite public comment by advertising in the government Gazette. 30 days after the advertisement, public comment is closed, and all comments and objections are available to the Commissioner when preparing his report for Parliament. If Parliament is in session, it must consider the report within seven days of receiving it. If it is not in session, then it is considered seven days after it starts its next sittings. The report containing the map of electoral boundaries must be approved by both Houses of parliament. If not, it is returned to the Commissioner with a request to complete a fresh redistribution of electoral divisions to be further presented to Parliament in due course.

6. Political parties benefit from electoral boundaries which make the boundaries of the electorates one that favours them. For example, when drawing the boundary for a Central Queensland electorate, the question of whether to include a city like Rockhampton in an electorate which trends in a westerly direction must be decided. Such an electorate would be socio-economically diverse although one would expect Rockhampton to be a centre which supported the Labor Party because of the industries that provide employment in the city. These considerations can influence how political parties, and consequently members of parliament, would think about a particular distribution of electorates. Clearly, they have an axe to grind. Giving an independent body the power to make decisions about electorates would make the process more independent, and presumably, fairer.

Research Task (Page 42)

Aboriginal and Torres Straight Islanders (First Nations peoples) were granted the right to vote federally in March 1962. Other significant events which led to First Nations peoples achieving voting rights at different levels (states and territories) included the 1967 referendum to change the Australian Constitution to allow the Federal Government to legislate about matters pertaining to First Nations peoples. A useful link for information about Aboriginal people is www.creativespirits.info/aboriginalculture/selfdetermination.

Practical Application (Page 43)

1. The Public Governance Performance and Accountability Act 2013 (Cth) applies to the AEC.

2. The stated purpose of the AEC is to maintain an impartial and independent electoral system for eligible voters through active electoral roll management, efficient delivery of polling services and targeted education and public education programs. It sets out the performance framework of the AEC.

3. The AEC puts its stated purpose of maintaining an impartial and independent electoral system into effect by
    - conducting successful electoral events (Federal elections, by-elections, referendums, industrial elections and ballots)
    - ensuring confidence in the Commonwealth Electoral Roll
    - regulating political party registrations and financial disclosure
    - supporting electoral redistributions
    - undertaking public awareness activities.

Research Task (Page 44)

Please refer to the downloaded material from the AEC webpage to answer this question. Further research may be required.

THE AEC DELIVERS A HIGH-QUALITY SERVICE

The AEC aims to deliver a high-quality service which allows voters to ensure their enrolment is up to date and facilitates voting based on individual circumstances. Australian citizens, aged 18 years of age or older, are required by law to enrol and vote in the federal election.

Enrolment services

The electoral roll will close at 8pm, seven days after the issue of the writ. Voters are able to enrol, check their current electoral enrolment, update their enrolment details, or check the progress of their enrolment application online. Enrolment applications are also available at any AEC office and on the AEC website. A full list of AEC offices is available on the AEC website.

Voting on polling day

On polling day, polling places across Australia will be open between 8am and 6pm local time. A list of polling places will be available at the AEC website. Voters can use the AEC's online tool to find nearby polling places and check accessibility.

Early voting services

Voters who are entitled to cast an early vote can do so in person or by post. A person is entitled to an early vote if they meet the eligibility requirements listed on the AEC website. Pre-poll voting centres will be located in each electoral division and the details of these locations will be available on the AEC website.

Postal voting

Voters who are entitled to a postal vote can apply at the AEC website which is the preferred method of application or by using a paper application form available at AEC offices. Postal vote applications must be received by the AEC before 6pm on the Wednesday before polling day. Voters may also receive paper postal vote applications or a link to an online form from candidates and political parties. It is lawful under the Electoral Act for third parties to distribute postal vote applications, however the AEC receives questions and complaints each election about this practice. Political parties are exempt from the Privacy

Act, and where applications for postal votes are submitted via parties, they may collect, retain and use applicants' data (e.g. to contact electors).

Interstate voting

Voters who are visiting interstate will be able to vote at a designated pre-poll voting centre operating on polling day. Voters who are outside their enrolled division, but still within their home state/territory, can cast an absent vote at any polling place within their home state/territory. Details regarding designated pre-poll voting centres operating on polling day will be available at the AEC website.

Mobile polling

AEC mobile polling teams will visit voters throughout Australia who are less able to get to a polling place. Mobile polling will occur at selected locations around Australia to deliver voting services catering for people experiencing homelessness, and those living in remote locations, non-remote discrete Indigenous communities, residential aged care homes, mental health facilities, hospitals and prisons. Mobile polling teams will also provide a service at Aboriginal Community Controlled Health Organisations. Details regarding the locations that mobile polling teams will be visiting will be available at the AEC website.

Voters in remote locations

Remote mobile polling is the AEC's primary method for servicing voters in remote communities across Australia for the federal election. These communities often do not have timely postal services, and an in-person mobile polling service is the most effective way to cast a vote. Details regarding the locations that remote mobile polling teams will be visiting will be available on the AEC website.

Voting for people who are blind or have low vision and Antarctic voters

Telephone voting is available for people who are blind or have low vision and for voters in the Antarctic (or in transit to or from Antarctica). The service allows voters to register and vote in secret from any location without attending an AEC office or polling place. The telephone voting service is available 8.30am to 5.30pm Australian Eastern Time Monday to Friday during the pre-poll voting period and 8am to 6pm Australian Eastern Time on polling day.

Overseas voting

Eligible voters who are living, working or holidaying overseas can vote in person at an overseas voting centre. Information on how to vote while overseas, including a list of overseas voting centres, is available on the AEC website. Postal voting will continue to be available to overseas voters, with communications and provisions in place – such as using an international courier to send postal votes overseas and supporting the return of postal votes via diplomatic posts – to maximise the ability to receive and return ballot papers in time. Voting when overseas is not compulsory. Voters unable to vote should complete and submit an Overseas Notification Form. Australian Defence Force voting The AEC will provide postal voting services to Australian Defence Force personnel serving overseas at the time of the federal election.

Sustainability

The AEC is conscious of our environmental impact and has adopted several initiatives to proactively reduce waste. All AEC cardboard materials have been designed to be lighter, stronger, and easier to be recycled and reused. Donations form a key part of the AEC's efforts to reduce waste for the next election, and useful items, such as first aid kits and

stationery will be donated to a range of organisations and schools situated in rural and regional areas of Australia.

Diverse and inclusive workforce

The AEC is committed to having a temporary election workforce that reflects the community it serves. The AEC uses a data-driven approach to ensure polling officials with language skills are employed where there are higher numbers of voters with English as a second language and has recruited polling officials with a range of language skills. The AEC recruits across the community, including working with partners to promote employment opportunities to people who have previously been under-represented in the AEC's temporary workforce, including young people, Aboriginal and Torres Strait Islander people, and people with disability.

Practical Application (Page 45)

1. The sources of data for the estimates of the indigenous voting population come from
    - Services Australia (self-identified Indigeneity data), and
    - population data from the Australian Bureau of Statistics.

2. The numbers of Indigenous enrolled population have increased between 2020 and 2023. The trend has been consistently to increase enrolment as shown by the fact that all States and Territories show an increase. The data suggests that the work being done by the AEC to enrolled indigenous voters has been successful. The enrolment rate rose from 78% at 30 June 2020 to 94.1% at 30 June 2023, an increase of 16.1%.

Practical Application (Pages 46 - 47)

1. It is challenging because electoral rolls do not include information about cultural identity. Census figures which could be used as a basis for comparison against voter turnout rates are imprecise.

2. Since 1962, the rate of voter participation in Federal elections by people living in remote indigenous communities has been lower than the national average.

3. Decisions made at the federal level over the last three decades which appear to have provided significant obstacles to voting are:
    - abolition in 1996 of the Aboriginal and Torres Strait Islander Election Education and Information Service,
    - abolition in 2005 of the Aboriginal and Torres Strait Islander Commission,
    - the more stringent rules for identification required to vote in the 2006 Electoral Integrity Bill, and
    - changes to the Commonwealth Electoral Act in 2012, which enabled the AEC to register eligible Australians to vote based on information available through several government agencies. The AEC chose not to use this method in some remote parts of Australia.

4. The obstacles identified in South Australia's APY lands included:

    - a lack of materials available in appropriate languages
    - uncertainty about how to cast a formal vote
    - problems related to literacy, and

- a lack of appropriate identification necessary to enrol.

Practical Application (Page 47)

1. The performance framework of the AEC designed to support electoral participation involves:
    - collaborating with community organisations and other service providers
        - to share electoral information
        - to raise awareness of election processes
        - to promote recruitment opportunities,
    - working with state and territory electoral commissions, and
    - chairing the Disability Advisory Committee, fostering inclusion and participation.

    The performance framework of the AEC will enable it to support electoral participation for all Australians. This is because it sets out objectives/purposes in a clear coherent statement and appears to be adequately funded by government to carry out its necessary activities.

Practical Application (Page 48)

1. According to the AEC the number of Australians enrolled at 21 September 2023 with a record 97.7% of eligible Australians. Included in that result is the highest ever recorded enrolment of First Nations people, which stands at 94.1%.

2. The AEC and Australian voters should be proud of the participation rate that was achieved in 2023. It is clearly an outstanding performance compared to rates achieved in other countries worldwide. The objectives set for the AEC to achieve for electoral participation mean that it should continue its current efforts and practices, so that all Australians, including First Nations peoples, peoples with a disability or other issues preventing them from voting, and peoples who live in remote communities have the opportunity to vote.

Practical Application (Pages 49 - 50)

1. The Hanlon government divided Queensland into four zones, Metropolitan, South-eastern, Western, and Northern. This meant that the value of a vote in the more populated zones was worth less than the value of a vote in the country areas. In addition, within each zone, the number of electors in each electoral division was based on a quota of 4000 votes in rural electorates, and 12,000 votes in metropolitan electorates, thereby creating a further imbalance.

   This was controversial because it was clearly unfair and meant that the political party representing country electorates had more representatives in parliament than the other parties. It was very difficult for a political party that did not have support in rural electorates to become the majority party in parliament. This system continued in Queensland for several years until an independent Electoral Commission was established.

2. Later in the 1970s, the Bjelke-Peterson government continued to use the Hanlon Labor government zonal system but instructed the electoral commission to draw boundaries which separated provincial cities from the other parts of the zones, creating a large number of safe Country Party electorates. This was criticized as unfair, as was the instruction given by the government to the electoral commissioner to draw boundaries which gave more weighting in favour of the rural electorates. This unfairness is reflected in the 1972 election result which is the subject of the next question.

3. a. The Labor party received the greatest number of votes.

b. The average number of votes needed to elect a representative for the political parties in the 1972 election is listed below:

   Labor—12,848.5, Liberal—9599.8, Country—9070.2.

   The comparison of the major parties indicates that it took approximately 30% less voters to win a seat in the seats won by the Liberal and Country party coalition government. Notwithstanding this, the Labor party successfully achieved government by winning a majority of seats in 1989. One of its promises was to create a fairer system of drawing electoral boundaries and deciding quotas for the electorates. As you read on, you will see that the Goss Labor Government established an independent Queensland Electoral Commission in 1992, removing political interference with the electoral system.

3.4 Australian elected governments

Practical Application (Pages 53 - 55)

1. The Australian Labor Party with 77 seats.

2. The Coalition Parties have the highest number of seats of any other party in the parliament and will therefore become the official opposition party.

3. There are minor parties and independents in the House of Representatives.
   - Australian Greens 4 seats.
   - Independents 13 seats
   - Centre Alliance 1 seat
   - Katter's Australian Party 1 seat
   - (Note: 2 vacancies at March 2025)

4. As at March 2025, there are a total of 76 seats in the Senate. The Liberal National party holds 30 seats, the Greens hold 11 seats, and the Labor party holds 25 seats. The One Nation party has 2 Senators. The United Australia party has 1 Senator. The Jacqui Lambie Network has 1 Senator. There are 6 Independents.

5. To pass a resolution supporting legislation in the Senate involves being able to control the votes of one half of the Senators, which is 38 votes, plus 1, namely 39. This means that in the current parliament that the government would need an additional 4 votes to pass legislation before the Senate. Because it does not have that number of votes in the Senate without the support of 4 other Senators, these additional four Senators are said to 'hold the balance of power'.

3.5 Membership of the Federal Parliament and Queensland State Parliament

Practical Application (Page 57)

1. A person is incapable of being chosen or of sitting as a Senator or a member of the House of Representatives who is:
   - a foreign citizen or acknowledges adherence to a foreign power
   - attainted of treason convicted and imprisoned for one year or longer
   - an undischarged bankrupt or insolvent

- the holder of any office of profit under the Crown, or any pension payable by the Crown
- the beneficiary of an agreement with the public service.

The position of a person who is a member who is subject to any of the above disqualifications, shall be declared vacant when disqualified.

Practical Application (Pages 56 - 57)

1. The two circumstances set out in s44(i) that gives rise to a person being incapable of being chosen as a Member of Parliament or sitting as a Member of Parliament are being:
    - under any acknowledgement of allegiance, obedience or adherence to a foreign power
    - a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power.

Case Study (Pages 57 - 59)

1. A Member of Parliament who is not an Australian citizen, but a citizen of another country cannot stand for election. Section 44(i) does not specifically state how a person qualifies to become a Member of Parliament – it only deals with disqualification. However, one could conclude that one must be an Australian citizen to qualify to become a Member of Parliament as all other forms of citizenship disqualify.

2. A Member of Parliament who holds dual citizenship of Australia and another country cannot become a Member of Parliament – they are disqualified under s44(i). This is due to the fact that they are, 'a citizen of a foreign power.'

3. An Australian citizen who has a close connection to another country cannot become a Member of Parliament as they are not disqualified under s44(i). This is because the section does not define a mere connection as being enough to disqualify a person – it needs to be more formal. An allegiance, obedience or adherence to a foreign power; or perhaps legally binding relationship (such as citizenship), could be considered examples of a more formal connection

4. A Member of Parliament who holds dual citizenship cannot hold a position in parliament, despite not voluntarily obtaining or retaining that citizenship as s44(i) clearly states, 'a citizen of a foreign power' is disqualified.

5. A Member of Parliament who does not take any steps to renounce his or her citizenship in circumstances where he or she is born overseas is disqualified under s44(i) if all that is required to become a citizen is being born in that nation. This is because s44(i) clearly states, 'a citizen of a foreign power' is disqualified. A person is still a citizen unless they renounce or revoke their citizenship.

6. A Member of Parliament who is born in another country and is considered to be a citizen of that country is disqualified under s44(i). This is because s44(i) clearly states, 'a citizen of a foreign power' is disqualified. Ignorance of the law is no excuse.

7. A Member of Parliament who is granted citizenship of another country cannot become a Member of Parliament – they are disqualified under s44(i). This is due to the fact that they are, 'a citizen of a foreign power.'

8. In circumstances whereby a Member of Parliament has taken all reasonable steps to renounce his or her citizenship of another country, they should not be disqualified under s44(i). If a person has done everything possible, you cannot hold him or her responsible forever.

Research Task (Page 59)

Ms Larissa Waters

1. Ms Waters was disqualified under s44(i) because under Canadian citizenship law a person born after 31 December 1946 is a natural-born Canadian citizen if the person is born in Canada.

2. Some people might describe Ms Waters's disqualification as being harsh, as her birth was registered with the Australian High Commission – not Canadian authorities, she was born to Australian parents, she never held a Canadian passport, exercised any right of Canadian citizenship and had not visited the country since leaving at 11 months old.

3. Whilst the decision may be perceived as being harsh, legally it was the correct decision, as the High Court of Australia applied Canadian legislation to establish Ms Waters was a citizen of Canada. The definition in s44(i) is quite strict – it does not provide allowances.

Mr Barnaby Joyce

1. Mr Joyce was a New Zealand citizen because his father was a New Zealand citizen. Mr Joyce is a New Zealand citizen by descent.

2. The definition of citizenship is a legal one, not a moral or social question. Therefore, the fact that Mr Joyce was not aware he was a New Zealand citizen by descent and had never sought or accepted any privileges as a New Zealand citizen had no bearing on the outcome, as being a citizen is a ground for disqualification under s44(i).

3. The renunciation Mr Joyce made on 12 August 2017 was insufficient as s44(i) also applies to the nomination process – Mr Joyce was incapable of being chosen as he was legally the citizen of another country.

Case Study (Page 60 - 61)

1. Section 44 of the Constitution sets out the various grounds on which a person elected to the Federal Parliament must be disqualified. Each of the cases are cases where the High Court found that disqualification should happen, even though the grounds were different in each case.

   In Mr Culleton's case s44(ii) applied. At the date of the election Mr Culleton was a person who had been convicted of an offence which was subject to punishment of one year of imprisonment or longer, which disqualified him.

   Mr Cleary was disqualified under s44 (iv) because at the time of nomination he held an office for profit (as a teacher) under the Crown.

   Mr Day was disqualified because a company in which he had an interest was paid rent by the Commonwealth, so he had an indirect pecuniary interest in an agreement with the Public Service of the Commonwealth in breach of s44(v).

2. The purpose of ss44 (ii), (iv), and (v) is to ensure that persons elected to the Commonwealth Parliament are of good character and do not potentially find themselves making decisions about matters which are in conflict with their own interests. The disqualifications in each of these cases achieve the purpose of the Constitution.

Research Task (Page 61)

1. Section 163 of the Commonwealth Electoral Act 1918 (Cth) (the Act) complements s44 of the Australian Constitution. It describes when a person is qualified for nomination as a member of the House of Representatives or the Senate. By inference, anyone who does not meet these criteria is not able to nominate. Any other grounds of disqualification are those found in s44 of the Constitution. Section 163 says that to be qualified to be elected as a member of the House of Representatives or the Senate, a person:
    - must be over 18;
    - be an Australian citizen: and
    - be either an elector entitled to vote in a House of Representatives election, or
    - be a person qualified to become such an elector.

2. Section 64(1) of the Parliament of Queensland Act 2001 (Qld) says that to be elected a person must:
    - be an adult Australian citizen living in Queensland are: and
    - be enrolled on the electoral roll for the electoral district or another electoral district: and
    - not be a disqualified person in subsection (2) of this section.

    Section 64(2) and the remaining subsections which follow set out all the criteria which disqualify persons from being elected as a member of the Queensland Parliament. These are not set out here. In the additional resources, we have reproduced a full version of section 64 of the Act.

3.6 Cultural, ethnic and gender diversity in Australian parliaments

Practical Application (Page 65 - 66)

1. Dowsett J distinguished the earlier judgment of the High Court in Cameron v Hogan on the basis that the Commonwealth Electoral Act was amended so that political parties successful in Federal elections would be publicly funded. He decided that because they were publicly funded, political parties registered under the Act could have their rules enforced by their members through judicial process.

2. It is probably the case that many disputes within political parties are resolved internally through dispute resolution. Many disputes are not significant enough to justify being taken to a court of law. However, when disputes are not able to be resolved, like all disputes of significance, having the dispute determined by a court may be necessary.

Practical Application (Page 66)

1. There is a reasonable level of cultural diversity in the 47th Australian Parliament. Most cultural groups are presented. First Nations people are represented by 9 Members and 2 Senators, which comprises 4.8% Parliament. In the 2021 census, 3.2% of the Australian population identified as First Nations people. The second most common group of non—English speaking ancestry is Greek, with 4 Members. Italian is the seventh largest ancestry group, with 4.4% of the Australian population. 4.8% of the 47th Parliament's Members and

Senators have Italian ancestry. 1.3% of the Australian population identified as having Vietnamese ancestry and there is one Member of Parliament (0.4%).

In modern Australia, gender diversity has always been a significant issue. The primary consideration has been to ensure that women get the opportunity to represent in Parliament. In 2015 both the Labor and Liberal parties set the same target for 50% female representation by 2025. The Labor Party achieved gender parity in 2023. Only 31% of Liberal and LNP parliamentarians are women. It is no secret that a preselection quota for women in 1994, followed by seat quotas in 2012, achieved parity before time for the Labor Party.

2. The main issue of concern appears to be that the party system does not always represent the views of minority groups, such as persons from non-Anglo backgrounds, or those with disabilities, of those who come from Asian countries for example as migrants to Australia. Clearly the party system does not make it easy for the views of these groups to be represented as policies which can be enacted.

   The solution to this problem appears to be to find ways to create opportunities for these groups to be represented outside the party system.

   This is an area where students may find it useful to do additional research and perhaps read more widely from the source quoted in source 5.

3. Students should consider the different meanings of underrepresentation. For example, it could be understood to refer to the fact that the number of representatives in parliament is less on a proportional basis than the number of persons in the community that belong to a particular group. This has been the case for gender (women) for a long time. On the other hand, First Nations peoples are underrepresented because for a long time their political views were ignored or suppressed. Although there have been, and are at present, representatives in parliament proportional to the number of First Nations peoples in the community, their entitlement to vote did not exist for many, many years.

   There is no real justification for women being underrepresented in the parliaments of Australia. There is also no real justification for the views of First Nations peoples being underrepresented. The disadvantages they have experienced, and continued to experience, and their lack of recognition in the Australian Constitution, have been instrumental factors in generations of disappointment. That is not to say that Australian governments, and many community organisations, and First Nations peoples them selves are not actively seeking to improve their lives.

Review

Comprehend (Page 67)

Question 1

a. Democracy: government by the people; a form of government in which the supreme power is vested in the people and exercised by them or by their elected agents under a free electoral system.
b. Direct democracy: where all members of the community participate voluntarily and directly in the decision-making which controls their community.
c. Representative democracy: where some members of the community must be represented in a decision-making body indirectly, and the structures which do this occur under a free electoral system.
d. Gerrymander: where the systems of representation are controlled by politicians so that they are able to skew them in their favour, making them unfair/an arbitrary arrangement of the political divisions of the constituency, made so is to give one party an unfair advantage in elections.
e. The Queensland Parliament: consists of 93 members in one House of representatives (the lower house), duly elected according to the provisions of the Electoral Act 1992 (Qld)
f. The Commonwealth Parliament: the Commonwealth Parliament consists of two houses, The Lower House (the House of Representatives) with 151 members, In the Upper House (the Senate) with 76 members, duly elected according to the provisions of the Commonwealth Electoral Act 1918 (Cth).
g. The Crown: in the Australian Constitution the Crown is the Governor General, the Queen's Representative in Australia.
h. The Executive (Cabinet): consists of the Prime Minister, the Governor General, and certain of the Senior Ministers appointed to Cabinet (usually the Treasurer, Minister for Foreign Affairs, the Deputy Prime Minister, and others).
i. The Australian Electoral Commission is a non—corporate Commonwealth entity under the Public Governance Performance and Accountability Act 2013 (Cth) and is an independent statutory authority established under the Commonwealth Electoral Act 1918 (Cth).
j. The Queensland Electoral Commission is established under the Electoral Act 1992 (Qld) as an independent statutory authority, responsible for the impartial conduct of Queensland elections.

Comprehend, analyse and evaluate (Page 67)

1. The current involvement of First Nations peoples in the electoral system, prior to the 2024 referendum, stood at an all-time high of 94.1% of the eligible electors. This compares favourably with the rate for Australia as a whole. The question, of course, is whether or not this will continue given the referendum result. Previous research has indicated that generations of ill-treatment had resulted in suicide, depression, and failure to engage in a meaningful life. It is to be hoped that other government policies both state and federal will address this situation so that the involvement of First Nations peoples will be maintained.

   It is the responsibility of the AEC to develop programs that lead to registration of all eligible First Nations peoples on the electoral roll. It is the AEC responsibility to educate First Nations peoples about the value of voting and the opportunity to participate in the community which this brings. It also should involve them in the administration of the electoral system in the communities. There is much that could be done to make sure that

activities and offices in local communities are staffed by people locally, to give responsibility and power over their own futures.

2. Underlying the issue of quotas for women in the preselection of candidates in a political party, is the fact that 51% of the Australian population is female, so Australian parliaments underrepresent the female half of the population. The quota system in preselection has been used effectively by the Labor party which has now achieved parity in representation between male and female parliamentarians. Presumably this then allows future representation to focus on the merit of candidates who put themselves forward, while continuing to ensure that the numbers are equal or very close to equal.

   On the other hand, the other major parties of the coalition, continue to argue that selection should be merit-based, and not controlled by a quota. In fact, the National party does not appear to have even a policy of promoting women candidates, although to be fair, they have had a number of women candidates over the years who have been successful. In the 2022 federal election, a large number of independent women candidates were elected, many of whom stood in seats held by the Liberal party. These are the so-called Teal candidates. The argument was that none of them would have been preselected for the Liberal party in those seats, and the policies that they supported did not reflect the policies of the Coalition, which found itself in Opposition.

   One of the arguments against quotas is that they lead to fielding inferior women candidates being selected just to make up the numbers, and that this results in female parliamentarians who are unable to cope. The evidence does not appear to support arguments against quotas. Informational evidence supports the view that quotas work. France has had a system of parity laws for 20 years, and a study in 2010 found that there was no evidence that this led to inferior politicians.

   The argument in favour of quotas is that it combats many out of date practices which are used to select candidates, for example, representing a faction, having pre-existing support amongst senior politicians and family members who are already part of the system, and that collecting favours and being supported by powerbrokers usually favours a male candidate. There is no particular evidence that supports the view that having no quotas is better. In fact, in Ireland, for example, it is the law that a political party must field at least 30% women candidates, or they miss out on their electoral funding. The result of this law is that there are more women parliamentarians and the parliament has become more representative as a result.

3. This review question has already been answered to a large extent in the answer to question 3 of the practical application on page 66. Broadly speaking, underrepresentation is when a particular group is described and found to not have adequate representation in parliament, because it does not have members of parliament which support it. The most obvious example of this is women. In the case of women it has been successfully argued in the Labor Party that there should be quotas established by the parties to preselect more women. We have seen that this has resulted in the Labor Party achieving 50% representation in its membership in parliament. Where quotas have not been established, other political parties have not achieved parity for women.

   One of the most significant issues for women is dealing with domestic violence. The fact that there are more women in Australia parliaments has no doubt assisted to give this issue priority, although the prevalence of domestic violence is such that it has been an important issue for men and women alike.

On other issues, such as same-sex marriage, lobby groups and community opinion have strongly influenced members of parliament to support change. At the time of writing, hate speech and anti-Semitism have been significant issues in the community. Incidents have been displayed prominently in the media and all politicians have raised these concerns. The point is, that sometimes policy is determined by forces outside parliament, and they are not matters determined by the fact that a particular group is underrepresented.

In the earlier practical application on page 66, and in answer to question one of this review historical target to represent First Nations peoples because they would not citizens, or entitled to vote, for many years has been discussed. Underrepresentation to take other forms.

The recent examples of the response by the Australian government to the issues of hate speech and anti-Semitism are such that we should have faith in our democracy and the institutions which represent it.

Further answers to this question are found in the activities of the last part of the chapter.. The answers given to the questions set in these various practical applications and other activities cover the topic adequately and can be reviewed as the answer.

The answer to the part of the question which requires evaluation should be the original work of the students, and should be judged according to how well it succeeds covering the issues and presenting arguments in favour of the position taken by the student.

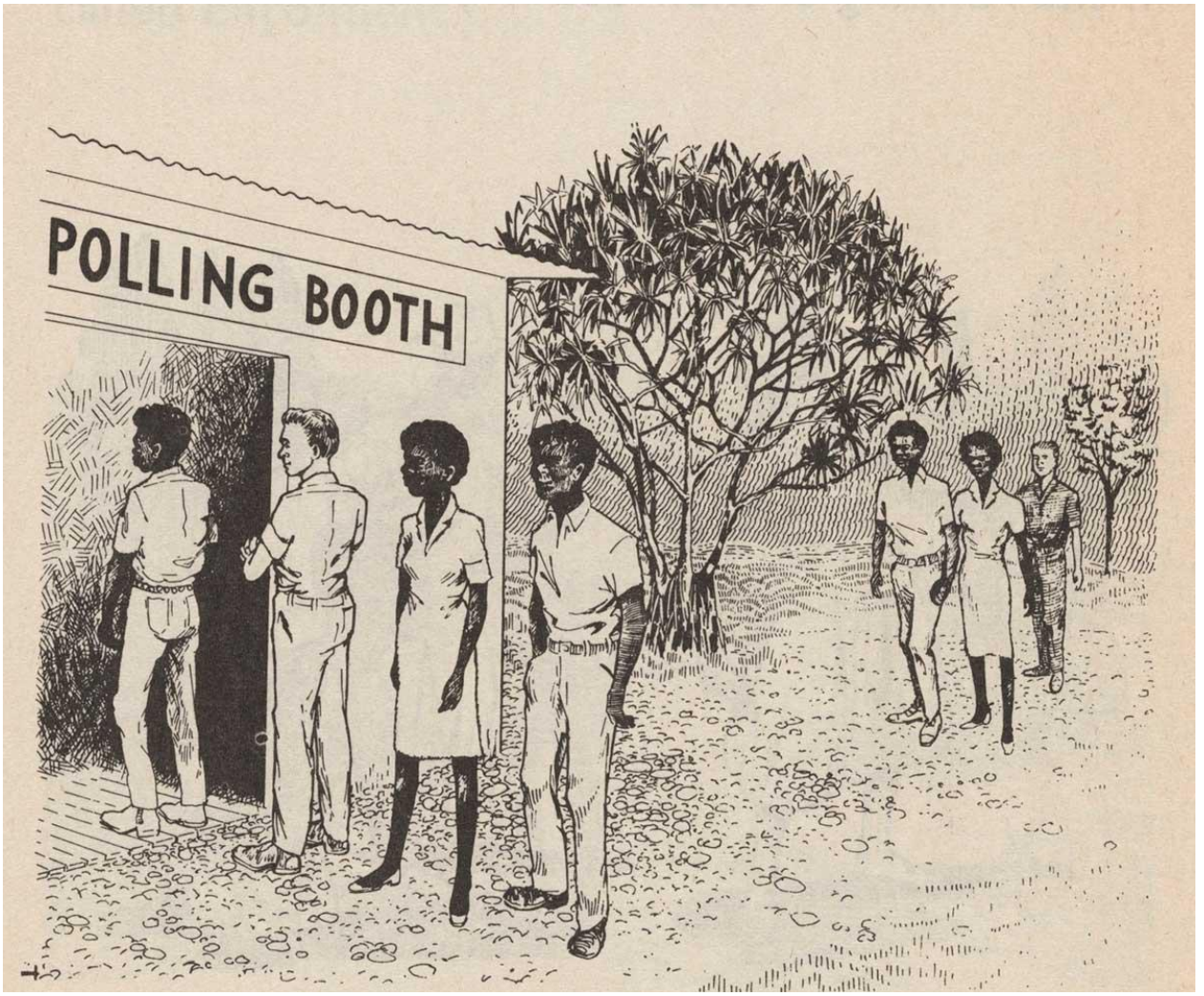
Additional Resources

South Australia-Women's suffrage

In a snapshot

On 18 December 1894 the South Australian Parliament passed the Constitutional Amendment (Adult Suffrage) Act. It was the result of a decade of struggle and finally gave women in South Australia the right to vote and the right to stand for election to parliament. South Australia was the first electorate in the world to give equal political rights to both men and women.

1. What legal rights were women denied for much of the 1800s?
2. What was the Women's Suffrage League, and why was it important?
3. What did the 1894 Act allow women to do for the first time and what was ground-breaking about it?



Australian voting history in action

Updated: 16 September 2022

Settlement

On 26 January 1788, the First Fleet landed at Port Jackson and the following month, on 7 February, Australia's first European colony was established. Captain Arthur Phillip was appointed by the British government as the first Governor of this new prison colony.

Subsequently, New South Wales attracted free settlers, and in time, these people felt entitled to have a say in who governed them. In 1842, a small group of male residents were enfranchised; however, they were only eligible to elect a proportion of the Colony's Legislative Council.

Eureka Stockade

During the 1850s, people from around the world flocked to the Australian goldfields. They had to purchase licences in order to earn money from prospecting for gold in these fields. In 1854, a miners' protest about the licence fee and their political rights resulted in a rebellion in which both soldiers and miners died. Following the rebellion, a number of the miners' demands were met, including their right to vote.

Male suffrage

In 1856, South Australia extended the vote to male residents aged 21 years and over. Two years later, Victoria followed their lead, with the remaining colonies following suit.

The Secret Ballot

Until the 1850s, people voted publicly, which left them vulnerable to intimidation and coercion. To rectify this situation, an independent electoral body was established during the 1850s to ensure elections were run fairly, and to this end the so-called 'Australian ballot', otherwise now known as the secret ballot, was implemented.

Women's suffrage

During the 1880s, the women's suffragette movement gained momentum. This movement was based on the belief that democracy, in its truest form, could not be achieved until women had the same electoral rights as men. In 1894, the South Australian Parliament agreed and the remaining colonies gradually came to the same view.

Leading by example, Australia helped to pioneer the recognition of women's suffrage internationally.

Federation

During the late 19th century, in response to various domestic and international political and economic circumstances, a movement to federate the Australian colonies developed around the country.

In 1898, South Australia, New South Wales, Victoria and Tasmania passed a referendum to federate under an Australian Constitution. The Australian Constitution is the fundamental law explaining how our country is governed, and change to this map of political power requires a referendum. In 1899, Queensland supported the federation, and the following year, Western Australia followed suit.

On 1 January 1901, the nation of Australia was born, with a federal parliament to govern it.

Compulsory voting

In 1924, to improve the low rates of voter turnout, amendments to the Commonwealth Electoral Act 1918 were made. Compulsory voting was introduced and this resulted in a dramatic increase in voter turnout at the following election.

Aboriginal and Torres Strait Islanders

Aboriginal and Torres Strait Islander peoples campaigned for many years to achieve full voting rights in state and federal elections. These rights were granted federally in 1962, and in 1965 Queensland allowed Aboriginal and Torres Strait Islander people to vote in State elections. Queensland was the last State to grant this right.

Voting age

During the 1960s and 1970s, a worldwide trend emerged in Western parliamentary democracies supporting lowering of the eligibility age to enrol and vote. Young people paying taxes, driving cars, and serving their country during times of conflict, believed they were entitled to have a say in the composition of their government.

In 1973, the Australian Parliament amended the Commonwealth Electoral Act 1918 and lowered the minimum voting age to 18 years.

The Australian Electoral Commission

In 1902, a branch of the Department of Home Affairs was responsible for Australia's federal electoral system. In 1973, this branch became the Australian Electoral Office. And on 21 February 1984, following major amendments to the Commonwealth Electoral Act 1918, the Australian Electoral Commission (AEC) was established as an independent statutory authority.

The AEC is responsible for conducting federal elections and referendums and maintaining the Commonwealth electoral roll. The AEC also provides a range of electoral information and education services.

The AEC has a national office in Canberra, State Offices in each state capital and a Northern Territory Office in Darwin. Each state is divided into Electoral Divisions, and each division has a Divisional Office Manager who is responsible for electoral administration within their division, in particular, maintaining the electoral roll, and preparing for the next electoral event.

Today

Australia is a federal, representative parliamentary democracy where citizens have the power to elect their representatives in parliament. Enrolling and voting is a right and a responsibility of each Australian citizen.

The effectiveness of our democracy depends on the active participation of all Australian citizens.

How Australian governments deal with the challenges Australia faces as a nation is very much in our hands.

The AEC acknowledges the Traditional Owners of country throughout Australia and recognises their continuing connection to land, waters, culture and community. We pay our respects to Elders past, present and emerging.

© AUSTRALIAN ELECTORAL COMMISSION 2024
AEC for schools Get Voting , Source: aec.gov.au/About_AEC/25/theme1-voting-history.htm

Chapter 4: Responsible government

4.1 The concept of responsible government

No questions

4.2 Forming government in Australia

Practical Application (Pages 70 - 71)

1. There are 151 seats in the House of Representatives in the 47th Parliament of Australia.

2. A party would need to secure 76 seats to form a majority government in Australia.

3. In 2010, the Labor Party of Australia won 72 seats. This was below the number required to form majority government, so they formed a majority government by securing the support of the Green Party of Australia and Independents.

4. In 2022, the Labor Party of Australia won 78 seats in the House of Representatives. As this was more than half the seats in the lower house, they were able to form a majority government.

What do you think? (Page 72)

[Answer asks for an opinion.] Relevant legal criteria could come from the rule of law—including that the Parliament is subject to open and free criticism (accountability and transparency); there is separation of powers present; stability and continuity; and provide more opportunity for lawmakers to balance individual rights with the protection of society.

Practical Application (Pages 72 - 74)

1. There is a viewpoint that minority governments may become more common in Australia. Journalist John Warhurst (Source 3) explains that our two-house system causes 'many power possibilities' evidenced by the fact that 'we have had most permutations and combinations recently.' Andrew Clark (Source 4) believes that the 'era of the majority rule is ending,' due to Australia's growing 'ethnically diverse society' who are 'less amenable to political labelling' and vote not according to long standing support for one specific party, but change their vote based on a party's promised response to a specific issue. The falling 'vote for major parties' (Source 5) is another reason minority parties may become more common in future parliaments.

2. In 2013 to 2014 the Abbott government, led by then Prime Minister Tony Abbott, was able to form a majority government.

3. A double majority government occurs when one political party or coalition of parties holds the majority in both houses of parliament. For example, from 2005 to 2007, a coalition formed between the Liberal Party of Australia and the National Party of Australia held the majority of seats in the Senate and House of Representatives. The Prime Minister at the time was John Howard.

4. **Summary of benefits and disadvantages of a majority and minority government in Australia.**

Type of Government	Benefits	Disadvantages
Majority governments	• More stable (Source 1) • Can pass law more quickly (Source 3) • Prime Minister does not rely on the confidence of one or more minor parties or independents to remain in government (Source 5) • Political party in power experiences less interference (Source 3)	• Outcomes can be less inclusive, as it does not require compromise and negotiation (Source 3)
Minority governments	• The 2010 to 2013 Labor minority government was Australia's most legislatively successful government (Source 2) • Common around the world (Source 3) • Australians support consensus or minority-style politics (Source 4) • Allows for alternative points of view to be aired (Source 5) • Are productive and constructive (Source 5) • Can deliver important and enduring reforms (Source 5) • Can lead to legislation being improved (Source 5)	• Unstable and chaotic (Source 1)

5. *[Answer asks for an opinion.]* One viewpoint held by journalists is that majority governments should be maintained as 'majoritarianism [is] a universal political value' (Source 4). Generally, political journalists in Australia are often older, more conservative and work for one publisher (e.g. News Corp Australia). They view minority governments as being more unstable and chaotic, although evidence from the 2010 to 2013 Labor minority government shows it was one of Australia's most legislatively successful governments (Source 2). This view may cause voters to select a candidate from one of Australia's two major political parties instead of making a free decision based on which person or political party aligns best with their political values. Long term, it prevents the inclusion of alternative points of view in lawmaking (Source 5), may lead to poorly drafted legislation not being improved or stopped (Source 5), and may further alienate voters from the political process.

6. *[Answer asks for an opinion.]* Relevant legal criteria could come from the rule of law—including that the Parliament is subject to open and free criticism (accountability and

transparency); there is separation of powers present; stability and continuity and responses to Question.

What do you think? (Page 75)

[Answer asks for an opinion.] Relevant legal criteria could come from the rule of law—including that the Parliament is subject to open and free criticism (accountability and transparency) and there is separation of powers present.

What do you think? (Page 75)

[Answer asks for an opinion.] Responsible government, a principle that holds the executive government (the prime minister and key ministers) accountable to the parliament, is a testament to the power of collective decision. While it ensures that the executive remains answerable to elected representatives and the public, it also empowers and constrains political leaders in different ways. For instance, this principle bestows a political leader with legitimacy, as they derive their authority from the support they receive from the majority of the lower house of parliament. This majority plays a crucial role in empowering leaders to implement their policies. However, it can also lead to instability. If they lose the confidence of the majority in the lower house, they risk being ousted from power. This constant pressure for leaders to maintain support and act in accordance with the will of parliament and voters limits their ability to act unilaterally and forces them to engage in negotiations, compromises, and sometimes policy backflips to keep the coalition intact.

Practical Application (Pages 76 - 77)

1. The event described in Source 1 is the swearing-in ceremony at Government House in Canberra of Anthony Albanese's new cabinet.

2. Anthony Albanese's cabinet contains 30 members.

3. According to the *Commonwealth of Australia Constitution Act 1901* (Cth), the members of the cabinet swear an oath of affirmation to 'Her Majesty Queen Victoria, Her heirs and successors according to law'.

4. *[Answer asks for an opinion.]* Responses may include the parliament or the people.

Practical Application (Page 77)

1. In 2020 and 2021, Scott Morrison appointed himself to multiple ministries.

2. Scott Morrison's action in having himself appointed to multiple ministries was legal. The *Commonwealth of Australia Constitution Act 1901* (Cth) s64 empowered the Governor-General to appoint multiple ministers to administer a single department.

3. The Governor-General appointed Scott Morrison to be a minister for multiple departments.

4. The inclusion of plurals when the *Commonwealth of Australia Constitution Act 1901* (Cth) s64 describes the power the Governor-General possesses (i.e. 'officers' and 'departments') demonstrates that it was legal for Scott Morrison to be able to share a ministry portfolio with a colleague. Section 64 also gives the Executive Council (made up of the Governor-General and senior ministers) the ability to create and adjust ministers. The Executive Council, a body that advises the Governor-General in the exercise of their powers, plays a crucial role

in the appointment process. The appointments were legal since these conditions were met and the steps to make formal appointments followed. The *Constitution* gives the Governor-General an essential role in appointing ministers; without this power, a minister cannot administer a department. Further evidence of their strength is shared in the phrase, 'Such officers shall hold office during the pleasure of the Governor-General.' However, as reported by *The Conversation*, 'the Governor-General has no discretion to refuse to accept the prime minister's advice,' so their power isn't unchecked, but may also demonstrate they are powerless to say no. The power to appoint multiple ministers to the same department also concentrates power in the hands of the prime minister or those at the top of the executive branch, including the Governor-General. This could lead to political leaders appointing themselves to multiple portfolios, raising concerns about accountability, transparency, ministerial responsibility, and checks on executive power. This weakens the foundational principles of the Westminster system.

5. Responsible government, a fundamental principle, holds the executive government (the prime minister and key ministers) accountable to the parliament. The *Commonwealth of Australia Constitution Act 1901* (Cth) s64 is crucial for this principle, as it creates the executive government. However, the secretive nature of the appointments, as highlighted by Solicitor-General Stephen Donaghue, raises serious concerns about the ability of the Parliament and the public to hold ministers accountable for the proper administration of particular departments.

4.3 Parliament

Practical Application (Pages 79 - 81)

Source 1

1. The House of Representatives passed the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 on the 20 August 2018.

2. The Senate passed the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 with a number of amendments on 6 December 2018. They then agreed to further amendments made by the House of Representatives on 13 February 2019.

Source 2

1. The Senate agreed to amendments made by the House of Representatives that gave ‘doctors a greater say in refugee medical evacuations’ (Source 2).

2. The Labor Party of Australia and the crossbench ‘joined forces in the House of Representatives to pass amendments’ (Source 2). At the time Labor was in Opposition, as ‘the Coalition retains the ability to govern’ (Source 2).

Source 3

1. In 1941, the Fadden Government faced a significant setback when it lost control over the budget and the ability to secure supply. The budget was reduced by a symbolic amount of 1 pound, a move that was more about the symbolic loss of control than the actual amount. This loss of confidence led to the resignation of the Fadden Government.

2. *[Answer asks for an opinion.]* The resignation of the Fadden Government after the budget was reduced by the symbolic amount of 1 pound highlights the strengths and weaknesses of the concept of the Government holding the confidence of the lower house of Parliament

and responsible Government. Responsible Government, a key concept in Australian political history and governance, provides a system of checks and balances – it holds the Executive accountable to the Parliament. In this case, the Fadden Government, which derived its legitimacy and authority from the majority in the lower house of Parliament, lost confidence and its ability to govern effectively. However, some would suggest that given the Fadden Government held the majority of seats in the lower house, they had a mandate or were given wide support from the community to put their election promises and policies into action. The Parliament's actions could be seen as going against the wider community.

3. *[Answer asks for an opinion.]* The proposed amendments made to the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 by the opposition (Labor Party of Australia) and the crossbench did not cause the Morrison Government to lose confidence. This was because Labor withdrew 'part of the medical transfer scheme that required funding to pay for medical experts to review transfers' (Source 3); as the bill was no longer a money bill, it did not test the Parliament's confidence in the Government.

Research Task (Page 81)

1. The *Commonwealth of Australia Constitution Act 1901* (Cth) s57 addresses the procedure when there is a disagreement between the Senate and the House of Representatives over a proposed law (a bill). This section provides a mechanism for resolving such deadlocks between the two Houses of Parliament. The process begins when the House of Representatives passes a bill, but the Senate disagrees (or the Senate delays the passage of the bill or makes amendments that the House rejects). A 3-month waiting period starts at this point. If the deadlock remains unresolved, the Governor-General has the authority to submit the proposed law to the electors in a double-dissolution election. If the bill is still not passed after the double dissolution election (if the Senate again rejects it in the newly elected Parliament), it can be passed by a joint sitting of both the House of Representatives and the Senate.

2. *[Answer may vary based on research.]*

   Some possible secondary sources include:

   - Cambell Rhodes, *What is a vote of no confidence?* <moadoph.gov.au/explore/stories/democracy/what-is-a-vote-of-no-confidence>.
   - Parliamentary Education Office, *What is confidence and supply?* <peo.gov.au/understand-our-parliament/your-questions-on-notice/questions/what-is-confidence-and-supply>.
   - Parliament of Australia, *Motions of no confidence and censure*, <aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter9/Motions_of_no_confidence_and_censure>.

   In this case, the Opposition had the opportunity to move a motion of 'no confidence', but this changed when Labor withdrew 'part of the medical transfer scheme that required funding to pay for medical experts to review transfers' (Source 3); as the bill was no longer a money bill, it did not test the Parliament's confidence in the Government. Additionally, the Government held the majority in the lower house of parliament so the motion would have failed to secure the support of the House of Representatives.

4.4 Governor-General

Practical Application (Page 82)

1. In 2024, Sam Mostyn was appointed as the Governor-General.

2. In the past Governor-General's have tended to have a 'military, judicial or political background.'

3. *[Answer asks for an opinion.]* Students may either argue that the role (a representative of the King) no longer reflects what it means to be a modern democracy, or may argue that Sam Mostyn's background reflects change.

Practical Application (Pages 84 - 85)

1. A joint sitting of Parliament involves both the House of Representatives and Senate sitting together to pass legislation. It occurs after a double dissolution election in which the Senate still does not pass a bill that caused the election to be called (s57).
2. The Prime Minister in 1975 was Gough Whitlam.
3. The Senate deferred the passage of a bill needed to finance the government (Source 2). The Senate was dominated by the Liberal and Country (now National) parties, who had formed an alliance (Source 2). The Democratic Labor Party (DLP), who had five members, often voted with them (Source 2).
4. Governor-General Sir John Kerr sacked the sitting Prime Minister Gough Whitlam, dissolved the Houses of Parliament and put in place a caretaker Prime Minister from the opposition party, Malcolm Fraser (Source 2). Governor-General Sir John Kerr's decision was legally justified, as he had reserve powers to dissolve parliament if there was an impasse concerning the passage of a supply bill (s57). Professor Mark McKenna, a leading Australian historian, says that the letters between the Queen and Sir John Kerr 'reveal how Australia's constitutional independence was fatally compromised' as 'the Queen and her private secretary knew more about Sir John's intentions' (Source 4). Historian Jenny Hocking found Sir John Kerr, 'withheld information from the Prime Minister, whose advice he was bound to accept' (Source 2).
5. This event was a significant political event as it was the first time a Governor-General had removed a Prime Minister who held the support of the House of Representatives. Professor Anne Twomey (Source 3) states that, 'many people were influenced by the events of 1975 to support a republic.'
6. *[Answer asks for an opinion.]* As this reserve power can only be used in very specific circumstances and legal advice forms part of the decision to dissolve parliament, there are sufficient safeguards to ensure the Governor-General, an unelected representative, uses this power correctly and only when the law dictates. As the Governor-General is simply applying the law, their unelected status has little impact on the decision-making process or the process itself. If there is a dispute, it is important an independent person, who is not influenced by party polices or the people, can make a decision to ensure government operates effectively.

4.5 Other mechanisms of accountability in parliament

Research Task (Page 87)

1. Locate the latest House of Representatives Hansard (aph.gov.au/Parliamentary_Business/Hansard). Question time is identified as 'Questions without notice'.

2. Two examples of questions without notice that demonstrate a member of parliament criticising or scrutinizing the government's actions on Monday 25 November 2024 include:
    - A member of the Opposition asked: *My question is to the Prime Minister. Former ACTU president and member for Throsby, Jenny George, has written in relation to your government's failure to deliver a $275 reduction in power bills, 'With each broken promise, trust diminishes. Social licence has fallen away in regional areas carrying the burden of the transition.' Prime Minister, why should Australians trust your government on energy prices after this broken promise?*
    - An Independent MP asked: *My question is to the Prime Minister. Australians are the biggest per capita losers on gambling. Eighteen months ago, Peta Murphy's review recommended a ban on online gambling, and this is widely supported in my electorate, including by a mum I met in Kings Cross who is working as a cleaner and is desperate to help her son escape online gambling and the damage it has done to their family. This parliament had a once-in-a-generation opportunity to stop online gambling advertising. Why have you abandoned it?*

3. An effective opposition ensures that government actions are subject to scrutiny and that policies, actions and laws are reviewed for fairness, accessibility, and responsiveness to all citizens. This scrutiny is essential in ensuring that government decisions and laws serve the public interest and are not discriminatory or unjust. An effective opposition ensures that laws are acceptable and in line with democratic values. They also play a key role in ensuring that laws are made through transparent processes, serving as a check on executive power and ensuring that they respect the rights of individuals while advancing the public interest.

Review

Comprehend (Page 88)

1. **Responsible government:** a principle that the executive government (the prime minister and key ministers) are responsible and accountable to the parliament.
   Minority government: occurs when no single political party or coalition has a majority of seats in the lower house of parliament (either the Legislative Assembly or House of Representatives), typically after an election. As a result, the political party with the most seats must rely on the support of independents or smaller parties to form government. An example of this in Australia was the Gillard government (2010–2013), which depended on the support of independents and the Greens.
   Majority government: occurs when a single political party or coalition holds more than half the seats in the lower house of Parliament (either the Legislative Assembly or House of Representatives). An example of this in Australia was the Albanese government (2022-2025) who won 78 seats to form a majority government.
   Double majority: occurs where a political party or coalition holds a majority in both Houses of Parliament—the House of Representatives and the Senate.

2. One principle of the rule of law that assists to hold the government accountable for its actions is the separation of powers doctrine. This doctrine asserts that the power held by the three arms of government, the executive, the legislature and the judiciary are kept separate. This ensures that each arm of government keeps each other in check and stops power being concentrated which can lead to abuse. For example, in Australia, judicial review allows courts to assess the legality of government actions, ensuring that the government cannot operate above the law, thus safeguarding citizens' rights and maintaining democratic accountability.

   [Other aspects of the rule of law mentioned in the chapter are that the government is subject to the law and open government.]

3. Maintaining 'confidence' in the context of responsible government refers to the requirement that the government (the executive) must retain the support of the majority in the lower house of parliament (the House of Representatives in Australia or the Legislative Assembly in Queensland). If the government loses this support, either through a vote of no confidence or failing to pass key legislation involving 'supply' (money), it must resign, triggering a potential change in leadership or a new election. This ensures that the government remains accountable to the elected representatives of the people as a whole.

4. Whether a political party or coalition of parties has formed a minority or majority government has significant implications for lawmaking. A majority government, where a single party controls either the House of Representatives (Australia) or the Legislative Assembly (Queensland) can pass legislation more easily, as it always has the most votes. For example, when the Liberal National Party of Queensland (LNP) won the 2024 Queensland election, they were easily able to pass legislation that increased the maximum sentences that could be given to youth offenders. In contrast, a minority government occurs when no single party has a majority, and the political party that eventually goes on to form government must rely on the support of independents or minor parties to pass laws. This often leads to more negotiation and compromise. A notable example was the Gillard Government (2010-2013), which was a minority government. To pass significant legislation,

like the National Disability Insurance Scheme (NDIS), the Gillard government had to broker deals with the Greens and independent MPs. This process can slow down legislation, but it also means that minority governments are more likely to incorporate diverse viewpoints, leading to policies that reflect broader consensus. However, minority governments are often seen to be less stable and more vulnerable to political instability or challenges from within the parliament.

Analyse (Page 88)

[Answer asks for an opinion.] According to an article published by the BBC, Solicitor-General Stephen Donaghue shared that 'Australia's previous prime minister 'fundamentally undermined' responsible government by secretly appointing himself to additional ministries' (Turnbull, 2022). Solicitor-General Stephen Donaghue's viewpoint highlights a significant issue: the lack of transparency in former Prime Minister Scott Morrison's secret ministerial appointments. While Donaghue concluded that the appointments were not illegal, his statement emphasises that accountability in government relies on the public and parliament being informed of the powers vested in ministers. Without knowledge of these powers, citizens and elected representatives cannot hold ministers accountable for their actions, undermining democratic principles. The consequences are serious—such secretive appointments erode trust in government, diminish parliamentary oversight, and compromise the principles of responsible and transparent governance.

Evaluate (Page 88)

[Answer asks for an opinion.] Responsible government effectively achieves its objective of holding the government accountable in Australia.

The House of Representatives, where the government holds power and it's given the authority to make laws, is held accountable through a variety of mechanisms. For example, if the government loses the confidence of the lower house of parliament, it must resign or it may be dissolved by the Governor-General, who has reserve powers to call an end to a parliament as provided by the *Constitution*. A vote of no confidence on the floor of the parliament can also compel a change in leadership or see a general election called. Furthermore, it is directly accountable to the people through regular elections, ensuring that if the government loses public support, it can be voted out. This framework ensures that executive actions remain under constant parliamentary scrutiny, upholding accountability.

The rule of law also assists to support the operation of 'responsible government' in Australia. Open government, a key element of the rule of law, ensures that laws are debated and tested before being enacted, providing a platform for both the opposition, the media and the public to challenge policies that may be unjust or contrary to the constitution.

The concept of 'responsible government' also ensures our system of government is generally fair, just, and ethical. It is designed to ensure equitable representation by law to support democratic elections and create law that protects individual rights or justifies their limitation where necessary. The separation of powers ensures that power is shared between the different arms of government to ensure that no-one, not even the government, is above the law.

However, weaknesses, such as the strong party discipline and the placement of considerable power in the hands of the executive, sometimes limits fairness by reducing the independence of parliamentarians and stifling opposition voices. While instances like the Scott Morrison multiple ministries scandal raise concerns about the lack of accountability and transparency and unethical behaviour; the existence of legal processes, elections and a free press show that the concept of responsible government is still operational, even if occasionally undermined by executive overreach.

Chapter 5: Making law in parliament

5.1 The legislative process

Practical Application (Page 93)

1. The new law introduced by the Palaszczuk Government has created a criminal offence 'to share or threaten to expose intimate images of someone without their consent.'

2. The idea for the new law originated as an election campaign promise.

3. The body that will sign off on the new law is the Cabinet.

4. *[Answer asks for an opinion.]* The Cabinet, with its significant influence on the laws of Queensland and Australia, is a body comprising the leader of the government and key ministers. These are not just leaders, but experienced and informed individuals who possess a comprehensive understanding of their respective portfolios. This knowledge and experience can lead to well-rounded and practical policies and laws that consider various aspects of governance, such as the economic, social, and environmental impacts of a decision. A unified approach to decision-making also helps present a strong front when discussing proposals in the community and in parliament.

   However, a potential weakness of this approach is that having the decision-making power sit entirely within a small group can result in a lack of diversity in perspectives. If only a few ministers are driving the legislative agenda, there is a risk that important viewpoints or concerns from other parts of society, such as opposition voices or the general public, may not be adequately considered. This could lead to policies that are too narrowly focused or biased, raising concerns about the risks associated with concentrated power and failing to address the broader needs of the population.

Practical Application (Page 94)

1. The amendment introduced in 2023 allows for the imprisonment of 'children in police watch houses for adults.'

2. The *Human Rights Act 2019* (Qld) s38 requires all bills to consider how an individual's human rights are impacted. The amendment that allows children to be imprisoned in police watch houses for adults 'will require a suspension of the state's *Human Rights Act*.'

3. The Hon Mark Ryan 'introduced the amendment as part of a swathe of changes to an unrelated bill in state parliament on Wednesday afternoon.' The article also refers to the bill's explanatory note, which the Hon Mark Ryan would have also introduced.

4. *[Answer asks for an opinion.]* Students' responses can examine either the act of introducing amendments within unrelated bills or the suspension of the *Human Rights Act*. When examining their viewpoint's implication, students should consider the impact it will have on efficiency, whether changing the process will impact the substance of the bill (i.e., whether or not a bill is affected by the process), whether it's feasible for a bill to not impact individual's human rights, the openness of the law-making process and whether the community has the opportunity to have their say on the proposed law, etc.

5. *[Answer asks for an opinion.]* Students' legal criteria may include whether placing children in adult watch houses is fair, acceptable to the community, applies to all children equally, can be enforced, balances individual rights with the protection of society, etc.

What do you think? (Page 95)

[Answer asks for an opinion.] When examining their viewpoint's implication, students should consider whether it's feasible for a bill to not impact individual's human rights in some way, whether some limitations can be justified for the good of society as a whole and the difficulty of balancing the needs of different groups.

Practical Application (Pages 96 - 97)

1. The short title of the bill is the Criminal Code (Defence of Dwellings and Other Premises – Castle Law) Amendment Bill 2024 (Source 3).

2. The primary objective of the Criminal Code (Defence of Dwellings and Other Premises – Castle Law) Amendment Bill 2024 is to amend s267 of Queensland's Criminal Code (the Code) and provide clearer guidance and legal protection for individuals who use force to defend themselves or others within their homes (Source 3).

3. The Criminal Code (Defence of Dwellings and Other Premises – Castle Law) Amendment Bill 2024 was introduced by the Member for Hinchinbrook, Mr N Dametto, who is a member of Katter's Australian Party (KAP) (Source 1).

4. The Criminal Code (Defence of Dwellings and Other Premises – Castle Law) Amendment Bill 2024 was a Private Members Bill. This is because Mr N Dametto is not a member of the government (see page 95).

5. The Criminal Code (Defence of Dwellings and Other Premises – Castle Law) Amendment Bill 2024 was referred to the Community Safety and Legal Affairs Committee, a parliamentary committee responsible for reviewing and reporting on bills related to law and order matters (Source 2).

6. The Criminal Code (Defence of Dwellings and Other Premises – Castle Law) Amendment Bill 2024 was referred to the Community Safety and Legal Affairs Committee, which was due to report to parliament by 4 November 2024 (Source 2). With the Queensland election occurring on 26 October 2024, this bill did not complete all stages of the legislative process before the parliament dissolved. This could have implications for the bill's future, as it may need to be reintroduced in the next parliamentary session, potentially delaying its enactment. *[Answer asks for an opinion.]* When examining their viewpoint's implication, students should consider whether it is fair that different people examine a bill after an election, what may happen if a member of parliament is not re-elected, the time and cost implications to continue or re-start the process, etc.

7. The government presents most bills introduced into parliament. As the government often holds the majority of seats in the lower house of parliament, a government bill is often passed with few impediments. As the Criminal Code (Defence of Dwellings and Other Premises—Castle Law) Amendment Bill 2024 is a Private Members Bill, it faces a more

challenging path to becoming law. It is not likely to become law unless the government supports its introduction, which may require significant advocacy and negotiation.

8. *[Answer asks for an opinion.]* Students' legal criteria may include whether the law is clear, acceptable, or retrospective, whether the law applies equally to all and can be enforced, whether the rights of victims and offenders are equally balanced and whether it will improve outcomes.

What do you think? (Page 98)

[Answer asks for an opinion.] When examining their viewpoint's implication, students can consider—

On good governance:

- Good governance involves the application of principles such as fairness, effectiveness, transparency, inclusivity, and respect for the rule of law. It ensures that decisions made are in the public interest.
- Good law-making typically involves the rigorous debate of ideas, diverse viewpoints and safeguards against potential flaws or bias.
- Laws should be scrutinised for their consistency with democratic principles, fairness, and respect for rights.

About whether 'good governance' involves debate or consensus:

- A lack of debate or rejection of bills may indicate insufficient examination of their implications, which could result in laws that do not address the diverse needs of the population.
- Heated debate or rejection may ensure that legal principles such as transparency, accountability, and representation are upheld. It allows for the examination of the bill's potential legal, social, and economic impacts, providing space for diverse opinions.
- But frequent rejection or heated debate might also lead to instability or a lack of consensus, hindering timely legislative progress.

Practical Application (Pages 99 - 100)

1. The amendment being proposed in the Resources Safety and Health Legislation Bill; Mineral and Energy Resources and Other Legislation Amendment Bill 2024 related 'to the operation of the Parole Board Queensland' (Source 2). The Bill sought to rectify an 'error in the subsequent engagement of these approved individuals to act for different periods' that 'may have the effect of invalidating parole decisions that the acting professional board members took part in' (Source 2). The amendments will ensure 'parole decisions remain enforceable and the parole system in Queensland is properly administered' by validating the appointment of acting Parole Board members (Source 3). The amendments were urgent to ensure 'decisions remain enforceable' after 'concerns were raised' about the appointment of some acting positions (Source 1, Source 2).

2. The Minister that introduced the amendment was the Hon Scott Steward MP, Minister for Resources and Critical Minerals (Source 2, Source 3). The Resources and Critical Minerals portfolio wouldn't include parole, as that would typically fall into the Department of Justice and Attorney General or Corrective Services.

3. A 'cognate' debate involves the parliament debating two or more bills together at the same time.

4. The Resources Safety and Health Legislation Bill; Mineral and Energy Resources and Other Legislation Amendment Bill 2024 has reached the Second Reading stage (Source 2). Prior to this, the Bill was presented to the Legislative Assembly for the first time, which involved a copy of the Bill alongside an Explanatory Note and a Statement of Compatibility of Human Rights being tabled to parliament, before a speech was made on the proposed law by the Minister. The Bill was also referred to a committee, who scrutinised the Bill and presented a report to the parliament recommending whether the Bill be passed or not.

5. *[Answer asks for an opinion.]* The amendment to the Resources Safety and Health Legislation Bill; Mineral and Energy Resources and Other Legislation Amendment Bill 2024 was presented during the Second Reading. This means that the amendments were not scrutinised by a committee; and key stakeholders and the community were not able to make submissions about the Bill, nor make statements to the Committee. However, the Second Reading stage does provide a forum for debate on the key ideas of the Bill, although members of parliament would have a shorter timeframe to read, consider and respond to the amendments. The amendments can also be scrutinised in the Consideration-in-Detail stage of the legislative process. When examining their viewpoint's implication, students can consider—

   On good governance and law-making:

   - Good governance involves the application of principles such as fairness, effectiveness, transparency, inclusivity, and respect for the rule of law. It ensures that decisions made are in the public interest.
   - Good law-making typically involves the rigorous debate of ideas, diverse viewpoints and safeguards against potential flaws or bias.
   - Laws should be scrutinised for their consistency with democratic principles, fairness, and respect for rights.

   On its implications:

   - There are other methods of scrutiny, and the law-making process occurs within an open and transparent way.
   - With a majority government, the opposition minor parties and independents have little power to stop the law from being passed. If greater power was given to non-government members the power could be used for political gain and negatively impact the law-making process.
   - Sometimes the law-making process requires flexibility to respond to urgent circumstances.
   - It was in everyone's best interests for these amendments to be passed, as it was essential for decisions made by the parole board to be valid.

6. *[Answer asks for an opinion.]* When justifying their decision, students can consider—
   - the fact this example occurred in Queensland (which has one house),
   - Queensland's system of responsible government means that ministers are accountable to the Parliament and, by extension, the public, which can serve as a check on government power,

- the impact of a majority or minority government (i.e. a minority government can stop a law from progressing, but a majority government can pass laws easily),
- the current process has built-in checks, ongoing vigilance and reforms are needed to ensure that laws truly serve the public good,
- other mechanisms of accountability (i.e. free press, right to protest, judicial system) might provide additional avenues for the government to re-consider the law.

Practical Application (Page 101)

1. The Export Control Amendment (Ending Live Sheep Export by Sea) Bill 2024 'will end the live sheep export trade by sea by 1 May 2028.'

2. The Export Control Amendment (Ending Live Sheep Export by Sea) Bill 2024 was examined by the Agriculture Committee.

3. There were many different stakeholders that were consulted about the Export Control Amendment (Ending Live Sheep Export by Sea) Bill 2024. These included stakeholders 'representing industry, government, local communities and animal welfare groups.'

4. The Export Control Amendment (Ending Live Sheep Export by Sea) Bill 2024 did not have universal support, with Committee Chair, Ms Meryl Swanson MP, 'acknowledging the strong opposition of sections of industry and local WA communities.' A House of Representatives Media Release also acknowledges the Committee 'received over 13,000 contributions from people supporting and **opposing** the bill.'

   [Answer asks for an opinion.] When deciding whether a proposed law must be supported by all stakeholders in order to be fair, just and effective, students can consider—
   - The purpose and role of involving stakeholders in making law: they help identify potential issues or unintended consequences and their feedback can improve the quality and fairness of the law and demonstrate community support for a law (a feature of an effective law).
   - The motivation of stakeholders: opposition may be driven by vested interests or outdated views that do not align with broader society.

5. The Agriculture Committee held two public hearings in Canberra and Muresk (Western Australia) which took 'important evidence from a range of stakeholders' and members of the community, who were able to submit the feedback on the Bill during the consultation period.

   [Answer asks for an opinion.] When applying the elements of inclusivity, transparency and accountability, students can consider whether—
   - the range of stakeholders and number of contributions demonstrates adequate **inclusivity** of diverse viewpoints;
   - the transition period might demonstrate an attempt to balance competing interests and shows the government is responsive to community concerns and is prepared to hold itself **accountable** for managing the impacts of the transition; and
   - two public hearings in different locations promotes adequate **transparency** and gave people an opportunity to find out about the Bill and provide feedback, also taking into account these hearings were open and accessible.

Practical Application (Pages 102 - 103)

1. The chair of the Youth Justice Reform Committee was Sandy Bolton MP, who is Queensland's only independent state MP.

2. The Youth Justice Reform Committee held '…26 meetings, 13 public hearings and [received] hundreds of submissions.'

3. The Youth Justice Reform Committee 'could not come to an agreement' on their interim report and 'it finally collapsed.' The interim report was later tabled to parliament 'after the Labor government compelled its release while claiming the LNP had attempted to block it from being published after three LNP members of the committee refused to sign off on it.'

4. After the collapse of the Youth Justice Reform Committee, Scott McDougall, Queensland's Human Rights Commissioner stated 'it was 'disappointing' a 'bipartisan, evidence based approach' had been lost at the 'expense' of the rights of children and the safety of the community. It's a real blow to Queensland's prospects of meaningfully addressing the underlying causes of youth offending.' The Youth Advocacy Centre Chief Executive, Katherine Hayes, said her organisation was 'very disappointed that the select committee has degenerated into a squabble.'

   [Answer asks for an opinion.] When examining their viewpoint's implication, students can consider—

   - whether a bipartisan approach is possible on issues such as youth crime and the impact this has on finding solutions on youth crime,
   - the role politicisation plays in committee hearings and its impact, and
   - the effect this outcome will have on the willingness of stakeholders such as the Queensland Human Rights Commission and Youth Advocacy Centre to become involved in future hearings.

5. *[Answer asks for an opinion.]* When justifying whether Queensland's committee system enhances the democratic process, students can consider whether—
   - The committee system allows for extensive stakeholder consultation, including input from experts, interest groups, and the public. This enhances the fairness of the legislative process by ensuring that diverse viewpoints are considered before recommendations are made. Doing so helps to achieve more **equitable outcomes**, as the voices of marginalised or impacted groups are not overlooked.
   - The system improves **responsiveness** by allowing committees to respond to public and stakeholder feedback during the inquiry process.
   - Committees help ensure that laws are clear, acceptable, and enforceable (elements of the **rule of law**) by allowing thorough scrutiny before legislation is passed.
   - Committees help **balance individual rights** with broader societal interests by considering the implications of laws on personal freedoms while ensuring the overall welfare of the community is upheld.

Practical Application (Page 105)

1. The political parties that united to reject a government bill on housing were the Greens and the Coalition.

2. In June 2023 'the Greens and the Coalition united to reject Labor's centrepiece housing policy.' This means that 'the government must wait three months before it can bring back the Housing Australia Future Fund bill' and 'sets up a high-stakes stand-off between Labor and the Greens that may give the government the power to dissolve the parliament and head to an early election.'

3. A double dissolution election is a special type of election in the Parliament of Australia that can be triggered when there is a deadlock between the two houses of Parliament—the House of Representatives and the Senate—over a piece of legislation. It is outlined in the *Commonwealth of Australia Constitution Act 1901* (Cth) s57.

4. *[Answer asks for an opinion.]* When analysing the bicameral system, students can consider whether two houses—
    - provide enhanced checks and balances, which may ensure laws are rigorously examined from multiple perspectives; or
    - hinder process and lead to political deadlock, which may lead to laws being delayed or blocked and exacerbate political instability and trust in the system.

5. *[Answer asks for an opinion.]* When justifying whether the law-making process produced a good outcome, students can consider whether—
    - the bill itself is **equitable** (i.e. it is addressing a pressing society issue that involves addressing inequality),
    - the deadlock is **fair** to those people struggling with housing affordability,
    - a more **just and fair** policy may be negotiated in the future to allow the bill to be passed,
    - the process followed by the parliament was clear and consistent, open and transparent and highlights institutional checks and balances,
    - the right to shelter is an important human right.

5.2 Analysing the legislative process

Practical Application (Page 107)

[Answer varies depending on research, bill and jurisdiction chosen.]

For example—

Legislative Process in Australia

Viewpoint	Plus	Minus	Interesting
Government	All bills introduced by the government will pass the House of Representatives in a majority government.	A double majority is rare, so the government will need to negotiate with the Senate to have a law made.	The Committee Chair gets the deciding vote in a deadlock.

Opposition	The Second Reading Debate provides the Opposition with the opportunity to criticise the bill and put forward an alternative.	The opposition cannot vote down a law on its own.	An MP can cross the floor, but this may mean they cannot be a member of the party moving forward.

What do you think? (Pages 107 - 108)

[Answer varies depending on research, bill and jurisdiction chosen.]

5.3 Delegated legislation

Practical Application (Pages 109 - 110)

1. Based on the contents of the *SBS News* article, a direction (specifically Direction 110) is a legally binding rule that provides criteria to guide how a decision maker (such as a member of the Administrative Appeals Tribunal) is to decide a visa application.

2. Direction 99 and Direction 110 were issued by the Immigration Minister, who at June 2024 was Andrew Giles.

3. Direction 99 requires 'decision makers including the Administrative Appeals Tribunal, to make the 'strength, duration and nature' of a person's ties to Australia a 'primary consideration' when reviewing visa cancellations.' Direction 110 sees 'community protection' being given 'greater weight when it comes to' decisions.

4. *[Answer asks for an opinion.]* Direction 99 'came under scrutiny when it was revealed that individuals previously convicted of crimes had their visas reinstated by the AAT'. An updated direction (Direction 110) was issued by the Immigration Minister Andrew Giles. The ability for a minister to create a direction with legal affect that can be applied immediately by decision makers is beneficial, as it allows the government to respond to an issue in a timely way and does not require a minister to follow the legislative process, which can be slow and cumbersome. However, delegated legislation is not scrutinised to the same degree as other laws, which can lead to issues and problems occurring as the legislation does not benefit from stakeholders reviewing the proposal and offering insight into how it could be changed to achieve better outcomes.

What do you think? (Page 110)

[Answer asks for an opinion.] When justifying whether delegated legislation can pose a danger for the principle(s) of the rule of law, students can consider whether—

- this type of law is clear and predictable, given that it can be changed quickly,
- there is adequate accountability given to the Executive,
- the law is capable of being enforced equally,
- the law is made in an open way, and
- the separation of powers is still operating effectively.

Review

Comprehend (Page 110 to 111)

Question 1

a. **Bill:** A proposed law.
b. **Delegated legislation:** Law made by other entities to whom parliament has given law-making power (such as government agencies, local councils or courts). Also called subordinate or subsidiary legislation.
c. **Long title:** A formal title that summarises the purpose, scope, and subject of an Act of Parliament. It's usually found at the beginning of the instrument.
d. **Notice paper:** An official document of a parliament, published by authority of the Clerk,
b. showing all the business before the House on a particular sitting day.
a. **Private Members Bill:** A bill introduced by a non-government member of parliament or senator.
b. **Short title:** The formal name by which legislation may, by law, be cited.
c. **Submission:** A submission is a written comment about a committee inquiry that can be used by a committee to increase the committee's understanding of an issue.

Question 2

a. FALSE. A bill can be presented by any member of the Queensland Parliament.
b. TRUE.
c. FALSE. In Queensland, if a bill passes through all stages in the Legislative Assembly and is given Royal Assent, it becomes a law.
d. FALSE. The process of 'first reading' of a bill in Australia involves the introduction of the bill to parliament. It is accompanied by explanatory memorandum.
e. TRUE.
f. FALSE. The process of 'second reading' of a bill in the Australian Parliament involves the members debating and ultimately voting on the main idea of the bill.
g. TRUE.
h. TRUE.
i. TRUE.

3 Ideas for a new law can come from many different places. These include an election promise, a policy, in response to an event or an emergency, a suggestion from a member or senator, an inquiry or royal commission, or pressure from a specific group of people, such as the media, an interest group or a lobby group. For example, in 2018, the Queensland Parliament created law to outlaw revenge porn. This law began as a commitment made by Premier Annastacia Palaszczuk during an election campaign.

4. There are two key differences between the legislative process in Queensland and Australia, these being the number of houses a bill passes through on its legislative journey and who gives Royal Assent. Australia has a bicameral legislature with two houses—the House of Representatives and the Senate. In contrast, Queensland operates under a unicameral system with only one legislative chamber, the Queensland Parliament. This means that in Queensland the legislative process only involves one house of parliament, whereas in Australia it is required to be passed through two houses. At the federal level, the Governor-General represents the Crown in the Parliament of Australia and performs functions such as giving Royal Assent to laws. In Queensland, the Governor performs a similar role at the state level.

Select, analyse and evaluate (Page 111 to 112)

All information required to complete this activity can be found on the Committee Inquiry page

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A"legislation%2Fbillhome%2Fr7203">

[Answer asks for an opinion.]

When applying the elements of inclusivity, transparency and accountability, students can consider whether—

- the range of stakeholders and number of contributions demonstrates adequate **inclusivity** of diverse viewpoints;
- the transition period might demonstrate an attempt to balance competing interests and shows the government is responsive to the concerns and is prepared to hold itself **accountable** for managing the impacts of the transition; and
- two public hearings in different locations promotes adequate **transparency** and gave people an opportunity to find out about the Bill and provide feedback, also taking into account these hearings were open and accessible.

When justifying whether the law-making process produced a good outcome, students can consider whether—

- the outcome is **fair** to the industry or was required,
- animal protection is important and **just**,
- it is responding to an important issue facing Australia,
- the needs of society are more important in this case then individual rights,
- a more **just and fair** policy may be negotiated in the future to better balance the needs of the stakeholders, and
- the process followed by the parliament was clear and consistent, open and transparent and highlights institutional checks and balances.

Chapter 6: Governance in action—the judicial system

6.1 The independence of judicial power

Case Study (Page 117)

1. At the mention of the case before the Victorian Court of Appeal, the court was gravely concerned that there was a *prima facie* case that the Ministers and *The Australian* had committed contempt of court. The court stated *on their face* the facts showed that the Ministers had failed to respect the doctrine of the separation of powers, had breached the principle of *sub judice* and reflected a lack of proper understanding of how judicial independence was important to our democracy.
2. The Ministers (through their legal representatives) refused to apologise or retract their statements.
3. [*Answer asks for an opinion.*] The timing of the Ministers statement is crucial – as if the Victorian Court of Appeal increased the sentences handed to the defendants, they might be perceived to have yielded to the Government. Some may believe the courts were influenced by the Minister's statements, which may result in some believing the rule of law has not been applied to this case.
4. [*Answer asks for an opinion.*] The remarks that were published in *The Australia* included describing judges as, 'hard-left activists', 'divorced from reality', and that they were conducting an 'ideological experiment'. As the Ministers had previously been lawyers, these statements may have been seen as being credible by members of the public, as the Ministers have some knowledge and experience in the law. However, it could also be argued that the Ministers should have known that these comments may be against the law and could leave them open to being prosecuted for contempt of court.
5. [*Answer asks for an opinion.*] The statements made by the Ministers could undermine the public's confidence in the judiciary as the Ministers' opinion may be perceived to hold greater weight, as the Ministers either worked in the legal field or had knowledge of the law. The published nature of these comments might lead to others making unfounded comments against the judiciary regarding their knowledge or ability, eroding the public's trust. It also might lead people to conclude that the government has interfered with the outcome of this case.
6. The Ministers provided a letter to the Court Registrar informing the court that they wished to offer an apology.

Practical Application (Page 119)

1. Mr Paul Papalia was the Minister for Corrective Services in Western Australia.
2. [*Answer asks for an opinion.]* On the surface of it appears that a minister of the Crown (part of the executive arm in the government) is attacking a judicial officer (part of the judicial arm of government) in the way that means judicial officer is carrying out her duty. When such an attack occurs, there is an erosion of confidence in the judiciary and in the rule of law. That is why the Law Society Vice President Gary Mack said what he did. They are 2 separate arms of government and for one to criticise the other so publicly is to undermine the system of government. It does that by undermining the administration of justice.
3. Mr Elliott said it is difficult to 'synthesize' the sentence in these circumstances. The case was complex because a young person was facing a number of challenges and there were many competing considerations. Mr Papalia never referred at all to the sentencing remarks

made by the judge and did not refer in any way to the judge's comments that the 17-year-old boy had been 'well and truly failed' by a system that had not addressed his mental impairments. It is clear that the 17-year-old had mental problems. This was not referred to in any way by Mr Papalia. Sentencing can be extremely complex, and all judicial officers are aware of that. It can be regarded as unfair for commentators including political and ministerial commentators to make adverse comments on decisions by judicial officers when they do not know the scope of the decisions to be made by those judicial officers and the factors which the judicial officers must consider in making those decisions. Mr Elliott points out that they are difficult decisions having regard to all the factors and considerations necessary to have regard to. It is extremely difficult to in some way reduce all those considerations in the sentencing process.

4. When Mr Elliott is saying there are other options for Mr Papalia. He is referring to the fact that it is ultimately the parliament that passes the laws. The parliament has the power to make such changes to the law that the parliament wishes to change. It is to support the principle of separation of powers that he says that it is the parliament which is responsible for the passing of laws. It has the ultimate control over the sentencing penalties and control over whether to impose mandatory sentencing. What Mr Elliott says supports the principle of the separation of powers.

6.2 The relationship between legislation and case law

Case Study (Page 121)

1. The originating court was the trial division of the Family Court of Australia. The appeal was heard by the Full Court of the Family Court of Australia.
2. The Attorney-General cited the English case *Corbett v Corbett* [1971] P 83 to support its submission, which had determined that gender was decided biologically at birth by a person's genital, gonadal and chromosomal characteristics. As it was an English case the decision made in *Corbett* would have been persuasive only, as it was not made by a higher court within the same hierarchy in Australia.
3. The Full Court of the Family Court of Australia held that Kevin was a man within the ordinary contemporary meaning of the word. The court further decided that whether a person is a man or a woman for the purpose of the marriage law of Australia should be determined on the date of the marriage. The judgment set out a broad and undefined range of both biological and cultural characteristics that could be used to decide a person's common law sex, moving beyond the biological factors used in the *Corbett* decision.
4. The court was required to make a decision about how gender should be defined as the *Marriage Act 1961* (Cth) did not define the terms 'man' or 'woman'. That was central to the definition of marriage. Case law is subject to statute law. Parliament is the supreme law-making body in Australia and has the power to confirm, clarify or override case law made by judges.
5. *[Answer asks for an opinion.]* The decision made in *The Attorney-General for the Commonwealth v 'Kevin and Jennifer' & Human Rights and Equal Opportunity Commission (2003)* was correct as it reflected the views of modern society at the time regarding the concept of gender. People's views and understanding of gender and sexuality had changed significantly since the 1970s. If the decision upheld the decision of *Corbett*, it would be emotionally and socially detrimental to many who undertake gender reassignment to

become their true gender. It would also cause much confusion and contradiction between the laws made by the States and the Commonwealth.

6.3 Landmark decisions, legal change and law reform

Case Study (Page 123)

1. When Australia was colonised by Britain, British law was immediately applied to the colony as it was categorised as *terra nullius* (the land of no-one). This ignored the fact that Aboriginal and Torres Strait Islander peoples had organised social institutions, their own system of law and their own relationship with the land. From the moment of British settlement of Australia, the land became the property of the British Crown. Aboriginal and Torres Strait Islander peoples had no right to the land.

2. Eddie Mabo, a member of the Meriam people, lived on Murray Island (Mer) in the Torres Strait. He was the lead plaintiff in *Mabo v Queensland* (*Mabo No. 2*) (1992) 107 ALR 1; 175 CLR.

3. Native title did exist in Mer and the Meriam people were entitled to the possession, occupation, use and enjoyment of the land. It had not been extinguished.

4. The Queensland Government passed the *Queensland Coastal Islands Declarative Act 1985* (Qld). The Act declared that native title rights were extinguished, and that no compensation was payable. It was to have a retrospective effect to 1879. If the Act was valid, the High Court of Australia decision would be meaningless.

5. [*Answer asks for an opinion.*] *Mabo v Queensland* (*Mabo No. 2*) (1992) 107 ALR 1; 175 CLR was a significant legal decision for all Australians as it gave our country the opportunity to correct the past. It recognised that Australia was not *terra nullius*. Aboriginal and Torres Strait Islander peoples had social institutions, their own system of law and they did have native title in their traditional lands. It recognised that the British view that Aboriginal and Torres Strait Islander peoples were less worthy was racist.

Practical Application (Pages 124 - 125)

1. [*Answer asks for an opinion.*] The broad objective of the *Native Title Act 1993* (Cth) was to provide a process to decide, recognise, protect and compensate native title claims.

2. [*Answer asks for an opinion.*]

3. [*Answer asks for an opinion.*] The *Mabo* decision directly influenced the creation of the *Native Title Act 1993* (Cth). If this judgment did not exist there would probably be no process for native title claims to be decided. The *Act* was enacted to resolve some of the issues arising from the *Mabo* decision and provide a way forward for how native title claims would be managed in the future. It demonstrates that quite often the courts have the ability to make decisions which are progressive, and the Government plays catch-up when it decides to enact legislation that either agrees or disagrees with a court's decision. Legislation provides a sense of certainty and finality.

Case Study (Page 126)

1. *Wik Peoples v State of Queensland* (1996) 187 CLR 1; [1996] HCA 40 was decided in the first instance by the Federal Court of Australia. The court held that the grant of pastoral leases under Queensland law had extinguished native title rights.

2. If there is a conflict between pastoralist and Indigenous peoples seeking to exercise native title rights, the pastoralist's rights prevail.

3. The *Wik* case decided whether a pastoral lease extinguished native title. The *Mabo* decision did not address this issue, as it involved land that wasn't subject to a pastoral lease – Mer had been continuously inhabited by a permanent community with their own social and political organisations.

4. [*Answer asks for an opinion.*] The *Wik* case further clarified how native title law could interact with a different type of lease and how a conflict between pastoral and native title rights would be resolved. These issues weren't addressed in the *Mabo* decision and shows how common law continued to be a significant force of change in native title law.

Case Study (Page 127)

1. The trial judge found that the Northern Territory was responsible for 53 acts held to have impaired or extinguished the Claim Group's native title rights and interests. For example, the determination allowed the Claim Group non-exclusive rights to hunt, fish and practise their law and culture. However, the native title holders did not have the power to exclude people from the land.

2. The Federal Court of Australia awarded the Timber Creek native title holders approximately $3.3 million in compensation for extinguishment of their native title rights. This was reduced to around $2.9 million on appeal by the Full Court of the Federal Court of Australia. The High Court of Australia unanimously ordered the amount of compensation to be $2,530,350.

3. [*Answer asks for an opinion.*] This case tested the compensation provisions of the *Native Title Act 1993* (Cth), providing a way for compensation provisions to be assessed in the future. A significant aspect of this decision was the recognition of intangible harm and spiritual loss in Australian law in monetary terms. This is important as it recognises the connection Aboriginal and Torres Strait Islander peoples have with the land and the impact government decisions have had on their life.

4. [Answer asks for an opinion.] This case provides binding precedent on all State and Territory jurisdictions – so the formula and criteria for assessing compensation claims for loss of native title rights is contained within case law. However, in order to ensure the law is clear and known, the Government should consider amending the *Act* to provide clarity and certainty. These are the features of an effective law.

Case Study (Pages 130 - 131)

1. The Immigration Department has a power to detain immigrants unlawfully in Australia and who they regard as being a danger to the Australian community.

2. The Department of Immigration power to detain comes to an end when there is no real prospect of the removal of such an unlawful immigrant from Australia becoming practicable in the foreseeable future.

3. When a person is unable to be removed from Australia then any detention is not legitimately connected to the immigration purposes as set out in the *Immigration Act*. It is purely punitive and because it is purely punitive it can't be ordered by any person, including the minister of the Department, other than a Court established under Chapter 3 of the *Constitution*. In other words, keeping a person, even an unlawful immigrant in indefinite detention, has to be ordered by a court and not by a minister of the Immigration Department (or any delegate of his). That is a clear example of the separation of powers. Punitive detentions are matters for judges, not matters for the executive arm of the government (ministers of departments).

Practical Application (Pages 131 – 132)

1. Mr Abdel-Hardy was medically unfit to leave Australia by an airplane flight to Austria because of heart disease, nerve damage, deep vein thrombosis and diabetes. The Federal Circuit Judge found that there was currently no real prospect of his removal from Australia becoming practicable in a reasonably foreseeable future by any means aside from a commercial airliner and that at this time he was not currently fit for travel.

2. Minister Giles concluded that Mr Abdel-Hardy, was not 'part of the NSYQ cohort' because the government believed that it could arrange a special charter flight to deport him despite his complex medical needs. In other words, the minister believed he was fit to travel by plane even if it required a special charter flight.

3. [*Answer asks for an opinion.*] It is very difficult. Given the High Court's decision was made in *NZYQ* which was simply that if an unlawful immigrant, even one that has been declared a person who was a danger to the Australian community, has no real prospect of removal from Australia with no such prospect becoming practicable in the reasonably foreseeable future, then he cannot be held in indefinite detention in Australia. That allowed Mr Abdel-Hardy to make a claim against Federal government for damages arising from false imprisonment given the decision in *NZYQ*. He was obviously a person dangerous to the Australian community because of his convictions (firstly quashed on appeal and then the result of a plea of guilty). He pleaded guilty to the use of poison to endanger life or inflict grievous bodily harm. This grievous bodily harm included an act of indecency. For that he was sentenced to jail. Given then that he could not be held in indefinite detention because of the *NZYQ* decision he was then entitled to make a claim against the Federal government for damages arising from false imprisonment if he was not released from prison. A lot of Australians would think that that was simply unfair. Once again it is a matter of opinion. The remedy which may or may not be ultimately taken up by the Federal government would be to pass legislation whereby such a person could be detained indefinitely and for that ruling to be made by a judicial officer. There are clearly however problems with passing such legislation because of the double jeopardy principle. That is, a sentence would be imposed upon for him for the principal offence (in this case the use of poison to endanger life or inflict a grievous bodily harm) and then a further penalty be imposed effectively for the same actions which would keep him in indefinite detention. No doubt the Australian Government is wrestling with this problem now.

Review

Comprehend (Page 136)

Question 1

a. Judicial independence simply means that members of the judiciary should be able to make decisions free from any external influence including any influence from the other arms of government (parliament and executive) or freedom from internal control by other judicial officers.

b. Statutory interpretation occurs when a judge decides the meaning of statue law as it applies to the case in dispute in his/her court. The fundamental rule of statutory interpretation is that the judge should interpret the meaning of the words by determining what parliament would have intended at the time the law was passed.

c. Judicial precedent is the system whereby judges are obliged to follow the decision of earlier cases and higher courts when the factual circumstances of the case he or she is deciding is essentially the same. If the answer to the question as to whether the facts in the case being tried by the judge are essentially the same as those case in a higher court is yes, then the rule of judicial precedent then applies, and the judge must decide the case in the same way as the precedent set by the higher court.

d. The main features of the Murri Court is that it is a Court which is not available for serious indictable offences but which for lesser offences it provides Aboriginal and Torres Strait Islander defendants with cultural and support services to help them address the underlining reasons for their offending behaviour. It allows for intervention of support services to assist the defendant. The sentencing takes into account the changes that the defendant has made in his or her behaviour as a result of that intervention.

e. Surrogacy is an arrangement between a woman, referred to as a surrogate, who agrees to carry and then give birth to a child on behalf of another person or couple (the intended parent/s). Surrogacy is governed by an Act of parliament in Queensland namely the *Surrogacy Act 2010* (Qld).

Question 2

a. *Mabo* is regarded as a landmark case because in that case the High Court decided that the doctrine of *terra nullius* did not apply to Australia when it was settled, and that the Aboriginal and Torres Strait Islander people held native title over their traditional lands. The court also held that Aboriginal and Torres Strait Islander peoples retained their native title unless the Crown takes an action inconsistent with the continuation of such native title. That obviously included situations where freehold land had been granted and where certain leasehold interest in the land had been granted.

b. The High Court of Australia determined what the proper compensation should be in this case in circumstances where loss or impairment of native title rights had been occasioned. The High Court determined the proper compensation for economic loss should be 50% of the freehold value of the land plus interest. Further there should be a further compensation paid for the cultural loss (non-economic loss) on top of the compensation for economic loss. In this case it was set at $1.3 million.

c. In *NZYQ* the High Court of Australia determined that the power of the executive government to detain unlawful immigrants came to an end when there was no real prospect of removal of that immigrant from Australia becoming practicable in the reasonably foreseeable future.

Analyse and evaluate (Page 136)

The power of the Immigration Department to detain unlawful immigrants ends when there is no real prospect of removing that immigrant from Australia in the reasonably foreseeable future. The reason why the unlawful immigrant can't be removed from Australia does not matter. If it is not reasonably foreseeable that such an immigrant is able to be removed from Australia then indefinite detention is not lawful. As to whether one agrees with that decision is a matter of opinion. It might well be that it is decided that one doesn't agree with that decision because such an unlawful immigrant could be a person who is a danger to the Australian community. Such a person could be like Abdel-Hardy who committed serious sexual offences against Australian citizens and because of an illness could not be removed from Australia and therefore could not be the subject of continued detention by the minister under the *Migration Act*. The result of the *NZYQ* decision was that people were released from detention who had committed offences in Australia and who some might regard as continuing to be dangerous to Australian citizens. The rights of the detained immigrant might be seen by some to be of lesser importance than the danger posed by that immigrant to Australian citizens. It is especially galling to some Australian citizens that an immigrant such as Abdel-Hardy was able to sue the Australian government for unlawful detention because of the decision of *NZYQ*. Mr Abdel-Hardy does not present as a deserving recipient of such compensation to a lot of Australians.

2. The selection of judges in the United Kingdom is made differently to the selection of judges in Australia. Judges in Australia are appointed by the Attorney General of the Commonwealth (and the Attorney General of each State of Australia). The Attorney General receives advice from whatever source he desires but generally states that he receives advice as to the competence of judges from other judicial officers. In the United Kingdom the Lord Chancellor of the United Kingdom (Chief Judicial Officer) along with senior judges across the UK, along with the first minister in Scotland, the first minister for Wales, and the Northern Ireland Judicial Appointments Commission, are consulted as part of the selection process. Potential judges are shortlisted based on merit and then interviewed by a selection commission. The selection commission then submits a report to the Lord Chancellor stating who has been selected to fill the vacancy. On receiving the report, the Lord Chancellor is required to consult the first minister in Scotland, the first minister for Wales, the Northern Ireland Judicial Appointments Commission and senior judges. Upon the selection being accepted the Lord Chancellor notifies the Prime Minister of the name of the successful applicant and then the final appointment is made by the King. In short there is a selection process in the UK completely different to that in Australia. There is no limit to the power of the Attorney General to appoint a judicial officer in Australia. The appointment of judicial officers in Australia has nowhere near the transparency and objectivity of the UK system.

Chapter 7: Governance in action—accountability

7.1 Understanding accountability

Practical Application (Pages 138 - 139)

1. Fraser Anning represents the state of Queensland.

2. Fraser Anning was elected when former senator Malcolm Roberts was found to be an invalid candidate by the High Court of Australia. Fraser Anning was the next senator on the One Nation senate ticket.

3. The article provides several reasons why Senator Anning should not be re-elected including that 'Queensland voters never chose Fraser Anning', he has 'disgraced his home state', his speeches are focused on ideological war instead of 'representing the needs and views of Queensland farmers' and that he is 'more focused on build[ing] his personal brand'.

4. *[Answer asks for an opinion.]* While many people chose to vote for a specific political party (as opposed to the individual), ultimately a Member of Parliament is elected to be an electorate's voice in parliament, and they should represent their views even if it conflicts with their own personal beliefs or the position taken by their political party. If a Member of Parliament fails to voice their concerns, there are few ways a citizen can use their voice in parliament, which is supposed to represent the people and diversity.

What do you think? (Page 139)

As the article which you read criticising Senator Anning came from the media (The Sunday Mail), it is reasonable to assume that the media carried stories about Senator Anning which were critical and had a negative influence on the electors of Queensland. It is therefore reasonable also to infer that the decision to reject him at the election was because they would have held him accountable for his views and behaviour.

What do you think? (Pages 139-140)

1. *[Answer asks for an opinion.]* Some people may believe Australia is more corrupt than other nations because the media has reported many instances of political parties collecting donations from developers, unions and lobby groups. Some may believe these donations influence government policy and decisions. There have also been instances where a particular politician or person in power has been accused of corrupt conduct and being charged. While such examples are rare, they are sufficiently frequent as to attract significant media coverage. For example, the Brereton Inquiry set up to enquire into alleged corrupt and illegal practices by some members of the Australian Armed Forces while in Afghanistan.

2. *[Answer asks for an opinion.]* Australia is not becoming more corrupt as our government is overseen by a number of institutions and independent bodies that are tasked with investigating alleged corruption – more so than in the past. On the floor of parliament and in estimate hearings the opposition regularly highlight poor decision making and royal commissions uncover ministerial mistakes and errors in their reports. Whistleblower protections and the media also make corrupt activity difficult to hide – there is always someone ready to blow the whistle. As well, many members of parliament have served

terms of imprisonment in Queensland for corruption, highlighting that it is difficult for corrupt activity to go undetected forever.

7.2 Internal mechanisms of accountability

Practical Application (Pages 142 - 143)

1. Ros Bates alleged that Health Minister Shannon Fentiman had incited violence against her. She alleged that a video posted on social media by the Minister had unleashed a wave of cyber bullying. Ms Fentiman responded rejecting that she had incited threats of violence and asked Ros Bates to withdraw her allegations. Ms Bates refused to withdraw.

2. The Speaker, the Hon Curtis Pit, referred Ms Bates to the State Ethics Committee.

3. The Speaker said that he could not allow directions that he made under standing orders to be simply denied. He said that if was important to uphold the office of the Speaker. Refusal of his directions would undermine the authority of the Speaker. *[Answer asks for an opinion.]*it is necessary for parliamentarians to respect the authority of the Speaker and therefore maintain order and decorum in the house of Parliament. It is also important that the Speaker makes consistent and impartial decisions treating all parliamentarians equally.

Practical Application (Page 143)

1. APS Commissioner Gordon De Brouwer was being questioned by Greens Senator Barbara Pocock.

2. Senator Barbara Pocock is asking questions about failure to meet targets to reduce consultancy use, and the consequences for any secretaries who fail to meet these targets.

3. The purpose of an estimates hearing is to allow members of Parliament to scrutinise (or closely examine) how executive government is spending taxpayers' money and the decisions they make.

4. *[Answer asks for an opinion.]* It is important that members of Parliament question Ministers in places other than the floor of parliament, as there is only a limited amount of question time. Not every action can be questioned sufficiently in such a limited time. As well, it allows other Members of Parliament to focus specifically on the decisions made by specific Ministers or public servants within a specific department, and budgetary decisions that aren't usually addressed in question time. This provides an additional level of accountability and scrutiny which provides the parliament with confidence in the government – a foundation of responsible government. The questions can also uncover practices previously unknown to the public and may prompt the government to change a policy or improve the way a department is run.

7.3 Inquiries and commissions

Practical Application (Pages 144 - 145)

1. It was named The Royal Commission into the Protection and Detention of Children in the Northern Territory. The royal commission investigated the conditions in the Northern Territory's detention centres. (A Plain English version of the full terms of reference can be found here: royalcommission.gov.au/sites/default/files/2019-01/rcnt-letters-patent-child-detention-nt-plain-english.pdf).

2. Former Prime Minister Malcolm Turnbull was prompted to call the royal commission by an ABC Four Corners report on the Don Dale Youth Detention Centre.

3. Some of the recommendations made by the royal commission included the closure of the Don Dale Youth Detention Centre and raising the age of criminal responsibility from 10 to 12.

4. *[Answer asks for an opinion.]* The royal commission found, 'shocking and systemic failures…[that] were known and ignored at the highest levels' (Vanovac, 2017). This included children being 'dared or bribed to carry out degrading and humiliating acts' or being 'subjected to regular, repeated and distressing mistreatment in detention and there was a failure to follow the procedures and requirements of the law' (Vanovac, 2017). As royal commissions have many powers to collect evidence, their findings must have been supported by the evidence given at the hearings.

5. *[Answer asks for an opinion.]* The article states that there, 'was a failure to follow…requirements of the law.' If this is the case, application of the rule of law means that anyone who acted outside the law, committed illegal actions or incited others to commit violence, should be charged. They should not get away with breaking the law because they worked for the government, or their actions were accepted by the government.

Practical Application (Page 145-146)

1. The Royal Commission recommended closure of the Don Dale Youth Detention Centre because it was it was an old, condemned adult jail, only fit to be bulldozed.

2. *[Answer asks for an opinion.]* It is not clear from the article why the recommendation was not acted on. Given that more children and young people in 2022 were being held inside the facility than they were when the royal commission recommended its closure in 2017, funding should be made available for a new facility immediately and it should be closed as soon as practicable.

3. *[Answer asks for an opinion.]* This seems like a reasonable proposition. If the community considers that the offenders between ages of 10 and 12 should be locked up, then it should provide adequate accommodation in detention centres that ensure these children experience rehabilitation so that they have an opportunity to become responsible citizens. A fit for purpose detention centre should have the necessary spaces so that children of this age receive age-appropriate education while in custody. While you consider the answer to this question, you should consider the arguments about the age of criminal responsibility. These two issues should be considered together.

4. *[Answer asks for an opinion.]* An important object of a royal commission is to make findings and recommendations of a practical and legal kind. Reforming the law depends on many factors, not the least of which are the policies of the political party in power, and the available resources to implement change. It is clear that it is not always possible to immediately implement the recommendations of a royal commission, but they may be able to be implemented over time. The story of the Don Dale Youth Detention Centre reflects this reality. Some of the Royal commission's most significant recommendations appear to have been rejected by the government in power.

Practical Application (Pages 146 - 148)

1. As shown below:

Questions	Notes
When did the Fitzgerald Inquiry occur?	The Fitzgerald Inquiry occurred in 1987, with the final report being handed down in 1989.
Why was the Fitzgerald Inquiry called?	The Fitzgerald Inquiry was called after a series of media reports of the Queensland police being closely involved with illegal gambling and prostitution activities.
What were the consequences of the Fitzgerald Inquiry?	The Fitzgerald Inquiry made over 100 recommendations and led to four ministers being jailed and many police officers being convicted of numerous offences.

2. *[Answer asks for an opinion.]* Journalists from the *ABC* and *The Courier Mail* (Source 1) uncovered serious levels of corruption that needed to be investigated. The mechanisms that operated at that time to combat corruption had failed, as police officers openly broke the law with little fear of reprisal as evidenced by the quote attributed to 'the Bagman', 'We believed no-one could touch us.' (Source 2). If the Fitzgerald Inquiry did not occur, there was a real possibility that illegal actions and corruption would continue to occur.

3. *[Answer asks for an opinion.]* Chris Masters's statement that journalism is about good citizenship means that being a good citizen involves speaking up when you see people breaking the rules, being corrupt, undermining the features of democracy and not acting with transparency. His viewpoint is correct, as journalists have been responsible for exposing corruption that others cannot because they don't have the power, resources or will. However, journalists need to investigate matters thoroughly to avoid jumping to conclusions and ensure their behaviour is lawful and ethical.

What do you think? (Page 149)

[Answer asks for an opinion.] The right to silence is fundamental for defendants facing criminal prosecution. It is a substantive common law right that should be available for all defendants. It is an important safeguard that protects people's liberty against the state, which wields immense power. It is unfair that one category of defendant is denied this right, while others can access it. It also puts a defendant at an unfair disadvantage during a trial. However, there is a public interest in uncovering corruption and if this right was taken away it might make it more difficult for commissions to charge people with acting unlawfully.

Practical Application (Pages 149 - 150)

1. The Government service that behaved in a corrupt way was the Queensland Police Service. It is alleged that officers were involved in illegal and improper dealings with prisoners.

2. Gordon Nuttall was a former government minister who was found guilty of 36 counts of receiving secret commissions from businessmen Harold Shand and Kenneth Talbot. Nuttall hid his association with both Shand and Talbot when he either directly or encouraged Cabinet to make decisions that would benefit those parties. Hiding this relationship ensured that particular decisions made by the government was a conflict of interest, lacked transparency and ensured no-one was held to account as decisions weren't checked thoroughly.

3. The rule of law says that no-one is held to be above the law and everyone is treated equally. The trial and sentencing of Nuttall showed that even a government minister will face the full force of the law if they break it.

4. *[Answer asks for an opinion.]* 'Noble corruption' cannot be justified, as the end should not be used to justify the means. Whilst the officers' motives for acting in a corrupt way is to solve crimes and perhaps give victims' families closure, it is not right to misuse power in these circumstances because it is difficult to know when it is and isn't being appropriately used – there are no safeguards. In contrast, some might believe that if the motive is pure – to solve a crime – it can be justified. Sometimes a crime can be impossible to solve without acting in an unlawful way and it is not right that someone should get away with a crime because they are good at hiding it or the police lack the resources to complete an investigation.

5. *[Answer asks for an opinion.]* Evidence that is gathered by denying someone the right to silence should be inadmissible. If it is not, the trial will not be fair as the defendant cannot adequately argue against the offence as they have confessed.

Practical Application (Pages 150 - 152)

1. The NACC is an independent Australian Government agency that detects, investigates and reports on serious or systemic corrupt conduct in the Australian Government public sector. It also educates the public service and the public about corruption risks and prevention.

2. The NACC can investigate public officials to make sure they carry out their official duties in an honest and unbiased way.

3. The NACC can:
    - enter Commonwealth premises and require Commonwealth information without a warrant

- make people and organisations give the NACC documents and items that allow the NACC to search their property
- conduct private hearings and, if it is in the public interest and exceptional circumstances justify doing so, conduct private hearings
- access a range of covert investigative capabilities such as intercepting telecommunication.

4. The NACC will work to prevent corruption by:
    - raising awareness and providing training to people who work in the Australian government public sector about preventing, detecting and reporting corruption
    - providing corruption prevention and education products based on research and analysis of corruption risks and trends, and
    - making recommendations to prevent corruption (including identifying risks and vulnerabilities) based on issues it finds during its investigations.

7.4 Whistleblowers

1. This Act applies to the public sector. *[Answer asks for an opinion.]* On the face of it, one would think that the law should be applied equally to the public and private sectors. Quite often though, some organisations in the private sector want to have control over how they operate and might find that it is better to keep some forms of wrongdoing out of the public eye until there is clarity about how to deal with the issues involved. For example, at the time of writing, the shares in a public company had dropped by over 25% in a short period of time, because of the alleged behaviour of the largest shareholder who is also a director. People who have bought shares, would probably have lost money. At the same time, it may be in the long-term public interest for these issues to have been disclosed. Any laws enacted to facilitate the public disclosure of wrongdoing in private companies would need to be drafted in consultation with the private sector and be sensitive to its particular circumstances.

2. *[Answer asks for an opinion.]* The obvious answer to this question is that when a person makes disclosures as a whistleblower, these disclosures may have unintended consequences for that person. The other side of the coin is that when the full facts of the matter are disclosed, or decisions are made as a consequence of disclosures, the media and people will inevitably have their own opinions about whether the whistleblower should have disclosed the facts or not. Within the boundaries of free speech and the law of defamation, it is always possible to malign a person who has been a whistleblower with the best of intentions. Both the whistleblower and the person is about whom disclosures are made, are subject to the rule of law, and should be given protection from inappropriate criticism or punishment.

Practical Application (Page 153)

1. Dr Kirsty Wright alleged that the Queensland Forensic Laboratory made mistakes which required DNA to be retested. The lab missed court dates and did not deal adequately with backlogs. She said that the lab should be shut down and testing outsourced.

2. The Queensland government maintained that it did not make any sense to shut down the core laboratory. It made changes that required the laboratory to introduce improvements to methodology and work on the backlog cases. Despite this, a quarter of the first 440

cases caught up in the Queensland's State forensics lab scandal yielded evidence that was not detected during the 15year long error. The lab's new chief Adjunct Professor Linzi Wilson-Wilde, defended the progress of the lab, saying that the 440 backlog tests were among 9500 tests done by the lab last year, which included 'business as usual' cases.

3. The commission of enquiry concluded that there were questions about the validity of DNA findings in 41,000 major crime cases dating back to 2007.

4. *[Answer asks for an opinion.]* There are two points of view. Which of them more appropriate would probably depend on whether you were a member of the Government or a member of the Opposition. It is fair to say that its approach may have solved the issues which plagued Queensland's Forensic Laboratory. It is probably necessary for students to find better information about the progress the lab has made towards solving its problems since this article was published in April 2020.

Practical Application (Pages 154 - 155)

1. Mr Fielding sent a distressing fax to the ATO in May 2017, begging for help, while recovering from a ruptured aneurysm in his brain. His publishing business of 35 years was in serious trouble. He and his wife had discovered an employee was systematically defrauding them. Nevertheless, the ATO came after them in pursuit of an outstanding tax debt using a garnishee notice, a debt collection tool that allows the ATO to order a bank to hand over money from a taxpayer's account without its consent.

2. Mr Boyle, an employee of the ATO, intervened and lifted the garnishee notice and set up a repayment plan for Mr Fielding's business.

3. Mr Boyle shared information about the ATO practice of using heavy-handed debt collection tactics to recover monies owed by Mr Fielding's business to the ATO.

4. Mr Boyle complained to his employer, the ATO, about the heavy-handed tactics used to recover debts within the ATO. When his complaints were ignored, in October 2017, he went public and told *Four Corners* about a disturbing culture at the ATO which included his area being instructed to use more heavy-handed tactics on taxpayers who owed the tax office money. As a consequence, the ATO made a complaint about Mr Boyle to the Commonwealth Solicitor, and Mr Boyle was charged with offences including taping private conversations without consent and taking photos of taxpayer information.

5. *[Answer asks for an opinion.]* It seems a reasonable policy for the ATO to approach taxpayers in a non-discriminatory helpful way if they have the capacity to repay debt to the ATO over time. The ATO is a public institution and should have clear policy guidelines which are in the public interest. Having followed the internal processes which, he was required to do, without achieving any positive satisfactory outcome, Mr Boyle's behaviour as a whistleblower seems to be clearly in the public interest, and reasonable in the circumstances. It is not in the public interest for the ATO to use heavy-handed tactics to close businesses in a democratic community.

Practical Application (Page 156)

1. The documents leaked by Mr McBride to the ABC formed the basis for the broadcaster's landmark Afghan Files reporting, which showed credible evidence of war crimes committed by Australian forces in Afghanistan.

2. Like Mr Boyle, Mr McBride would need to show that at the time that he committed the alleged criminal conduct, it was a reasonable part of the process of making these disclosures. Perhaps it was the case that his criminal conduct did not occur at the same time as he leaked the documents to the ABC. We do not know because he withdrew that defence in 2022. The second part of the question goes to the issue that Mr McBride argued that the offences with which he was charged contained a public interest element, which was rejected by the trial judge. If the public interest element was the fact that Australian forces in Afghanistan committed war crimes, and this was part of the disclosure, it seems appropriate that the Australian public should know that this occurred, and Australian soldiers who committed the alleged war crimes should be subject to legal process. Legal process may have seen the rule of law applied, the offending soldiers charged and prosecuted. In any event, the judge found against him.

3. We have already seen that the Australian government is a signatory to the Geneva Conventions which prohibit war crimes. The reputation of our Armed Forces is the responsibility of the Australian government and a concern for the Australian public. It is in the public interest to expose alleged war crimes to maintain the integrity of the armed services. *[Answer asks for an opinion.]* Whether or not Mr McBride should receive a jail sentence for being a whistleblower is complicated. Where there are laws which prohibit his conduct, in the interests of national security, for example, and they are punishable by a custodial sentence, avoiding that sentence is simply a question of whether or not the Attorney General of Australia commutes that sentence. On the face of it, not going to jail seems like an appropriate outcome.

Review

Comprehend (Page 157)

1. Accountability involves being called to account (or being held responsible) to some authority for one's actions.

2. There are three surveys that illustrate Australians' concerns about corruption are growing. Transparency International (a global non-government organisation) reported that Australia was perceived to be the 14th least corrupt nation by respondents to a survey in 2022 – three years prior we were 11th. An Australian Public Service survey found that one in 20 believe a colleague had acted in a corrupt manner—a figure that has risen. A Griffith University survey into citizens trust in governance found two-thirds (67%) of Australian's favor the introduction of a national integrity commission.

3. Every time an election is held citizens have the power to collectively vote for or against the government. If a citizen doesn't believe the Government has met their expectations, made decisions they don't agree with or not been effective they have the opportunity to vote for an alternative. The election process sees citizens judge the government.

4. The *Parliament of Queensland Act 2001* (Qld) s102 establishes the Ethics Committee, which investigates conduct which allegedly obstructs the work of Parliament, as well as

dealing with the ethical conduct of particular members. It is made up of a cross-section of different members of parliament from different political parties.

5. The Fitzgerald Inquiry occurred in 1987. It was called by Acting Queensland Premier Bill Gunn after a series of media reports about the Queensland police being closely involved with illegal gambling and prostitution activities which were publicly aired. Over the next two years, Mr Gerald Edward 'Tony' Fitzgerald QC uncovered significant and systemic corruption involving the police and politicians. The final report was handed down in 1989.

Analyse and evaluate (Page 157)

1. Estimates hearings allow Members of Parliament to scrutinise (or closely examine) how the Executive Government is spending taxpayers' money and the decisions they make. It can also allow for the scrutiny of government agencies and authorities. Estimates hearings are an example of responsible government in action – it checks how the government plans to collect and spend money so it can maintain the confidence of parliament. If there are concerns about how the Government has acted the parliament may lose confidence in the Government – but as the Government has the majority in the House of Representatives in most cases, it is difficult to lose confidence.

2. The Fitzgerald Inquiry made over 100 recommendations and led to four ministers being jailed and many police officers being convicted of numerous offences. It led to the establishment of the current Crime and Corruption Commission (CCC) and the Queensland Electoral Commission (QEC).

3. The CCC has many coercive powers, which allow them to investigate allegations of corruption more easily than other law enforcement officials, but these wide-ranging powers can also be concerning. Witnesses have no right to silence, they must attend hearings and give evidence, the CCC can compel people and agencies to produce records or other items if asked and its hearings can be open or closed. The CCC can also provide indemnity from prosecution, which can encourage people to assist them with their inquiries.

4. *[Answer asks for an opinion.]* Disclosures against the law include matters concerning Australia's national security. The reason this is the case is because disclosing information about Australia's armed forces, espionage practices or border control operations might put people at risk – they may be killed or captured by other sovereign countries. However, making disclosures about Australia's national security punishable may allow corruption to occur as there is little oversight over the actions of Australia's armed forces or intelligence agencies.

5. *[Answer asks for an opinion.]* The most effective way to maintain government accountability and integrity is a combination of both internal, external and independent mechanisms. This combination of pressure helps uncover corruption as the government is being held accountable on multiple fronts: Parliament (through estimates hearings, ethics committees and question time), the media, elections and independent anti-corruption bodies. It is difficult to hide corrupt activity when there are many ways it could be uncovered. Throughout our political history each mechanism has uncovered corruption or unethical behaviour which has led to people being imprisoned, resigning, or a system/process being changed. One mechanism could not have achieved this result. Each

mechanism has its own advantages and disadvantages, so reliance on one might make allow corruption to occur unchecked if a particular limitation is exploited.

Additional Resources

Useful links

Attorney-General's Department, *A Commonwealth Integrity Commission– proposed reforms*—aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen/Report/c04

Australian Government, *Royal Commissions*—royalcommission.gov.au/

Australian Public Service Commission, *APS Values and the Code of Conduct*—stateoftheservice.apsc.gov.au/2018/01/aps-values-code-conduct-2/

Chris Masters, *Moonlight reflections*—griffithreview.com/articles/moonlight-reflections/

Crime and Corruption Commission, *The Fitzgerald Inquiry*—ccc.qld.gov.au/about-the-ccc/the-fitzgerald-inquiry

Crime and Corruption Commission, *Homepage*—ccc.qld.gov.au/

Griffith News, *Griffith research shows trust in government slides*—app.secure.griffith.edu.au/news/2018/08/20/griffith-research-shows-trust-in-government-slides/

Human Rights Watch, *Australian: Espionage Bill Threatens Democratic Values*—hrw.org/news/2018/01/28/australia-espionage-bill-threatens-democratic-values

Mark Willacy, Wayne Harley and Alexandra Blucher, *Moonlight State: The Bagman, the secret codes, and the payments to bent cops in web of corruption*—abc.net.au/news/2017-06-12/fitzgerald-inquiry-files-reveal-inner-workings-of-corrupt-cops/8600046

Queensland Parliament, *Committees*— parliament.qld.gov.au/work-of-committees/committees

Queensland Parliament*, Estimates Hearings*— parliament.qld.gov.au/work-of-committees/Estimates

Queensland Parliament, *Ethics Committee*—parliament.qld.gov.au/work-of-committees/committees/ETHICS

Parliament of Australia, *National Integrity (Parliamentary standards) Bill 2018*—aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen/Report/c04

Parliament of Australia, *Chapter 4 Arguments for and against the establishment of a national integrity commission*—aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen/Report/c04

Parliament of Australia, *Chapter 7 – Accountability*—aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/c07

Parliament of Australia, *No. 4 – Senate Committees*—aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief04

Parliament of Australia, *Infosheet 4 – Committees*—aph.gov.au/about_parliament/house_of_representatives/powers_practice_and_procedure/00_-_infosheets/infosheet_4_-_committees

Parliamentary Education Office, *Parliamentary Committees*— peo.gov.au/learning/fact-sheets/parliamentary-committees.html

Parliament of Australia, *Royal Commissions and Commissions of Inquiry*— aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/royalcommissions

Parliamentary Education Office*, Senate Estimates*— peo.gov.au/learning/fact-sheets/senate-estimates.html

The Australian Institute, *34 former judges call on PM: National Integrity Commission now*— tai.org.au/content/34-former-judges-call-pm-national-integrity-commission-now

The Conversation, *Royal commissions: how do they work?*— theconversation.com/royal-commissions-how-do-they-work-10668

The Hon. Margaret McMurdo AC, *Governance in Queensland: Thirty Years On*— griffith.edu.au/__data/assets/pdf_file/0028/297055/Governance-in-Queensland-ultimate-version.pdf

The Mandarin, *What are the merits of royal commissions and other forms of inquiry?*— themandarin.com.au/104199-what-are-the-merits-of-royal-commissions-and-other-forms-of-inquiry/

Transparency International Australia, *Homepage*— transparency.org.au/

Chapter 8: Why do laws change?

8.1 Australian society and legal change

Practical Application (Pages 160 - 161)

1. Nuclear activities currently allowed are nuclear installations which include a nuclear reactor for research, the production of radioactive materials for industrial or medical use, and a radioactive waste storage or disposal facility which has a prescribed activity level.

2. Licences for the construction or operation of a nuclear fuel fabrication plant, a nuclear power plant, an enrichment plant, or a reprocessing facility are all currently prohibited under the Act.

3. Final approval for a licence to establish a nuclear installation currently prohibited under the *ARPANS Act* is the responsibility of the Minister under the *EPBC Act*. *[Answer asks for an opinion.]* It is the responsibility of the Federal Minister to ensure the health and safety of people, and the protection of property and the environment from harmful effects of radiation. This is carried out in the approval process. It is important that all licensing regimes conducted by governments are impartial, and subject to appropriate expert information and criteria, to establish consistency of decision-making.

Practical Application (Pages 161 - 162)

1. Amend the *Youth Justice Act 1992* (Qld) to include a provision that states that the Act does not apply to children convicted of serious crimes. The serious crimes should be specified, e.g. murder, manslaughter, attempted murder, and any other crimes that the government decides should be included. At the same time, other legislation, such as the *Criminal Code* and the Punishment and Sentencing Act should be amended to include provisions that state that children can be charged, convicted, and sentenced as adults. The amending Act should state that the *Human Rights Act 2019* (Qld) does not apply to the changes to the *Youth Justice Act*.

Practical Application (Page 162)

1. *[Answer asks for an opinion.]* The answer to this question will depend upon which degraded landscape referred to in the article is chosen by the particular student. The information available to each student on research will vary, so again no particular answer is offered as a model. Students should be encouraged to distinguish between laws which apply on different levels of government, and perhaps to select one level of government and look at what it's doing. For example, at the time of writing, erosion on the beaches of the Gold Coast during cyclone Alfred would be a good example of a degraded landscapes choose. Plans need to be made by the Gold Coast City Council, and perhaps the State government, to attempt to solve this problem in the long-term. Of course, what happened with climate change or an issue on the federal level, but local government and state government need to have plans what development they permit in the coastal areas for which they are responsible.

Research Task (Page 163)

[Answers may vary with students' opinions and choice of topic].

There is no correct answer for this activity. Topics which have been recently in the media include:

- Islamaphobia. Attacks on mosques in Sydney (and Australia).
- Anti-Semitism. Attacks on the homes of Jews and on Synagogues in Australia.
- The war in Gaza, the causes of the war, its outcomes for victims, and solutions for a lasting peace.

Some sources will be provided for at least one of these topics in additional resources to this chapter.

Research Task (Page 163)

[Answers may vary with students' opinions and choice of topic].

The following lobby groups include some which are featured in this chapter. The choice is yours.

Queensland lobby groups

- Adult time-adult crime. (Queensland criminal law)
- Double jeopardy reform
- Victims of crime. In Queensland, the Victims' Commissioner is independent to government, and supported by a statutory office
- One punch can kill.
- Jack's law.
- Raising the age of criminal responsibility. #RaiseTheAge. Children belong in school yards, not in prison cells. It's time for action. Join the campaign to #RaiseTheAge.
- Youth Advocacy Centre: campaign to lower age to imprison children from 18 to 17.
- Women's Electoral Lobby: increasing women's representation in parliament.
- Queensland Conservation Council: Coal Seam Gas, and the Adani mine.
- Human Rights Council: responds to complaints of human rights violation
- Children by Choice: abortion law reform
- Australian Privacy Foundation: the right to privacy
- Braveheart Inc: child and sex abuse

Australian lobby groups

- Same-sex marriage. Lobbyists for gay rights. The NSW Gay & Lesbian Rights Lobby (GLRL) advocates for the equality of lesbians, gay men and their families.
- Greenpeace: antiwhaling campaign
- Australian Conservation Foundation: all environmental issues
- Australian Coal Association: promoting the coal industry
- Australian Monarchist League: promoting the monarchy in Australia.
- National Council on Drugs: providing community opinions about drug use and control.
- Australian Taxpayers Association: giving governments an opinion on proposed tax changes.
- Business Council of Australia: promoting the interests of business
- National Farmers Federation: promoting the interests of farmers.

8.2 Lobby, advocacy groups and the media

Practical Application (Pages 164 - 165)

1. Timeline

1949	Victoria abolishes death penalty for homosexual acts
1975	South Australia decriminalizes homosexual acts, the other States of Australia followed:
1976	ACT
1980	Victoria
1983	Northern Territory
1984	New South Wales
1987	Western Australia
1990	Queensland
1997	Tasmania

2. Australia's decision to adopt the human rights set out in the ICCPR in 1994, and passing the *Human Rights (Sexual Conduct) Act 1994* (Cth) was extremely important because it meant that any Act of State Parliament which continued to criminalize homosexuality, following the precedent of the Tasmanian Dam Case, would be invalid (unconstitutional).

Practical Application (Page 166)

1. Support for same-sex marriage rose from 38% in 2004 to 68% in 2015 across all polls. At the same time those opposed dropped from 44% in 2004 to 25% in 2015.

2. It is reasonable to describe the support for same-sex marriage between 2009 and 2015 as high and stable. Except for one poll, of 54% by Ipsos in 2013, there were 6 other polls which exceeded 60% during that period.

Practical Application (Page 166 - 167)

1. Tony Abbott clearly meant that party members could vote according to their conscience, and not in accordance with party policy.

2. Generally, the Liberal party and the National party decide policy positions independently of each other, even though they are in coalition government. Combining the two parties to decide a policy on same-sex marriage, or even discuss it, introduced the views of the National party into a Liberal party meeting. Members of the Liberal party were annoyed because the many of them were in favour of same-sex marriage, but when combined with the National party members, there was a majority against. Clearly by this time, a

Parliamentary wide conscience vote would have been likely to pass same-sex marriage legislation.

3. Branch stacking refers to the practice of introducing new members into a branch meeting in order to achieve a particular policy outcome or decision by the branch, which would not have been possible otherwise. Christopher Pyne described the joint party meeting as a way to ensure that a vote on policy included the National party members so that the outcome would be different. Christopher Pyne meant that it was not possible for the Liberal party to have a fair vote because the National party members opposed same-sex marriage. Supporters of same-sex marriage saw Mr Abbott's tactical position as a stalling tactic, to delay a decision by Parliament on the issue. Supporters of same-sex marriage also thought Mr Abbott was deferring the decision in the hope that it would be possible to defeat it at a later date.

4. Although the article does not say so, the Labor Party's position on same-sex marriage was to allow a conscience vote of its members. Party policy did not require its members to vote against same-sex marriage. Therefore, if the Labor Party was elected it would probably introduce a bill into the house for it to vote on the issue as it said it would. At this time Labor Party policy was already in favour of same-sex marriage, so it would have been happy to have a vote, even if members were allowed a conscience vote. A vote for same-sex marriage would have been difficult for the government, and would have embarrassed them, because some members of the Liberal National party coalition were threatening to cross the floor on the issue. Of course, a conscience vote would have meant that this was not the case.

5. *[Answer asks for an opinion.]* It was probably not necessary for a national plebiscite to be held in order to establish whether or not to legalise same-sex marriage by a vote in the Parliament. However, given public opinion, if the plebiscite supported same-sex marriage there would be further argument for the legislation to be put and passed. Presumably, it could be argued that opposition to same-sex marriage was so significant, that it would be necessary for a plebiscite approving the legislation to be passed.

Practical Application (Pages 167 - 168)

Timeline

2010—A private member's bill to legalise same-sex marriage is defeated on the second reading in the Senate.

2012—A private member's bill to legalise same-sex marriage is defeated on the second reading in the Senate.

2012—A private member's bill to legalise same-sex marriage is defeated on the second reading in the House of Representatives.

2013—A private member's bill to legalise same-sex marriage is defeated on the second reading in the Senate

2015—In August the Liberal National party coalition government rejects holding a conscience vote and votes against introducing same-sex marriage legislation into parliament.

2015—In October Prime Minister Turnbull promises that there will be a plebiscite held after the 2016 election if his government is returned.

2016—The return of the Liberal National party coalition government.

2017—In August Prime Minister Turnbull promises to return the Plebiscite bill to a hostile Senate and to hold a postal ballot if it is rejected.

2017—In August the Senate again rejects the plebiscite bill because it favours a conscience vote.

2017—15 November, the results of the postal vote are published, 61.6% in favour, 79 5% of Australians voted.

2017—17 November, Bill to legalise same-sex marriage introduced into parliament.

2017—8 December, same-sex marriage Bill receives Royal Assent and becomes law.

(Note, the period of scrutiny of the amendments to the *Marriage Act 1961* (Cth) did not take the usual amount of time for legislation to pass through the house.)

What do you think? (Page 168)

Sometimes it is difficult for Parliament to pass legislation in our federal system even though the majority of the electorate supports the change. Politicians are elected over a cycle and represent electorates which may not support the majority position. They may be in power because they support other important policies than the one in question. The government may not hold the balance of power in the Senate, leading to rejection of a policy which they took to an election they won. This was the case in respect of the plebiscite issue. At the end of the day there was an outcome which satisfied everyone, even some politicians who were opposed to the same-sex marriage reforms.

Research Task (Page 169)

[Answers may vary with students' opinions and choice of topic].

1. Lobby groups and the media were very important in driving the proposals for reforming the law to enable people like Raymond Carroll, who allegedly committed the murder of Deirdre Kennedy and admitted lying in his trial, but was unable to be tried again for the offence, because he had been acquitted.

2. In a ministerial statement made by the Honourable Yvette D'Ath on 29 November 2023, the minister announced changes to expand the exception which allowed an acquitted person to be retried for the same offence where fresh compelling evidence is available. The Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill 2023 added 10 additional offences to the exception of murder previously established in 2007. These included manslaughter, attempted murder, unlawful striking causing death, killing an unborn child, rape, incest and repeated sexual conduct with a child. In addition, there were provisions clarifying the meaning of fresh evidence, ensuring that the evidence of an expert witness is not excluded solely because of failure to exercise reasonable diligence in presenting same.

8.3 Patterns of crimes and civil offences

Practical Application (Pages 170 - 171)

1. The survey found that 27% of women and 15% of men had experienced violence or abuse by a partner. Therefore, women were more likely than men to have experienced violence, emotional abuse, or economic abuse by a partner since the age of 15.

2. It is important that surveys of this kind are gender neutral, and are not able to be criticised for ignoring either men or women when the survey is conducted. Such surveys by the ABS are normally required by law to be impartial.

3. The data does not indicate a trend, but at the time of writing, the media quoted data that indicates that there has recently been an increase in partner violence and abuse. 100 women were killed in the previous 12 months in a domestic violence situation. The status of violence against women is that clearly it must be given priority as it is the most prevalent.

4. See the answer to the previous question. Violence against women by their partners is extremely prevalent. More than a quarter of women experience violence and abuse in their relationship. This would impact their children, who would become damaged by the experience, and see it as an acceptable way of resolving their own issues in adulthood. The trend needs to be reversed for the benefit of the Australian community, which is essentially built on having successful family relationships.

Research Task (Page 172)

[Answers may vary with students' opinions and choice of information.] Students should be encouraged to read widely about this topic, choose the resources they see as relevant to their point of view, and present it in an appropriate form. Students should choose the information that they think tells the story of Rose and Luke Batty, and should emphasise those things which they think are important

Practical Application (Page 173)

1. The purpose of the taskforce was to reduce domestic violence incidents in Queensland. It was started because of the rapid rise of reported domestic violence incidents throughout the state.

Practical Application (Page 174)

1. The elements of the offence are:
   - it must involve unlawfully choking, suffocating or strangling;
   - another person without their consent; and
   - it must occur in a domestic relationship; or
   - be associated with domestic violence.

2. It is necessary to prove 'intent' for the offence of assault to be made out. Section 315A does not require this.

3. In the context of domestic violence, the occurrence of choking, suffocating, or strangling a person would raise the issue of whether or not to prosecute the perpetrator with assault. Prior to s315A, it would have been quite difficult to charge a person who has done these things with assault because the relationship of the parties might make it difficult prove that the perpetrator intended to harm the victim. This new offence is easier to prove. If there is physical evidence corroborating an allegation that choking, suffocating, or strangling a person has occurred, that would probably be sufficient evidence to bring the charge.

Practical Application (Page 175)

1. The specialist DFV court justice response coordinates civil and criminal matters in each location. It has community support, including transporting people to and from court for court appearances, linking people with programs, and helping to ensure people understand the court process and any orders that are made. The specialty courts have a specific set of objectives to achieve in their operation. This means that both the judicial officers and administrative staff would be focused in achieving the outcomes and objectives of their Charter. So broadly speaking, the courts would be focused on outcomes that were more specific than those of the mainstream courts in the legal system.

2. Guidelines for a profile are:
   - Personal background—does it raise any issues about inappropriate professional behaviour ?
   - Course of study—did it include studies (e.g. family law/domestic violence/ethnicity issues) which might be helpful?
   - Work experience—has the applicant experienced working as a duty lawyer and/or in courts dealing with domestic violence?
   - Specific legal knowledge—applicant should be questioned about relevant issues for both persons charged and persons who are victims that appear in the court. They should be presented with scenarios so that they can respond and indicate how they would behave, the advice they might give, and outcomes they would expect.

   (Note: it would be useful to visit a court which deals with domestic violence in the context of a community which had mixed ethnicity, and to ask practicing duty lawyers for their views.)

Research Task (Page 176)

[Answers may vary with students' opinions and choice of information.] No answer is provided for this exercise. The reports should be readily available, and students can form their own opinions.

Practical Application (Page 176 - 177).

1. *[Answers may vary with students' opinions and choice of information.]* The way in which governments have tried to influence the behaviour, and encourage more responsible drinking practices, has been to use a combination of policies, which may vary the location. For example, choosing the locations where Safe Night Precincts are implemented. Some of the variables students may find interesting to consider include:

- standard hours,
- individual licence conditions,
- lockouts, advertising bans,
- last drinks policies,
- ID scanners,
- deferred closing times,
- safety action plans, and the 'safe night out' strategy.

These can be used in varying combinations to achieve the desired outcomes.

2. Hotel and club management should train and instruct their staff to:
    - observe the regulations which apply to hotels and clubs
    - treat customers respectfully, but refuse service to customers who are drunk or behave badly
    - give notice to patrons when closing time is imminent

    It is important for hotels and clubs to observe the law, especially if they wish to create a safe and responsible environment for their customers.

Practical Application (Page 177)

1. The research looked at three-year trends from July 2016 to June 2019. The statistical outcome is a 49% drop in the number of serious assaults between 3 AM and 6 AM on Friday and Saturday nights across Queensland. There was also a 52% reduction in these assaults in Fortitude Valley, one of the state's most popular precincts for night entertainment. The inference is that the reported statistical reduction in assaults supports the policies the government introduced under its Tackling Alcohol-Fuelled Violence program.

8.3 Law reform and technology

Practical Application (Page 179)

1. Deepfake imagery is a digital photo, video or sound file of a real person that has been edited to create an extremely realistic but false depiction of them doing or saying something that they did not actually do or say. Advances in artificial intelligence taken the technology further, allowing it to rapidly generate content that is extremely realistic, almost impossible to detect with the naked eye and difficult to debunk.

2. Deepfakes have numerous positive applications in entertainment, education, medicine and other fields particularly for modelling and predicting behaviour.

Practical Application (Page 180)

1. The increase in pornographic deepfake images generated by artificial intelligence prompted the move from the Federal government to ban the sharing of non-consensual digitally created and altered sexually explicit material.

2. Non-consensual deep fake images are images posted without the consent of the person whose image is being posted. The offence is aggravated if it is done without consent. The idea that an act is done without the consent of the person whose image is posted offends an important principle. Increasing the penalty is appropriate. As to whether seven years is sufficient penalty or not, that is probably a matter of personal opinion. Presumably it is at

the higher end of the penalty range, as the perpetrator would probably harm the victim in ways which are highly offensive.

Practical Application (Pages 180 - 181)

1. The alleged offence was the publication of a series of explicit AI-generated images of students from the Bacchus Marsh Grammar on social media which had been manipulated to create obscene images.

2. The mental health of students whose images were displayed was affected. The student responsible for posting the images may be charged with an offence, as also may the Internet provider that carries the images. As in all cases involving criminal offences, even though there may be general prohibitions which exist and might cover the general circumstances in this case, it is always better to pass specific legislation which describes the actual offence which should be prohibited. This gives greater certainty to victims and assists the police to gather evidence of the offence.

Practical Application (Pages 181 - 182)

1. The eSafety Commission can provide a removal notice to online providers requiring them to remove an offending image in as short a time period as 24 hours. Where a sexually explicit image is transmitted online, including material created or altered using technology, there is a civil penalty for distributing or threatening to distribute such images. The offence carries 500 penalty units ($111,000). While it is a matter of personal opinion, it seems unlikely that social media platforms like Facebook would be determined by such a small fine. An appropriate recommendation might be to increase the fine to one which is meaningful.

2. The behaviours described in Source 2 are now the subject of civil and criminal penalties, including a penalty of six years in jail for sharing non-consensual deep fake sexually explicit material. The amendments to the *Online Safety Act 2021* (Cth) should have the effect of decreasing offences of this kind. Passing laws which punish behaviour that the community finds inappropriate is legally justified to maintain an orderly and fair society.

Case Study (Pages 183 - 184)

1. Anthony Rotondo has been charged with contempt because he disobeyed orders 1 to 6 made by the Federal Court of Australia.

2. An *ex parte* application is one heard by a court in the absence of the person entitled to respond to the application. Anthony Rotondo, the defendant was not present because he was overseas at the time that the court heard the application.

3. The eSafety Commissioner applied for a warrant for the arrest of Anthony Rotondo.

4. The Hon Justice Rangiah issued a warrant for the arrest of Anthony Rotondo. The legal justification for the warrant for his arrest was that Anthony Rotondo disobeyed court orders made against him.

Practical Application (Pages 184 - 185)

1. Anthony Rotondo admitted to all three contempt of court charges. These are the charges brought by the eSafety Commissioner of the Commonwealth.

2. Anthony Rotondo was charged under Queensland law with five counts of obscene publications and exhibitions, one count of obscene publication and exhibition of a child under 16 years and endangering a property by fire. These appear to be offences under the amended *Criminal Code 1899* (Qld) s223 and s227B created specifically to charge people who post non-consensual deep fake pornography online. To be certain that this is the case it would be necessary to see the charge sheet prepared by the police prosecutor for the court.

   The *Criminal Code 1899* (Qld) should contain provisions specifically prohibiting such offences so that there is no doubt the police are aware of the evidence which needs to be gathered to convict perpetrators.

   One of the important principles of the rule of law is that the law should be clear, certain, and as impartial as possible. Generally, in drafting, this is achieved by specifying the elements of an offence specifically, without ambiguity.

Practical Application (Page 186)

1. There are different kinds of scams. Students may have different responses to this question. However, in this practical application there is a description of what happens in a romance-baiting scam. Essentially, the scammer goes through a number of steps to build a relationship with the potential victim, culminating in the scammer asking the victim for money, and then disappearing.

2. Those Australians unlucky enough to be taken in by a scammer, and become emotionally involved and part with their money to the scammer, they will suffer emotional trauma and financial loss. The statistics suggest that people who are more vulnerable (over 55) are more likely to succumb to the scammers.

Research Task (Page 187)

[Answers may vary due to criminal offence chosen, example shown below.]

Crimes Act 1995 (Cth) s474.15

Using a carriage service to make a threat

1. Person; uses; a carriage service; make another person (the second person); threat to kill the second person or a third person; and person; intends; second person to fear the threat will be carried out.

2. The maximum sentence for this offence is 10 years imprisonment.

3. This offence might apply to circumstances where a catfish threatens to kill their victim.

4. The maximum sentence is sufficient to the criminal act, as threatening to kill a person is serious. However, it doesn't reflect the actions of most people who catfish – as many either do it for social or financial reasons. It only applies to a strict set of circumstances. It also is quite long and difficult to understand, which hampers the communities' ability to understand the criminal offence. It is good to see that 'actual fear' isn't necessary and it is wide-ranging as it includes an apprehension of fear as well.

Case Study (Page 187-188)

1. The criminal offence with which Abdelmalek was charged and found guilty was stalking.

2. *[Answer asks for an opinion.]* Abdelmalek used social media to connect with her victims and led them to believe they were in a relationship. Abdelmalek was arrested by the Queensland Police Service. Abdelmalek used a fake online identity, and the identity of two well-known actors. Abdelmalek was a social catfish – she didn't try to financially benefit from her crime. However, Abdelmalek's crime had a great emotional and psychological impact on the first victim as ultimately that the victim committed suicide.

3. *[Answer asks for an opinion.]* If Abdelmalek was overseas the case would be much harder to prosecute as the police would have to apply to the other country to extradite her. There could also be conflict between the different laws of the jurisdictions, on which she might be able to rely to prevent extradition.

Practical Application (Pages 188 - 189)

1. The judge said that she had warned both Abdelmalek and her lawyers that she might impose a more severe jail term if they continued to pursue her appeal. She pointed out that the matter proceeded despite an overwhelming prosecution case and full knowledge of the additional stress that flows to the victims as a result of the appeal continuing. She described the defendant's behaviour as persistent and malicious, that she spent thousands of hours pursuing her victims online in secret, creating a web of false identities and characters.

   (Students should make up their own minds about whether or not they support the judge's action to increase the defendant's sentence.)

Practical Application (Page 189)

[Answers may vary with students' opinions and choice of topic.]

1. There are different kinds of scams. Students may have different responses to this question. However, in the practical application on page 186 there is a description of what happens in a romance-baiting scam. Essentially, the scammer goes through a number of steps to build a relationship with the potential victim, culminating in the scammer asking the victim for money, and then disappearing.

   Catfishing involves a person using false information to cultivate a persona online that does not represent their true identity. The catfish uses this false persona to carry out a scam. As it has been possible to prosecute scammers under existing legislation, which do not specifically set out the elements of a scanning offence Law reform has not proceeded in this area. The lack of a specific legislation at Commonwealth and State level which sets out the elements of scanning and catfishing makes it difficult for police to gather evidence and prosecute. The most significant recommendation that can be made in this area is for an enquiry to be set up and for draft legislation both at Commonwealth and State level to ensure that people scam catfish properly prosecuted for their alleged offences.

Practical Application (Pages 190 - 192)

Question 1

a. According to s359B(b) an individual can be charged with stalking for a single incident if it is protracted.

b. According to s359B(d) the impact must firstly cause the stalked person to have apprehension or fear which, in turn, causes detriment.

c. Some examples of technology related words include 'email' or the use of 'any technology' (s359B(c)(ii)). It could be implied that giving offensive material (s359B(c)(v)) could employ the use of technology as mobile phones are often used to send offensive material. Similarly, 'watching' (s359B(c)(iii) could imply technology, as it may include the use of surveillance technology.

d. Firstly, a person could watch a person through the use of spyware installed on the stalked persons mobile phone (s359B(c)(i). A stalker could contact the person using an App such as Messenger (s359B(c)(ii). A stalker could send violent material to their victim (s359B(c)(v). The last example might involve a stalker sending spam to their victim (s359B(c)(ii). Actions that involve the defendant physically being close to their victim in proximity (such as loitering, approaching, entering) can't be done online, but every other type of conduct could potentially use a digital platform or device to instill fear.

e. *[Answer asks for an opinion.]*The use of surveillance technology, gaining intimate material without consent, posting humiliating images or videos should also be mentioned somewhere in the Act. These actions can be used to commit further acts, have a huge emotional impact and invade the victim's privacy.

Question 2

a. If a defendant followed a victim and loitered around their home on at least three occasions, the maximum penalty he or she could receive is 5 years imprisonment.

b. If a defendant sends at least two text messages to their former partner threatening to kill their pet and owned a gun, the maximum penalty he or she could receive is 7 years imprisonment.

c. If a defendant emailed a number of violent images to a person and threatened to use violence against them, the maximum penalty he or she could receive is 7 years imprisonment.

d. *[Answer asks for an opinion.]* Using technology to commit stalking should receive a higher penalty than it currently does, as it can have a huge impact on a person's mental health and wellbeing. Cyberstalking can impact every aspect of a person's life as we rely on technology so much and cannot exist without it- it is central to people's work and social life. It can cause people to feel unsafe and attacks their privacy. However, it should not receive a higher penalty than stalking that involves a weapon, contravenes a court order or violence, as these are also serious.

e. *[Answer asks for an opinion.]* Cyberstalking should form a separate category like those found in s359E(3) as it can have a serious impact on a victim's psychological wellbeing and

can cause people to commit suicide to escape. Placing cyberstalking as a separate category highlights its seriousness to the community and opens up conversations about what online behaviour is acceptable.

3. *[Answer asks for an opinion.] Both* the Queensland and Commonwealth Act refer to similar devices and similar impacts. However, the Queensland Act has a higher maximum penalty and includes a wider range of offences. The Queensland Act is a more suitable legislative response, as it applies to more circumstances and acknowledges the immense impact this crime has on the victim's independence, sense of self and safety.

Case Study (Page 193)

1. The appellant used Facebook to send private messages to the victim and also made public posts about the victim that could be seen by the world at large.

2. *[Answer asks for an opinion.]* The Facebook posts and witness testimony would have formed the central pieces of evidence at used by the prosecution at trial.

3. *[Answer asks for an opinion.]* If 'apprehension or fear' only extended to include the apprehension or fear of physical harm, it would mean a wide variety of impacts would go unrecognised. Non-physical harm can be just as detrimental and have a longer impact than physical injury.

Practical Application (Page 193)

1. *[Answer asks for an opinion.]*Both jurisdictions identify technological means as a way someone can be stalked, referring to telephone, facsimile or any technology. The SA Act also includes reference to the Internet, but it could be argued that Queensland's use of the word 'any technology' includes the Internet. The SA Act also includes surveillance, which is not specially referred to in the *Criminal Code 1899* (Qld), although, it could be argued the word 'following' or 'watching' could be interpreted to mean surveillance.

2. *[Answer asks for an opinion.]*The Queensland Act uses the word detriment. This includes serious mental, psychological or emotional harm.

3. *[Answer asks for an opinion.]*Cyberstalking is a serious issue facing our community. The words used by the Queensland Act are wide-ranging and can be interpreted in many ways to include technological facilitated stalking. However, to strengthen this in the eyes of the community, more specific reference should be made to technological devices and platforms so everyone is aware that cyberstalking is unacceptable

Practical Application (Pages 193 - 194)

1. Ginger Gorman believes, 'social media companies are woefully slow to enforce protections', 'police are also lagging in their response to allegations of online crime' as they 'don't understand the real-life harm it does, the relevant legislation or how to investigate crime like this. They don't have the training or resources to deal with it.' Rachel Cassidy also brings up policing as a key issue stating there is, 'a lag time between law environment and the justice system catching up'.

Research Task (Page 194)

[No answer is offered for this research task.] This research task is an extension activity to stimulate students to think about the issues it raises. Teachers should look for a credible attempt to assessing the law on cyberstalking in Queensland.

8.5 Transnational and organised crime

Research Task (Page 195)

[No answer is offered for this research task.] This research task is an extension activity to stimulate students. Teachers should look for a credible attempt to assess the roles of each of the Australian Criminal Intelligence Commission (ACIC) and the Australian Institute of Criminology (AIC) in providing intelligence and support to combat transnational and organised crime.

Practical Application (Pages 196 - 197)

1. More than 53,000 transactions over 3 years.

2. An IDM is an Intelligent Deposit Machine.

3. The three major problems from AUSTRAC's point of view were:
   - The bank didn't limit the number of transactions a customer could make in a day.
   - The bank's IDM's allowed up to 200 notes per transaction which allowed up to $20,000.00 per transaction well above the mandatory reporting limit; and
   - The bank's IDM's allowed anonymous cash deposits.

4. If there were 53,000 transactions that the bank failed to flag over 3 years and each transaction was in fact a maximum transaction, namely 200 notes of $100.00 each put into the IDM, then the amount of money that avoided being flagged by the bank would have been over $1,000,000,000.00 ($1 billion). That is an extremely large sum of money that would have escaped the scrutiny of AUSTRAC. Having regard to the amount of cash that went through the IDMs in May and June 2016 this unscrutinised sum represents a large proportion of the total amount of dollars that was transacted through the bank's IDMs during the three year period – approximately 1 1/18th.

5. *[Answer asks for an opinion.]* The sum of $1 billion. Many would believe however the sum of $1 billion over a 3 year period is a significant sum in the context of money laundering.

6. The bank's argument was simply that all the 53,000 contraventions of the code should be counted as one offence because it was a single software coding error made in 2012 that was identified in 2015 and then fixed. The bank's argument was that because it was a single error that all the 53,000 contraventions should be treated as one, despite the fact that each of the contraventions carried a maximum penalty of $18 million. By analogy a similar argument could be raised that if a person's speedometer was broken and the person driving didn't know how fast he was going then he would only pay a fine once even though he'd exceeded the speed limit 450 times. That is the argument that is unlikely to fly.

Practical Application (Pages 197 - 198)

1. The bank agreed to pay the biggest fine in Australia's corporate history, namely $700 million plus costs.

2. The failures of the bank during the 3 year time period were:
   - It failed to properly monitor transactions on 778,370 accounts to check for money-laundering red flags.
   - 149 suspicious matter reports were filed late or not filed at all.
   - The bank failed to perform checks on 80 suspicious customers and transaction monitoring did not operate as intended on a number of accounts.
   - There were 14 occasions where the bank failed to properly assess risks related to its IDMs.

   [Answer asks for an opinion.] The $700 million payment should be viewed in light of the breaches by the bank over a period of 3 years and the effect that has had on money-laundering by criminal syndicates in Australia, and the effect on Australian society as a result of such money-laundering.

Practical Application (Page 199)

1. The defendants were charged with dealing with proceeds of crime. They were charged over their involvement in a syndicate that laundered tens of millions of dollars using cryptocurrency, foreign bank accounts and ATMs across Melbourne's east.

2. Liu was sentenced to 5 ½ years in jail and Zhou was sentenced to 3 ½ years in jail. When passing sentence, the judge commented that it was likely that as Chinese nationals they would be deported after serving their jail sentences.

3. *[Answer asks for an opinion.]* The article does not say who the likely victims of the crime syndicate are. Crime syndicates are commonly engaged in the sale and distribution of illegal drugs, extortion, and other such crimes. No evidence was led that either of the defendants was actively engaged in such criminal activity, but their prosecution and conviction for dealing with the proceeds of crime is important because it makes it more difficult for crime syndicates to succeed with their illegal activities, when they are not able to wash their funds, so they appear legal.

   The sentences received by the defendants seem adequate given that there are ongoing consequences of being jailed, and that they were not directly involved in causing harm to victims of the crime syndicate. Also, they both pleaded guilty, which would have been taken into account. One of the principles which is an important consideration is that sentencing should be consistent. The article does not indicate what submissions were made to the judge about other sentences for similar defendants. Assuming the judge applied these criteria the sentences were probably within the appropriate range.

Review (Page 200)

Comprehend

Question 1

a. Law reform is the modernisation of the law by bringing it into accord with current conditions; the elimination of defects in the law; the simplification of the law: and the adoption of new or more effective methods for the administration of the law and the dispensation of justice.

b. Same-sex marriage was achieved when Senator Dean Smith introduced a bill to amend the *Marriage Act 1961* (Cth) so as to redefine marriage as 'a union of two people'. The amendment to the Act passed into law on 8 December 2017 when it received Royal assent. No longer was it a requirement of the law that marriage would be the 'union of a man and woman'.

c. The elements of the offence are:
   - it must involve unlawfully choking, suffocating or strangling;
   - another person without their consent; and
   - it must occur in a domestic relationship; or
   - be associated with domestic violence.

d. Money-laundering primarily gives money which has been obtained from illegitimate sources the appearance of having come from legitimate sources. It involves the actual moving of such funds without detection. It is likely to be invested in businesses or schemes that provide the greatest chance of concealing the origins of the money. This money-laundering enables criminals to obviously further their criminal activity, hide their wealth, evade taxes and avoid prosecutions. As such money-laundering is an enabler of crime and is in itself a lucrative criminal enterprise.

e. The principle of double jeopardy, which is also the law in Queensland, is set out in Article 14 of the ICCPR:

   No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure for each country.

   In 2007, and again in 2023, the Queensland government passed legislation creating exceptions to this principle, essentially allowing applications for a retrial in certain serious crimes when 'fresh and compelling evidence' is discovered.

f. There are different kinds of scams. Students may have different responses to this question. However, in the practical application on page 186 there is a description of what happens in a romance-baiting scam. Essentially, the scammer goes through a number of steps to build a relationship with the potential victim, culminating in the scammer asking the victim for money, and then disappearing.

g. Unlawful stalking is set out in *Criminal Code 1899* (Qld) s359B(b). An individual can be charged with stalking for a single incident if it is protracted.

Cyberstalking involves the use of technology such as mobile phones to send offensive material to a person or it may include the use of surveillance technology.

Some examples are:

- a person could watch a person through the use of spyware installed on the stalked persons mobile phone (s359B(c)(i).
- A stalker could contact the person using an App such as Messenger (s359B(c)(ii).
- A stalker could send violent material to their victim (s359B(c)(v).
- This might involve a stalker sending spam to their victim (s359B(c)(ii).

Actions that involve the defendant physically being close to their victim in proximity (such as loitering, approaching, entering) can't be done online, but every other type of conduct could potentially use a digital platform or device to instill fear.

h. Deepfake imagery is a digital photo, video or sound file of a real person that has been edited to create an extremely realistic but false depiction of them doing or saying something that they did not actually do or say. Advances in artificial intelligence taken the technology further, allowing it to rapidly generate content that is extremely realistic, almost impossible to detect with the naked eye and difficult to debunk.

Question 2

a. In Australia, society's changing values, needs, morality and ethics, advances in technology and significant events, have acted and continue to act as an impetus for legal change. Legal changes are generally carried out by passing or amending an act of Parliament. Legal change therefore occurs when political parties propose change prior to election. It also happens during the term of a government because there is a need for a new law. It is not always possible to identify a single cause or impetus for each example of law reform. Quite often there are multiple causes, or a number of different contributors. Public opinion, the media, lobby groups and advocacy groups, and institutions like the Law reform commission, all play their part.

b. Some policies of political parties are not able to be implemented unless new laws are passed, or existing laws are amended. Many policies can be implemented without legislation, because the government has power to do this under existing legislation. Examples of this are in the practical applications pages 160 to 162. In this way, when political parties adopt policies, especially those which are promoted in an election campaign, these policies can lead to legal change. Of course, the reality of having two Houses of Parliament, for example at the federal level in Australia, is that passing laws can be more complicated and may result in a political party which holds power and is in government may not be able to pass legislation to give effect to policy. Australian government is generally because the government may not control the Senate.

c. Lobbying and advocacy groups have a long history in promoting changes to introduce same-sex marriage laws. In Australia, there were several organisations which were lobby groups that started in 1969 and 1970. One of these, Campaign against Moral Persecution (CAMP) was founded in Sydney in June 1970 and galvanised the early gay-rights movement in Australia. Importantly, these lobby groups led to the decriminalisation of homosexuality in Australia, and gradually through advocacy public opinion changed. The changes in public opinion are set out in a table on page 166 of this book. The campaigns by these

groups increased political support, and eventually the *Marriage Act* was amended on 8 December 2017.

d. We have seen in the same-sex marriage Law reform debate that public opinion was a useful tool to convince parliamentarians that vested interests who opposed the reform would allow parliamentarians to have a conscience vote. Where a point of view is not necessarily the one held by many people, public opinion does not always hold sway. This is often the case where those who hold the power to make change do not agree with public opinion. It took the supporters of same-sex marriage more than several decades to achieve reforming the law. There are probably still many people in Australia continue to be opposed to same-sex marriage successive because of their beliefs.

e. The ABS conducted a Personal Safety Survey in 2021-2022, which found that 27% of women and 15% of men had experienced violence or abuse by a partner. Therefore, women were more likely than men to have experienced violence, emotional abuse, or economic abuse by a partner since the age of 15.

   This statistical information confirmed to the government and to the community that domestic and family violence had reached levels in Australia which required action. Furthermore, because of the level of violence against women it clearly needed to be given priority.

   In the last decade, the Queensland government, which contained a significant number of women representatives, and was led by a female premier, Anastacia Palaszczuk set up a specialist task force on domestic and family violence, namely, the report *Not now, Not ever: Putting an End to Domestic and Family Violence*. This is only one of the initiatives which led to law reform in this area. A new offence of 'Choking, suffocation or strangulation in a domestic setting', and the establishment of specialist domestic and family violence Courts were 2 of the recommendations which were implemented by the government.

d. This question is not able to be answered from the information contained in this chapter. However, students will be aware from Legal *Studies for Queensland Volume 1* (Ninth edition) that there were many changes to the criminal Law in 2023-2025 as a consequence of the media campaign highlighting the details of offences committed by children. At the time of writing, the current Queensland government is legislating to put into effect policy of 'Adult Crime, Adult Time'.

Analyse and evaluate

Question 1

1. The Queensland criminal offence of unlawful stalking (*Criminal Code 1899* (Qld) s 359B) and the Commonwealth criminal offence of using a carriage service to menace, harass or cause offence (*Criminal Code Act 1995* (Cth) s474.17) set out the State and Commonwealth law which applies to unlawful stalking (cyberstalking).

   In essence, according to s359B(b) an individual can be charged with stalking for a single incident if it is protracted. In addition, according to s359B(d) the impact must firstly cause the stalked person to have apprehension or fear which, in turn, causes detriment.

There are several concerns about existing legislation.

Firstly, using technology to commit stalking should receive a higher penalty than it currently does, as it can have a huge impact on a person's mental health and wellbeing. Cyberstalking can impact every aspect of a person's life as we rely on technology so much and cannot exist without it- it is central to people's work and social life. It can cause people to feel unsafe and attacks their privacy. However, it should not receive a higher penalty than stalking that involves a weapon, contravenes a court order or violence, as these are also serious.

Secondly, cyberstalking should form a separate category like those found in s359E(3) as it can have a serious impact on victim's psychological wellbeing and can cause people to commit suicide to escape. Placing cyberstalking as a separate category highlights its seriousness to the community and opens up conversations about what online behaviour is acceptable.

Both the Queensland and Commonwealth Act refer to similar devices and similar impacts. However, the Queensland Act has a higher maximum penalty and includes a wider-range of offences. The Queensland Act is a more suitable legislative response, as it applies to more circumstances and acknowledges the immense impact this crime has on the victim's independence, sense of self and safety.

2. While there is existing legislation in Queensland prohibiting the nonconsensual sharing of intimate images, there is no legislation which prohibits deception and misinformation in political advertising, making it a criminal offence. The same comment applies to the *Online Safety Act 2021* (Cth). There are penalties under the legislation for the nonconsensual sharing of intimate images, but there is no specific legislation which deals with political advertising.

   There is clearly a concern about generated 'deepfake' videos or images of political candidates or for other figures who could easily be misrepresented in the election process. Such digital images, if misleading and/or deceptive, could give the subject of the image the right to take a civil action for misleading and deceptive conduct under the *Trade Practices Act 1975* (Cth).

   On the face of it, there are possible infringements of the *Electoral Act 1992* (Qld), which could also be relied on to challenge a misleading advertisement.

   The *Electoral Act 1992* (Qld) (the Act) regulates State elections in Queensland and outlines electoral advertising responsibilities.

   Section 185 of the Act states that it is an offence during the election period for a person to:

   - print, publish, distribute or broadcast anything that is intended or likely to mislead an elector in relation to the way of voting at the election;
   - (for the purpose of affecting the election of a candidate) knowingly publish a false statement of fact regarding the personal character or conduct of the candidate; or

- print, publish, distribute or broadcast by television any representation or purported representation of a ballot paper for use in the election if it is likely to induce an elector to vote other than in accordance with the Act.

Additional resources

Romance scams and catfishing

Australian Competition and Consumer Commission (ACCC), *Dating & romance*—scamwatch.gov.au/types-of-scams/dating-romance

Australian Cyber Security Centre, *Dating and romance scams*—cyber.gov.au/threats/dating-romance-scams

Eric J Vanman and Samantha Lo Monaco, *How a catfish hooks their victims online-and why they don't always try to get away*—abc.net.au/news/2019-04-14/how-a-catfish-hooks-their-victims-online/10997656

Cyberstalking

ACORN, *Cyber-bullying*—acorn.gov.au/learn-about-cybercrime/cyber-bullying

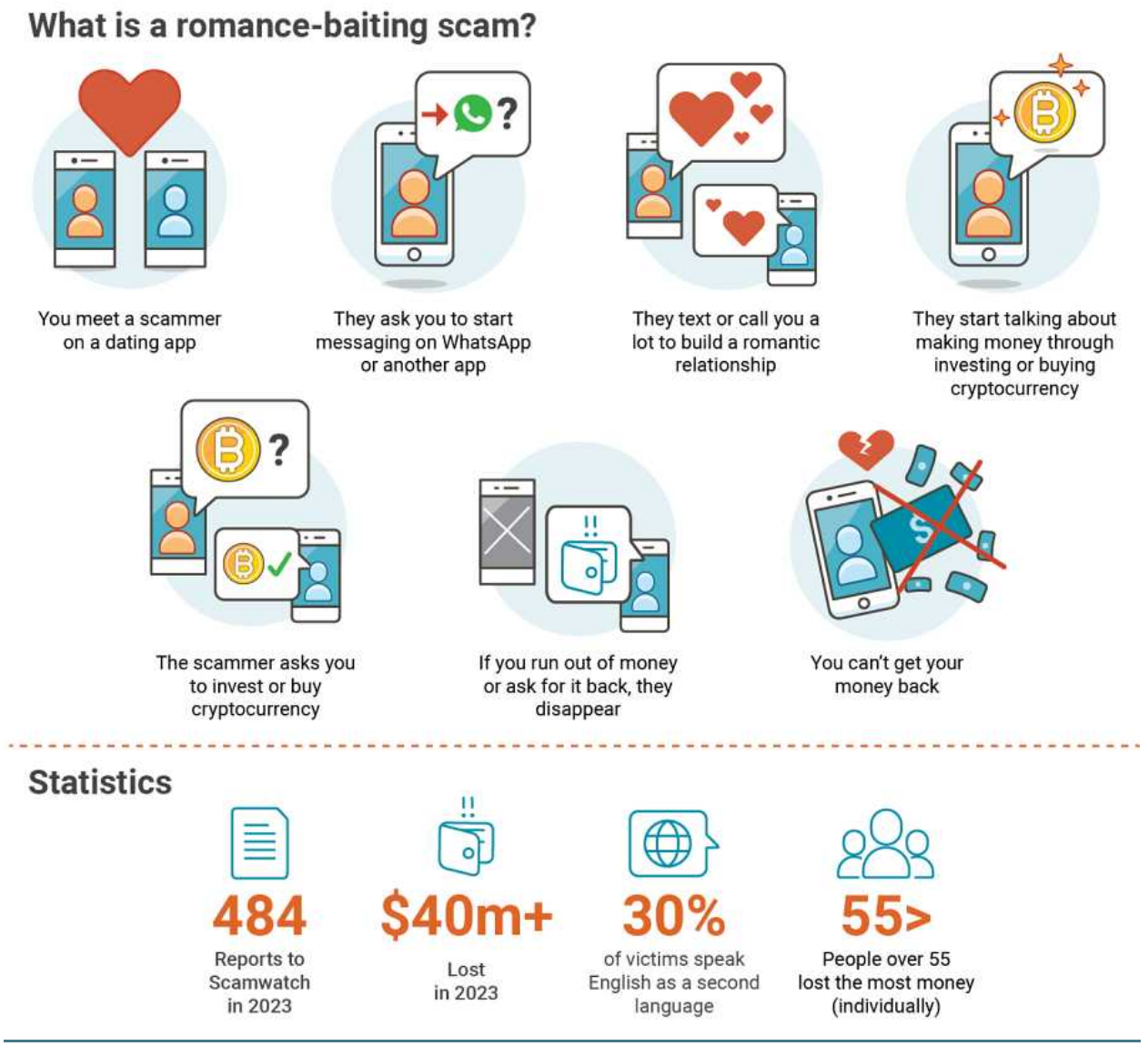
AFP, *Cyber crime*— afp.gov.au/what-we-do/crime-types/cyber-crime

Emily Ogilvie, *Cyberstalking*— aic.gov.au/publications/tandi/tandi166

eSafety Commissioner, *What is cyberstalking?*— esafety.gov.au/women/take-control/cyberstalking/what-is-cyberstalking

Parliament of Australia, *Chapter 4: Cyber-stalking, online grooming and sexting*—aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jscc/report/chapter4.htm

Avoid heartache this Valentine's Day - never take investment advice from an online love interest



The National Anti-Scam Centre is warning people looking for love online to beware of financial criminals luring them into investment scams.

Romance baiting scams cause significant emotional and financial harm to Australians, with Scamwatch receiving 484 reports of this scam in 2023. Despite overall losses nearly halving in the past year, reports to Scamwatch show that more than $40 million was lost to romance baiting scams in 2023.

Romance baiting scams disproportionately impact people from culturally and linguistically diverse backgrounds, with reports to Scamwatch from these communities accounting for more than 30 per cent ($12 million) of total losses last year.

"Scammers are cold-hearted criminals who are looking to exploit people's emotions in order to take their money," ACCC Deputy Chair Catriona Lowe said.

"We are urging people to not take financial or investment advice from someone you have only met online. Even if you think you know who you are messaging, remember that it could be a scammer on the other side of the screen."

"These scammers will spend weeks, even months, messaging their victim, making them feel like they've formed a genuine connection before shifting the conversation to investment or cryptocurrency opportunities. Ultimately, these 'opportunities' turn out to be investment scams, leaving the victim not only broken hearted but out of pocket by significant amounts of money."

Australians aged over 55 years old suffered the highest individual losses to romance baiting scams in 2023.

"While the decline in annual losses indicates that coordination between government and industry is increasing community awareness and disrupting scammers, we are concerned that people are still losing an alarming amount of money to romance baiting scams," Ms Lowe said.

"Online dating and social media connection is a common way to meet new people, but it also presents an opportunity for scammers to deceive people and take advantage of their trust."

"We are working closely with law enforcement to combat these scams and protect the public."

How the scam works

- The victim and scammer meet on a dating app or dating website. Sometimes scammers will befriend the victim on social media.
- After some initial messages, the scammer will ask the victim to move the conversation to a free, encrypted messaging platform, such as Google Hangouts, WeChat, Line or WhatsApp.
- The scammer typically spends a couple of weeks developing a close relationship with the victim. This is sometimes referred to as 'love bombing' where the scammer is in contact with the victim several times a day professing their feelings for them.
- After a while, the scammer begins to talk about making money through different investments, most commonly involving cryptocurrency.
- The scammer will then offer to show the victim how to invest and will pressure the victim into transferring a small amount of money to see how easy it is.
- Initially, it often appears to victims as though they are making a profit from their investment. They may even be able to move money around, as the scammer entices them to keep investing more money.
- Often victims will be told they have to 'top up' their account to access their money or that they must always have a certain amount in their account otherwise it will be frozen, and their money lost.

- The scam ends when the victim has no more money to give or refuses to keep investing. At this point, the scammer may either disappear and stop all contact with the victim or may demand that the victim invests more money to access the money already invested.
- The victim is left with a significant financial loss while also losing the person who they thought they were developing a relationship with.

Protect yourself

STOP – Don't give personal information or act on investment advice from someone you have only met online. Don't feel pressured to invest. If you have any doubts, stop communicating with them.

THINK – Ask yourself if you really know who you are communicating with? Scammers can use different profile pictures and lie about who they really are, especially online. Do an internet search of the person's name or photo to see if it's a scam.

PROTECT – Act quickly if something feels wrong. Contact your bank immediately if you have invested money. Help others by reporting scams to Scamwatch.

Background

- The National Anti-Scam Centre is working closely with the Australian Federal Police to protect the public from romance baiting scams, also known as 'pig butchering scams', and assisting law enforcement to bring offenders to justice.

- The National Anti-Scam Centre's first fusion cell is currently working with industry on better ways to combat investment scams in Australia. There has been an overall downward trend in investment scams impacting Australians since the establishment of this fusion cell in July 2023.

Source: ACCC, 'Avoid heartache this Valentines Day, never take investment advice from an online love interest,' *Media Release*, (Online, 8 February 2024) <accc.gov.au/media-release/avoid-heartache-this-valentines-day-never-take-investment-advice-from-an-online-love-interest>.

Romance scams

Scammers use dating or friendship to win your trust and get your money.

Never assume a person that you've only met online is who they say they are. Scammers go to great lengths to convince you the relationship is real and manipulate you to give them money. Romance scammers will leave you broke and broken-hearted.

Scammers will find you on social media, dating or gaming apps and websites. They might also text or email you. They hide behind fake profiles and identities, sometimes of famous people. They're really good at making you feel special, so you believe the relationship is real.

Once you trust them, they have an 'emergency' and ask you to give them products or money to help them. Or they ask you to do things for them, like set up accounts or transfer money they give you. Scammers can wait years to build this trust.

Warning signs it might be a scam

- They express strong feelings quickly and the relationship moves fast. You are made to feel special quickly.
- If you are chatting on your usual social media platform or an official dating service, they will quickly try and move the conversation offsite, for example to WhatsApp.
- Romance scammers will encourage secrecy and will influence you to only trust them. They may try to isolate you from your family and friends.
- There will always be an excuse why they can't meet in person or show themselves on camera. They say they live overseas or somewhere remote, or their technology isn't working.

Other things to look for

- Their online profile doesn't match what they tell you about themselves.
- They talk about money or investments. They might say they know about cryptocurrency and offer to teach you.
- You are asked for personal photos, videos or information they could use against you in the future.
- The scammer gets desperate or angry if you don't do what they ask. They may threaten to cut off the relationship.

Steps you can take to protect yourself

Never send or transfer money to someone you haven't met

- If your online connection asks you for money, they are likely a scammer. Stop contact right away and seek support.

- Don’t send money, card or bank details or important identity documents like your passport to someone you’ve only met online: No matter how long you’ve been messaging them.
- Never agree to transfer money for someone else. It’s called money laundering and being involved is a criminal offence.

Check the person is who they say they are

- Take things slowly. Ask lots of questions and watch for things that don’t add up.
- Search for the scammer’s name along with the word ‘scam’ in a search, and look for websites about romance scams in the results.

Be careful what you share (and what you don't)

- Never send intimate pictures or videos of yourself to people you don’t know. Scammers use these to blackmail people.
- Don’t keep your online relationship a secret. Speak to people you know about it. It can be easier for others to spot the warning signs.
- Be careful about what you share about yourself online. Scammers can use information about your hobbies, job or family to target you.

Source: National Anti-Scam Centre, *Online dating and romance scams*, (Online, 2024) <scamwatch.gov.au/types-of-scams/romance-scams>.

The Hon Mark Dreyfus KC MP

5 June 2024

Media Release

Legislation introduced today will create new criminal offences to ban the sharing of non-consensual deepfake sexually explicit material.

The Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 will impose serious criminal penalties on those who share sexually explicit material without consent. This includes material that is digitally created using artificial intelligence or other technology.

Digitally created and altered sexually explicit material that is shared without consent is a damaging and deeply distressing form of abuse.

This insidious behaviour can be a method of degrading, humiliating and dehumanising victims. Such acts are overwhelmingly targeted towards women and girls, perpetuating harmful gender stereotypes and contributing to gender-based violence.

This Bill will strengthen existing Commonwealth Criminal Code offences, and introduce a new aggravated criminal offence to target those who use technologies to artificially generate or alter sexually explicit material (such as deepfakes) for the purposes of non-consensual sharing online.

These offences will be subject to serious criminal penalties of up to 6 years imprisonment for sharing of non-consensual deepfake sexually explicit material. Where the person also created the deepfake that is shared without consent, there is an aggravated offence which carries a higher penalty of 7 years' imprisonment.

The Albanese Government is committed to tackling gender-based violence in all forms.

The proposed new laws would build on other actions taken by the Government, including increased funding for the eSafety Commissioner, advancing the review of the Online Safety Act a year ahead of schedule, and the commitment to address harmful practices such as doxxing and overhaul the Privacy Act to give all Australians, particularly women who are experiencing domestic and family violence, greater control over their personal information.

Source: Attorney-General, 'New criminal laws to combat sexually explicit deepfakes,' *Media Release* (Online, 5 June 2024) <ministers.ag.gov.au/media-centre/new-criminal-laws-combat-sexually-explicit-deepfakes-05-06-2024>.

Cyberstalking

Cyberstalking is when a person keeps constant track of you online in a way that makes you feel uncomfortable, worried or threatened.

What is cyberstalking?

Cyberstalking is the use of digital technology to track and harass someone.

Cyberstalking behaviour can include:

- constantly checking in on someone and trying to get their attention even when they make it clear that they are not interested
- making repeated unwanted contact with someone by calling, emailing, texting, messaging, or asking inappropriate questions
- repeatedly sending, posting or sharing unwanted sexual requests, sexual or offensive content, abusive comments, or false accusations to or about someone
- monitoring someone's movements using the location (GPS) technologies that are built into the operating systems of phones and fitness apps, or using tracking devices or spyware
- following or contacting someone across multiple online accounts and making it known they can't hide
- accessing or hacking someone's online accounts to find their personal information, track their movements, read their emails or messages, or change their passwords to lock them out of their own accounts
- 'gaslighting' a person by changing their environment in small ways that are difficult to prove to others, such as using remotes to turn internet-connected devices on and off within their home.

Sometimes cyberstalking starts as over-enthusiastic interest in a person or an invasion of their privacy. But often the intentions are far worse right from the beginning – the person doing the cyberstalking may want to scare, humiliate, coerce or control someone, or harm their credibility or reputation.

Cyberstalking is often accompanied by offline stalking and it can lead to physical danger. Threats of sexual abuse or other forms of physical violence should be reported to the police.

Cyberstalking is also often a type of tech abuse that is part of domestic and family violence, but going offline does not fix the problem. Someone in an abusive relationship or who has left an abusive partner needs to be able to use digital technology, such as a mobile phone or computer, so they can find support and stay in touch with trusted friends and family.

How to spot cyberstalking

If you start receiving repeated unwanted and annoying messages or start feeling harassed, you may need to ask yourself if you are being cyberstalked.

The person doing it can be:

- someone you don't know
- someone you have met, but you are not friends with
- a friend, family member or carer
- a partner or ex-partner.

The following warning signs may indicate that you are being cyberstalked.

Someone doesn't take NO for an answer

You have made it clear that you are not interested, don't want to be contacted by someone or have simply ignored their messages. But this person doesn't take no for an answer and keeps sending messages or trying to contact you.

Someone engages with every post you make

The same person's name keeps popping up in your notifications all the time, on every service or site that you use.

Someone tries to follow your family and friends

You have unfriended or unfollowed someone or have not accepted their requests, so they try to get inside your social network to monitor your social life and check where you are and what you are doing.

Someone constantly asks where you are and what you are doing

Someone you know, such as a partner or ex-partner, constantly posts or sends messages that are harassing, threatening or demanding, such as 'What are you doing?', 'Who are you with?', 'Where are you?', 'If you don't get home soon I'm coming to find you.' They may also start contacting friends or family to check up on you.

Someone wants to rescue you

You are being threatened or receiving unwanted contact and someone steps in to offer advice and support, but they seem to know a lot about what is going on. Their intention is to separate you from your social circles, so they can come to 'rescue' you, making you grateful and trusting even though they are secretly the one who caused the problem.

What to do if you suspect you are being cyberstalked

Cyberstalking is dangerous and can develop into physical abuse. Do not wait to report cyberstalking. If cyberstalking behaviour or online abuse gets worse, there is a greater risk of emotional or physical harm.

All Australian jurisdictions have laws dealing with cyberstalking. If you are in Australia and in immediate danger, call the police on Triple Zero (000). Otherwise, you can contact your local

police through the police assistance line (131 444). You can also contact 1800RESPECT (1800 737 732) for advice and support.

How eSafety can help

If content sent, posted or shared online is intended to harm the physical or mental health of the person targeted, it may meet the definition of adult cyber abuse. This could be the case if the person doing the cyberstalking keeps posting humiliating, abusive or intimidating comments about you, if they share your personal information online (doxing), if they threaten to harm you, or if they use a fake account to pretend to be you in order to harm your reputation or relationships.

Adult cyber abuse should be reported to the online service of platform. If the online service or platform doesn't help, and the harmful content meets the definition of adult cyber abuse, eSafety can investigate and may be able to have it removed.

If the person doing the cyberstalking shares or threatens to share nudes or other intimate images or videos of you without your consent, that is image-based abuse. You can report it to eSafety straight way and we will help have the image or video removed.

These are the steps you can take:

- Collect evidence: Collect evidence by taking a screenshot of the chat or post – if things turn nasty you might need it as evidence to report the behaviour to online services, police or eSafety. Find out more about how to collect evidence.
- Report harmful content: Report harmful posts or profiles to the app, online service or platform. You can find reporting links for most apps in The eSafety Guide.

If the harmful content is serious enough to meet the legal definition of adult cyber abuse, and the service or platform does not remove it, you can report to eSafety using our online form and we will help to have it removed.

In cases of image-based abuse, when someone shares or threatens to share an intimate image of you, report to eSafety immediately.

- Prevent further contact: Once you have collected evidence, you can use in-app functions or the settings on the web browser to mute, unfollow or block the other person and change your privacy settings. The eSafety Guide has advice on key online safety functions for many online services, including online dating apps. For image-based abuse, stop all contact with the other person. You can use in-app functions to ignore or mute them, but don't block them until you are advised to do so by eSafety or the police.
- Get more help: Experiencing or helping someone who has experienced serious online abuse can be very distressing. You may find it helpful to use the strategies we recommend for managing the impacts of adult cyber abuse, including tips for taking care of your wellbeing.

You can also find counselling and support that is right for you.

You can also find out more about tech abuse that is part of domestic and family violence.

You may also be able to take out a protection order against the abusive person.

How to reduce the risk of cyberstalking

It is important to remember that if someone is cyberstalking you it is never your fault – they are the one doing the wrong thing. However, there are things you can do to help protect yourself from it.

- Set strong passcodes and passwords
- Protect your personal identity information like your full name, home address, phone numbers, date of birth, email address, passwords and bank details.
- Turn off location services and restrict access to GPS data
- You can use your account or device settings to control or restrict who has access to your location or GPS data.
- Don't give away location information by mistake
- Avoid posting information that may allow others to work out where you are (like photos that show street signs) or where you go regularly (like the name of your workplace, gym or church), and don't check into locations on your apps.
- Set your online accounts to private
- By adjusting your privacy settings, you can stay in control of who sees what you post or share online and who can contact you directly.
- Update your software
- Regular software updates help reduce the risk of security exposure or information leaks.

Source: E Safety Commissioner, *Cyberstalking* (Online, 2024) <esafety.gov.au/key-topics/staying-safe/cyberstalking>.

Chapter 9: Legal institutions and law reform

9.1 Royal commissions

Practical Application (Page 202)

1. According to the *Royal Commissions Act 1902* (Cth) s1A the '...Governor-General may, by Letters Patent in the name of the King...' authorise a royal commission. The Governor-General is part of the Executive arm of government.
2. According to the *Royal Commissions Act 1902* (Cth) s1A the type of matter a royal commission can inquire into is, '...any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.'
3. The document that restricts the scope of a royal commission is the Letters Patent.
4. A royal commission produces a report at the end of its inquiry.

Practical Application (Page 206)

1. The Commissioners appointed to the *Royal Commission into Institutional Responses to Child Sexual Abuse* are the Hon Justice Peter David McClellan AM, Robert Atkinson, the Hon Justice Jennifer Ann Coate, Robert William Fitzgerald AM, Dr Helen Mary Milroy, and Andrew James Marshall Murray.
2. The Commissioners were tasked to investigate institutional responses to allegations and incidents of child sexual abuse. When investigating this matter, the Commissioners were directed to inquire into what institutions and governments should do to protect children, encourage reporting, address victims needs and improve how this type of crime is investigated and prosecuted.
3. Royal commissions can make recommendations critical of the government. This is evidenced by the statements in the Letters Patent including, 'We direct you to make any recommendations arising out of inquiry...including recommendations about any policy, legislative...reforms'; 'what should be done to eliminate or reduce impediments....including addressing failures' and 'governments should do to better...'. Royal commissions can hold governments accountable for their actions because Commissioners can freely and openly identify circumstances where the Commonwealth, State or Territory Governments have contributed to injustice, failed people or made the wrong decision.

Practical Application (Pages 207 - 208)

Child Abuse Royal Commission Begins Private Hearings in Newcastle

1. Thirty-two people provided evidence in a private hearing in Newcastle.
2. Evidence given in a private hearing will not be considered 'formal evidence', but they will influence the final outcome.
3. *[Answer asks for an opinion.]* There can be many benefits of making provisions to allow people to provide evidence behind closed doors. One of the key benefits of allowing people to provide evidence behind closed doors is that it allows vulnerable people to give evidence freely and without intimidation. If vulnerable witnesses were forced to give evidence in open court, they may feel scared to speak out against those that harmed them and feel judged by members of the people viewing court.

Practical Application (Page 208)

Royal Commission into Child Abuse begins hearings in Adelaide to examine Salvation Army homes

1. The focus of the hearings in Adelaide was the abuse that occurred in four Salvation Army homes in South Australia, Victoria and Western Australia.
2. Victims of abuse have seen the Salvation Army suffer both criminal and civil consequences. Abuse survivor Graham Rundle won a civil case against the organisation. As well, a staff member was jailed for indecent conduct against three boys.

Practical Application (Page 209)

Child abuse: Documenting Australia's shame

1. The institution who is being investigated in the article by journalist Phil Mercer is the Catholic Church.
2. *[Answer asks for an opinion.]* Mr Ellis, a victim of sexual abuse, shared a positive outcome of taking part in the hearings, this being, that victims feel that, '…their stories [are] valued' and that someone cares. Ellis further states, 'For many, many years people have been silenced, people have been fearful of what reaction they will get if they were to tell their truth. The overwhelming emotion people have when they have had that opportunity is empowerment' (Mercer, 2018). This quote demonstrates that many victims feel the royal commission is giving them the opportunity to share their stories and be believed—something that is in direct contrast to how they were treated as children. This may give them the opportunity to move forward.

Practical Application (Pages 210 - 211)

1. The two parties involved in making the submission highlighted in the text are Scouts Australia NSW and the Senior Counsel assisting the royal commission.
2. *[Answer asks for an opinion.]* It is important that both parties have the opportunity to make a submission as it allows both Scouts Australia NSW and the Senior Counsel assisting the royal commission to present their side in open court. This, in turn, allows the royal commission to engage with evidence from both parties to reach a fair, balanced and impartial decision.
3. *[Answer asks for an opinion.]* The issue in dispute involved whether Scouts Australia NSW had effectively recorded and communicated concerns about allegations of the sexual abuse of children committed by Mr Larkins to members of the organisation. The Senior Counsel assisting the royal commission believed they had not, whilst Scouts Australia NSW resisted this finding.
4. According to the submission made by the Senior Counsel assisting the royal commission, Mr Currie and Scouts Australia NSW failed children by allowing Mr Larkins to continue to attend major Scout activities. They also submitted that the organisation advised others that Mr Larkins was not to have contact with young Scout members through 'word of mouth' and supervision by Mr Currie was not sufficient and that Mr Currie's actions were more focused on maintaining the good reputation of the organisation and not protecting children.

Practical Application (Pages 212 - 214)

1. The range of reforms recommended by the royal commission included expanding the number of professions legally obligated to report sexual abuse (to include religious ministers and school counsellors for example) (Source 1), introduce a new offence of failing to protect children from sexual abuse or failing to report the sexual abuse of children (Source 1), legally forcing religious ministers to report information shared in confession (Source 1) and expanding schools' liability (Source 1).
2. Most of the recommendations would specifically help victims of child abuse. The National Apology to Victims and Survivors of Institutional Child Sexual Abuse (Source 2), commenced a national redress scheme (Source 2) and provided legal assistance to victims directly to assist victim's emotional, legal and social needs (Source 1).
3. The statutory body the royal commission recommended be introduced was The National Office for Child Safety (pmc.gov.au/domestic-policy/national-office-child-safety). This was established in July 2018 (Source 2).
4. *[Answer asks for an opinion.]* Some of the royal commission's recommendations are directed at institutions or organisations. It can be difficult to force these bodies to act on a recommendation. For example, the Government may find it hard to legally force a religious institution to permanently remove religious ministers convicted of sexual abuse from the Church. The Government also cannot force institutions to be part of the National Redress Scheme. These examples demonstrate that the recommendations made by royal commissions aren't legally binding, as royal commissions cannot force the Government, organisations or individuals to act on a recommendation.
5. *[Answer asks for an opinion.]* The National Redress Scheme is supported by both the Government and victims. The Government wants all institutions to sign up urgently. This will see the Government being able to achieve one of the recommendations and shows they are implementing the report, which is important for voters and potential voters to see. Victims also want a redress scheme, as becoming part of the scheme will allow victims to seek redress from institutions that failed to protect them from sexual abuse promptly and efficiently. Both stakeholders see the scheme as providing a way forward to acknowledging and compensating the pain and suffering of victims. The National Redress Scheme is difficult to implement as not every institution has agreed to join the scheme, which leaves many victims unable to access compensation. In the article Social Services Minister Paul Fletcher reports that, '…about 50 per cent of the applications that have been received from survivors related to institutions that are not yet with the scheme' (McDonald, 2018). This means victims cannot receive redress.
6. *[Answer asks for an opinion.]* Establishing a targeted legal service accessible to victims is one reform that should be implemented. Funding this service would allow victims to access free legal advice. Accessing legal advice is essential to making the legal system accessible. The advice may empower them to make legally sound decisions about any future civil or criminal actions they may wish to pursue. Ensuring defendants face legal consequences is an important step for many victims, as many institutions and individuals have failed to be held accountable by the law. If a defendant receives a legal outcome for their behaviour, it may allow victims to feel a sense of justice.

What do you think? (Page 214)

[Answer asks for an opinion.] When justifying whether royal commissions should continue to be utilised in the future to drive legal change and reform, students can consider whether—

- all persons and organisations including the government subject to and accountable to the law,
- the law is **amendable** and can be changed to meet the needs of society,
- the recommendations made by royal commissions can **protect human rights** and individual freedoms and **promote equality**.

9.2 Law reform commissions

Practical Application (Pages 218 - 220)

1. The key recommendation made by the Australian Law Reform Commission (ALRC) was to amend the *Sex Discrimination Act 1984* (Cth) to ensure that 'religious schools should no longer be exempt from discrimination laws' (Source 2). This recommendation 'would protect students and teachers from discrimination on the basis of their sexuality, gender identity, marital or relationship status, or pregnancy' (Source 2).

2. A government is not required to implement a recommendation made by the Australian Law Reform Commission (ALRC), with Professor Lucas Lixinski stating that, 'the government is not obligated to follow the ALRC's recommendations, but they carry a lot of weight' (Source 2). The latter part of the quote demonstrates a role of the ALRC in the law reform process—as the recommendations they make are informed by expert analysis, public consultation, and research it offers a government solution(s) for their consideration. However, a limitation is that the government is not legally bound to implement these recommendations. This means that even well-reasoned suggestions can be ignored or altered based on political, social, or economic factors. While the ALRC's input is influential, the ultimate decision lies with the government, which may not always prioritise or act on the proposed reforms. Thus, the process may not always result in timely or comprehensive legal changes.

3. *[Answer asks for an opinion.]* In a *SBS News in Depth Podcast*, Mark Spencer, a Director of Public Policy at Christian Schools Australia said, 'They are a direct attack on faith in Australia. They would gut Christian schools; they would gut other faith-based schools. They would effectively try to tell us what beliefs we can and can't have and which staff we can employ' (Source 2). His viewpoint reflects a strong opposition to potential reforms that could impact the autonomy of faith-based schools, particularly in terms of their ability to uphold religious values and employ staff who align with those beliefs. By calling the recommendations 'outrageous' and a 'direct attack on faith,' Spencer suggests that the reforms could undermine the core principles on which religious schools are founded. The consequences of this perspective could be significant: if such reforms limit a school's freedom to operate according to its faith-based principles, it could lead to a clash between religious freedom and anti-discrimination laws. Faith-based schools may feel their religious identity and ability to govern their institutions are under threat, potentially resulting in legal challenges, public debate, and calls for compromises. This tension could impact both the educational environment and the broader societal discussion about balancing religious

rights with inclusivity. However, if these recommendations are implemented it could lead to a more inclusive school environment.

4. In response to the Australian Law Reform Commission (ALRC) report, 'the Prime Minister Anthony Albanese has revealed his government has drafted two bills in response to the report,' but they are yet to share either option with the parliament, with Deputy Opposition Leader Sussan Ley stating that 'I haven't seen it' and Senator David Pocock stating 'put forward your proposal' (Source 2).

5. Bipartisan support means that members from different political parties agree on a particular issue or proposal.

6. *[Answer asks for an opinion.]* Those supportive of the implementation of Recommendation 1 in full from the Australian Law Reform Commission (ALRC) report may justify your position with the following criteria:
    - All organisations, including religious institutions, are subject to and accountable to the law.
    - The amending of the *Sex Discrimination Act 1984* (Cth) would be known and accessible.
    - The amending of the *Sex Discrimination Act 1984* (Cth) will ensure the law is applied equally and fairly.
    - The law would be made in an open and transparent way.
    - The law making and inquiry process was open and subject to free criticism.
    - The amending of the *Sex Discrimination Act 1984* (Cth) protects human rights and individual freedoms and doesn't discriminate based on arbitrary grounds.
    - The amending of the *Sex Discrimination Act 1984* (Cth) meets the needs of society.

    Those against the implementation of Recommendation 1 in full from the Australian Law Reform Commission (ALRC) report may justify your position with the following criteria:
    - All organisations, including religious institutions, are subject to and accountable to the law.
    - The current law is known, stable and accepted by many in the community.
    - Not amending the *Sex Discrimination Act 1984* (Cth) will protect the freedom of religion.

Research Task (Page 220)

As of December 2024, a Bill to implement the Australian Law Reform Commission (ACLR) Recommendation 1 has not been introduced to Australian Parliament.

9.3 Parliamentary inquiries

Practical Application (Pages 223 - 224)

1. The Cohesive Community Coalition 'represents over 20 of Queensland's diverse ethnic and religious communities' (Source 2).

2. The significant event that the Cohesive Community Coalition believe is behind an increase in hate crime and vilification is 'the coronavirus pandemic' (Source 1). Queensland Human Rights Commissioner Scott McDougall stated that 'since COVID, there has been more fear in the community, and we've seen the Asian community targeted initially and more recently the African community' (Source 1).

3. One of the laws that may be relevant to this situation is Queensland's anti-discrimination law (Source 1). The State's 'vilification and hate crime laws' may also be relevant (Source 2).

4. To highlight that the law is not achieving its purpose, community and religious groups are using evidence such as 'a dossier of hate-related incidents dating back to 2013' which showed there has been 'very few prosecutions' using Queensland's anti-discrimination laws (Source 1).

5. The Cohesive Community Coalition has recommended 'clearer laws and penalties for hate crimes, options for victim protections' and 'measures to improve the way hate crimes are policed like a new community scrutiny panel' (Source 2).

Reflection (Page 225)

[Answer asks for an opinion.] Some possible responses include:

- Support your arguments with evidence, whether from case law, statute law, or academic journals.
- Follow a clear structure.
- When investigating a legal issue, gather a wide range of viewpoints such as legal experts, members of the public, interest groups, and others with relevant knowledge.
- Write clearly and concisely.

Practical Application (Pages 225 - 226)

1. The first state to ban the public display of hate symbols was Victoria.

2. In 2022, the Palaszczuk Government announced it would introduce law to 'criminalise public displays of hate symbols like swastikas.' The law was the result of a recommendation made by the Legal Affairs and Safety Community, who inquired into hate crimes.

Practical Application (Page 226)

1. New laws criminalising the display of certain hate symbols and crimes motivated by hatred or serious contempt because of the victim's race, religion, sexuality, sexual characteristics or gender identity come into effect on 29 April 2024.

2. The specific hate symbol that was made illegal by the new hate crime laws is the Nazi Hakenkreuz (the 'hooked cross').

3. 'A hate symbol can only be made illegal by regulation if the image represents the ideology of extreme prejudice against people based on their race, religion, sexuality, sexual characteristic or gender identity. The government must also consult with the Queensland Human Rights Commissioner before a hate symbol can be banned under the law' (Queensland Human Rights commission, n.d.).

What do you think? (Page 226)

[Answer asks for an opinion.] The parliamentary inquiry was able to recommend law that passed the parliament, with these laws sharing the following characteristics of an effective law, i.e. the law is clear, fair, stable, enforceable, adaptable, responsive and prospective.

However, as incidents of anti-sematic behaviour have been rising (see AFP Commissioner Reece Kershaw's Media Statement) which could be used as evidence that the law is failing to achieve its objective.

Research Task (Pages 226 - 227)

The Inquiry Homepage can be found here <aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Headtraumainsport>.

1. On 1 December 2022, the Senate Community Affairs References Committee was referred an inquiry into *Concussions and repeated head trauma in contact sports*. Public hearings for this inquiry were held in Bass Hill NSW (30 January 2023), Brisbane QLD (22 February 2023), Canberra ACT (1 March 2023) and Melbourne VIC (26 April 2023).

2. One organisation that made a submission to the *Concussions and repeated head trauma in contact sports* Inquiry was Rugby Australia (Submission 12).

3. The Senate Community Affairs References Committee report into *Concussions and repeated head trauma in contact sports* was tabled in the Senate on 5 September 2023.

4. The Senate Community Affairs References Committee report into *Concussions and repeated head trauma in contact sports* made 13 recommendations. None of these would involve creating, amending or repealing an Act of Parliament.

Review

Comprehend (Page 227)

1. a. **Consultation:** the act of discussing something with other people.
   b. **Royal commission:** a formal, independent public inquiry appointed by the Governor or Governor-General who are tasked to investigate an issue of public importance for the Government. A royal commission has special powers to collect information. They produce a written report making recommendations.
   c. **Submissions:** something providing an opinion either orally or in writing in response to a question.
   d. **Terms of reference:** the scope of the royal commission.

2. A royal commission is a formal, independent inquiry established by the government to investigate a specific issue of public concern. Royal commissions are generally established to uncover the truth about something or provide advice to assist the Government to form policy. They do this by gathering and analysing evidence which inform recommendations for legal, social or economic change or reform.

3. The Legal Affairs and Community Safety Committee played a key role in the creation of the *Criminal Code 1899* (Qld) s52D, which criminalises the display, distribution, or publication of prohibited symbols. This section targets symbols associated with hate groups, particularly those linked to Nazi ideology, as a response to growing concerns about the spread of hate speech, discrimination and extremism in Queensland. The committee conducted extensive inquiries, consulting with legal experts, community organisations, and stakeholders, ultimately recommending the creation of a new offence that was just, fair, and appropriately tailored to protect members of the public who feel menaced, harassed or offended by certain hate symbols.

4. A law reform commission is an independent body tasked with reviewing and recommending changes to laws to ensure they remain fair, efficient, and relevant. The key features include that commissions:

   - operate **independently** from the government,
   - are established by their own Act, the *Law Reform Commission Act 1968* (Qld) and the *Australian Law Reform Commission Act 1966* (Cth) that defines its functions, powers and duties,
   - are funded by the government,
   - are led by a judicial officer,
   - conduct research and consult with legal professionals, stakeholders, and the public,
   - have the primary goal of improving the law by addressing outdated, unjust, or inefficient legal frameworks,
   - provide suggestions for legislative changes or reform, which may involve the creation of a new law, an amendment, or the repeal of existing laws (called recommendations).

5. The Australian Law Reform Commission (ALRC) follows a structured process when conducting an inquiry. The inquiry process begins with the release of a discussion paper,

which outlines key issues and poses questions for public feedback. The ALRC then conducts consultations with stakeholders, including legal professionals, academics, and the public, to gather diverse perspectives, as well as conducting its own academic research. It may hold public hearings or receive written submissions to inform its analysis and publish a consultation paper. After reviewing all the input, the ALRC develops a final report. This report is submitted to the government, who responds.

Analyse (Pages 227 - 228)

Article 1—'*Government flips on royal commission on mortgage brokers'*

[Answer asks for a personal opinion, with suggested key points below.]

The Government and Opposition's views on using fixed-rate commissions paid by lenders are the same, with both sides 'no longer ban[ning] trailing commissions.' Treasurer Josh Frydenberg said, 'The government changed its position because we are concerned about the impact on competition in the mortgage-lending market' as brokers play a 'critical role' in the home lending market. The Opposition 'also backflipped, proposing a fixed-rate commission for mortgage brokers rather than accepting the banking royal commission's recommendation to apply user-pay fees to the service.'

This viewpoint has many consequences. The Royal Commission's concerns about the trial commission will not be dealt with and will continue, which could negatively impact customers. However, it will address concerns that implementing the recommendation will decrease competition in the home loan market and decrease costs for consumers who won't have to pay brokers directly.

The current law will not be reformed, as both main political parties have decided not to implement a ban on trailing commissions. Extensive lobbying by the mortgage broking industry was effective in changing both political parties' points of view. This demonstrates that the findings of a Royal Commission are not legally binding, which is a shortcoming of the Royal Commission process. Even though there was significant evidence that trailing commissions led to unethical behaviour, a well-organised and politically influential lobby group could counter-act this with a campaign.

Article 2—'*Overwhelming need for royal commission into COVID pandemic response in Australia, Senate committee finds'*

[Answer asks for a personal opinion, with some suggested key points below.]

The Senate's Legal and Constitutional Affairs Committee has recommended the establishment of a royal commission to address the key elements of the pandemic's emergency phase.

This viewpoint highlights that a parliamentary body has serious concerns regarding the handling of the pandemic. Having a royal commission would hold the government to account by identifying any missteps or failures in managing the pandemic and ensuring public health and safety. This could lead to systemic reforms in crisis management, enhanced transparency in government decision-making, and lessons learned for future public health emergencies. The findings might prompt legislative changes, improvements in health infrastructure, and stronger crisis response frameworks. It could also strengthen public trust by demonstrating a commitment to accountability and learning from past mistakes.

However, while a royal commission into COVID-19 could provide valuable insights, it may also have negative consequences. The royal commission process is time-consuming and costly, diverting resources that could be used for current public health needs or pandemic recovery efforts. It may also foster political divisions, as differing views on the government's handling of the crisis could create public tension. Additionally, scrutinising decisions made during a rapidly evolving crisis could unfairly target individuals or agencies who acted in good faith, leading to reputational damage or creating a climate of blame rather than constructive reform.

Evaluate (Page 229)

1. *[Answer asks for an opinion, with a suggested response below.]*

   Author Scott Prasser views royal commissions as the 'institution of last resort' for governments when all other bodies are deemed unsuitable.' This means that royal commissions are the final option for governments to turn to when dealing with complex, high-profile matters. Royal commissions are independent and powerful and have the authority to investigate sensitive or politically charged issues thoroughly. Governments typically turn to royal commissions when other bodies—such as parliamentary committees—are deemed insufficient or unsuitable for handling these matters. Royal commissions have broader investigative powers, including subpoenaing witnesses and conducting private hearings, which makes them effective at uncovering the truth in controversial situations. However, their use can also be politically risky, as they may expose government shortcomings or lead to public criticism. Thus, they are often reserved for matters of significant importance when all other avenues have been exhausted.

   Prasser's viewpoint is fair and just, as it aligns with key legal principles. A royal commission's independence ensures impartiality, a core feature of the rule of law. This impartiality is a cornerstone of the legal system, and it ensures that the investigations are fair and just. By holding public hearings, publishing submissions, and releasing a report, this body also demonstrates transparency, another key feature of the rule of law, when other legal bodies may be compromised or unable to handle politically sensitive issues. Other key principles of the rule of law reflected in royal commissions are that they are bound by legal frameworks, ensuring fair procedures, accountability, and rights protection.

2. *[Answer asks for an opinion, with a suggested response below.]*

   The Hon Michael Kirby's statement that permanent law reform bodies 'keep the flame of ideas alight' is correct. A permanent law reform body, such as the Australian Law Reform Commission (ALRC), is an essential way for Australia and Queensland to investigate potential scope for law reform. These bodies ensure that the law remains relevant and adaptable to societal needs by addressing technological advancements, changing social norms, and gaps in existing laws. These bodies also conduct their work in an open and transparent way. Permanent law reform bodies provide consistency and institutional knowledge, enabling them to propose well-researched and informed recommendations for governments to consider implementing. The independent nature of law reform bodies also ensure that any recommendations they make are not reactionary but driven by a long-term vision of justice and fairness. These bodies also offer a platform for public participation, ensuring that reforms reflect diverse perspectives while upholding human rights and the

rule of law. This long-term, continuous approach is vital for creating a responsive and adaptable legal system.

Chapter 10: Coronial inquests and investigations

10.1 About the Coroners Court of Queensland

No questions.

10.2 Coronial investigations

Practical Application (Pages 232 – 233)

Case Study 1

1. In the case of pilot 1 and pilot 2 these deaths were a reportable death because they were violent or otherwise an unnatural death.

2. In the case of the deaths of pilot 1 and pilot 2 no inquest was held into the deaths of pilot 1 and pilot 2 because there was no mandatory requirement to hold an inquest (s27) and there was no really suspicious circumstances. The aircraft that had struck powerlines and subsequently crashed causing the deaths. The reason the aircraft struck the powerlines was that the plane had failed to produce sufficient thrust to maintain a normal climb. Where the cause of death was clear and where there was no suspicious circumstances then the coroner wouldn't feel it necessary to hold an inquest.

Case Study 2

1. In the case of Mahsan Muhammad, his death was violent or otherwise unnatural death.

2. In relation to the death of Mahsan Muhammad, even though the death was a reportable death, there were once again no suspicious circumstances. There is evidence from other people on the boat as to cause of death, namely his fall off the boom arm into the sea while attempting to reconnect a recovery rope to one of the otter boards. At the same time he was not wearing a Personal Floatation Device. There were no suspicious circumstances because attempts to grab him in the water were unsuccessful and he simply floated away and was not seen again. The coroner would not have felt it necessary to hold an inquest into that death.

Case Study 3

1. In the case of Mr G his death was an unnatural death.

2. In the case of Mr G, once again, there were no suspicious circumstances. It was clear that his death was as a result of his not being able to swim to the bank. Evidence was given that he'd gone under the water several times and just simply did not resurface. He was found dead on the following day and the cause of death was drowning. Given that there were no suspicious circumstances the coroner didn't feel it was at all necessary to go to the expense of having an inquest.

10.3 Coronial inquests

Case Study (Page 234)

1. This particular death caused a large amount of publicity. It was the death of a young 14-year-old boy who was a very able and experienced competitor despite his age, at what would otherwise be described as a well supervised event, namely the Australian Surf Lifesaving Championships on the Gold Coast. The inquest was held to determine how this death could have happened.

2. A duty which was imposed on Surf Lifesaving Australia was to ensure the health and safety of its contestants and in particular to eliminate risks to the health and safety as far as reasonably practicable, and, where it is not practicable Surf Lifesaving Australian was required to minimise those risks as far as reasonably practicable while implementing risk control measures.

3. The effect of the recommendation that the police must refer the death to Workplace Health & Safety Queensland was to ensure that not only should such a death be investigated by the police for criminal activity it also ensured that the death was investigated by the organisation responsible for Workplace Health & Safety in Queensland. As to whether it's appropriate in the circumstances is a question of personal opinion. However, it ensures an extra level of scrutiny of deaths in circumstances such as this one where a death occurs when a body (here Surf Lifesaving Australia) has a duty to ensure the health and safety of its contestants.

Case Study (Pages 235 – 237)

1. The death of Mr Offner did arise from an illegal activity. The sawn-off shotgun provided by Mr Richie was capable of firing live rounds. Because it was so capable it was unlawfully provided because it was in breach of s39(1)(a) of the *Weapons Act Regulations 2016* (Qld). These regulations were made pursuant to the *Weapons Act 1990* (Qld). It was also unlawful for Mr Richie to have accessed illegally (homemade shotgun shells from a man known as Mr C). Even though that it is not in the text, Mr C was prosecuted for the unlawful supply of that homemade ammunition to Mr Richie. It was accepted that Mr C did not know the use to which the shotgun shells were to be put. He therefore was not at risk of being the subject of criminal charges that Mr Richie would have been subject to had he not already died of natural causes before the inquest. Mr Richie would have faced a manslaughter charge, unlawful possession of a handgun charge, and a breach of workplace health and safety regulations. The principal illegal activity which gave rise to the death which was described by the coroner as a gunshot wound to the chest causing heart failure, was a provision by Mr Richie of an operable firearm illegally and the provision by Mr Richie of shells unlawfully obtained from a person who sold homemade shotgun shells. It was overtly unlawful because blank fire weapons have restrictors which are effectively metal stoppers placed in the barrel which prevents a discharge of any projectile. The use of the plastic wad fibre filament in the illegal shotgun cartridge shell created the projectile. That would have made no difference had the shotgun been inoperable. Together the illegal actions of Mr Richie caused the death of Mr Offner.

   The coroner set out very clearly that if Mr Richie had survived, he would have faced the prospect of:
   - Manslaughter charge (s303, 289 *Criminal Code* (Qld)).
   - Unlawful possession of a handgun (s50 *Weapons Act* (Qld)).
   - Unlawful supply of a handgun (s50B *Weapons Act* (Qld)).
   - Breach of workplace health safety duty causing death charge -industrial manslaughter (s34C *Work Health and Safety Act* (Qld)).

   The coroner went on to say that Mr Richie, if convicted of any of those offences would have received a lengthy prison sentence namely:

   - Manslaughter conviction based on criminal negligence. Possible head sentence of 10 years imprisonment.

- Unlawful supply of a handgun – mandatory minimum sentence of 30 months imprisonment before release.
- Industrial manslaughter charge – penalty of up to 20 years imprisonment.

2. The coroner made recommendations relating to the public health and safety of people placed in such positions as they were in this case, and to ways to prevent deaths from happening in similar circumstances in the future. His recommendations were that:

    - The definition of blank fire ammunitions and their practical use in theatrical productions should be reviewed.
    - The establishment of a section of the Queensland Police Service to specifically review the role of theatrical armourers and introduce standards for the qualifications necessary to obtain such a licence.
    - Making it absolutely clear that operable firearms and non-blank firing weapons cannot be used in theatrical performances.
    - These should be done in the context of a review by the Queensland Government or the relevant provisions of the *Weapons Act 1990* (Qld) and the *Weapons Act Regulations 2016* (Qld).

    NB. In the text (Page 233) it was said that a coroner must not include in his or her findings any statement that a person is or may be guilty of an offence or liable for some action (s45(5) *Coroner's Act 2003* (Qld)). The students may be wondering why the coroner in this case was so explicit about criminal blame being attributed to Mr Richie. The coroner said that Mr Richie was arguably no longer 'a person' because he was deceased.

What Do You Think (Page 237)

The Queensland Police Service concluded that provisions of the *Weapons Act 1990* (Qld) and the *Weapons Act Regulations 2016* (Qld) were sufficient to meet the recommendations of the coroner. The police said the firearms that are capable of discharging a projectile are not blank-firing firearms. These were prohibited under the current law from being used in theatrical productions. They said further that the *Weapons Act 1990* (Qld) provided for the issue of blank firearms licences which enables individuals or organisations to possess and use blank fire firearms. More particularly s39 of the *Weapons Regulations 2016* (Qld) provides that theatrical ordinance supplier's licence authorises a licensee to supply and possess a blank fire firearm or a permanently inoperable firearm. As a result, there was already in existence a requirement that any licence issued to a theatrical ordinance supplier (in this case Mr Richie) did not authorise such a supplier to supply or possess a blank-fire firearm or permanently inoperable firearm. In short if Mr Richie had obeyed the law as he was required to do so this unlawful killing would not have occurred.

The police also pointed out that under s40 of the *Weapons Regulation 2016* (Qld)there was a register that was required to be kept by a theatrical ordinance supplier which set out the details of the name, address and supplier number of any other party to a supply transaction and the date and time of each occasion and when physical possession of a weapon was parted with by a licensed person, and the type, action, make, model and serial number and calibre of any weapon used. The police also reported that any weapons licensing process assesses each armourers (ordinance supplier) application for a licence on a case-by-case basis. The person wishing to obtain a licence are required to have a combination of practical experience and knowledge and to complete a safety training course approved by the Commissioner of Police and to keep the register.

In short, the police reported that there was sufficient safeguards in the current state of the law in the *Weapons Act 1990* (Qld) and the *Weapons Act Regulations 2016* (Qld) to protect the public. In his decision the coroner also raised issues about the conduct of the film producer and stunt coordinator because of their failures to do the following:

- Appoint a site safety officer with overall control of safety considerations for the filming of an event such as this.
- Undertake dedicated firearm safety briefings on set.
- Test the firearm before it is used on set.
- Consider more costly but safer production options such as computer enhancement.

An expert armourer gave evidence in this case as to whether the scene could have been filmed without the need to fire the actual shotgun. He gave evidence that it was possible and relatively easy to duplicate the visual and sound effect of the shotgun being fired in post-production. It is costly but possible. The sound cue for coordination of the actors could have been done by firing a blank safely off screen (ordinarily done using a smaller firearm).

The expert was also asked would it be beneficial to wear a ballistic vest for added protection. His evidence then was that only once in his 40-year career had he taken a bulletproof vest to set for use by an actor. That was an occasion for the filming of Mission Impossible 2 and it was taken on set for the exclusive use by Tom Cruise. After trying it on he determined that it was far too restrictive and bulky to be worn under the costume and would negatively impact the performance. It was also stated that it is not a good idea to introduce measures that give people a false sense of security. A bullet-proof vest covers the torso, but it doesn't cover the head and the extremely important part of the body, the eyes. In short, the use of a bullet-proof vest was really impractical given the reality required in production. These recommendations might be ones which students could suggest could have been adopted and incorporated into law along with the use of digital imaging techniques which are becoming increasingly available.

Review

Comprehend (Page 238)

1. The perhaps of an inquest is to determine the cause and circumstances of death and to determine how to avoid (as a result of the conduct and recommendations arising from the inquest) future deaths of the type that have occurred.

2. Specialist task forces are established to investigate failures or inadequacies in our legal system and as a result identify ways in which those problems can be met.

Analyse and evaluate (Page 238)

1. Strange as it might seem, the inquest into the death of Johann Offner does not achieve any significant law reform. The recommendations made by the coroner to the relevant authority, namely the Queensland Police Service, were investigated and it was determined by the Queensland Police Service that the existing law was sufficient.

2. However, *Barclay's* case did make significant changes to law reform. Firstly, the recommendation implemented by the Queensland Government was to have the Queensland Police Service make a change to its *Operational Procedures Manual*. The manual was changed by inserting a separate heading called 'Drowning Death at a Surf Lifesaving Event'. The manual which describes the procedures police should take in certain circumstances provided that police officers responding to a drowning death or a missing competitor who is suspected of having been drowned at an official surf lifesaving event are to immediately notify the Office of Industrial Relations. As a result, the investigation of such a death is to be conducted in conjunction with inspectors from Workplace Health and Safety Queensland. These inspectors have legal powers under the *Work Health and Safety Act 2011* (Qld), the *Electrical Safety Act 2002* (Qld) and the *Safety and Recreational Water Activities Act 2011* (Qld). Those Acts empower the inspectors to enter any workplace to investigate workplace incidents or reports of unsafe or unhealthy conditions, to conduct inspections, and in particular investigate whether there are any dangerous work practices being conducted at work sites. In this particular case where there has been a drowning death or a missing competitors who is suspected of having drowned in an official event, the experience of the inspectors from Work Health and Safety in determining whether dangerous work practices existed is vital and of much assistance to the police. It may well be that dangerous work practices do exist even in events conducted by Surf Lifesaving Australia. Under the *Work Health and Safety Act 2011* (Qld) the employer (in this case the organiser) must provide the workers (in this case the competitors) with a safe and healthy environment. They must properly manage exposure to risks and decide on which controls must be in place to prevent harm. The inspectors review whether that process has occurred or not. This case did produce an effective means of achieving law reform.

Additional Resources

- The Coroner's Court of Queensland publishes online up to date non-inquest and inquest findings. A very large number of them relate to inquests into the death in custody of first nations people, inquests into the deaths of people in aged care institutions and inquests into the death of treatment of patients in hospitals. There is a recent inquest into the death of *Maximilin Patrick McDowall* which the students might find interesting. The findings of the inquest were delivered on 24 October 2024 in Brisbane. The cyclist, Mr McDowall died after receiving multiple injuries while riding his bicycle. He was struck by a Brisbane City Council bus.
- Another inquest that might be of some interest is the inquest into the death of *Robert George Kenneth Malayta*. The findings were delivered on 12 December 2024 in Townsville. It related to the death of Mr Malayta who was just 18 years of age who had been in the car with his older brother and a female friend of his older brother. The car was reported stolen. The police became aware of it. The police set up a tyre deflation device over which the car drove, and its front left tyre was deflated. The 3 people ran from the car through parklands, playgrounds and football club grounds towards the edge of Ross River. Mr Malayta drowned in Ross River trying to cross it. The cause of death was drowning.

Chapter 11: Current and emerging legal issues

11.1 Where next for law reform?

What do you think? (Page 240)

[Answer asks for an opinion.]

11.2 Current and emerging legal issues

Practical Application (Pages 241 - 242)

1. The member of parliament who introduced the Bill which sought to raise the age of criminal responsibility in Queensland was Greens Maiwar MP Michael Berkman.

2. One key viewpoint is that of a Queensland parliamentary committee that 'stymied an effort to raise the age of criminal responsibility to 14, instead recommending a continued national approach to increasing the age to 12.' This is in opposition to the proposed law. Another key viewpoint is that of former Queensland police commissioner Bob Atkinson, who recommended that the 'age of young people can be held responsible for criminal actions [should increase] from 10 to 12.' This is in support of the proposed law, which is also shared by the United National Committee on the Rights of the Child, the Queensland Family and Child Commission and Australian Attorney's General.

3. The Bill that sought to increase the age of criminal responsibility to 14 was a private members bill, as it was introduced by a non-government member of parliament Michael Berkman, who is a member of the Greens. To become a law, a Bill must be passed by the majority of members in the Legislative Assembly. As the Greens are a minor party, unless they have the support of the government, it is unlikely the Bill would become law. Another factor that makes the passage of the Bill unlikely was that 'Queensland parliamentary committee has stymied an effort to raise the age of criminal responsibility to 14, instead recommending a continued national approach to increasing the age to 12.'

What do you think? (Page 242)

[Answer asks for an opinion.]

Practical Application (Pages 242 - 243)

1. Katherine Folbigg was convicted of the murder and manslaughter of her four children. She appealed her conviction but was unsuccessful and remained in prison for almost 20 years before a Special Commission of Inquiry found that there was reasonable doubt. Although the system did achieve justice for Folbigg, it came at great personal and financial cost and took a lot of time. Professor Hamer and Dr Dyer state that her case demonstrates that the 'criminal justice system carries an inbuilt risk of wrongful conviction' with 'inquiries…[being] inefficient and expensive.' They believe 'a statutory body working at arm's length to investigate claims of wrongful conviction' is more cost effective and accurate.

2. The authors believe the current system 'needs to do more to address the statistical certainty of the occasional wrongful conviction.' The current system has limited resources and powers, with a Criminal Cases Review Commission (CCRC) being independent and at

arm's length from the criminal justice system. It would also have 'the powers and resources to investigate defendants' claims to have been wrongly convicted.

3. The introduction of a Criminal Cases Review Commission (CCRC) isn't a new and recent recommendation. The authors of the article write that 'the call for this key piece of criminal justice infrastructure isn't new. The Australian Law Council expressed support for a federal CCRC in 2012. Commentators have called for an Australian CCRC on many occasions.'

4. *[Answer asks for an opinion.]*
   Students could choose from viewpoints including:
   - The authors, Professor David Harmer and Dr Andrew Dyer, who believe 'the system needs reform' and 'the systematic risk of wrongful conviction demands a systematic solution.'
   - The Australian Law Council, who 'expressed support for a federal CCRC in 2012.'
   - Former High Court Justice, Michael Kirby, who 'reiterated his view that such a commission is needed.'
   - The Sydney Institute of Criminology that is 'currently calling on governments to take steps to establish an Australian CCRC.'

   Consequences could include:
   - Wrongful convictions could be addressed through an independent process, separate to the court system which may be timelier and more cost effective.
   - An additional statutory process would cost Australian and State/Territory Governments money.
   - Findings of wrongful convictions could lead to mistrust in the criminal justice system.
   - The current system has several processes to address miscarriages of justice that work well.
   - There will always be a small risk a wrongful conviction will occur, no matter the process.
   - CCRC findings could assist in the reform of the criminal justice system.

Research Task (Page 244)

[Answer will depend on personal selection.]

Jurisdiction	Body	Webpage
England, Wales and Northern Ireland	Criminal Cases Review Commission	ccrc.gov.uk
Scotland	Scottish Criminal Cases Review Commission	sccrc.co.uk/about-us
New Zealand	Te Kāhui Tātari Ture | Criminal Cases Review Commission	ccrc.nz

Canada	Criminal Cases Review Commission (as of early 2024, the CCRC is still under development)	can-ccrc-consult.ca/home-ccrc

1. The Criminal Cases Review Commission (CCRC) is an independent body in England, Wales, and Northern Ireland that investigates potential miscarriages of justice (Criminal Cases Review Commission, 2025). Commencing operation in 1997, its primary role is to review criminal cases where individuals believe they have been wrongly convicted or sentenced (Harmer, 2014). If the CCRC identifies significant new evidence or legal arguments, it can refer the case back to the Court of Appeal (Government UK, 2025).

2. Cases referred to the Criminal Cases Review Commission (CCRC) are undertaken by one of twelve Commissioners (Criminal Cases Review Commission, 2025).

3. Eligible individuals who believe they have been wrongfully convicted or sentenced can apply to the CCRC for a review (Criminal Cases Review Commission, 2025). A Case Review Manager looks at the case and decides what should happen next (Criminal Cases Review Commission, 2025). Sometimes this might be that there is no real possibility of the conviction or sentence being quashed (Criminal Cases Review Commission, 2025). If it is referred, 3 Commissioners examine the case and can refer the case back to the Court of Appeal.

4. The House of Commons Library (2016) stated that, 'the CCRC has been accused of timidity in its dealings with the Court of Appeal and of being so cautious in its approach that it has failed to refer a sufficient number of cases to the appeal courts, including 'obvious' miscarriages of justice.' This hesitance may be driven by a desire to maintain a high success rate in the Court of Appeal, leading the CCRC to avoid cases where the evidence isn't overwhelmingly strong. As a result, this conservative approach can prevent potentially obvious miscarriages of justice from being properly addressed, ultimately limiting the effectiveness of the CCRC in ensuring justice is served.

What do you think? (Page 244)

[Answer asks for an opinion.]

Practical Application (Page 245)

1. Australia's domestic surrogacy landscape has seen a significant shift. In 2020, the country witnessed the highest number of domestic births via surrogacy, with 76 children being born through Australian-based surrogacy arrangements. This is a stark contrast to the years before, where domestic surrogacy arrangements were relatively low. From 2009 to 2012, the number of births was consistently below 20, before rising to between 29 and 43 births from 2013 to 2016. The trend continued to climb, with domestic births surpassing 50 from 2017.

2. Australia recorded the highest number of international births via surrogacy, totalling 275 live births. Between 2009 and 2011, international surrogacy arrangements were uncommon, with fewer than 30 agreements made. However, this number surged in 2012,

resulting in 266 live births occurring overseas. The total number of global births through surrogacy fluctuated, ranging from a low of 164 in 2017 to a peak of 275 in 2020.

3. The statistics compiled by Stephan Page highlight a striking contrast in the prevalence of surrogacy arrangements made domestically within Australia compared to those conducted overseas. Between 2009 and 2021, there were 462 live births attributed to domestic surrogacy arrangements, demonstrating a relatively limited adoption of this practice within the country. In stark contrast, during the same period, a significant 2,327 live births were reported as a result of surrogacy arrangements executed abroad. This notable difference underscores the growing trend of Australians seeking surrogacy options in foreign countries, often due to legal, regulatory, or societal factors that may make domestic arrangements more challenging or less accessible.

4. *[Answer asks for an opinion.]* The Australian Government website titled 'Surrogacy in Australia' (accessed 22 September 2024) clearly states, 'It is also illegal for some Australians to engage in commercial surrogacy overseas.' This creates a complex legal situation for many Australians who seek surrogacy options outside the country. According to statistics compiled in an article published in 'Precedent', surrogacy arrangements occurring overseas have emerged as the most prevalent route for prospective parents, with 2,327 live births reported from international surrogacy arrangements, compared to 462 live births within Australia. These figures highlight a legal issue involving the effectiveness of our domestic legislation—thousands of children are being born through surrogacy arrangements that the Australian legal framework deems illegal.

   If the law regarding international surrogacy was effectively enforced, it stands to reason that such a significant number of Australians would be deterred from seeking surrogacy outside the nation. This is clearly not the case, which demonstrates the law is not applied or enforced, thus many couples are not following it. An essential aspect of effective legislation is the public's understanding of the law and their support for it. Many Australians may not fully grasp the legal implications of international surrogacy, or they may not support the law itself. As a result, some individuals may deliberately choose not to follow the law, while others may simply be unaware that the practice is illegal.

   In summary, the current law in Australia regarding international surrogacy is ineffective, as evidenced by the thousands of children born through such arrangements at a time when the law explicitly prohibits them. For the legal framework to function as intended, it must not only be enforceable but also widely understood by the community. Without addressing these gaps, the law remains largely unheeded, leading to a disconnect between legal standards and real-world practices.

Research Task (Page 244)

[Answers for Questions 1 to 3 asks for an opinion and involves personal research.]

Some suggested sources include:

- Ainsley J Newson, 'Compensated transnational surrogacy in Australia: time for a comprehensive review,' *Medical Journal of Australia*, (2016) 204(1), 33-35. Available: mja.com.au/journal/2016/204/1/compensated-transnational-surrogacy-australia-time-comprehensive-review

- Castan Centre for Human Rights Law, 'Compensated surrogacy remains illegal in Australia,' Castan Centre for Human Rights Law Newsletter, (2016) 3. Available: austlii.edu.au/au/journals/CastanCHRightsLawNlr/2016/3.pdf
- Channel 9, 'Push for compensated surrogacy,' 9 News, (Online, 28 August 2014) < 9news.com.au/health/push-for-compensated-surrogacy/590bd4ef-91bc-4f0a-bf4c-f024c8a65e06>.
- Caroline de Costa, 'Compensated surrogacy – What do Australians think?', *Australian and New Zealand Journal of Obstetrics and Gynaecology* (Online), (2016) 56 (6), 549-551. Available: obgyn.onlinelibrary.wiley.com/doi/full/10.1111/ajo.12572.
- Professor Paula Gerber, 'Arrests and uncertainty overseas show why Australia must legalise compensated surrogacy,' ABC, (Online, 24 November 2026) <abc.net.au/news/2016-11-24/why-australia-must-legalise-compensated-surrogacy/8053666>.
- Sarah Jefford, 'Compensated or Commercial Surrogacy' (Blog, n.d) < sarahjefford.com/compensated-or-commercial-surrogacy>

Practical Application (Page 247)

1. Two countries that have or are considering introducing a specialised sexual assault court are South Africa and Scotland.

2. The introduction of a specialised sexual assault court in Australia has many benefits and limitations. One key benefit raised by Lowik and George (2023) is that having a specialised court for sexual offences ensures that all court personnel become more trauma-informed and can deal with complex social issues and law. Possessing more knowledge on the emotional and social impact of sexual assault may improve how court personnel explain and guide victims through the criminal justice process. Another significant benefit is the high level of satisfaction among victims and survivors. In South Africa, 87.5 percent of victims were satisfied with their preparation for trial, a figure that is very high and may ensure they feel safer and supported in court, feel better prepared, and can provide evidence better. Lowik and George (2023) also raise some limitations, stating, 'it may lead to a gradual loss of more general legal skills and too narrow a focus, which may result in biased decision-making.' This is a concern in a court system that holds impartiality in high regard, as it is essential that both victims and defendants feel the system is fair and just for continued support and trust.

3. If a specialised sexual assault court is not established within Australia's criminal justice system, Lowik and George (2023) propose an alternative legal approach known as a 'specialist approach.' This method involves modifying court proceedings to better accommodate the needs of victims and survivors. For example, court sessions could be scheduled on specific days of the week to align with regular court operations.

4. *[Answer asks for an opinion.]* Those supportive of the introduction of a specialised sexual assault court may justify your position with the following criteria:
    - A specialised sexual assault court would apply the same rules to everyone, ensuring equality before the law.
    - Decisions in a specialised sexual assault court will be overseen by an independent and impartial judiciary.
    - Decisions in a specialised sexual assault court are made in the open.
    - Any rules or laws that establish a specialised sexual assault court will be clear and pubic.

- Introducing a specialised sexual assault court is supported by the community.

Those against the introduction of a specialised sexual assault court may justify your position with the following criteria:

- A specialised sexual assault court will treat victims and defendants differently to most other criminal matters, which may be unfair.
- Changing the way sexual assault cases are heard may make processes and law unstable for a period.
- One of the limitations raised in the Lowik and George (2023) article was it could lead to a narrow focus, which can lead to an increase in bias.

Review

Comprehend (Page 247)

There are many ways I can discover laws that may need reform. Some approaches identified in this chapter include:

- Keeping an eye on the laws that are being introduced in other States and Territories.
- Reading a legal decision, which may reveal a miscarriage of justice, a gap or a limitation on how a law is being applied or interpreted.
- Read sources written by legal or medical academics.
- Looking at a campaign.

Chapter 12: The human rights background to international law

12.1 What are human rights?

No questions.

12.2 Origin of human rights

Research Task (Page 253)

This research exercise is an extension activity in which students can participate at their own level. Here are some rights existed prior to World War II. There are others the students can find.

- The right to vote.
- The right to citizenship.
- The right to own land.
- The right to marry.
- The right to freedom of movement.
- The right to a fair trial.

(Note: all of the above freedoms were denied Aboriginal and Torres Strait Islanders prior to World War II. It is not a complete and comprehensive list.)

12.3 *United Nations Charter*

Practical Application (Page 253)

1. Two major principles of international relations codified in the *United Nations Charter* (*UN Charter*) are:
   - the sovereign equality of States
   - prohibition on the use of force in international relations.

2. As an international treaty, the *UN Charter* is an instrument of international law. As signatories to the *UN Charter*, the UN Member States are bound by it.

Practical application (Pages 254 - 256)

1. The Members of the United Nations are the states that participated in the United Nations Conference on International Organisation at San Francisco and signed the Declaration by the United Nations of 1 January 1942, as well as those that have since signed the Declaration and been admitted by a decision of the General Assembly upon the recommendation of the Security Council. As stated, Members become Members on signing the Charter and on the resolution of the General Assembly upon the recommendation of the Security Council.

2. The obligations of the Members are set out in Article 2 of the *Charter*. Students' answers will differ according to their individual interpretations of the 7 paragraphs of Article 2.

3. Members of the United Nations are bound by the principles of Article 2 of the *Charter,* and as such when they breach their obligations, the General Assembly may expel them from the Organisation. Article 6 says that this happens when a Member persistently violates its obligations.

4. The core principles in the preamble say the peoples of the United Nations are to:
   - reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,
   - establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,
   - promote social progress and better standards of life in larger freedom.

5. The Purposes set out in Article 1 of the *Charter* are to some extent reflected in each of the Principles listed in Article 2. To that extent, completing the table mean that each of the numbered paragraphs in Article 2 would be set out opposite each of the numbered paragraphs in Article 1.

6. The Principle of the sovereign equality of member states, if practised in accordance with the Purposes of the *Charter*, would mean that States would recognise each other's borders, and would not violate them unilaterally and illegally, having regard to international treaties. An obvious example of this is Russia's invasion of Ukraine. It has occurred without provocation and without regard to international law. Students could do some reading about this topic and make a decision for themselves about the behaviour of the protagonists.

12.4 Universal Declaration of Human Rights

Practical Application (Page 259)

The answers to the questions in this practical application depend upon the response and choice made by each group of students. The exercises designed to stimulate students into thinking critically about which of the rights set out in the Universal Declaration are more important to them, and there is no model answer which can be provided. Teachers should provide stimulus materials to accompany this Practical Application.

1. This is a class exercise. Unnecessary to answer.
2. This is also part of the class exercise.
3. Some developing nations appear to have breached human rights obligations. For example:

   Article 15—everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. This appears to have been breached in Myanmar in respect of the Rohingya ethnic group.

   Article 23—everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. There are many homeless people in Australia who do not enjoy this right. Any country in the world which has a subsistence economy would have difficulty ensuring that all of its citizens enjoy this right. Many Pacific Islands are unable to provide gainful employment for their citizens.

   Article 20—everyone has the right to freedom of peaceful assembly and association. This appears to have been breached in the Indonesian province of Irian Jaya (West Papua), where the Indonesians have imposed controls on the local Indigenous population.

   Students will find other examples of rights which are breached in developing countries, and which indicate that those societies find it difficult to achieve the high standards required by the *Universal Declaration*.

   It is not surprising that some human rights found in the *Universal Declaration* are more likely to be breached in developing countries. This does not mean that what is set out in the

Universal Declaration should be changed because those countries are unable to effectively protect those rights. The countries in which human rights are violated need to be supported so that they can aspire to better social, economic, and cultural conditions which deliver the human rights to which we all aspire.

12.5 Principal covenants

Practical Application (Page 261)

[Only row completed as an example.]

Right	Australian example	Overseas example
Right of appeal—ICCPR Article 14(5)	A person convicted of an offence in the Magistrates Courts can appeal to the *District Court (Justices Act 1886* (Cth) s222). A person can apply for leave to appeal from the District Court to *Court of Appeal (District Court Act 1967* (Qld) s118). A person can apply for an appeal to be heard from the Supreme Court to Queensland Court of Appeal (*Supreme Court of Queensland Act 1991* (Qld) s62).	A website maintained by uscourts.gov states that, 'an appeal is available if, after a trial in the U.S. District Court, the losing side has issues with the trial court proceedings, the law that was applied, or how the law was applied.' This is found in Federal Rules of Appellate Procedure, 2018, Rule 3.

Practical Application (Page 261)

1. Member states who are signatories to the protocol agree that individuals who claim to be victims of a violation by a state party to any of the rights in the ICCPR may send and receive communications to the UNHRC setting out the violations of any of the rights set forth in the covenant or the committee to consider.

   The limitations on this power are that the person claiming to have had their rights violated must before communicating with the UNHRC must have first exhausted all available domestic remedies before doing so.

2. The findings made by the HRC where an individual makes a complaint that his or her rights under the ICCPR have been violated do not bind the Member state unless the particular right has been enshrined in the domestic law of that state. Unless a Member state passes domestic laws, which entitled its citizens to the relevant right, it has no obligation to comply with the decision of the HRC.

Case Study (Page 262)

1. Toonen made a complaint about the *Criminal Code Act 1924* (Tas) s122(a)(c); s123. These sections made consensual sex between adult males illegal.

2. The complaint had two grounds, that the law violated Toonen's right to privacy (ICCPR, Article 17) and it discriminated against him on the basis of sexual orientation (ICCPR, Article 26).

3. *[Answer may vary due to research and personal opinion.]* After the decision Tasmania chose to not amend or repeal the relevant sections of the *Criminal Code Act 1924* (Tas). In response to the decision, the Commonwealth Government passed the *Human Rights (Sexual Conduct) Act* 1994 (Cth), which legalised sexual activity between consenting adults in Australia. The Tasmanian Government later chose to repeal the law. The *Optional* Protocol provided Toonen with the opportunity to seek redress from a global organisation. This opportunity would not have been afforded to Toonen if Australia did not ratify the *Optional Protocol*. This decision and Australia's actions demonstrate that the *Optional Protocol* can place pressure on governments to reform the law to uphold an individual's human rights.

4. *[Answer may vary due to research and personal opinion.]* In a speech at the Castan Centre of Human Rights at Monash University former High Court Justice Michael Kirby said the decision carried, 'significant moral and persuasive authority.' Former High Court Justice Michael Kirby believes that the change Tasmania was forced to make due to this decision led to it becoming more 'enlightened' and supportive of gay, lesbian and bisexual persons. The decision was referred to in United Nation reports and declarations at the time.

What do you think? (Page 262)

The purpose of the *Second Optional Protocol* was to eliminate the death penalty. The death penalty was completely abolished in Australia by 1985. Queensland abolished this form of punishment in 1922. Not only was abolishing the death penalty part of Australian domestic law, it was also abolished by the majority of countries in the world and supported internationally by the protocol. Australia's position on the death penalty, therefore, was supported by international opinion and by the law of many other countries.

Practical Application (Page 263)

1. The UNHRC has a working group which conducts reviews of countries human rights record and reports back to the UNHRC. This is done at regular intervals and is called a Universal Periodic Review (UPR). The reviews are based on national reports, information from the reports of independent human rights experts and groups, human rights treaty bodies, and other UN entities.

2. The purpose of the UPR is to conduct a peer review of a country's human rights record, so as to ensure and encourage them to meet their commitments to human rights under the various instruments of the UN.

3. The principles which the UNHRC seeks to uphold by the UPR process are those contained in the ICCPR.

Practical Application (Page 264)

1. *[Answer may vary due to personal opinion.]*

Economic rights	Social rights	Cultural rights
• Right to employment— Article 6(1)	• Right to training— Article 6(2)	• Right to take part in culture— Article 15

• Right to enjoy just and favourable working conditions— Article 7(a)(i)(ii), (b), (c) • Right to form a union— Article 8	• Right to enjoy just and favourable working conditions— Article 7(a)(d) • Right to social security— Article 9 • Protection of the family unit— Article 10 • Right to an adequate standard of living— Article 11 • Right to enjoy the highest attainable standard of physical and mental health— Article 12 • Right to education— Article 13 and 14	

2. *[Answer may vary due to personal opinion.]* The category of rights primarily protected in the ICESCR is social rights. This type of right is perhaps the most difficult to protect by law, as attainment of these rights can be subjective— individuals may have different opinions on what is an adequate standard of living, or the highest attainable standard of physical and mental health.

3. An individual's access to an economic, social or cultural right may be limited, '…as they are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society' (Article 4).

4. *[Answer may vary due to personal opinion.]* The limitations of developing countries abilities is acknowledged in Article 3(3), which states, 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nations.' As developing countries have less money, it allows developing countries to prioritise delivering economic rights to their citizens, as opposed to others, which may be more difficult to meet.

5. Progress is monitored by the Economic and Social Council (Articles 16-25). These articles, which set out the way in which progress is monitored, are reproduced in the additional resources to this chapter.

Research Task (Page 265)

Answers to this Research Task will vary according to the nature of the task, the options provided for students to follow, and the extent to which students carry out research, having regard to the time available to them when studying the topic. Because of this, no answer is provided.

Review

Comprehend (Pages 265 – 266)

Question 1:

a. Human rights are the fundamental freedoms and protections that belong to every single one of us. They are universal, inalienable, indivisible and interdependent.

b. A State party of the United Nations is a Member state of the United Nations which is a signatory to the *United Nations Charter*.

c. The *Universal Declaration of Human Rights* is a statement in the form of a proclamation by the Member States of the United Nations setting out the rights to which all peoples and all nations should aspire to achieve in all parts of their societies.

d. *Optional Protocols* are agreements which extend the legal obligations in a covenant (such as the ICCPR) to which the signatories of the original covenant can become parties, thereby extending their obligations in accordance with the protocol. The protocol is optional because it does not have to be accepted by all the original signatories to the covenant.

Question 2

a. The most important impetus for human rights, as we know them in the *Universal Declaration,* came from the atrocities and conflict of World War II. There were many ideas and philosophies about human rights in many Western countries before this. However, the growth in the nature and scope of human rights reflects the cooperation and hard work done by the countries that grouped together to form United Nations in 1945. The countries that grouped together felt that there was a need to chart a new course which would improve the world for future generations.

b. In Article 1 of the *United Nations Charter* the Purposes of the United Nations are:
   - to maintain international peace and security
   - to develop friendly relations among nations
   - to be a centre for harmonising the actions of nations attainment of these common ends.

c. In Article 2 of the *United Nations Charter* the Principles of the United Nations are:
   - the sovereign equality of all its Members
   - fulfilling in good faith the obligations assumed by the Members in accordance with the Charter
   - to settle international disputes by peaceful means
   - to refrain from threatening or using force against the territorial integrity or political independence of any state
   - to assist with actions taken in accordance with the Charter, and to refrain from giving assistance to any state against which the United Nations is taking preventative or enforcement action
   - to ensure that states that are not Members of the United Nations act in accordance with these principles
   - to refrain from interference in the domestic jurisdiction of any state.

d. The *International Bill of Human Rights* comprised the *Declaration of Human Rights*, the *ICCPR* and the *ICESCR*. These latter two covenants, in the form of multilateral treaties, committed nations to respect civil and political rights, and economic, social and cultural rights, giving the nations of the world an opportunity to create a new world order in which nation states would coexist peacefully with each other and solve their disputes within the framework of international law. They were drafted and introduced into the General Assembly in 1954, but it took until 1966 for each of them to be adopted by the United Nations General Assembly.

e. Member states who are signatories to the protocol agree that individuals who claim to be victims of a violation by a state party to any of the rights in the *ICCPR* may send and receive communications to and from the HRC setting out the violations of any of the rights set forth in the covenant for the committee to consider.

The limitations on this power are that the person claiming to have had their rights violated must before communicating with the HRC first exhaust all available domestic remedies in their domestic jurisdiction. The findings made by the HRC where an individual makes a complaint that his or her rights under the ICCPR have been violated do not bind the Member state as the HRC is not a court which has jurisdiction to make decisions under the domestic law of that state.

Analyse (Page 266)

1. New Zealand, the State party in the statement, is working to improve sustainable fisheries management and to reduce illegal, unreported and unregulated fishing in the South Pacific. The particulars of this include implementing a catch quota system, rights-based management systems, and full observer coverage on all purse seine vessels. New Zealand's point of view is consistent with the economic principles of the ICESCR, in that sustainable fisheries management will enable the Pacific Islands to provide ongoing fair and just conditions of work for the people of the Pacific Islands and indirectly influence the availability other benefits such as adequate food, clothing, and housing.

   [Answers can vary according to personal opinion.] The point of view expressed by the New Zealand Permanent Mission in the statement, that all countries should cooperate with the establishment of effective disciplines on harmful subsidies on fisheries in the World Trade Organisation seems reasonable, if it leads to sustainable fisheries which the Pacific Island communities can continue to enjoy in the future.

Additional Resources

Australian Human Rights Commission, *Human rights at your fingertips*—humanrights.gov.au/our-work/commission-general/international-covenant-civil-and-political-rights-human-rights-your

Australia's Magna Carta Institute, *40 years of the ICCPR*—https://www.ruleoflaw.org.au/40-years-iccpr/

Human Rights Law Resource Centre Ltd, *Australia's Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*—static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59890cb6bebafbda58887261/1502153913013/OP-ICESCR+Australia+Can+Provide+International+Leadership+and+Ratify+1.pdf

Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into the Status of the Human Right to Freedom of Religion or Belief, Chapter 6: Implementing the ICCPR in Domestic Law*—aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Interim_Report/section?id=committees%2Freportjnt%2F024110%2F25347

United Nations Office of the High Commission, *International Covenant on Civil and Political Rights*—ohchr.org/en/professionalinterest/pages/ccpr.aspx

United Nations Office of the High Commission, *International Covenant on Economic, Social and Cultural Rights*—ohchr.org/en/professionalinterest/pages/cescr.aspx

United Nations Office of the High Commission, *Human Rights Committee*—ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx

United Nations Office of the High Commission, *Australia Homepage*—ohchr.org/EN/Countries/AsiaRegion/Pages/AUIndex.aspx

Chapter 13: International law

13.1 What is international law?

Practical Application (Page 269)

1. These instruments are
   - Universal Declaration of Human Rights
   - International Covenant on Civil and Political Rights
   - International Covenant on Economic, Social and Cultural Rights

   International human rights treaties adopted since 1945 conferred legal form on inherent human rights and developed the body of international human rights. Other instruments such as declarations, guidelines and principles adopted at the national level contribute to its understanding, implementation and development.

2. International human rights law lays down obligations which States are bound to respect by becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect, and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

3. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level. By monitoring the performance of Member States, the United Nations seeks to encourage compliance with the international treaties to which a country is signatory. While the treaty obligations may not become domestic law, monitoring can be used to argue that there is an international rule of law which all Member States should follow. By observing the rule of law, Member States will contribute to the achievement of the Purposes and Principles of the United Nations Charter.

13.2 International conventions

Research Task (Page 271)

[Not necessary to answer]. There will be different answers depending on the choice students make. Teachers should note where students can get assistance as set out in the Tip below the Research Task.

Practical Application (Page 273)

1. **Signature ad referendum:** a representative of a nation may sign a treaty under the condition that the signature is confirmed by the State.

   Signature subject to ratification, acceptance or approval: a signature subject to ratification, acceptance or approval does not establish consent to be bound.

   Ratification: defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act.

   Accession: the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states.

Reservation: the declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the Treaty in their application to that state.

Despite the fact that in each case further explanation is made, the topic sentences essentially convey an accurate meaning for each term.

2. It means that the state needs to complete the process of ratifying or acceding to the treaty by going through the processes required by the United Nations protocols in order for the treaty to be binding.

3. This is certainly what it means, and the state has an obligation to refrain from actions which might defeat the object and purpose of the Treaty, while it decides whether or not to ratify or accede to it.

4. The processes are different because each state must complete its own domestic requirements in order to be able to ratify or accede to a treaty. The processes required by the United Nations involve institutional administrative arrangements which depend on domestic decisions by the state concerned. On the other hand, completion of a contract between two parties is essentially a communication between them which binds each of them. What is the same, is that in each case there must be completion of all processes required for the contract or a treaty for it to be binding. There are also different consequences of the binding effect of the two processes. In the case of a contract, once bound, a party who breaches the contract can be sued for damages and/or specific performance. In the case of a Nation State that breaks a treaty obligation, it can simply avoid consequences by refusing to participate in the *International Court of Justice*, although the terms of the treaty may ensure that there can be action of some kind.

5. Where parties have been present, and have negotiated and signed a treaty, ratification is usually the next step. If other states are to be offered the opportunity to be party to the Treaty as well, the Treaty will say that this is the case. If it does, other parties, not present when the treaty was originally negotiated and signed, can accept the treaty after the event. This is called accession.

   There are two reasons why these arrangements were established. Firstly, it gives the Member States an opportunity to negotiate domestic agreement with the treaty and introduce it into domestic law before going through the process of making it binding. Secondly, the original parties to a Treaty may want control over which other member states of the United Nations can join it as a party, without going through a negotiating process about the obligations of membership.

6. A reservation enables a state to accept a multilateral treaty as a whole by giving it the ability not to agree to certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to-at almost any stage in the process, and even after a state agrees to be bound by a Treaty, it can complete the administrative arrangements for a reservation.

7. Advancing human rights in the international legal system, involves drafting covenants in areas where there is sufficient agreement among the Member States of the United Nations. It was therefore important to have a process whereby those Member States who were initially in agreement, for example, with the *ICCPR*, to be able to sign up to that International covenant once it was adopted by the United Nations General Assembly. Those Member States who, for whatever reason, did not sign up to the *ICCPR* when initially adopted, could then use the process of accession once they had decided to become a signatory. At the same time, if a country did not wish to agree to all of the articles of the *ICCPR*, it could make a reservation at the time that it acceded. This allowed countries to

excuse themselves from articles which did not have agreement in their domestic situation. It is a good system, because it has opportunities at different stages, and has flexibility, which has allowed Member States to become involved to the extent that they are able to having regard to the particular circumstances.

13.3 Customary international law

Practical Application (Page 274)

1. The two requirements which Professor Greenwood identifies are
   - there must be widespread and consistent state practice
   - States must believe in the particular rule of practice, called *opinio juris*, which means 'a belief in legal obligation'.

Research Task (Page 275)

The law of the sea is a body of customs, treaties, and international agreements by which governments maintain order, productivity, and peaceful relations on the sea.

Notable in the development of the law of the sea are a number of international conventions signed in the latter half of the 20th century. The United Nations (UN) held its first Conference on the Law of the Sea (UNCLOS I) in 1956, which resulted in a 1958 Convention. The final conference, held in Montego Bay, Jamaica, in 1982, resulted in the *1982 Law of the Sea Convention* (LOSC). The *LOSC* came into force in 1994 upon receiving the necessary number of UN signatories.

Many existing customary law principles became articles in the *LOSC* when it came into force. For example, the continental shelf principle which determined that the natural prolongation of a Member States land territory under the sea was derived from customary law. In this case, the ICJ rejected the principles contained in the *Geneva Convention on the Continental Shelf* (1958) because the Federal Republic of Germany had not ratified that Convention, so that the boundary between the parties had to be drawn by agreement rather than by a rule defined by the Convention.

Practical Application (Page 276)

1. Human rights law was viewed as quintessentially a matter of sovereign concern to States until the mid-20th century, when treaties and declarations were adopted by the United Nations and other international bodies.

2. Jurists only began to speak of human rights as customary law in the 1960s. Although its existence is uncontroversial, the content of customary international law in the area of human rights has not previously been analysed in a comprehensive manner. The author's approach in his book is to examine human rights' norms in order to determine whether they may be described as customary, using as a basis the content of the *Universal Declaration of Human Rights*.

3. The author's approach is to rely on relatively new sources of evidence of the two elements for the identification of custom, namely State practice and *opinion juris*, and in particular, the increasingly universal ratification of major human rights treaties and materials generated by the Universal Periodic Review mechanism of the Human Rights Council.

13.4 General principles of international law

What do you think? (Page 277)

[Answers will vary according to each student's perception of general principles of international law and the international human rights legal system.]

Students should look at the sources of human rights law, for example, the *Declaration*, the *ICCPR*, the *ICESCR*, and the *Human Rights Act 2019* (Qld).

It would then be helpful to choose/investigate some of these human rights to see if they are supported by the rule of law. The rule of law is a cornerstone of the concept of human rights and democracy. The rule of law is a fundamental principle underlying general principles of international law.

The rule of law implies that rights must be protected by law, independently of the will of the ruler. Individual rights and freedoms are to be protected against any manifestation of arbitrary power by public authorities. The principle of the 'rule of law' is contained in the Preamble to the *Charter of the United Nations*, which states as its objective:

> *to save succeeding generations from the scourge of war, and to reaffirm faith in fundamental human rights, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from international law can be maintained.*

The International Commission of Jurists has proposed the following definition: 'The rule of law is more than the formal use of legal instruments, it is also the Rule of Justice and of Protection for all members of society against excessive governmental power.' In sum, the rule of law means that law shall condition a government's exercise of power, and that subjects or citizens are not to be exposed to the arbitrary will of their leaders.

For example, in the Australian legal system an important right is the 'presumption of innocence', which is a right embedded in our criminal justice system. This is also a principle of international human rights law.

13.5 *International Court of Justice* (ICJ)

Case Study (Pages 278 - 279)

1. The principle of international customary law which Australia and New Zealand were relying on was that injuries should not be caused to a nation by the conduct of another nation. They argued that the radioactive fallout from recurring above-ground nuclear tests was damaging to Pacific nations including Australia and New Zealand.

What do you think? (Page 280)

It is appropriate to describe the majority view as taking a narrow interpretation of the 1974 case, by limiting its application to the particular facts. This can certainly be supported as a valid point of view.

On the other hand, the effect of the nuclear tests, both aboveground and underground, could also be argued to be a valid point of view. Both types of tests would harm marine life, and currents spread radioactive material across the Pacific. This is a wider view of the alleged damage to the South Pacific marine environment and the court could have considered all of these matters together.

At the end of the day, students may wish to choose a point of view which is more less likely to prevent testing from take place.

It is important that despite the majority of the Court taking a narrower view of its jurisdiction, the French recognized the legitimacy of the wider view and ceased nuclear testing.

Practical Application (Page 281)

1. Georgia made a complaint against the Russian Federation alleging that it had breached its obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). The ICJ decided initially that it was able to hear the preliminary stages of the case because both parties were signatories to and had ratified the ICERD. The Court found that Georgia did not present sufficient evidence to justify its claim that Russia had carried out ethnic cleansing. The legal basis for the court's decision was that there was insufficient evidence to make out a case for ethnic cleansing against Russia. It therefore dismissed Georgia's claim.

Research Task (Page 281)

[Unnecessary to answer.]

13.6 International Criminal Court (ICC)

No questions.

13.7 The rights of states

What do you think? (Page 283)

Taiwan satisfies the criteria in the *Montevideo Convention on the Rights of States*, Article 1. Notwithstanding, Taiwan was part of mainland China until 1949 when the Communist party, by force of arms, drove out the existing dictatorship, whose members and supporters joined the Taiwanese people in Taiwan. Ever since, the Republic of China (mainland China) has objected to Taiwan being recognized as an independent state. Australia's position is that it does not recognize Taiwan as an independent State. It has a one China policy.

Taiwan has never been able to successfully arrange for sufficient Member States in the United Nations General Assembly and on the Security Council to vote in favour of its application for membership. This is essentially because of the political background as well as the political reality of current world politics.

Practical Application (Page 283)

1. **Sovereign:** a group or body of persons or a state possessing sovereign authority. (*Macquarie Dictionary*, Second Edition, 1981).

   Principle 1 should be interpreted by each Member State to mean that subject to the *Charter,* the rights of each of them should be the same. It should mean that all members are equal in power and authority within the United Nations.

2. Principle 4 of the *Charter* requires Member States to refrain from using or threatening to use force against the territorial integrity or political independence of any other State. The first paragraph of the Preamble says the purpose of the United Nations is to save succeeding generations from the scourge of war.

   It also supports all of the Purposes set out in Article 1 of the *Charter*, in particular:

   - to maintain international peace and security

- to develop friendly relations among nations.

3. Principle 7 permits the United Nations to intervene in the affairs of a Member State in accordance with Chapter VII of the Charter. Generally, this is when the Security Council decides to act against a Member State which breaches the fundamental obligations of the *Charter*. This is set out below:

   Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

   Article 39

   The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

   Article 41

   The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

   Article 42

   Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Practical Application (Pages 284 - 285)

1. The dispute between China and the Philippines is about a group of land and maritime features that are in the South China Sea. Each of them claims sovereignty over these assets.

2. The dispute over sovereignty of a group of land and maritime features in the South China Sea is expressing itself in conflict between Chinese boats and Philippine supply vessels servicing the BRP Sierra Madre, a Philippine vessel purposely grounded in 1999 by the Philippines to assert sovereignty over the Second Thomas Shoal.

3. China and the Philippines went to the Permanent Court of Arbitration in the Hague to seek a ruling on the dispute.

4. The Permanent Court of Arbitration in the Hague ruled overwhelmingly in favour of the Philippines, determining that major elements of China's claim, including its nine-dash line, recent land reclamation activities, and other activities in Philippine waters-were unlawful.

5. China reacted negatively to the ruling, maintaining it was 'null and void'. The authors of the article suggest that China may take assertive and inflammatory steps to defend its position. The authors state that the extent to which China abides by the ruling in the long term, and the extent to which the international community supports and seeks to enforce the ruling,

will have consequences for the utility of international law as a tool to ensure the peaceful, stable, and lawful use of the seas going forward.

We have previously discussed the importance of the rule of law in decisions made under international law. This decision was made by the Permanent Court of Arbitration in accordance with the *UN Convention on the Law of the Sea* and should be observed in order to give stability and certainty to sovereign states in their relations with each other.

6. Philippine citizens occupying the disputed atolls, could find their individual human rights breached if the two countries came into open conflict. For example, their personal security might be threatened which might infringe Articles 1 and 3 of the *Universal Declaration* which state that:

    - all human beings are born free and equal in dignity and rights
    - everyone has the right to life, liberty and security of person

    As indicated in the answer to the previous question, maintaining a system of international law which enforces the rule of law, so that Member States abide by the decisions of the various international committees, tribunals, and courts, means that the system is fair and consistent. This has to be the most important feature of the International legal system, that it operates according to the law in a consistent and fair process.

Review

Comprehend (Page 286)

Question 1

a. **International law:** International law is system of rules, principles, and practices that govern relationships:
   - between nations, and
   - between nations and other international bodies.

b. **Conventions:** Conventions are all the international agreements (covenants, treaties, statutes, protocols, charters) entered into between two or more nations to conduct their affairs.

c. **Ratification:** defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act.

d. **Accession:** the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states.

e. **Sovereignty:** the power or authority in government as possessed or claimed by a state or community.

2. The rights of nation states are to maintain their sovereignty, protect their borders and territories, and to pass laws for the good governance of their citizens. Sovereignty is a description of statehood, whose legal characteristics are as follows:
   - states have the ability on the international stage, to perform acts and to agree to conventions (covenants, treaties, statutes, protocols),
   - states have exclusive competence in their internal affairs,
   - states are not subject to compulsory international processes, jurisdiction or settlement without their consent, given either generally or in the specific case,
   - states are regarded as 'equal' (although this may be formal rather than substantive), and
   - states enter into specific and legal arrangements with other states and withdrawing from those arrangements is an attribute of sovereignty.

3. The ICJ only has jurisdiction to hear disputes between nation states. It can only make orders that bind the nation states that appear before it and accept its jurisdiction. It does not set precedents which are binding on all nations.

4. The sources of law for the ICJ are:
   - International Conventions—nations which ratify or accede to a treaty or covenant can be party to a legal action on the basis of the terms contained in that treaty or covenant.
   - International Customary Law—these are rules that have evolved from the customs of national states and are usually stable and observed over a period of time. One example is that nations now have control over maritime territory up to 12 (nautical) miles from the shoreline.
   - General principles of law recognised by civilized countries. Basic concepts, processes and procedures that are possessed by fair, functioning legal systems.

- The judicial decisions of the most highly qualified, published, and respected judges and academics. There is no doctrine of precedent. The court looks to these decisions for guidance only.

5. Ratification is the process completed by a nation state after it has negotiated and signed a treaty to make it binding. Accession occurs where a nation state not involved in the negotiation of a treaty is permitted by the terms of the treaty to subsequently become a party. In both cases, the nation state must pass domestic legislation which adopts the terms of the treaty as part of its domestic law for it to become domestic law.

6. The ICC is a permanent court situated at the Hague in Holland. It is responsible for prosecuting the crimes of individuals which are so heinous that they cannot be left to one nation to prosecute. These crimes include genocide, crimes against humanity and war crimes.

Analyse and evaluate (Pages 286 – 287)

Case Study

1. A treaty becomes international law when:
    - It has been adopted by a resolution of the General Assembly of the United Nations and is available for Member States to sign.
    - Member States sign the treaty and are bound by its obligations at the international level.

    A treaty becomes domestic law when:

    - it is ratified by a Member State, and
    - the Member State passes domestic legislation adopting the terms of the treaty.

    The circumstances in which a treaty can be enforced are:

    - the nation state seeking a remedy, and the state it alleges has breached the Treaty, must both be party to the Treaty and have ratified the Treaty,
    - the state alleging breach of the Treaty must bring an application to an international tribunal which the treaty recognizes as having the power to hear the complaint; and
    - the state against whom the allegation is made must accept that the tribunal can hear the matter.

2. Country B can take legal action against Country A, but it is unlikely to be successful.

    It may not have the standing to bring the action on behalf of the Indigenous children of Country A unless some of its Children were citizens of Country B. If they were, It could probably successfully bring an action to say that Country A was discriminating against its citizens.

    However, Country A could refuse to join the court action. Before the ICJ is prepared to exercise jurisdiction, both parties must consent to its jurisdiction.

National Sovereignty v Human Rights Article

1. The issue in this example is that the Dominican Republic refuses to meet the requirements of international rights law in relation to its citizens.

There is an international legal framework in which the Dominican Republic is a Member State. This is the Inter-American Court of Human Rights, an international court based in San José, Costa Rica. Together with the Inter-American Commission on Human Rights, it was formed by the American Convention on Human Rights, a human rights treaty ratified by members of the Organization of American States (OAS).

The Inter-American Court works with the Inter-American Commission to uphold and promote basic rights and freedoms. The court adjudicates claims of human rights violations by governments, and issues advisory opinions and interpretations of certain legal matters.

The Organization of American States established the Court in 1979 to enforce and interpret the provisions of the American Convention on Human Rights. Its two main functions are thus adjudicatory and advisory. Under the former, it hears and rules on the specific cases of human rights violations referred to it. Under the latter, it issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or member states.

The adjudicatory function requires the Court to rule on cases brought before it in which a state party to the convention which has accepted its jurisdiction, is accused of a human rights violation.

In addition to ratifying the convention, a state party must voluntarily submit to the Court's jurisdiction for it to be competent to hear a case involving that state.

Under the convention, cases can be referred to the Court by either the Inter-American Commission on Human Rights or a state party.

The Dominican Republic is entitled to reject the decision made by the Inter-American Court of Human Rights. It simply has to indicate it does not accept the jurisdiction of the court, which would then be obliged to disqualify itself from hearing the matter.

Chapter 14: Human rights of children and prisoners

14.1 *Convention on the Rights of the Child*

What do you think? (Page 290)

Under the *Convention on the Rights of the Child* (CRC), a child is defined as 'every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier' (Article 1). This means that under international law, a child is an individual under the age of 18.

Prior to 2016, under Queensland criminal law, a 17-year-old was treated as an adult and served their sentence in an adult prison. Applying the CRC definition of a child, the Queensland criminal law considered a 17-year-old as an adult, as 'the law applicable to the child' stated that 'majority is attained earlier.'

In summary, the legal changes brought about by the *Youth Justice and Other Legislation Amendment Act (No. 2) 2016* (Qld) have aligned Queensland's legal framework with international standards. Prior to this, a 17-year-old was treated as an adult for sentencing purposes under Queensland law, a stance that conflicted with the CRC's definition of a child. However, under the current legal framework in Queensland, 17-year-olds are now considered children for criminal law purposes, including sentencing.

Research Task (Page 291)

1. The *Convention on the Rights of the Children* can be located:
   - Office of the High Commissioner of Human Rights <ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.
   - Queensland Family and Child Commission <qfcc.qld.gov.au/childrights/uncrc>.

2. *[Answer asks for an opinion.]*

Civil rights	Health, welfare and developmental rights	Protection from abuse rights	Participation rights
• Article 2 (protection against discrimination) • Article 7 (citizenship registration) • Article 16 (privacy protection) • Article 17 (access to information) • Article 38 (respect the rules of	• Article 6 and 27 (right to life, survival, good standard of living) • Article 5, 9, 10, 18 and 20 (care of children by legal guardians and family environment; reunification rights) • Article 24 (heath rights)	• Article 3 (best interests of the child) • Article 11 (protection against illicit transfer and non-return of children abroad) • Article 19, 25, 37, 38 and 41 (legal protections from violence and inhumane punishment)	• Article 8 (Identity) • Article 12 (respect for children's views) • Article 12 and 13 (freedom of thought, conscience and religion) • Article 15 (freedom of association and peaceful assembly) • Article 26 (welfare rights)

humanitarian law)	• Article 28 and 29 (right to education) • Article 31 (right to rest and leisure) • Article 39 (promotion of physical and psychosocial recovery)	• Article 20 (protection of culture) • Article 21 (adoption rights) • Article 22 (refugee protections) • Article 23 (disability protection rights) • Article 32, 33, 34 and 36 (protection from drugs, sexual abuse and exploitation) • Article 35 (prevention from abduction) • Article 40 (imprisonment rights)	• Article 30 (culture, language and religion) • Article 32 (employment rights)

3. The *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (OPAC) and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* would be categorised as protection from abuse rights.

Practical Application (Pages 292 - 293)

1. The right that is being discussed in the *Convention on the Rights of the Child* (CRC) Article 12 (Source 1) is the right for a child to be heard.
2. The *Convention on the Rights of the Child* (CRC) Article 12 is a participation right as it provides for the opportunity for a child to be heard in a court setting. It could also be considered a civil right, as it gives children the right to participate and be heard in the legal system.
3. Article 12 of the *Convention on the Rights of the Child* (CRC) ensures the right of children to express their views freely in all matters affecting them. The purpose is to recognise children as active participants in decisions impacting their lives, promoting their autonomy and dignity. It emphasises that children's opinions should be given due weight, in accordance with their age and maturity. The underlying value is respect for children's evolving capacities and their role in shaping decisions related to their well-being. However, the right is not absolute. Article 12(2) identifies that a child must share that view 'in a manner consistent with the procedural rules of national law.'
4. The right of a child to be heard is a fundamental principle embedded in the *Family Law Act 1975* (Cth). Specifically, Section 60CC outlines the framework within which a court assesses the best interests of the child while making decisions on parenting orders. This section emphasises that the child's views must be considered and weighs heavily in determining what constitutes the best interests of that child. Moreover, Section 60CD(2)

aligns with Article 12(2) of the *Convention on the Rights of the Child* (CRC), reinforcing the importance of children's voices in legal proceedings. It stipulates that while a child's views should be acknowledged, they are 'subject to the applicable Rules of the Court,' ensuring that these contributions are provided in a manner that upholds the integrity of the legal process. Additionally, it mandates that children must be 'independently represented by a lawyer,' thereby ensuring that their views are articulated accurately and effectively, free from any undue influence.

5. *[Answers can vary based on personal opinion.]* The *Family Law Act 1975* (Cth) Section 60CC(2)(b) and Section 60CD aim to protect children's best interests in family law proceedings, which may intersect with the rights under Article 12 of the *Convention on the Rights of the Child* (CRC). Section 60CC(2)(b) requires courts to consider a child's views, depending on their age, maturity, and circumstances, aligning with Article 12's emphasis on respecting children's opinions. However, Section 60CD gives discretion to the court to determine whether a child's views should be heard, potentially limiting this right if it is deemed not in the child's best interest or if the child is too young or vulnerable to express an informed opinion.

   While these provisions protect the principle of child participation, they also limit the full expression of Article 12 by prioritising the child's best interests, which may sometimes override the child's right to be heard, particularly in complex or harmful situations. The Australian Human Rights Commission has, in the past, acknowledged in a submission to the United Nations Committee on the Rights of the Child that provisions in the *Family Law Act 1975* (Cth) do consider the child's best interests (Source 4). However, they state that the application of the relevant sections of the Act varies, demonstrating that the law may not be consistently or equally applied.

Practical Application (Pages 293 to 295)

1. The two non-government organisations that contributed to the monitoring process of Australia's ratification of the *Convention on the Rights of the Child* (CRC) through the submission of their own report is the Law Council of Australia (Source 3) and the Australian Human Rights Law Commission (Source 4).

2. In their alternative report to the United Nations Committee on the Rights of the Child, the Australian Law Council highlighted the lack of Independent Children's Lawyers (ICLs) in family law matters (Source 3). They argue that a funding gap has led to experienced lawyers being less willing to advise and represent children in court. The Council believes that increasing funding would better support children's voices in courtroom proceedings. Additionally, the Australian Human Rights Commission noted that the circumstances in which a child can express their views are limited, for example 'it does not extend to considering the views of children in non-contested matters' (Source 4). They have called on the Australian Government to amend the *Family Law Act 1975* (Cth) to enable children to express their views in all matters that affect their rights and interests.

3. *[Answer asks for an opinion.]* The Australian Government's submission to the Committee on the Rights of the Child (Source 5) states that 'courts in Australia may consider the views of children as part of their determination of the child's best interests.' While agreeing that children's voices are heard, the Australian Human Rights Commission submission stresses that the scope of matters is too limited and should be broadened, particularly in non-court-based family services (Source 4). It criticises the *Family Law Act 1975* (Cth) for not requiring children's views in non-contested matters and recommends expanding the scope to include all issues affecting children's rights.

The Law Council of Australia takes a similar approach, it acknowledges the presence of children in court matters but also emphasises there is a gap in how the law is applied. The Law Council of Australia points out there is a lack of Independent Children's Lawyers (ICLs) in family law cases. It argues that inadequate funding for ICLs limits the effective representation of children's views, advocating for increased resources to ensure better legal support for children in family law proceedings.

The non-government sources reflect different perspectives on how children's views should be incorporated into family law matters, whereas the Government simply states the law allows for a child to express their views and does not examine how broadly or effectively the law achieves its purpose.

4. *[Answer asks for an opinion.]* The Committee on the Rights of the Child recommended that the Australian Government amend the *Family Law Act 1975* (Cth) to give all children the opportunity to express their views in all matters concerning them, including non-court-based family services (Source 6).

   An effective law must be responsive to societal needs, adaptable, and capable of delivering justice. The *Family Law Act 1975* (Cth) currently fails to address the full range of circumstances where a child's voice might be crucial, especially in non-court-based settings. By including all matters concerning the child, the law would not only better protect the child's welfare, but also lead to more informed, tailored decisions that truly reflect their needs and desires, ultimately fostering a better legal outcome. Amending the current law would also reflect key principles of the rule of law, which demands that laws be clear, predictable, and applied equally. By ensuring all children can express their views in all relevant matters, the law would be more inclusive and consistent, aligning with the principles of fairness and justice. This would clarify how children's views are considered in family matters, extending legal protections equally to all children, whether their case involves court proceedings or non-court-based services.

   The reform of the Act would also allow for the full realisation of the *Convention on the Rights of the Child* (CRC) Article 12, which gives children the right to express their views freely in all matters affecting them. The *Family Law Act 1975* (Cth) currently limits this right in non-court matters, contradicting the full implementation of the CRC. By aligning with the CRC, the proposed amendments would ensure Australia meets its international obligations, demonstrating our commitment to respecting and protecting children's autonomy in all matters that affect them.

   By amending the *Family Law Act 1975* (Cth), the Government would not only strengthen the legal system's alignment with human rights, the rule of law, and the child's best interests, but also pave the way for a more just and equitable family law system.

Practical Application (Pages 295 to 296)

1. Five years have passed since Australia last appeared before the UN Committee on the Rights of the Child, as it was Australia's 'five-year assessment' (Gordan and Peieg, 2019).

2. The UN Committee on the Rights of the Child meeting occurred in Geneva.
3. The UN Committee on the Rights of the Child was critical of the Australian Government's actions. The issues the Committee mentioned included 'the high number of children in care in the criminal justice system, the continued forced sterilisation of children with disabilities,

the government's treatment of refugee and asylum-seeking children, and the lack of meaningful opportunities for children to participate in decision making on polices that affect their lives' (Gordan and Peieg, 2019).

14.2 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

What do you think? (Page 297)

1. *[Answer asks for an opinion.]*
2. *[Answer asks for an opinion.]*

Practical Application (Pages 298 - 299)

1. The act of 'torture' is addressed in State, National and International law in the *Criminal Code 1899* (Qld), *Criminal Code Act 1995* (Cth) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). While these sources of law share some similarities, they also differ.

   All three sources of law prohibit torture absolutely, with no exceptions allowed in specific situations (such as during warfare or emergencies) according to international law, and similarly under domestic law. Each also have a broad similarity in their definition of torture. All highlight the infliction of severe pain or suffering, whether physical or mental, for specific purposes such as punishment, intimidation, or coercion. However, the Queensland law focuses more on physical pain or harm, the definitions within CAT and Australian focus more on mental suffering. Both these sources also make mention of public officials and those acting in an official capacity. Finally, all frameworks require that the infliction of pain or suffering be intentional. Torture must be deliberately inflicted rather than accidental or due to negligence.

   However, each law has a specific scope, as they only apply to a specific jurisdiction. For example, the *Criminal Code 1899* (Qld) only applies to Queensland. The Queensland, Australian and International law also differs on how it responds to acts of torture. For example, Queensland and Commonwealth law focus more on penalising individuals who commit acts of torture. International law has a more preventative focus. Additionally, Queensland law is more locally focused, while Commonwealth law extends its reach beyond Australia's borders, and international law sets the global standard and promotes state accountability.

2. *[Answer asks for an opinion.]* Both Australian and Queensland law provides a solid foundation for preventing acts of torture, as they embody several features of effective legislation. Both the *Criminal Code Act 1995* (Cth) and the *Criminal Code 1899* (Qld) offer clear, precise, and specific definitions of the crime of torture, which instils confidence in the clarity of the legal language. This minimises ambiguity and misinterpretation.

   Furthermore, since both Acts are available both online and in print, they are accessible to the public, accompanied by clear communication regarding the rights, responsibilities, and processes relevant to Queensland and the Commonwealth. The fact that these criminal offences are enacted through Acts of Parliament allows for modifications in response to societal changes, emerging issues, or unforeseen circumstances. This flexibility ensures the law can adapt and hold individuals accountable.

   Moreover, both sources of law are reasonably consistent, promoting equal treatment of citizens in Queensland and Australia. This consistency also ensures that similar acts receive comparable penalties, resulting in predictability and uniformity between State and Federal enforcement.

Research Task (Page 299)

[Answer asks for an opinion; an example is shown below.]

1. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) can be found:
   - Office of the High Commissioner on Human Rights <ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>.
   - Australian Human Rights Commission <humanrights.gov.au/our-work/commission-general/convention-against-torture-and-other-cruel-inhuman-or-degrading>.
   - Department of Foreign Affairs and Trade <austlii.edu.au/au/other/dfat/treaties/ATS/2018/5.html>.

2a. The right to complain is in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) Article 13.

2b. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), Article 13 focuses on the right of individuals to complain about allegations of torture or ill-treatment and outlines the obligation of States to ensure that such complaints are investigated.

The legal principles that underlie this article include:

- The right to an effective remedy for individuals who believe they have been subjected to torture or ill-treatment.
- It holds States accountable for ensuring that individuals have the means to lodge complaints about torture or inhuman treatment.
- Investigations to be carried out independently and impartially.

The main features include that:

- any individual has the right to lodge a complaint,
- the complaint should be investigated promptly,
- the complaint should be impartially examined, and
- the complaint and witnesses are protected from retaliation.

2c. A possible limitation to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), Article 13, is that it does not qualify the effectiveness of the 'steps taken to ensure that the complainant and witnesses are protected against all ill-treatment…'. It also mentions that it only applies to a 'jurisdiction'.

Practical Application (Page 300)

1. The Committee highlighted in the article is the United Nations Committee against Torture.

2. The United Nations Committee against Torture has many roles. One role they have is to 'publish findings' from Member States on how effectively they are implementing and upholding the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). In this case, the Committee 'expressed serious concerns' and 'made recommendations' on how Australia can improve CATs inclusion in domestic law (UN, 2022).

3. The Committee against Torture raised several concerns about Australia's implementation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), including:
    - Australia's use of mandatory detention under the *Migration Act 1958* (Cth),
    - the minimum age of criminal responsibility being 10, and
    - children in detention being subjected to verbal abuse, racist remarks and solitary confinement.

    These issues have been widely reported in the media.

Practical Application (Page 301)

[Answer asks for an opinion, an example is shown below.]

In 2023, Australia's Human Rights Commissioner, Lorraine Finlay stated, 'Australia has a long way to go to meet our minimum OPCAT obligations' after we requested and were granted a delay in its ratification. Finlay underscores the nation's insufficient progress in implementing robust measures to prevent torture and ill-treatment in detention. This viewpoint suggests systemic gaps in oversight, accountability, and detention conditions. The consequence of such failure is twofold: it undermines Australia's international credibility and human rights standing, and it potentially endangers vulnerable detainees, who may face abuse or neglect. Additionally, the failure to comply with OPCAT obligations may result in the erosion of public trust in the government's commitment to human rights protections, drawing increased scrutiny from international bodies and NGOs.

Review

Comprehend (Pages 301 - 302)

1. The origins of the *Convention on the Rights of the Child* (CRC) can be traced back to the post-World War II era when there was a growing recognition of the need to protect the rights and well-being of children, who are often the most vulnerable members of society. The CRC was developed with input from various stakeholders, including governments, non-governmental organisations, human rights advocates, lawyers, health specialists, social workers, educators, child development experts and religious leaders. The CRC was adopted by the United Nations General Assembly in 1989. It was opened for signature, ratification, and accession, and came into force on 2 September 1990, marking the beginning of its implementation and enforcement.

   The CRC acknowledges that children have the same human rights as adults while also noting that young people are vulnerable to exploitation and abuse, as they are dependent on adults to support their health, well-being, and development. At its core, the CRC aims to:

   - provide every child with equal rights (non-discrimination),
   - empower children to express their views on matters affecting them, and
   - ensure the best interests of the child are considered in any laws and legal processes that impact them.

   The CRC outlines specific rights for children. Some key rights include:

   - Right to education (Articles 28, 29): Every child has the right to education, and governments should aim to make education free and compulsory, at least at the primary level.
   - Right to protection from harm (Article 19): Children should be protected from all forms of physical or mental violence, abuse, neglect, and exploitation, including sexual abuse and child labour.
   - Right to health and health services (Article 24): Children have the right to enjoy the highest attainable standard of health, and governments are required to ensure access to medical services and prevent disease.
   - Right to rest and play (Article 31): Every child has the right to rest, leisure, play, and engage in recreational activities appropriate to their age.
   - Right to protection from exploitation (Article 32): Children should be protected from work that is harmful to their health or education, such as child labour.

2. Under the *Convention on the Rights of the Child* (CRC) Article 1, a child is defined as, 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.' One of the fundamental reasons children are awarded special protection under international law is that they are considered particularly vulnerable due to their developmental stages and dependency on adults. For example, children's bodies and minds are still developing, so they rely on adults—particularly their parents and caregivers—for guidance, care, and protection. Their dependency means that they are more likely to be exploited or neglected if adequate protective measures are not in place. The CRC plays a crucial role in providing additional safeguards to ensure governments protect children from physical harm, violence, neglect, and exploitation.

3. The *Convention on the Rights of the Child* (CRC) includes a monitoring mechanism that involves regular reporting to a specific United Nations organisation, known as the

Committee on the Rights of the Child (Committee). This Committee is composed of 18 independent experts. The primary function of the Committee is to monitor and evaluate the implementation of the rights outlined in the CRC by the countries that have ratified the treaty. This evaluation occurs through a process called 'State Party reporting'. Countries that are signatories to the CRC are required to submit periodic reports—typically every five years—to the Committee. These reports detail how the countries are upholding children's rights within their jurisdictions. The Committee reviews these reports to assess each country's adherence to the principles and provisions of the CRC. It provides guidance and recommendations for improvement, helping to ensure that children's rights are respected in all areas of life, including health, education, and protection from violence and exploitation.

4. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) emerged in response to global conflicts, particularly World War II and the atrocities of the Holocaust. Concerns about the widespread occurrence of torture, especially under authoritarian regimes, also motivated its creation. The CAT was drafted and adopted in 1984, with the primary goal of preventing and eliminating torture and other forms of cruel, inhuman, or degrading treatment or punishment in all circumstances, including during law enforcement, judicial proceedings, and detention. The CAT aims to prevent torture, hold perpetrators accountable, provide redress for victims, and promote the global abolition of torture. The convention includes key rights, such as:

    - Prohibiting the use of statements obtained through torture.
    - Banning torture and cruel or degrading treatment, as well as refoulement (the extradition of individuals to countries where they may face torture).
    - Requiring governments to actively prevent torture, investigate allegations of torture, and provide remedies for victims of torture.

5. The bodies that are tasked with monitoring Australia's compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *Optional Protocol to the Convention against Torture* (OPCAT) include the Committee against Torture, National Preventive Mechanism (NPM) and United Nations Subcommittee on the Prevention of Torture (SPT).

Analyse (Page 302)

Article 1—*'Australians want social media age restrictions tightened'*

1. *[Answer asks for an opinion; an example is shown below.]*

    In response to the legal issues surrounding age restrictions on social media, the UN Committee on the Rights of the Child emphasises that 'children have the right to meaningful access to digital technologies as part of their civil, economic, political, and social rights'. In the context of social media age restrictions, human rights organisations, including the UN, have concerns about the unintended consequences of blanket bans on when a child can access social media. While one of the consequences of age restrictions will protect children from potential harms such as cyberbullying or exploitation, they may unintentionally restrict access to educational resources, social interactions, and opportunities for civic engagement online. As digital technologies increasingly play a vital role in education, creativity, and social participation, these restrictions may hinder children's development and cause greater harm long term as children do not learn the skills to navigate these

platforms. The introduction of age-based restrictions to access social media may also see Australia be criticised globally when our implementation of the *Convention on the Rights of the Child* is reviewed, further decreasing our human rights standing on the international stage.

Article 2—'*Experts urge Australia to pay compensation owed to victims of war crimes in Afghanistan'*

1. *[Answer asks for an opinion, an example is shown below.]*

   In 2020, a military inquiry concluded that Australian soldiers killed 39 unnamed prisoners in Afghanistan (United Nations, 2024). In response, the United Nations has called on Australia to fulfil its commitment to compensate the families of these 39 victims of war crimes committed by the Australian military (United Nations, 2024). The families of the victims are the primary affected parties, enduring grief, loss, and trauma. For them, the issue revolves around seeking justice and recognition for the deaths of their loved ones. The soldiers and military personnel involved may face legal and moral repercussions, including criminal prosecution or disciplinary actions. Moreover, Australian taxpayers and the government are implicated, as the state may be responsible for providing financial compensation. This raises concerns about public accountability and the financial implications for the government, as it involves the application of international law, domestic law, and human rights law.

   A key viewpoint on this legal issue is that of the victims' families. They are profoundly impacted by the actions of the Australian military. The killings have led to deep grief and trauma, exacerbated by a lack of accountability and justice. The families are left without closure as they seek recognition of their loved ones' wrongful deaths and fair compensation. The delay in addressing these issues only intensifies their pain, as they grapple with the emotional and psychological consequences of the war crimes while questioning the Australian government's commitment to human rights and justice. This concern is reflected in the United Nations' observation that 'the Australian Government is making genuine, albeit slow efforts' in response to this situation (United Nations, 2024).

Chapter 15: Human rights and discrimination

15.1 What is discrimination?

No questions.

15.2 *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)

Research Task (Page 306)

a. The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) creates distinctions between various groups based on 'race, colour, descent or national or ethnic origin' (Article 1).

b. The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) protects several key rights aimed at eliminating racial discrimination. Three key rights protected under ICERD are the right to equality before they law (Article 5), the right to housing (Article 5(iii)) and the right to education and training (Article 5(v)).

c. The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) addresses hate speech by requiring states to take measures to eliminate racial hatred and discrimination. In particular, Article 4 specifically obligates states to prohibit and condemn any propaganda or incitement to racial discrimination, as well as to criminalise hate speech and related activities. This ensures that governments implement laws to prevent racial intolerance and protect individuals from harmful speech that may lead to racial violence or discrimination.

d. The principle of 'non-discrimination' is a cornerstone of international human rights law, including in the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), which mandates Member States to prohibit and eliminate discrimination based on race, colour, descent or national or ethnic origin. ICERD, Article 2 obligates Member States to adopt measures that promote equality and prevent practices that discriminate based on race or ethnicity. The convention emphasises that every person should enjoy their rights without distinction or exclusion due to racial or ethnic differences.

e. Member States have many responsibilities to combat racial discrimination. Firstly, the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) Article 2 obligates states to pursue a policy that eliminates racial discrimination and promotes understanding among all races. Secondly, Member States are compelled to 'prevent, prohibit and eradicate' apartheid and racial discrimination (Article 3). Thirdly, Member States must protect victims and ensure effective remedies (Article 6).

f. An individual complaint is called a communication.

g. False, while ICERD allows for 'special measures' (Article 1, 4) to advance certain racial or ethnic groups, it does not allow for racial discrimination.

h. False. ICERD addresses the cultural rights of different racial or ethnic groups. It emphasizes the importance of protecting the rights of individuals and groups to freely express and develop their culture (Article 1, 1).

Practical Application (Page 307)

1. Australia has submitted four reports to the CERD Committee since 1999, 1999, 2003, 2010, and 2016.

2. Australia has appeared before the CERD Committee 4 times since 1999, these being 2000, 2005, 2010 and 2017.

3. Australia is taking its reporting obligations to the CERD Committee somewhat seriously as it hasn't submitted a report on time. An article published by Joseph, Fletcher, and Lochhead-Sperline (2024) states that 'there has been an average delay of just under 18 months.'

4. Australia's relationship with the CERD Committee hasn't always been positive. An article published by Joseph, Fletcher, and Lochhead-Sperline (2024) states that 'In 2000, the [Australian] government accused the Committee of a 'blatantly political and partisan' approach' and our 'appearance in 2005 was also factious.' However, the article also states, 'relations have improved since that very low point,' demonstrating that Australia's relationship has been in conflict but is improving.

5. Australia needs to urgently address three key areas to combat racial discrimination, as highlighted by Joseph, Fletcher, and Lochhead-Sperline (2024). These include the ongoing discrepancies in almost all life outcomes between Indigenous and non-indigenous Australians, Islamophobia, racism against international students, and the mandatory immigration detention regime.

Practical Application (Page 308)

1. The CERD Committee made findings against Australia and Western Australia in 2024.

2. The specific group that the government's decisions are impacting is Indigenous peoples.

3. The CERD Committee was concerned that Australia and the Western Australian Government had 'failed to seek free, prior and informed consent from Indigenous people about changes to Indigenous cultural heritage legislation; and failed to protect Indigenous cultural heritage adequately; and potentially breached the *International Convention on the Elimination of Racial Discrimination*' (Environmental Defenders Officer, 2024).

Research Task (Page 309)

As of March 2024, the current Race Discrimination Commissioner is Mr Giridharan Sivaraman. Racial Discrimination Act 1975 (Cth) s19 and s20 outlines the duties of the Race Discrimination Commissioner. According to a Media Release published by the Hon. Mark Dreyfus KC MP (2024), 'the Race Discrimination Commissioner is responsible for combatting all forms of racial discrimination, and promoting understanding, tolerance and harmony across all sectors of Australian society.'

15.3 *Convention on the Elimination of All Forms of Discrimination Against Women*

What do you think? (Page 310)

[Answer asks for an opinion.] Students' legal criteria may include whether enforcing gender restrictions on combat roles is fair and just, is acceptable to the community, applies to all women and/or defence force equally, can be enforced, is clear and stable, balances individual rights with the protection of society, etc.

Practical Application (Page 310)

1. Answers below:

Part	Articles	Summary
1	1-6	Sets out the scope of the treaty, including key terms, condemnation of discrimination and the commitments undertaken by States.
2	7-9	Political rights: the right to vote and nominate for election; represent their country, participate in political life and seek citizenship.
3	10-14	Social and economic rights: equal access to education, employment opportunities, welfare, health care and banking and to participate in sport
4	15-16	Legal rights: equal rights in criminal and civil matters and empower women to make legal decisions about family life.
5	17-22	Establishes the Committee on the Elimination of Discrimination against Women and reporting procedures.
6	23-30	Describes CEDAW's effect on other treaties.

2. Discrimination in defined in Article 1 as, 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.' This definition is broad to ensure all types of discrimination can be addressed by the *Convention*. This can help women access equal treatment in a variety of spheres but can also make it difficult for Nation States to achieve equality in every area, leaving them open to complaints and legal action.

Practical Application (Page 311)

1. A State party much submit a report 'every four years.'

2. Australia submits a report to 'the United Nations Committee on the Elimination of Discrimination against Women.'

3. The United Nations Committee on the Elimination of Discrimination against Women meets in Geneva.

4. Nawaz and Cody (2018) believe that the United Nations Committee on the Elimination of Discrimination against Women will see 'little improvement in women's rights [in Australia] and a concerning deterioration in some area.'

15.4 *Convention on the Rights of Persons with Disabilities*

Practical Application (Page 313)

1. Around 650 million people worldwide have a disability.
2. The CRPD was opened for signature and ratification on 30 March 2007.
3. United Nations Secretary-General Ban Ki-moon believes the purpose of the CRPD is to, 'eradicate the obstacles faced by persons with disabilities' (UN, 2008). Akiko Ito, the UN Focal Point on Disability states the *Convention,* will make sure that these people will no longer be ignored' (UN, 2008).

What do you think? (Page 314)

[Answer asks for an opinion.]

Practical Application (Page 315)

1. The key purpose of the *Convention on the Rights of Persons with a Disability* (CRPD) is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity' (Article 1).

2. The *Convention on the Rights of Persons with a Disability* (CRPD) defines disability as to include 'those who have long-term physical, mental, intellectual or sensory impairments which in internation with various barriers may hinder their full and effective participation in society on an equal basis with others' (Article 1).

3. *[Answer asks for an opinion.]* One word that could be used to summarise the core ideal of Article 3 is 'equality'.

4. The *Convention on the Rights of Persons with a Disability* (CRPD) Article 3 asks for 'equality between men and women.'

Research Task (Page 315)

1. The Convention on the Rights of Persons with a Disability (CRPD) can be located on the following websites:
   - United Nationals Office of the High Commissioner on Human Rights, *Convention on the Rights of People with Disability* <ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>.
   - United Nations, Department of Economic and Social Affairs, *Convention on the Rights of People with Disability* <social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>.
   - United Kingdom Government, *Easy Read Convention on the Rights of People with Disability* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/345108/easy-read-un-convention.pdf>

- Equality and Human Rights Commission (UK), *The United Nations Convention on the Rights of People with Disability: What does it mean for you?* < <equalityhumanrights.com/sites/default/files/uncrpdguide_0.pdf>.

2. *[Answer asks for an opinion; with an example being:]* The *Convention on the Rights of People with Disability* Article 10 contains the 'right to life'. This human right creates an obligation on State Parties to affirm the right to life for persons with disabilities, ensuring their protection by law on an equal basis with others.

3. *[Answer asks for an opinion.]*

General principles	Access	Equality and non-discrimination	Civil and political	Social, economic and cultural
	• Article 9 – Accessibility	• Article 5 – Equality and non-discrimination • Article 7 – Women with disabilities • Article 11 – Situations of risk and humanitarian emergencies	• Article 10 – Right to life • Article 12 – Equal recognition before the law • Article 13 – Access to justice • Article 14 – Liberty and security of person • Article 15 – Freedom of torture or cruel, inhuman or degrading treatment or punishment • Article 16 – Freedom from exploitation, violence and abuse, Article 17 – Protecting the integrity of the person • Article 18 – Liberty of movement and nationality	• Article 19 – Living independently and being included in the community • Article 20 – Personal mobility • Article 23 – Respect for home and the family • Article 24 – Education • Article 25 – Health • Article 26 – Habilitation and rehabilitation • Article 27 – Work and employment • Article 28 – Adequate standard of living and social protection • Article 30 – Participation in cultural life, recreation, leisure and sport

			• Article 21 – Freedom of expression and opinion, and access to information • Article 22 – Respect for privacy • Article 29 – Participation in political and public life	

Case Study (Page 317)

1. Fiona Given believed that the Commonwealth Electoral Commission's actions had denied access to her right to participate in political life as the officer's actions meant that she was treated differently to others.
2. Article 29(a)(i)(ii) and (iii) generally allow a person with a disability to have the opportunity to enjoy their political rights on an equal basis to others. Specifically, it ensures that voting procedures, facilities and materials are appropriate, accessible and easy to understand; protect their right to vote by secret ballot and guarantees the free expression of the will of persons with disabilities as electors. Article 4 concerns the general obligations of the CRPD. Specifically, Fiona believed that Australia did not adopt appropriate measures for the implementation of the rights within the CRPD (including modifying or abolishing discriminatory legislation) or undertake or promote research to develop measures to increase accessibly. Article 9 enables that persons with a disability have access to measures that allow them to live independently and participate fully in all aspects of life.
3. This case study demonstrates the *Optional Protocol* in action as if Australia had not ratified it, Fiona Given would not be able to file a complaint to the CRPD Committee.
4. An explanation of the complaint process can be located on the following webpages:
    - Attorney-General's Department <ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/complaints-mechanisms-under-human-rights-treaties>
    - Office of the High Commissioner of Human Rights <ohchr.org/en/treaty-bodies/crpd/individual-communications>
    - New Zealand Ombudsman <humanrights.gov.au/complaints/complaint-guides/complaints-under-disability-discrimination-act>
    - Independent Mechanism for Northern Ireland <equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/UNCRPDguidemakingacomplaint2012.pdf>
5. *[Answer asks for an opinion.]*
6. Australia has not amended the *Electoral Act 1918* (Cth). This demonstrates that although the Committee has the power to hand down findings that criticise Australia's actions, the

Government does not have to act on these adverse findings and there is no legal recourse to enforce a finding.

15.5 Discrimination legislation in Australia

Case Study (Pages 319 – 320)

Sharma v Legal Aid Queensland [2001] FCA 1699; 112 IR 124

1. Mr Sharma alleged that he was not offered a position in Legal Aid Queensland because of his race.
2. Mr Sharma decided to withdraw his application for the first position and scored lower than the successful applicant in the second position.
3. [Answer may vary due to personal opinion.] An example of direct evidence that would prove someone has been discriminated against would be a person saying to an unsuccessful applicant that they did not get a job because they don't wish to hire a particular race. Unless an organisation was unprofessional, it would be difficult for a person to get this type of evidence, as many people don't ask for feedback about why they did not get a job or seek the written feedback. As well, people do not admit to discrimination willingly.

Murugesu v Australian Postal Corporation & Anor [2015] FCCA 2852

1. Mr Murugesu alleged he was subjected to racial and offensive remarks from a manager. He reported his manager's behaviour, but his complaints were never invested.
2. Australia Post was found vicariously liable as the complaint involved the action of one of its employees. Although the Court found the company had policies in place to respond to allegations of racial discrimination, had publicly stated the company would not tolerate racism and had sound workplace training in place, it failed to take all reasonable steps to investigate or respond to the manager's behaviour.
3. Applying the decision of Murugesu, it is important that businesses take all reasonable steps to investigate and respond to allegations of racial discrimination.
4. *[Answer asks for an opinion.]*

Practical Application (Pages 320 – 322)

Source 2

Skin-deep: Proof and inferences of racial discrimination in employment

1. The burden of proof in all discrimination cases lies with the complainant.
2. *[Answer asks for an opinion.]* The author of the article, Jonathon Hunyor, believes that the difficultly complainants face to mount a successful case is, 'producing direct evidence to support their case makes inferences to be drawn from the surrounding circumstances all the more important for a complainant' (2003, p. 4). A counterargument to this is that a complainant must have substantial and direct evidence to claim discrimination, as an opinion or belief isn't impartial or objective.

The standard of proof in discrimination claims: the Full Court lightens the load, a little

1. **Facts:** William Charles Gama was employed as a licenced aircraft maintenance engineer at Qantas. While an employee of Qantas, Mr Gama suffered several injuries that ultimately impacted his ability to complete the duties associated with his role. It was at this time he

also alleged that his supervisor racially taunted him. His employment was terminated after medical assessments indicated that he would not be able to return to pre-injury duties. In 2006 the Federal Magistrates Court ordered Qantas to pay $71, 692.70 in compensation for breach of *Racial Discrimination Act 1975* (Cth) s9 and *Disability Discrimination Act 1992* (Cth) s15(2)(d). Both parties appealed.

Issue(s): There were many grounds of appeal, including:

- Did the Court take the correct approach when making inferences regarding the discrimination?
- Did the Court use the correct approach when deciding the standard of proof in relation to Gama's claims?
- Was the Briginshaw test applied correctly?
- Was the damages assessment correct?

Decision: Claims of racial discrimination should be treated similarly to other civil claims. Claims should not be treated as unique or inherently serious. The assessment of damages remained unchanged.

2. Hely (2008) believes that proving discrimination 'is notoriously difficult.' This is primarily because the courts have 'frequently observed that discrimination is a serious matter, not lightly to be inferred.'
3. In discrimination cases, evidence of discrimination is treated as a matter of utmost seriousness, not to be lightly inferred. This underscores the high standard of proof required for applicants. In the case *Qantas Airways v Gama* [2008] FCAFC 69, Branson J emphasized the long-standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict. This approach, as noted by the author Hely (2008), significantly elevates the standard of proof and underscores the influence of legal precedents in shaping the standards of discrimination cases.

Source 3

1. The CERD Committee is concerned about the, 'limited number of racial discrimination cases brought before the courts.' The reasons provided include the costs of court proceedings and the burden of proof requirements.
2. *[Answer asks for an opinion.]* Recommendation 16(a) involves reversing the burden of proof in civil proceedings involving racial discrimination. If this was to occur, complainants alleging racial discrimination may be successful in supporting their claims. In contrast, this could lead to unfair outcomes as more employers are held liable in weaker cases.

Practical Application (Page 324)

1. The Queensland Government was seeking an exemption for its trains, which are non-compliant with anti-discrimination law.
2. The Human Rights Committee's preliminary view was that, 'it has ruled to refuse almost all of the exemption requests on the basis of disability discrimination' (Roe, 2018).
3. *[Answer asks for an opinion.]* You may wish to provide students with a copy of the Explanatory Memorandum of the Bill to explore its objective and purpose:
    - Austlii <classic.austlii.edu.au/au/legis/cth/bill_em/ddb1992274/index.html>

- Australian Human Rights Commission <humanrights.gov.au/our-work/disability-rights/disability-discrimination-bill-1992-explanatory-memorandum>

4. If the Queensland Government is not granted an exemption, Queensland Rail will be in breach of the Act. Queensland Rail may receive a financial penalty, and may be at risk of lawsuits from people with disabilities unable to fully access the trains.

What do you think? (Page 325)

[*Answer asks for an opinion.]*

You may wish to provide students with sources to confirm whether their perception is correct. Suggested webpages include:

- Australian Institute of Health and Welfare, 'Older Australians' < aihw.gov.au/reports/older-people/older-australians/contents/justice-and-safety>.
- Australian Human Rights Commission, 'Key Findings' <humanrights.gov.au/our-work/key-findings>.
- Department of Employment and Workplace Relations, 'Ageism awareness in the workplace with Australia's Acting Age Discrimination Commissioner and President Emeritus Professor Rosalind Croucher AM' <dewr.gov.au/newsroom/articles/ageism-awareness-workplace>.

Hypothetical (Page 326)

1. The legal provision of the *Age Discrimination Act 2004* (Cth) most relevant to this case is s18, Discrimination in employment. This section prohibits discrimination on the basis of age in employment-related matters. In particular, s18(1) states that it is unlawful for an employer to discriminate against a person during the recruitment phase.

2. [*Answer asks for an opinion.]* In the interview, the hiring manager expressed concerns about Maria's 'lack of experience' and 'youthfulness' suggesting that the company typically hired older and more experience candidates for the role being advertised. The comment about Maria's 'lack of experience' reflects the stereotype younger people lack experience and are therefore less competent in the workplace. This stereotype can lead employers to assume that younger candidates are not as capable of handling complex tasks or making important decisions, regardless of whether the job itself requires significant experience. The hiring manager's comment about hiring 'older, more experienced candidates' also points to a stereotype that older workers are more experienced and therefore better suited for certain roles. The focus on hiring 'older, more experienced' candidates may unfairly prioritise experience over potential and adaptability, qualities that younger candidates can bring to the table.

3. Discrimination based on age is unlawful under Commonwealth law. The *Age Discrimination Act 2004* (Cth) s18 (1)(c) states that, 'It is unlawful for an employer…to discriminate against a person on the ground of the other person's age…in determining who should be offered employment.' This provision prohibits employers from treating an employee or prospective employee unfairly based on their age. The employer's comments about Maria's 'lack of experience' and 'youthfulness' in the interview directly to Maria could be interpreted as referencing her age as the word 'youthfulness' is often associated with being young. Thus, the interviewer's comments suggest a bias against younger candidates as Maria's potential is being judged primarily by her age rather than her qualifications or ability to perform the job. Additionally, the employer's comments that the company 'typically hires older, more experienced candidates' indicate that age (and the perceived experience that comes with it)

is a significant factor in hiring decisions, thus constituting discrimination on the ground of age.

Section 18(4) and (5) do allow an employer to justify discrimination if they can show that the discrimination is based on the inherent requirements of the job. In the case of a 22-year-old university graduate, it is unlikely that a legitimate job requirement exists that necessitates hiring older candidates. Unless the employer can demonstrate that older candidates are essential due to specific job requirements, age-related discrimination would likely be unjustifiable.

4. [*Answer asks for an opinion.]* Possible recommendations a student may make is to talk to the hiring manager to understand why she was not offered the role and gain feedback on how she can gain experience, filing a complaint with the Australian Human Rights Commission (AHRC) or taking legal action.

   Any one of these avenues can have personal, career, social and financial implications.

Review

Comprehend (Pages 326 – 327)

1. ***International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)**

   One of the fundamental aims of the United Nations is to create a world free from racial segregation and discrimination. However, the creation of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) had its origin in many events, including the atrocities of World War II, the impact of colonialism, widespread racial discrimination and the rise of civil rights movements. Therefore, the principles on which ICERD is based include:

   - non-discrimination,
   - equality, and
   - social justice.

   ICERD seeks to provide State Members with the knowledge and tools to eliminate racial discrimination and to promote understanding of all races. It does this by:

   - prohibiting racial discrimination in all its forms,
   - promoting equality by emphasising that all individuals should enjoy equal rights and should be provided equal protection against discrimination, and
   - monitoring implementation.

   ***Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)**

   One of the origins of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) is the United Nations Commission on the Status of Women, which was established to monitor and promote women's rights. The Commission's work in uncovering areas in which women were treated unequally to men was instrumental in developing CEDAW. The treaty not only reaffirms the fundamental ideals at the centre of all international human rights instruments-that all people should be treated equally and without discrimination, but also plays a crucial role in promoting women's rights. CEDAW's essential purpose is to set out steps crucial to eliminating discrimination against women. It starts this by setting out its key principles: freedom and equality.

   ***Convention on the Rights of Persons with Disabilities* (CRPD)**

   While the *International Bill of Human Rights* contains the broad principles of equality and non-discrimination, it is largely silent on the specific needs to persons with a disability. Over time, the desire for a specific human rights instrument to highlight and address the discrimination, barriers and challenges faced by people with disabilities began to grow as advocates in the disability space pushed for change. In the early 21st century, the United Nations General Assembly, in collaboration with experts and persons with a disability began drafting a new instrument to specifically address the needs of persons with a disability. The result was the *Convention on the Rights of Persons with Disabilities* (CRPD). The purpose of the CRPD is to, 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of all persons with disabilities, and to promote respect for their inherent dignity' (Article 1). CRPD's general principles found in Article 2 include: non-discrimination, full and effective participation, equality of opportunity, accessibility, equality between men and women, respect for the evolving capacities of children with a disability, and respect for inherent dignity and autonomy.

2. **Committee on the Elimination Racial Discrimination (CERD Committee)**

   The Committee on the Elimination of Racial Discrimination (CERD) is a proactive body that comprises 18 independent experts from various countries. They convene twice a year in Geneva, demonstrating their commitment to their role. The CERD Committee's primary function is to oversee Member States' (such as Australia's) adherence to the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). The Committee meticulously reviews the reports submitted by Member States and issues concluding observations, which contain recommendations for enhancing the efforts of a State Party in eradicating discrimination. This process underscores the CERD Committee's proactive role in supporting those affected by racial discrimination.

   Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee)

   The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) comprises 23 independent elected members. The key functions of the CRPD include examining State Parties' implementation of rights under the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), making recommendations detailing how State Parties can improve compliance with the CEDAW and accepting individual complaints about violations of rights under CEDAW. In this way, the CEDAW Committee plays a crucial role in advocating for women's rights and ensuring their equality.

   Committee on the Rights of Persons with Disabilities (CRPD Committee)

   The Committee on the Rights of Persons with Disabilities (CRPD) monitors the implementation of the *Convention on the Rights of Persons with Disabilities* (CRPD) by the Member States. These States are not only required to submit regular reports to the committee on how the rights enshrined in the CRPD are being implemented, but they are also held accountable for their actions. The Committee examines individual complaints and makes inquiries, further reinforcing the accountability of the Member States. These different roles demonstrate that the group of persons supported by the CRPD are those with a disability.

3. The *Racial Discrimination Act 1975* (Cth) promotes several fundamental human rights, including the right to equality before the law and freedom from racial vilification. Firstly, s 10 of the Act ensures that individuals are treated equally in legal matters, regardless of their race, ethnicity, or national origin. It guarantees access to justice and protection from discrimination. This reflects Article 5, *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). Secondly, s18C and s18D protects individuals from hate speech or actions that incite racial hatred, which is found in the ICERD, Article 4. This means that people cannot be targeted or marginalized because of their racial or ethnic background.

4. The *Sex Discrimination Act 1984* (Cth) safeguards several important human rights, particularly the right to equality in employment and the right to freedom from sexual harassment. Section 14 of the Act guarantees that individuals cannot be discriminated against based on their sex, marital status, or pregnancy during hiring, promotions, or salary decisions. It promotes fairness and equal opportunities in the workplace, which reflects the rights listed in the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), Article 11. The Act ensures that individuals are not excluded or treated unfairly in educational settings based on their sex or marital status in Section 21, providing

equal access to education for all. This reflects the human rights within Article 10 of CEDAW which aims to provide women with 'equal rights to men in the field of education.'

5. The *Disability Discrimination Act 1992* (Cth) promotes several key human rights, including the right to access public services. Section 23, requires that individuals with disabilities have equal access to any premises, ensuring they are not excluded or disadvantaged due to their disability. This reflects elements of the *Convention on the Rights of Persons with Disabilities* (CRPD) Article 9, which promotes accessibility to 'the physical environment.'

6. The *Commonwealth of Australia Constitution Act 1901* (Cth) grants the Commonwealth Parliament the exclusive power to create laws. One specific power outlined in the *Constitution* is the 'external affairs' power, found in section 51 (xxix). This section gives the Commonwealth Parliament the power to legislate on matters concerning Australia's relationships with other countries and international agreements. The scope of this power was a central issue in the *Tasmanian Dam Case*, which established that the 'external affairs' power enables the Commonwealth Parliament to legislate regarding international treaties. In this case, the legislation aimed to protect the Franklin River from a dam the Tasmanian Government wished to build. The external affairs power plays a crucial role in protecting individual human rights by allowing the Commonwealth to incorporate international human rights treaties into domestic law. This integration enhances legal protections against discrimination, racial inequality, and other human rights violations, ensuring that international standards are recognised and enforced within Australia.

Chapter 16: Monitoring human rights

16.1 Introduction

No questions.

16.2 Periodic reporting

Practical Application (Page 330)

1. The Article number that concerns the reporting procedure for the *Convention on the Rights of Persons with Disability* is Article 35.

2. The *Convention on the Rights of Persons with Disability* Article 35 (1) states that 'a comprehensive report on measure taken to give effect to its obligations…within two years after the entry into force.' Article 35 (2) then requires State Parties 'submit subsequent reports at least every four years.'

3. The *Convention on the Rights of Persons with Disability* Article 35 (1) states that 'the Committee, through the Secretary-General of the United Nations' is responsible for receiving and transmitting the reports from State Parties.

Practical Application (Page 331)

1. The *Disability Rights Now 2019: Shadow Report to the United Nations Committee on the Convention on the Rights of Persons with Disabilities* (CRPD) was a 'collaborative effort by Disabled People's Organisations, disability representatives and advocacy organisations from around Australia' (Pope, 2019).

2. The audience of the *Disability Rights Now 2019: Shadow Report to the United Nations Committee on the Convention on the Rights of Persons with Disabilities* (CRPD was the United Nations.

3. The *Disability Rights Now 2019: Shadow Report to the United Nations Committee on the Convention on the Rights of Persons with Disabilities* (CRPD includes 'findings from a survey of almost 900 Australians with a disability and reviews the country's progress in implementing the CRPD' (Pope, 2019).

4. The purpose of the Shadow Report was to 'review the country's progress in implementing the CRPD' and how well Australia upholds 'the rights of people with disability' (Pope, 2019).

5. The Shadow Report is beneficial for many key stakeholders, including the Australian Government, the United Nations and persons with a disability. The report gives 'an opportunity for people with disability across Australia to tell the United Nations about the widespread hardship, discrimination, violence and poverty they face every day' (Pope, 2019). This may assist the Australian Government to form more focused policy that will support persons with a disability better, give the United Nations a deeper understanding how well Australia is implementing the CRPD and overall, improve disability rights.

Research Task (Page 332)

[Answers will vary based on treaty chosen. An example is shown below.]

1. The *Concluding observations on the 8th periodic report of Australia: Committee on the Elimination of Discrimination against Women* was found < digitallibrary.un.org/record/1641944?ln=en&v=pdf>.

2. In its *Concluding observations*, the Committee on the Elimination of Discrimination against Women welcomed Australia's amendment to the *Marriage Act 1961* (Cth), guaranteeing the right to marry for all couples, regardless of gender in 2017. However, the Committee was concerned about the lack of measures taken to withdraw Australia's reservation to the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) Article 11(2), which concerns women being able to serve in combat roles. To address this concern the Committee recommended that Australia 'expediate the adoption of an amendment to the *Sex Discrimination Act* allowing women to assume combat roles' (2018, 3)

3. Australia should expedite the adoption of an amendment to the *Sex Discrimination Act 1984* (Cth) allowing women to assume combat roles, grounded in the principles of the rule of law, which emphasises fairness, equality, and justice. The rule of law dictates that all individuals, regardless of gender, should have equal access to opportunities and be judged based on their abilities, not stereotypes or discrimination. By denying women the right to serve in combat roles, Australia undermines the principles of equality and non-discrimination, violating fundamental human rights. Furthermore, the rule of law supports the notion that laws should evolve to reflect contemporary values. As society progresses toward gender equality, the legal system must adapt to ensure that all citizens have equal opportunities to contribute to national defence. Expediting this amendment would ensure legal consistency, protect individual rights, and strengthen Australia's commitment to fairness, creating an inclusive military that values capability over gender.

16.3 Special Rapporteurs

Practical Application (Pages 334 – 335)

1. The United Nations Special Rapporteur on contemporary forms of slavery is Tomoya Obokata.

2. The United Nations Special Rapporteur on Contemporary Forms of Slavery visited 'Australia from 14 to 27 November 2024' (Obokata, 2024). 'The purpose of his visit was to understand the nature and extent of contemporary forms of slavery in the country and analyse the efforts of Australia to address these practices at local, regional and federal levels' (Obokata, 2024).

3. In his report to the United Nations Office of the High Commissioner, Professor Tomoya Obokata (2024) states that his visit was 'at the invitation of the Federal Government'. In the report he also thanks 'state/territorial and local authorities for their openness and full cooperation before and during the visit' (Obokata, 2024). This demonstrates that the Australian Government supported and allowed the visit.

4. The United Nations Special Rapporteur on Contemporary Forms of Slavery used various methods to collect information and evidence on slavery in Australia. These methods included:
    - engaging with 'the Australian Human Rights Commission, Anti-Slavery Commissioner for New South Wales, civil society/community-based organisations, workers' organisations, legal professional, academic experts, as well as workers and victims/survivors of contemporary forms of slavery';
    - visiting 'Sydney, Riverina region, Melbourne and Brisbane' and
    - virtual meetings 'with some state/territorial authorities and other stakeholders before and during his visit' (Obokata, 2024).

Practical Application (Pages 335 – 336)

1. The United Nations Special Rapporteur on Contemporary Forms of Slavery is Tomoya Obokata. He 'is a scholar of international law and human rights, specialising in transnational organised crime, human trafficking and modern slavery. He currently serves as Professor of International Human Rights Law at York Law School in the United Kingdom' (Hutchens, 2024).

2. The two groups of workers the Special Rapporteur on Contemporary Forms of Slavery is Tomoya Obokata is 'persons with disabilities…employed in sheltered workshops' and 'migrant workers in Australia' who are employed 'in high-risk sectors such as agriculture, horticulture, food processing, aged care, accommodation, domestic work, hospitality, cleaning and security' (Hutchens, 2024).

3. The industries these employees typically work in are, 'in high-risk sectors such as agriculture, horticulture, food processing, aged care, accommodation, domestic work, hospitality, cleaning and security' and 'Australian Disability Enterprises (ADEs) where they engaged in manual labour work, such as warehousing, picking and packing, cleaning and laundry services' (Hutchens, 2024).

4. The United Nations Special Rapporteur on Contemporary Forms of Slavery Tomoya Obokata identified many deficiencies in Australia's monitoring process. One deficiency concerns the power imbalance between employers and temporary migrant workers in Australia. 'Since employees are either tied to a single employer, and mobility is reported to be extremely difficult, and/or dependent on their employer for extension of contracts or nomination for permanent residency' (Hutchens, 2024). As the Department of Employment and Workplace Relations (DEWR) is the lead agency for monitoring employer compliance, the 'inspection of workplaces remains insufficient, particularly in rural or remote areas, because it still very much depends on reporting by workers' (Hutchens, 2024).

Research Task (Page 336)

1. *[Web address included in question.]*

2. *[Answers will vary based on recommendations selected.]* In his Country Visit to Australia Report, the Special Rapporteur on Contemporary Forms of Slavery made many recommendations. Two of these are:
    - Raise the minimum age for marriage to 18, with no exceptions.
    - Decriminalise sex work fully in law and in practice.

3. *[Answers will vary based on recommendations selected.]* Relevant legal criteria could come from the rule of law—law is not retrospective, law is made in an open and transparent way by the people, law is known and accessibility, the law is applied equally and fairly; individual rights are protected; the features of an effective law—the law is known and accessible, accepted by the community, the law is clear and the law is adaptable.

What do you think? (Page 337)

[*Answer asks for an opinion.]* For example:

Special Rapporteurs are an essential tool in the UN's response to violations, particularly in promoting accountability and combatting impunity. Reasons may include:

- By documenting violations and recommending specific actions, Special Rapporteurs play a critical role in holding governments and other entities accountable, urging them to take responsibility for their actions or face international scrutiny.
- Special Rapporteurs draw international attention to human rights issues, ensuring that violations cannot be easily ignored.
- Special Rapporteurs can pressure states to investigate and prosecute perpetrators of violations.

Special Rapporteurs fail to promote accountability and combat impunity. Reasons may include:

- Special Rapporteurs do not have the authority to enforce their recommendations or take direct action against violators.
- Special Rapporteurs often face challenges in gaining access to affected areas, gathering evidence, or interviewing victims due to political restrictions, which can hinder their ability to conduct thorough investigations and report on violations accurately.
- In countries where governments are resistant to international scrutiny or actively suppress human rights, the work of Special Rapporteurs may have little to no impact.

16.4 Inter-State complaints

Research Task (Page 338)

1. The *International Convention on the Discrimination of All Forms of Racial Discrimination* (ICERD) can be found on the United Nations Office of the High Commissioner <ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

2. The relevant articles of the *International Convention on the Discrimination of All Forms of Racial Discrimination* (ICERD) are found below:

Article 11	1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State. 2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six

	months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State. 3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged. 4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information. 5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.
Article 12	1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention; (b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members. 2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention. 3. The Commission shall elect its own Chairman and adopt its own rules of procedure. 4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission. 5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being. 6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations. 7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article. 8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13	1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute. 2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission. 3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.
Article 22	Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

3. **Inter-State Complaint Process—*International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) Committee**

State Party believes a violation has occurred	4. A State Party to the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) can bring the matter to the attention of the Committee. 5. The Committee provides the communication to the other State Party. 6. The other State Party can explain or clarify the matter. Article 11 (1)
	↓
State Party is re-referred	• If the matter is not resolved to the satisfaction of both State Parties within 6 months, the matter can be referred again to the Committee. Article 11 (2)
	↓
An ad hoc Conciliation Commission is formed	• The Committee obtains and collates the information it deems necessary. • The Chairman appoints an ad hoc Conciliation Commission. Commission members must be appointed unanimously, or a secret ballet process is used. Article 12 (1) Article 14
	↓

The Committee considers the matter and makes recommendations	• The Commission considers the matter. • The Chairman communicates a report to the State Parties. • The States inform the Chairman whether they accept the recommendations contained in the report, or not. ticle 13 (1)(2)(3)
	↓
Refer matter to the *International Court of Justice*	• A State Party can refer the matter to the *International Court of Justice* if negotiation and arbitration fail. Article 22

Practical Application (Pages 338 – 339)

1. The *Convention* the State of Palestine and Israel are a party to is the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).

2. The ad hoc Conciliation Commission 'was set up in 2022' to settle the dispute between Palestine and Israel over issues of racial discrimination and 'was comprised of 5 human rights experts from the Committee' (Office of the High Commission, 2024).

3. [*Answer asks for an opinion.]* In the Press Release, the Commission uses the words 'mutually agree', 'all State parties share the significant responsibility…' and 'shared responsibility'. The Commission chose these words because they reflect the attributes of cooperation, shared accountability and collaboration that are central to resolving disputes in a way that does not involve court. For example, the phrase 'mutually agree' suggests that the resolution of disputes or concerns under the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) should not be imposed by one party alone but should result from consensus and dialogue between involved state parties. It emphasises that a peaceful resolution is best achieved when both sides are willing to come to an understanding and compromise, respecting each other's interests.

4. [*Answer asks for an opinion.]* Relevant legal criteria could come from the rule of law—treaty and decisions are made in an open and transparent way, treaty is known and accessible, the treaty is applied equally and fairly; the ad hoc Conciliation Commission was headed by an open, independent and impartial decision maker.

What do you think? (Page 339)

[*Answer asks for an opinion.]* Suggested legal criteria a student could use to justify that a conciliatory approach is better than an adversarial approach to settle Inter-state disputes include:

- A conciliatory approach ensures that all parties are treated **equally and fairly**, as it encourages dialogue and compromise rather than one party seeking to dominate or defeat the other. In international disputes, particularly those involving sensitive issues like human rights, ensuring fairness for all states helps maintain diplomatic relations and trust between state parties.
- Conciliation fosters an environment where all states, regardless of power or influence, can participate in the process. It ensures justice is **accessible** to all.

Suggested legal criteria a student could use to justify that an adversarial approach is better than a conciliatory approach to settle Inter-state disputes include:

- Adversarial proceedings, particularly in a court or tribunal, can create binding decisions and set legal precedents that clarify the interpretation of international treaties. These precedents provide legal certainty for future cases, ensuring **consistency** and **fairness**.
- In an adversarial system, each state can defend its sovereignty and national interests in a formal, structured environment. This approach may be seen as better for **protecting the rights of states**.
- An adversarial system uses an **open, independent and impartial judiciary**, which supports the fair resolution of disputes.

16.5 Individual complaints

Case Study (Pages 343 – 344)

1. The body that was engaged with the complaint (or communication) in the case *Daniel Billy et al. v Australia* was the United Nations Human Rights Committee.

2. The applicants, 8 Torres Strait Islanders, used the complaints mechanism stated within the *First Optional Protocol to International Covenant on Civil and Policial Rights*, which Australia signed. The legal basis of their claim was that they alleged Australia that violated Articles 2, 6, 17, 24(1) and 27 under the *International Covenant on Civil and Policial Rights* (ICCPR).

3. The relevant Articles of the *International Covenant on Civil and Policial Rights* (ICCPR) include:
   - Article 2: Each State Party respects individuals' rights and rectify any laws or actions that don't reflect the ICCPR.
   - Article 6: The right to life.
   - Article 17: That no-one be subject to arbitrary or unlawful interference with their privacy, family, home or correspondence.
   - Article 24(1): That children should not be discriminated against.
   - Article 27: The individuals should have the right to enjoy their own culture.

4. **Individual complaint (communication) process**

Individual meets the criteria to make a complaint	7. A State Party must be a Party to the treaty. 8. The individual meets the criteria and has exhausted all domestic remedies.
	↓
Individual submits a complaint	• The individual gathers the required evidence and/or writes the complaint (called a communication).
	↓
The treaty body or court reviews the communication	• The treaty body or international court confirms whether the communication meets the procedural requirements and whether the communication is admissible.

	↓
The State Party responds to the communication.	• The State has the opportunity to respond to the complaint. Article 4
	↓
A decision is made	• The treaty body or court makes findings.

5. The complaint process utilised by 8 Torres Strait Islanders in the case of *Daniel Billy et al. v. Australia* illustrates how the individual complaint mechanisms established by certain treaties can effectively monitor a country's adherence to its citizens' human rights. This specific complaint process highlights potential human rights violations, bringing them to the attention of the appropriate treaty body or court. It enables the body or court to investigate the alleged breach, thereby overseeing the country's actions.

Practical Application (Pages 345 – 346)

1. Authors McGaughey, Maguire and Purcell believe the decision *Daniel Billy et al v Australia* is significant 'in terms of climate litigation, and in terms of the rights of Indigenous peoples.' This is the first case that explicitly links 'climate harms and human rights obligations' as 'international climate change law is yet to incorporate explicit human rights obligations' (McGaughey, Maguire and Purcell, 2024). The authors also state that the case is also the first time 'that a United Nations body had found a State violated international human rights law through inadequate climate policy, establishing that human rights law applies to climate harm' (McGaughey, Maguire and Purcell, 2024).

2. [*Answer asks for opinion.]* Some believe that 'United Nations human rights complaints mechanisms present distinct opportunities for impact' (McGaughey, Maguire and Purcell, 2024). This allows the community, media and academia to 'engage with UN human rights treaties and to consider a human story which may focus the attention of domestic compliance' (McGaughey, Maguire and Purcell, 2024). It may lead to legal or policy changes that support the protection of individuals human rights. It also gives people a voice to draw international attention to their plight, which may support their own social, emotional and physical wellbeing.

3. [*Answer asks for an opinion.]* Students' response should consider whether the ability for an individual to make a complaint to a UN treaty body or court is effective.

   For example, the decision *Daniel Billy et al v Australia* hasn't led to any new policies or laws that address climate change or make the towns in the Torres Strait Islands more climate resilient. In this way the law is incapable of being enforced, which makes it ineffective.

   On the other hand, it has drawn the international community's attention to this issue and sets a precedent for others to follow. It may also put more pressure on the Australian government to act. In this way, the process is reflecting many of the key attributes of the rule of law, that being, the law is known and accessible, the decision is made by an independent and impartial judiciary, and it demonstrates that no-one is above the law.

Practical Application (Page 346)

1. The percentage of cases that were remedied was 9% (6 cases out of 65).

2. The percentage of cases that were partially remedied was 25% (16 out of 65).

3. The treaty that has seen the highest percentage of complaints filed was the International Covenant on Civil and Policial Rights (ICCPR), with 74% (48 out of 65). This high number of complaints may be because this treaty contains the human rights that most people recognise as key human rights in a democracy, or they may be easier for a complainant to substantiate.

4. *[Answer asks for an opinion.]*

Review

Comprehend (Page 347)

1. The 7-core international human rights treaties contain a periodic reporting mechanism to monitor a party's progress in implementing its contents into its domestic policy, processes, and law. For example, the *Convention on the Rights of Persons with Disabilities* (CRPD) Article 35 (1) states that '[e]ach State Party shall submit to the Committee…a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard.' The report is written and submitted by the Australian Government, but it's important to note that other non-government organisations (NGOs) play a crucial role in this process. They can submit 'shadow reports' for the Committee to consider, providing an alternative perspective and ensuring a comprehensive review. An example of this occurred in 2019, when many disabled people's organisations collaborated to write a report called *Disability Rights Now 2019* to the United Nations. From this, a Committee releases a publicly available report that makes concluding observations on a State's progress in implementing a treaty, raises concerns about the specific area(s), and makes recommendations.

2. Special Rapporteurs are another way the United Nations promotes and protects human rights. A Special Rapporteur is:
   - independent and non-paid, and
   - appointed by the United Nations Human Rights Council (UNHRC) and have expertise in a specific area.

   They conduct fact-finding missions according to a specific term of reference using various methods, including field visits, consultations, and written correspondence. The Special Rapporteur then shares their findings and recommendations in a report to the UNHRC. A recent example of this was when the United Nations Special Rapporteur on Contemporary Forms of Slavery visited Australia in 2024. During his visit, he engaged with the Australian Human Rights Commission, Anti-Slavery Commissioner for New South Wales, civil society/community-based organisations, workers' organisations, legal professionals, academic experts, as well as workers and victims/survivors of contemporary forms of slavery; visited 'Sydney, Riverina region, Melbourne and Brisbane and held virtual meetings with some state/territorial authorities and other stakeholders before and during his visit.

3. The Australian Human Rights Commission (AHRC) assists Special Rapporteurs by collecting and providing information that is relevant to their terms of reference, raising awareness about human rights issues, and promoting the recommendations made by the Rapporteurs.

4. Certain treaties permit one State party to lodge a complaint against another State party, referred to as an 'Inter-State complaint. The process for submitting these complaints can vary between treaties, each having its own specific processes and procedures. For example, the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) Article 11 allows for one State Party to submit a communication (or complaint) to the Committee if they believe another State Party 'is not giving effect to the provisions of this Convention.' The Committee provides this to the receiving party, initiating

a negotiation process to resolve the matter to the satisfaction of both parties. If this is unsuccessful, the communications shifts to an ad hoc Conciliation Commission.

5. Some treaties, either within the treaty itself or in its optional protocol, create an opportunity for an individual (or applicant) to bring a complaint (also referred to as a communication) alleging a State has violated their human right to a committee or court. Before submitting a communication to the relevant committee or court, an individual must have exhausted all domestic remedies. Once received, the committee or court will confirm whether the case meets the procedure requirements and whether the communication is admissible. At this point, the State has the right to respond to the complaint before findings are made publicly by the committee or court.

Comprehend, analyse and evaluate (Pages 347 - 348)

Source 1

1. In 2022, the United Nations wrote a letter to the Australian Government accusing the country 'of failing to prevent the 'sheer obliteration of the rights' of its own citizens including children who are held in 'sordid' conditions in camps in north-eastern Syria' (Hurst, 2022). At this time, about '46 Australian citizens, including 30 children' were being held in camps in al-Hawi and Roj.

2. *[Answer asks for an opinion.]* Student's may examine viewpoints of the United Nations, Australian community, Australian Government and the citizens in north-eastern Syria and their families in Australia.

   Students may raise the following legal issues:
   - whether we are legally obligated to repatriate these citizens,
   - security concerns about bringing the citizens home to Australia and the Australian government's obligation to protect the Australian community,
   - the conditions of the al-Hawi and Roj camps, and
   - whether the Australian government's actions breach a Convention.

   Students may decide Special Rapporteurs effectively monitor and protect human rights. Reasons may include:
   - By documenting violations and recommending specific actions, Special Rapporteurs play a critical role in holding governments and other entities accountable, urging them to take responsibility for their actions or face international scrutiny.
   - Special Rapporteurs draw international attention to human rights issues, ensuring that violations cannot be easily ignored.
   - Special Rapporteurs can pressure states to investigate and prosecute perpetrators of violations.

   Students may also argue that Special Rapporteurs fail to monitor and protect human rights. Reasons may include:
   - Special Rapporteurs do not have the authority to enforce their recommendations or take direct action against violators.

- States do not implement recommendations made by Special Rapporteurs, particularly when governments are biased or unwilling to address human rights violations affecting marginalised or vulnerable populations, leading to unequal protection.
- Special Rapporteurs rely on state cooperation to report human rights abuses, but states often ignore or refuse to implement their recommendations, evading accountability without significant international consequences, especially in cases where political or economic interests are involved.
- Special Rapporteurs often face difficulty in ensuring that the recommendations they make lead to meaningful change.
- In countries where governments are resistant to international scrutiny or actively suppress human rights, the work of Special Rapporteurs may have little to no impact.

Source 2

1. The mandate of the Special Rapporteur in Source 2 focuses on the human rights implications related to the management and disposal of hazardous substances and waste. The Special Rapporteur's report expresses concern about the strict restrictions on peaceful protests regarding this mandate. These restrictions limit citizens' ability to protest or bring government attention to issues related to waste disposal in their communities.

2. *[Answer asks for an opinion.]* Student's may examine viewpoints of the United Nations, the community, protest or lobby groups or NSW/Qld/Tas/Vic Government.

   Students may raise the following legal issues:
   - whether the restrictions are necessary,
   - the importance of the right of protest,
   - whether the law balances individual rights with community protection appropriately,
   - whether a State government's actions breach a Convention.

   Suggested legal criteria listed in Source 1 above.

Chapter 17: The role of international institutions in upholding rights

17.1 Introduction

What do you think? (Page 351)

[Answer asks for an opinion.] In another activity you were asked whether developing countries found it difficult to become signatories to all of the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This issue would be an important consideration if the countries of the South Pacific were considering setting up a regional human rights court, and a covenant which set out the rights to which South Pacific countries might agree. Nevertheless, there is probably considerable value in the countries of the South Pacific, including Australia and New Zealand, convening talks about the future of human rights in the South Pacific. There are probably many issues on which they can reach agreement. One standout issue is the effect of climate change on all countries, but particularly on many islands in the South Pacific.

Experience tells us that it took up to 10 years for the International Bill of Human Rights to be adopted and for most of the Member States of the United Nations to become signatories.

There is considerable political, cultural, and ethnic diversity among the nations of the South Pacific.

Noumea continues to be a colony of France. Tonga is a monarchy where democratic rights continue to be limited by the monarch's control. There is enormous cultural and ethnic diversity in Australian's closest neighbour, Papua New Guinea.

Students should carry out research to find out what these countries might have in common and how they would react to their sovereignty being subject to the equivalent of the HRC. Of course, as students would realise from their studies, countries can reserve rights and only signup to those things with which they agree.

Research Task (Page 352)

[Unnecessary to answer—student choice.] You will find that an extract of the article authored by the Hon Justice Michael Kirby AC CMG referred to in the Tip which follows this activity in the text is reproduced in additional resources for those students who do this research task.

17.2 *International Court of Justice* (ICJ)

Case Study (Pages 354 - 355)

1. The International Treaty entered into between Japan and Australia and other countries was the International Convention on the Regulation of Whaling (ICRW).

2. If Japan was to grant to any of its nationals, including any Japanese company a special permit authorising that person or company to kill, take and treat whales for purposes of scientific research then it would not have been in breach of its obligations under the treaty. This exception to obligations contained in the treaty was contained in Article VIII of the ICRW.

3. The 3 provisions of the convention that were breached by Japan were:
    - The moratorium on commercial whaling.
    - The moratorium on the use of factory ships to process whales.
    - The prohibition on commercial whaling in the Southern Ocean Sanctuary.

Practical Application (Pages 355 – 356)

1. Japan withdrew from the IWC in 2019.

2. Japan announced that it would limit commercial whaling to within its own waters. Commercial whaling was banned under an International Whaling Commission moratorium in 1986, so the decision to cease commercial whaling in the Southern Ocean only partially complies with the ban.

3. Japan admits that the construction of the new 'mothership' is designed to enable it to continue to whale in the Antarctic Ocean in times of food crisis. It was intended to pass on Japan's 'whaling culture'.

4. Australia's position is that there should be a worldwide moratorium on commercial whaling which includes whaling in the Southern Ocean.

5. Australia can make a claim against any other Member State of the United Nations that is a signatory to the International Convention on the Regulation of Whaling, by bringing a claim alleging a breach of the ICRW. It can do this by making claim on its own behalf, or by making claim which is framed as a collective state interest. The factual basis relied on to make a claim would influence the approach taken in framing the claim. If the claim is framed as a collective interest, it is easier for other Member States to join the court action, and make representations supporting the claim.

Practical Application (Page 357)

Both of Australia and Timor-Leste submitted to the jurisdiction of the ICJ. Effectively this meant that any matters which were in dispute between the two countries could be heard in the ICJ and any decision made by the ICJ would be observed by them.

After Timor-Leste began its case, the Australian Security Intelligence Organisation (ASIO) raided the Canberra office of Mr Collaery, the lawyer acting for Timor-Leste, and seized electronic and paper files. Timor-Leste Day applied to the ICJ for orders to prevent Australia relying upon the documents seized from the legal representative. They were successful, and the ICJ make orders which followed the well- established principle that communications between a litigant and his or her lawyers must be kept confidential and must never be made available to the other side in proceedings. The ICJ effectively acted in a way which showed that it would make impartial and legally binding decisions about the matter. It was therefore no surprise that the Australian government communicated with the government of Timor-Leste, and the earlier agreement between the governments was abandoned and renegotiated.

The ICJ, showed that it would be an effective jurisdiction to resolve the matter, and the Australian government was clearly in the wrong.

Practical Application (Page 359)

1. The purpose of the Australian Declaration of Intervention is that Australia seeks to avail itself of its right to intervene in the merits phase proceedings between Ukraine and the Russian Federation on questions of construction of the relevant provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide* (the *Genocide Convention*).

2. Australia has a continuing commitment to the rules-based international order that is critical for maintaining international peace and security. Australia has a long history of supporting efforts to promote the *Genocide Convention*. It played an active role in negotiating the text of the *Convention* and supporting its adoption. Australia was one of the first countries to ratify the *Genocide Convention* in 1949.

3. Australia's intervention is limited to matters regarding construction of the provisions of the *Convention* which are at issue in the case. The construction of the *Convention* given by the judgement of the court will be binding in Australia because it has intervened in the court action. This does not mean that Australia becomes a party to the dispute and Australia's intervention does not affect the equality of the parties.

4. The importance to the ICJ of countries like Australia intervening in the process of decision-making to provide support for an allegation made by a fellow Member State is that the views of countries like Australia are available to the ICJ while it is considering its decision. Member States like Australia can put forward their views about the interpretation of a Convention to which they are signatory, which is one source of law for the ICJ. Member States can also make submissions about the general principles of law which they and their fellow Member States consider to be widely accepted as international law. In this particular case, if the matter does go to the ICJ for a decision, the submissions that Australia and other Member States make about any evidence of genocide will be of assistance to the ICJ in its deliberations.

Practical Application (Pages 359 - 360)

1. The women in the Schweiz case claim that the Swiss government put them at risk of dying during heatwaves that were caused by climate inaction, and that the risk to their health was exacerbated by their age and gender.

2. The Court found that the Swiss government violated Article 8 of the *European Convention on Human Rights* (ECOHR), 'the right to respect for private and family life'. The Court also found that article 8 'encompasses a right to effective protection by State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life'.

3. In April 2023, the United Nations General Assembly asked the International Court of Justice (ICJ) to give an advisory opinion on States obligations under international law, including international human rights law, regarding the protection of the climate system. When this advisory opinion is available, it is very likely to be highly persuasive as an authority for other courts internationally in all countries, to consider when making decisions.

4. *[Answer asks for an opinion.]* Australia's relationship with the countries of the South Pacific, including its response to the concerns that they have about climate change affecting them, are likely to influence the position it takes, when making submissions to the ICJ. It is likely to support the view that international human rights law includes the most recent development where the United Nations General Assembly adopted the human rights principle that a 'clean safe and sustainable environment' is a human right. In the ACT, this principle has been added

to its *Charter* of Human Rights. This is likely to lead to the development of other human rights principles in support of legislation which ensures this right is respected.

17.3 *International Criminal Court* (ICC)

Research Task (Page 361)

[Unnecessary to answer.] This is a Research Task designed to build on the information in the text and should be answered by students at their level of competence.

Practical Application (Page 362 - 363)

1. The purpose of Senator Lambie's referral was to focus on the legal responsibility of Australian Defence Force Commanders who knew, or should have known, about alleged war crimes committed by Australian forces under their command in in Afghanistan.

2. The ICC prosecution is presently investigating alleged war crimes against humanity and war crimes committed by various sides in the Afghan conflict including Australian, UK and Taliban forces and the Islamic State-dating back to the early 2000s.The scope of the investigation is as described, but does not include the USA, which is not a member of the court and does not respect its jurisdiction.

3. Australia's position is that no person will be surrendered to the court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes. In addition, Australia would only surrender a person to the ICC for prosecution following the Commonwealth Attorney General issuing a certificate.

   The position of the ICC is that it does not prosecute alleged war crimes unless a country is unwilling or unable to do so itself. In Australia's circumstances, it is appropriate for Australia to conduct investigations into alleged war crimes and prosecute them if they are made out. This treats the alleged perpetrators in accordance with international law. The rule of law is applied, and the members of the Armed Forces, are treated fairly and impartially according to the law.

Review

Comprehend (Page 363)

Question 1

a. Globally there are several international institutions to which member states of the United Nations have joined on a regional basis. These groups of states have agreed to the terms of a Convention, Treaty or charter to allow them to have disputes and issues determined on a regional basis.

b. A court which has global jurisdiction can exercise it worldwide. The two main courts which have global jurisdiction within the international court system are the *International Court of Justice* (ICJ) and the *International Criminal Court* (ICC).

c. A contentious case is one:
- made by one state against another, and
- where a nation state has shown leadership in enforcing rights on behalf the group of treaty parties, or indeed on behalf of the 'international community as a whole' (which is the pursuit of 'collective interests')

d. A Declaration of Intervention is a statement made to the ICJ stating that a Member State wishes to exercise its right to intervene in proceedings before the ICJ on questions of interest relevant to the said case pursuant to Article 63 (2) of the *Statute of the International Court of Justice* (the *Statute*).

e. The ICJ gives advisory opinions on legal issues referred to it by the United Nations. Member States can appear by application in the matter and make submissions on relevant issues.

Question 2

a. The ICJ has global jurisdiction which is derived from the *Statute of the International Court of Justice*. It is a permanent court that hears civil complaints or cases (called 'contentious cases'):
- made by one state against another, and
- where a nation state has shown leadership in enforcing rights on behalf the group of treaty parties, or indeed on behalf of the 'international community as a whole' (which is the pursuit of 'collective interests')

It also has jurisdiction to give advisory opinions on legal issues referred to it by the United Nations.

b. The *International Criminal Court (Rome Statute)* is the international treaty that founded the ICC. The Statute sets out the ICC's jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression. It is a permanent international court capable of investigating and prosecuting the most serious crimes of international concern.

c. The jurisdiction of the European Court of Human Rights (ECOHR) applies to all Member States of the European Union. Its role is to hear claims by Member States and individuals regarding alleged violations of the *European Convention on Human Rights*.

Justices of the High Court of Australia have referred to the decisions of the ECOHR. As the Commonwealth and State Parliaments introduce more legislation consistent Australia's human rights obligations, such as the *Human Rights Act 2019* (Qld), the influence of the

ECOHR and other international legal developments in international human rights law will be maintained and potentially grow.

Analyse (Page 363)

1. The ICJ Is an International Court whose role is to make decisions when Member States who accept its jurisdiction make competing claims. In this case, Australia is accusing Japan of pursuing a large-scale program of whaling under the Second Phase of the Japanese Whale Research Program by granting a Special Permit in the Antarctic. it alleged that Japan was in breach its international obligations under the ICRW.

   The ICJ had to decide whether or not the granting by the Japanese of a special permit was for the purpose of scientific research or not. Its role is to make a decision about the dispute between the two countries. The ICJ made findings of fact against Japan and ordered Japan to revoke any authorisations, permits or licences to kill, take or treat whales and to refrain from granting any further permits under Article VIII of the Convention in pursuance of that program.

2. Australia is a signatory to the *Rome Statute* which established the ICC and is a State Party to that treaty. The USA is not a signatory to the *Rome Statute* and is not a State Party to the Treaty. It Is an Issue for the ICC that the USA does not support it, as it is the support of States Parties like Australia that will ensure that the ICC has a future.

   Australia actively participates in the Assembly of States Parties to the Rome Statute. This Assembly Is the Court's management oversight and legislative body. It meets at least once a year and sets the general policies for the administration of the Court and reviews its activities.

Select and evaluate (Page 363)

1. We have already selected for you (see Page 353) a number of important involvements by Australia in the ICJ. Refer to these for a selection of your own.

   In the answer to Analyse (2) above, we have set out the involvement of Australia with the ICC.

   Bipartisan policy by the two major political parties in Australia (Labor and LNP) that we continue to support the ICJ and the ICC, accept their roles and jurisdictions, and respect the decisions that they make. Nowhere is this more evident than in our support for New Zealand's application to reopen the Nuclear Tests case against France, and our response to the claims by Timor-Leste a during the dispute between the two governments.

   In the words of a former Foreign Minister of Australia, Mr Hayden, in his 1986 statement:

   > *...the Australian government has consistently advocated that United Nations systems, including the International Court of Justice, should be maintained as a force for peace and stability. The government has encouraged resort to the International Court as a forum for the peaceful settlement of international legal disputes. It has done so by example, through acceptance of the compulsory jurisdiction of the Court, and also by actually seeking to make the International Court a forum for settling legal disputes between the parties to multilateral treaties if such disputes cannot be resolved by negotiation or other peaceful means.*

Additional Resources

II The Australian Debt: The Influence of the European Court of Human Rights on the Development of Australian law

Australia is not a party to the Convention, nor is it subject to the jurisdiction of the European Court of Human Rights (ECOHR). Until recently,21 no jurisdiction in Australia had adopted general provisions for the protection of fundamental human rights, though some relevant provisions exist in the Australian Constitution. The federal Attorney-General, Robert McClelland, has announced that the Australian Labor government, elected in 2007, intends to examine this issue in its first term.

The increasing number of references to the jurisprudence of the European Court in decisions of United Kingdom courts, especially since 2000 when the *Human Rights Act 1998* (UK) came into force, has inevitably been noticed by Australian courts. This is unsurprising given the continuing significance for Australian law of analogies borrowed from Britain. The introduction in various Australian jurisdictions of legislation for the general protection of human rights is likely to enhance still further the attention that is given to decisions of the European Court of Human Rights. My purpose is to demonstrate the already substantial Australian debt to the reasoning of the European Court of Human Rights. I will illustrate the wide range of areas in which decisions of the Court have been cited in local judicial reasons. I will suggest that, in the present environment, this process is likely to continue and expand.

A Recent Illustration: The Prisoners' Voting Case

The most recent extended reference by the High Court of Australia to the reasoning of the European Court of Human Rights occurred in interesting and hotly contested circumstances. In *Roach v Electoral Commissioner*, the High Court was concerned with amendments to the *Commonwealth Electoral Act 1918* (Cth) enacted in 2006. The amendments had the effect of disenfranchising from voting in federal elections electors who were serving sentences of imprisonment regardless of the duration of their sentences and whether for offences against federal, state or territory laws.

Previously, the disenfranchisement of prisoners in Australia had applied only to prisoners serving custodial sentences of three years or longer. By majority, the High Court held that the 2006 amendments were invalid under the *Australian Constitution*; that a substantial reason was required to disqualify an eligible elector from voting; and that the new provisions, in making no distinction between short and long term prisoners or relative culpability, were incompatible with the constitutional concept of universal suffrage as it had evolved in Australia. The amending provisions were thus struck down. In effect, the previous form of the legislation was revived.

In each of the majority opinions in *Roach*, the Justices of the High Court referred to the decision of the European Court in Hirst v United Kingdom (No 2). There, the European Court of Human Rights held, by majority, that a blanket ban on voting by all convicted prisoners in the United Kingdom violated art 3 of Protocol I to the Convention. In his reasons in *Roach*, Gleeson CJ explained how the majority in Hirst had concluded that the blanket ban 'was arbitrary . . . and lacked proportionality . . . even allowing for the margin of appreciation to be extended to the legislature'.

It was, of course, impossible to apply such jurisprudence 'directly' to the meaning of the *Australian Constitution*. Yet Gleeson CJ pointed out that 'even so, aspects of the reasoning are instructive'. By analogy, the 2006 amendments were seen as 'abandoning any attempt to identify prisoners who have committed serious crimes'. They were thus viewed as 'breaking the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people'.

Hirst was also referred to in the joint majority reasons of myself, Gummow and Crennan JJ. Those reasons likewise acknowledged the differences between the questions raised for consideration by the European Court of Human Rights and the High Court of Australia respectively. Nevertheless, the joint reasons pointed to the way in which the decision in Hirst had impacted upon the consideration of a like question in the Supreme Court of Canada, decided in accordance with the *Canadian Charter of Rights and Freedoms*. In' justifying the acceptability of a disqualification for prisoners serving three years of imprisonment or more, the joint reasons concluded that such provisions were not 'necessarily inconsistent, incompatible or disproportionate in the relevant sense'.

The dissenting Justices in *Roach* (Hayne and Heydon JJ) rejected the relevance of the reasoning of the European Court to what was ultimately a question about the requirements of the *Australian Constitution*. Hayne J rejected the relevance of any 'generally accepted international standards' in elucidating the demands of the *Australian Constitution*. Heydon J was even more emphatic on this.

Source: The Hon Justice Michael Kirby AC CMG, 'Australia's Growing Debt to the European Court of Human Rights,' *Monash University Law Review* (Vol 34, No 2), pp. 242 – 244. <classic.austlii.edu.au/au/journals/MonashULawRw/2008/10.pdf>.

Chapter 18: Refugees, abduction of children, conduct of war

18.1 Legal implications of signing international treaties and conventions

No questions

18.2 *Protocol Relating to the Status of Refugees*

Practical Application (Page 360)

1. The purpose of the *1967 Protocol* was to amend the *1951 Refugee Convention* so that it applies equally to all refugees both before and after 1967.

2. The important change is in Article 1 (2) which says:

   > For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of Article 1 of the Convention as if the words *'as a result of events occurring before 1 January 1951 and…'* And the words *'as a result of such events'*, in Article 1A (2) were omitted.

3. Australia's obligations under the original *1951 Refugee Convention* changed. Australia became responsible under the amended *1951 Refugee Convention* for all refugees, not only those who became refugees *'as a result of events occurring before 1 January 1951'*.

Practical Application (Page 367)

1. A refugee is a person who has a *'well-founded fear of being persecuted'*, and because of that fear is unable or unwilling to return to that person's country of former habitual residence. The *1951 Refugee Convention* applies to any person who claims to be a refugee *'as a result of events occurring before 1 January 1951'*.

2. The *1951 Refugee Convention* ceases to apply if a person who claims to be a refugee who:

   - has voluntarily re-availed himself of the protection of the country of his nationality
   - has voluntarily reacquired his nationality if it was lost
   - has acquired a new nationality which has provided protection
   - has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution
   - has refused to avail himself of the protection of the country of his nationality after the circumstances which made him afraid have ceased to exist
   - has committed a serious crime or acts contrary to the purposes and principles of the United Nations.

3. *[Answer asks for an opinion.]* It is appropriate that nation states should have regard to a criminal record of persons seeking to be refugees. Governments are very concerned about the safety of their citizens. Endangering citizens by accepting refugees who are criminals, especially criminals who are likely to repeat crimes, such as certain types of sexual offenders, is probably not acceptable. There is always a question of the nature of the crime, when the offences occurred, and whether or not the potential refugee has completed a sentence relating to that crime.

   It is a complicated issue and is politically sensitive, so that the system so that checking the status of a potential refugee must be subject to a legal system which is fair and meets the objectives of the community. Broadly speaking the circumstances set out in Article 1F are appropriate.

Practical Application (Pages 368 – 369)

1. *[Answers will vary according to assumptions made by students about the potential refugee.]* You have no criminal record. You have a well-founded fear of persecution based on what happens to people like yourself in your country of origin. You are homosexual. The remote beach you have landed on in the Northern Territory is within the Australian migration zone. You are therefore not automatically subject to offshore detention. You expect therefore to be arrested and detained while undergoing various checks of a personal kind and your status in the country you come from. You expect to be allowed to make application for a Temporary Visa once these checks are satisfactorily completed. You expect your application to be successful and that you will be released into the community once a temporary visa is granted.

   (Teachers could request students to vary the assumptions about the potential refugee and see how this might affect their answers. At this stage it is unlikely from the information in the text that they will be able to provide all the answers necessary. Revisit this question at the end of the chapter and consider the answers that will be different in that context.)

Practical Application (Page 369)

1. The global refugee crisis exists because the humanitarian organisations of the United Nations, and the humanitarian organisations of nation states, are unable to cope with the numbers of persons displaced by war, violence and persecution.

2. The most significant cause of the refugee crisis appears to be war. In times of war people are often displaced from their homes and persecuted because they do not belong or are regarded as enemies.

Practical Application (Page 370)

1. In refugee resettlement over 10 years Australia was third overall and second on a per capita basis receiving 13.1% (132,180) of the 1,008,934 refugees resettled.

2. *[Answer asks for an opinion.]* Some of the factors influencing the number of people Australia has recognised as being entitled to refugee status over the last 10 years are likely to be:
   - Australia's geographical distance from major sources of refugees, in Africa, the Middle East, and parts of Asia (e.g. Myanmar).
   - Relatively speaking, on the world scale Australia has a relatively low population base. Australia does not share borders with countries from which refugees are actively leaving.
   - Australia has a rigorous process for the recognition of refugees.

3. *[Answer asks for an opinion.]* As has been indicated in the previous answer, refugee recognition depends on a number of factors which are not within the control of a nation state. Quite clearly, the large number of refugees which have travelled across the Mediterranean from North Africa in recent years would mean that those countries to which they went would probably have very high levels of refugee recognition. On the other hand, Australia discourages boats from Asia and the open ocean to the north of Australia is a

significant barrier. Also, the refugees who want to travel illegally to Australia across the ocean take great risks.

On the other hand, refugee resettlement occurs when a refugee has applied for a temporary visa, is processed, and is granted the temporary Visa to resettle. It does not seem fair to compare the statistics or combine them to assess Australia's international contribution without significantly more investigation.

Practical Application (Pages 371 – 372)

Question 1

a. A person is a refugee if the person:
   - where the person has a nationality-is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country, or
   - where the person does not have a nationality-is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

b. The tests set out in the *Migration Act* which determine if a person satisfies the character test are:
   - does the person have a substantial criminal record
   - has the person being convicted of an offence
   - does the Minister reasonably suspect the person is a member of a group or organisation that has been or is involved in criminal conduct.

Question 2

a. The definition of a refugee in the *Migration Act* and the definition of a refugee in the *1951 Refugee Convention*, although there are differences in wording, are essentially the same. Both of them apply the core test that the refugee has to establish of a 'well-founded fear of persecution' in the refugee's country of origin and will disqualify refugees who establish this criterion if they have a serious criminal record.

b. In the narrow sense of interpreting the *Migration Act*, Australian domestic law satisfies its international obligations under the *1951 Refugee Convention* as amended by the *1967 Protocol*. In that sense, our domestic law sufficiently complies with international law. However, as you will find out as you proceed further into this topic, in other respects, the detail of the laws passed to deal with refugees raises other issues of whether Australia meets its legal obligations with regard to the treatment of persons seeking asylum in our country.

Practical Application (Pages 372 – 373)

1. The Australian humanitarian program provides resettlement for refugees and others who are displaced as a result of conflict, persecution and human rights abuses. The intake is drawn from a range of nationalities, ethnic and religious groups, reflecting global displacement arising from conflict and persecution. It prioritises those most in need of global resettlement in line with guidance and referrals from UNHCR and focuses on people who are outside their home country and who are:
   - assessed as refugees by the UNHCR referred to Australia for resettlement

- applicants proposed by a close family member in Australia
- vulnerable cohorts within a refugee population, including women and children, and ethnic and LGBTI+ minorities.

2. As you can see from the previous answer, Australia cooperates with and relies on the UNHCR to a great extent. There are obviously components of the program which do not need direct UNHCR support but arise out of the refugee intake which is already in Australia. For example, in the onshore component which is reserved for people who arrive in Australia lawfully, some or all or seek Australia's protection and are found to engage Australia's non-refoulement (non-return) obligations.

Research Task (Page 375)

[Answer will vary due to student research choices.]

Case Study (Page 375)

The response by CAT seems entirely reasonable in the circumstances. It seems highly unlikely that M. K. M.'s fear of persecution was not well-founded. We do not know from the case what finally happened, but Australia's initial response to the claim of M. K. M. seemed quite inadequate, given the factual circumstances he faced if returned to Afghanistan. The reasons why Australia rejected his claim do not seem to reflect the test which should be applied in the circumstances. Both the international legal obligations under the 1951 Refugee Convention and under the Migration Act seem to be reasonably satisfied in the circumstances, so that his claim to be a refugee should have been accepted. The fact that Australia complied with the committee's interim measures request, indicates perhaps that the relevant Australian authorities accepted the views of the CAT.

Case Study (Page 376)

There is no doubt that the Australian government breached the rights of Mr Gnaneswaran under the ICCPR by forcibly deporting him while his case was before the UNHRC. However, he had exhausted his rights under the Australian legal system, and the question really was whether or not the Australian government were obliged to pay attention to the processes of the UNHRC in the particular circumstances. Australia's response seems arbitrary and unreasonable, given the fact that he was arrested, interrogated and taken to court in Sri Lanka when he arrived.

Case Study (Pages 377 – 378)

1. The principal Act that applies to refugees is the *Migration Act 1958* (Cth).

2. The plaintiff in this case was classified as an 'unauthorised maritime arrival' (UMA). This meant that the plaintiff was taken to Papua New Guinea to be processed.

3. Australia's use of regional processing facilities is constitutionally valid under the aliens power conferred by s51(xix) of the *Constitution*.

4. The High Court of Australia acknowledged in their decision that, 'there may be some doubt whether the provisions…can be said to respond to Australia's obligations under the *Refugee Convention* [at 44].'

5. *[Answer asks for opinion.]* The outcome of the case may have been different if Australia had fully included the *1951 Convention* into Australian domestic law, as the court would have

the power to apply our human rights obligations to the case being heard. However, Australia is processing the plaintiff's application for asylum and assisting the plaintiff to settle outside Australia, so it may have had little impact on the final outcome.

Practical Application (Pages 378 – 379)

1. The AHRC has monitored and reported on the conditions for people in immigration detention in Australia for over 20 years. Its work includes:
    - investigating complaints about alleged breaches of human rights in immigration detention facilities
    - conducting visits to immigration detention facilities and publishing reports on those visits
    - conducting national inquiries
    - developing minimum standards for the protection of human rights immigration detention.

2. The AHRC has called for an end to the Australian system of immigration detention, because it is mandatory and not time limited. It leads to breaches of Australia's human rights obligations.

3. The position the AHRC took on 23 April 2023 was that the use of immigration detention may be legitimate in certain circumstances, but that a person should only be held in an immigration facility for a strictly limited period of time if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be managed in a less restrictive way.

    Whether or not students agree with this position is a matter of personal opinion. The length of time a refugee should be held in an immigration facility does depend on the risk to the community if they are released, and on the feasibility of returning them to their nation of origin or to another nation which is prepared to accept them as refugees.

    The relevant legal criteria to this decision is found in the various international treaties which set out the obligations of the Australian government. The ICCPR, the CAT, the CRC, and the *Convention Relating to the Status of Refugees*. Fair treatment in accordance with the obligation is found in these treaties is the standard to which the Australian government should aspire.

Research Task (Page 379)

[See additional resources where several cases are introduced to assist students in their inquiry.]

Practical Application (Page 380)

1. Asylum seekers held in offshore detention were subjected to a decade of medical neglect, inhumane treatment and human rights abuses. Hundreds of people held in offshore detention became so sick they had to be medically evacuated to Australia. As far back as 2015, the United Nations special rapporteur on torture found that Australia's detention of people seeking asylum on Manus Island and Nauru constituted systematic violations of the *International Convention against Torture*.

2. As at 19 February 2024 there are 40 people who recently sought asylum in WA, who are waiting to be sent to offshore detention in Nauru. The position of the Australian government remains unchanged. Amnesty International says these people should not be sent to Nauru which will condemn them to detention in an offshore processing centre about which there have been allegations of corruption and mismanagement and where there is continuing human suffering.

3. As this question invites students to give their point of view, there are likely to be different points of view, so there is no definite set answer. For example, some students may support the Australian Government's point of view, which has had bipartisan support since 2013, that the only way to prevent refugees who seek asylum from arriving illegally by boat, is to stop them, and create 'excised offshore places' were people who arrive are not in Australia's migration zone, and are therefore not entitled to apply for a temporary Visa.

   At the same time, this policy has led to such inhumane outcomes, that reflect badly on Australia, that every effort should be made to establish the entitlement to seek to some arrangement which does not leave them in indefinite detention.

Practical Application (Page 381)

1. Member States made 50 formal recommendations based on the issues of:
   - offshore processing of people seeking asylum
   - indefinite immigration detention
   - lack of legislation to prohibit detention of children
   - refoulement
   - lack of compliance with international law of asylum and border management policies.

   Although the core principles of the *1951 Refugee Convention* are contained in the *Migration Act*, there are clearly quite a number of specific details which are not included in the Australian legislation, and these caught the eye of critical UN Member States.

2. As we have seen, the conditions under which refugees lived in offshore processing detention facilities on Manus Island and Nauru have been the subject of criticism for over a decade. In addition, offshore processing clearly does not comply with Australia's obligations to refugees under the 1951 Refugee Convention and therefore attracted the most criticism.

18.3 *Hague Convention on the Civil Aspects of International Child Abduction*

Practical Application (Page 382)

1. The purpose of the *Hague Convention* is to protect children from the harmful effects of wrongful removal and retention across international boundaries by providing a procedure to bring about their prompt return and ensuring the protection of rights of access of both parents. It provides a lawful procedure for seeking the return of abducted children to their home country. It also assists parents to contact or get access to children overseas.

2. The removal or the retention of a child is considered wrongful where:

- it is in breach of rights of custody attributed to a person, an institution or any other bodies, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and
- at the time of removal or retention those rights were actually exercised, either jointly or alone, and would have been so exercised but for the removal or retention.

3. Australia and other State signatories should establish a Central Authority to discharge the duties which are imposed by the *Convention* upon such authorities. These duties include bringing applications in the state to which the child has been removed for the return of a child on behalf of the person who is entitled to care for the child where it was habitually resident immediately before any breach of custody or access rights.

Practical Application (Page 383)

1. The structure and content of the *Hague Convention* is used in the Family Law (Child Abduction Convention) Regulations. The terms are cross-referenced and incorporated into the Regulations so that they mean the same thing in each document. In addition, there is a definition of a 'return order' which incorporates the principles set out in the *Convention*.

2. For a system of international laws to work in a way which ensures all Nation State signatories would be happy to incorporate the principles and processes of the *Hague Convention* into domestic legislation it would have to be incorporated in an identical way so that it could be relied upon by all signatories to work fairly and impartially. An important principle of the rule of law is that in the application of international laws, all litigants are treated equally. This could only be achieved by the incorporation of the *Convention* into domestic legislation in the same way. It then could be relied upon to deliver outcomes which were accepted by all Nation State signatories, and the persons who use the system.

Case Study (Pages 383 – 385)

1. The natural and ordinary meaning of the phrase 'habitual residence is determined by reference to a number of factors:
   - settled purpose:
   - actual and intended length of stay;
   - purpose of the stay:
   - strength of ties to the contracting State (in this case Finland or Australia):
   - degree of assimilation into a contracting State including living and schooling arrangements; and
   - degree of cultural, social and economic integration.

   These factors have been determined by reference to the case law which has accumulated as decisions have been made in the various jurisdictions that have decided the circumstances of 'habitual residence' in various cases.

2. The decision of the Court is determined by applying the facts of the case to the law, so that the meaning of 'habitual residence' is decided in the particular circumstances. The first step in any decision is to decide the applicable law. In this case, the applicable law is to determine the habitual residence of the child in question. The facts of the case are then used to decide the place in which the child habitually resided immediately before being removed to another jurisdiction/Nation State.

3. Answers to this question will be different depending on the particular facts that the student decides to change. For example, how important would it be to the decision if the parents had decided that the children should live in Australia and filed consent orders in the court to that effect prior to the parents separating. This could be quite significant because it would be evidence of what parents both wanted.

Research Task (Page 385)

[This is a student activity to widen their perspective and does not require an answer here.]

18.4 *Geneva Conventions* and *Hague Conventions*

Practical Application (Pages 386 – 387)

1. *[Answer asks for an opinion.]* We have seen that Australia is a strong supporter of the International order and international rule of law. It has been involved in a number of military conflicts where members of the armed services have needed assistance of the kind supplied by Red Cross and Red Crescent. Australia has an interest in ensuring that the assistance these organisations provide is available when needed for Australian troops.

Practical Application (Pages 387 – 388)

1. Australia agreed on an arrangement with the US, under which a US soldier would be embedded with Australian troops and would 'formally' take custody of any persons captured by Australian troops. The idea was that the captives would then always have been 'in the power' of the US and that physically transferring them to a US facility would not involve the transfer from Australia as Detaining Power and so its obligations under Article 12 of the *Third Geneva Convention* would not have been activated. Thus, Australia would not have needed to continue monitoring the situation of the transferees.

2. Professor Byrne says that the arrangement between Australia and the US was illegal. He says that the problem with the arrangement was that it flies in the face of proper interpretation of the Convention, which must be interpreted considering the ordinary meaning of its terms and in the light of its humanitarian object and purpose. An interpretation that seeks to sidestep what appear to be self-evident obligations by legal arrangement is not a defensible interpretation of the Treaty. Australian troops, by capturing enemy fighters, clearly brought them within their power and Australia's obligations under the Convention were thereby triggered. The question then becomes whether Australia properly carried out its continuing duty under Article 12, which he does not think they thought they needed to do.

Review

Comprehend (Page 388)

Question 1

a. A refugee is a person who has a *'well-founded fear of being persecuted'*, and because of that fear is unable or unwilling to return to that person's country of former habitual residence. The *1951 Refugee Convention* applies to any person who claims to be a refugee *'as a result of events occurring before 1 January 1951'*.

b. A person is a refugee according to the *Migration Act* if the person:
   - where the person has a nationality, and is outside the country of his or her nationality, and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country, or
   - where the person does not have a nationality, and is outside the country of his or her former habitual residence, and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

c. Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This is a general principle of international human rights law to which Australia subscribes

d. The tests set out in the *Migration Act* which determine if a person satisfies the character test are:
   - does the person have a substantial criminal record
   - has the person being convicted of an offence
   - does the Minister reasonably suspect the person is a member of a group or organisation that has been, or is, involved in criminal conduct.

e. The Migration zone is the territory in which Australia's Visa policy applies. The Australian migration zone covers such Australian controlled territories as the government may determine.

f. An Excised offshore place is a territory excised from the migration zone and which falls outside the operation of the *Migration Act* ss46A(1). Persons arriving unlawfully in an excised offshore place are prevented from making valid Visa applications. This does not involve removing such areas from Australia's sovereign territory. Therefore, Australia's obligations under the *1951 Refugee Convention* continue to apply to the whole of Australia, including excised offshore places.

g. A Declared country is a country which has been designated under the *Migration Act* as a country to which a person arriving unlawfully in an excised offshore place can be taken and detained

h. The purpose of the *Hague Convention* is to protect children from the harmful effects of wrongful removal and retention across international boundaries by providing a procedure to bring about their prompt return and ensuring the protection of rights of access to both parents. It provides a lawful procedure for seeking the return of abducted children to their home country. It also assists parents to contact or get access to children overseas.

i. The natural and ordinary meaning of the phrase 'habitual residence is determined by reference to a number of factors:

- settled purpose:
- actual and intended length of stay;
- purpose of the stay:
- strength of ties to the contracting State (in this case Finland or Australia):
- degree of assimilation into a contracting State including living and schooling arrangements; and
- degree of cultural, social and economic integration.

These factors have been determined by reference to the case law which has accumulated as decisions have been made in the various jurisdictions that have decided the circumstances of 'habitual residence' in various cases.

j. International humanitarian law (IHL) is a set of rules that seeks to limit the effects of armed conflict. It protects persons who are not, or are no longer, directly or actively participating in hostilities and imposes limits on the means and methods of warfare. IHL is also known as 'the law of war' or 'the law of armed conflict'

2. The important change is in Article 1 (2) which says:

> For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this Article, mean any person within the definition of Article 1 of the *Convention* as if the words 'as a result of events occurring before 1 January 1951 and…' And the words 'as a result of such events…' , in Article 1A (2) were omitted.

Australia's obligations under the original *1951 Refugee Convention* changed. Australia became responsible under the amended *1951 Refugee Convention* for all refugees, not only those who became refugees *'as a result of events occurring before 1 January 1951.'*

3. The rights and responsibilities contained in the *1951 Refugee Convention* are summarised on Page 368 of the text, and are not repeated here. The *Migration Act* generally supports persons who arrive as asylum seekers and land in our migration zone when they arrive. In that sense, there are legal arrangements to allow them to apply for Visas and to have available to them Australian Courts should they feel aggrieved. On the other hand, persons seeking asylum who arrived in Australia in what is defined by the *Migration Act* is an excised offshore place, are not entitled to the benefit of the Australian legal system and have no rights. They are placed in offshore detention, and all the things that Australia is not supposed to do to them under the *1951 Convention* are done to them. For example, they are subject to:
   - indefinite immigration detention
   - the detention of children
   - lack of access to Australian Courts
   - inadequate and unsatisfactory facilities for housing, health and medical care.

4. The tests set out in the *Migration Act* which determine if a person satisfies the character test are:

   - does the person have a substantial criminal record

- has the person being convicted of an offence
- does the Minister reasonably suspect the person is a member of a group or organisation that has been or is involved in criminal conduct.

5. The UNHCR is concerned about the human cost of 'offshore processing' and its consequences. The implications of Australia's policy decision to process refugees and asylum seekers in Papua New Guinea and Nauru is that peoples' lives are at immediate and critical risk. The UNHCR would like Australia to immediately evacuate all refugees and asylum seekers from Papua New Guinea and Nauru. Australia may be breaching articles concerning freedom of movement (Article 26) and differentiated treatment of refugees (the principle of same treatment is found in many articles).

   The Australian humanitarian program provides resettlement for refugees and others who are displaced as a result of conflict, persecution and human rights abuses. The intake is drawn from a range of nationalities, ethnic and religious groups, reflecting global displacement arising from conflict and persecution. It prioritises those most in need of global resettlement in line with guidance and referrals from UNHCR and focuses on people who are outside their home country who are:
   - assessed as refugees by the UNHCR and referred to Australia for resettlement
   - applicants proposed by a close family member in Australia
   - vulnerable cohorts within a refugee population, including women and children, and ethnic and LGBTI+ minorities.

   As you can see from the above, Australia cooperates with and relies on the UNHCR to a great extent. There are obviously components of the program which do not need direct UNHCR support, but arise out of the refugee intake which is already in Australia. For example, in the onshore component which is reserved for people who arrive in Australia lawfully, many seek Australia's protection and are found to engage Australia's non-refoulement (non-return) obligations.

6. International humanitarian law (IHL) is a set of rules that seeks to limit the effects of armed conflict. It protects persons who are not, or are no longer, directly or actively participating in hostilities and imposes limits on the means and methods of warfare. IHL is also known as 'the law of war' or 'the law of armed conflict'. IHL is part of public international law which is is made up primarily of treaties, customary international law and general principles of law.

   On the other hand, international human rights law is set out in the various treaties signed by Member States who are signatories to the *United Nations Charter*. International human rights law is found in the *International Bill of Rights*, which comprises *the Universal Declaration of Human Rights* and the *ICCPR* and the *ICESCR*.

   The *United Nations Charter* prohibits the use of force, except where necessary in self-defence, and where the United Nations Security Council authorises the use of force. IHL is about regulating behaviour of Nation States once a war starts.

Comprehend and analyse (Page 339)

1. The *Migration Act* was amended in 2001 so that the governments could change Australia's migration zone by removing certain parts of its territory and calling them 'excised offshore places'.

A person who arrives in the migration zone without a valid Visa, is an unlawful non-citizen. If that person arrives at an excised offshore place, the person becomes an 'offshore entry person' and cannot make a valid Visa application. However, the Minister may determine it is in the public interest to grant a Visa.

The additional strategy was that a person who arrives at an excised offshore place can be taken to a country which has been designated a declared country under the Migration Act. While there are Temporary Protection Visas Available for refugees in offshore detention, these persons have not been processed under Australian immigration law. They have no avenue of redress to the Australian legal system. They are barred from making applications to Australian Courts for redress.

The constitutionality of these declared countries was unsuccessfully challenged in the High Court.

The effect of these legal arrangements enables Australia to avoid compliance with the *1951 Refugee Convention*, because those refugees subject to offshore detention do not have any rights under the Australian domestic legal system. However, because Australia is a signatory to the *1951 Refugee Convention* it has been properly criticised for the consequences that these arrangements have for these refugees.

2. The importance of the 'habitual residence' test is that it is common legal standard applied in every Nation State that is a signatory to the *Hague Convention*. The legal impact of the test is that it determines the country in which orders are decided for the benefit of a child whose place of residence is in dispute between parents. The decision of the Court is determined by applying the facts of the case to the law, so that the meaning of 'habitual residence' is decided in the particular circumstances. The facts of the case are used to decide the place in which the child habitually resides immediately before being removed to another jurisdiction/Nation State.

Comprehend and evaluate (Page 389)

1. The Nation States which are signatories to the *1951 Convention* should, according to Article 23, treat lawful refugees in the same way as their other citizens. This is because the UNHCR is committed to the rule of law. It says that refugees should be treated equally to other citizens, and granted the same rights. This is the purpose of the *Convention*.

2. The Australian government's point of view with respect to asylum seekers is that those that arrive in excised offshore places are treated differently from refugees who arrive in Australia's migration zone. The *Migration Act* is structured to give effect to this point of view. The purpose of these arrangements is to prevent persons seeking asylum from coming to Australia illegally by boat. It has created a group of persons who are in offshore detention who have no rights, and the Australian government does not treat them as entitled to all of the rights under the *1951 Convention*.

3. The point of view of the UNHCR supports the United Nations objective that Nation States who are signatories to the *1951 Convention* should adopt the whole of the Convention in its domestic legislation. In this way the purposes, principles, and processes of the United Nations are achieved, and if Australia did the same, it would be putting all its obligations under the Convention into effect.

That the Australian government does not do this is supported by the two major political parties (Labor and LNP) because they both wanted a solution to the problem of persons seeking asylum arriving illegally by boat from overseas. These persons do not have a Visa when they arrive and are sent to declared countries and detained in offshore processing facilities. The political objective of protecting Australia from such persons, has been achieved at considerable cost to Australia's reputation. Source 2 outlines recommendations that the Refugee Council of Australia has said the Australian government to adopt to remedy this situation.

Additional Resources

INDEFINITE DETENTION CONTINUES FOR PEOPLE WHO CANNOT BE FORCIBLY DEPORTED

High Court ruling in *ASF17 v Commonwealth of Australia* [2024] HCA 19 Summary

On 10 May 2024, the High Court handed down its judgment in the case of ASF17.
The decision followed the High Court's ruling in NZYQ in November 2023, in which the Court held it was unlawful for the Australian Government to continue detaining a person in immigration detention where there was no real prospect of the person's removal from Australia becoming practicable in the reasonably foreseeable future. That case was brought by a plaintiff who was both stateless and engaged Australia's international protection obligations. In ASF17, the Court considered whether the same limitation on detention applied to a person who did not have a formal protection finding, but could not be removed because his country of origin refuses to accept the forced return of its citizens and he had not consented to return.

Source: Human Rights Law Centre, 'Indefinite detention continues for people who cannot be forcibly deported,' *Human Rights Law Centre*, (Online, N.d) <hrlc.org.au/human-rights-case-summaries/2024/05/28/high-court-ruling-in-asf17-v-commonwealth-of-australia#text=The%20decision%20followed%2>.

HIGH COURT OVERLOOKS SUFFERING OF PROLONGED DETENTION FOR PEOPLE SEEKING ASYLUM

The Asylum Seeker Resource Centre (ASRC) is disappointed by today's High Court decision in the case of CZA19 and DBD24.

The Court held that detaining people seeking asylum while their visa applications are pending is lawful in some instances, even when there is no real prospect of their removal in the foreseeable future.

The ASRC's client, LPSP, was allowed to join the case as a 'friend of the court' because he had started a class action in the Federal Court with the same argument as the main applicants. His argument was that once someone is recognised as needing protection, their detention is no longer lawful. High Court Justice Edelman called LPSP's arguments 'strong,' even though the court ultimately disagreed with the main claim made by CZA19 and DBD24.

The decision permits the continuation of prolonged detention practices that are cruel and inhumane.

The judgment means that even if it's clear someone will eventually be released into the community – either because they get a visa or removal isn't possible – they can still be kept in detention indefinitely while their visa application is processed. This goes against human rights and moral standards, continuing a system of long, unnecessary, and harmful detention.

Despite the landmark NZYQ decision, the ASRC continues to see people seeking asylum held for years and the devastating impact on their lives, their family and community. The ASRC's

Human Rights Law Program will continue to challenge and advocate for a migration system grounded in fairness, justice and human dignity.

ASRC client, LPSP, said: 'This decision is just awful. It was unnecessary for us to be held in detention for so long and many people are now depressed and struggling to recover from what they endured in detention. We are paranoid about what is going to happen next. Being held in the camp with no release date was torture, we were so scared of being sent back to a country that we barely knew.'

Jana Favero, Deputy CEO at ASRC, said:
'This is not just a legal matter—it's about the kind of country we want to be and ensuring all in our community are treated fairly and equally. Do we uphold the right to freedom, or do we continue to punish people for seeking safety? Human rights and equality before the law must shape our actions and values. We have already seen divisive and discriminatory rhetoric in the early days of the election campaign and are concerned what will come next.'

Source: Asylum Seeker Resource Centre, 'High Court overlooks suffering of prolonged detention for people seeking asylum,' Asylum Seeker Resource Centre, (Online, 2 April 2025) <asrc.org.au/2025/04/02/high-court-overlooks-suffering-of-prolonged-detention-for-people-seeking-asylum/>.

Useful links

Refugee and asylum seekers Analysis & Policy Observatory (APO), *Australia and the 1951 Refugee Convention*— apo.org.au/node/54433.

Austlii, *Convention Relating to the Status of Refugees* austlii.edu.au/au/other/dfat/treaties/1954/5.html.

Australian Human Rights Commission, *Questions and Answers About Refugees & Asylum Seekers*—humanrights.gov.au/our-work/questions-and-answers-about-refugees-asylum-seekers.

Australian Law Reform Commission, *Refugee Law*— alrc.gov.au/publications/22-refugee-law/refugee-law-australia-0.

Erika Feller (The University of Melbourne), *Rethinking Australia's Refugee Policy*— pursuit.unimelb.edu.au/articles/rethinking-australia-s-refugee-policy.

DW, *Refugee Convention of 1951 still crucial cornerstone of human rights*— dw.com/en/refugee-convention-of-1951-still-crucial-cornerstone-of-human-rights/a-19429093.

Parliament of Australia, *Refugee Resettlement to Australia: What are the facts?*— aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/RefugeeResettlement.

Refugee Council of Australia*, Refugees in Australia*— refugeecouncil.org.au/refugees-in-australia/.

The United Nations High Commissioner of Refugees, *1951 Refugee Convention*—unhcr.org/en-au/1951-refugee-convention.html.

University of Melbourne, *Refugee & Asylum Seeker Law Research Guide: Australia*— unimelb.libguides.com/refugee_law/Australia.

Chapter 19: Human rights in Australian law

19.1 Right to Free Speech

Practical Application (Page 393)

1. The law of defamation does restrict freedom of expression. The issue is whether the law of defamation is too strict and thus places an unreasonable limit on the freedom of expression. All that is required at this stage is to either agree or disagree that it is important that the law of defamation does not place unreasonable limits on the freedom of expression. At this stage the question of what is a reasonable or unreasonable limit on the freedom of expression is not yet able to be determined by the student. The most recent amendment referred to the *Defamation Act 2005* (Qld) s10(a) is referred to on the next page and provides a new limit on whether a person is successful or not in the law of defamation.

2. This question simply relates to whether there should be a law of defamation that can be pursued in the courts. The most obvious answer is yes. To say otherwise is to take rights from a citizen that had been in existence for hundreds of years.

Practical Application (Page 394)

1. This is a very significant effect that s10(a) has had on proceedings for defamation. The change in the law is very significant. A person now needs to show that he has suffered or is likely to suffer "serious harm" to his reputation. It is not sufficient to show that he suffers harm only, it must be serious harm. It significantly changes the balance between a plaintiff and the defendant in court proceedings. The defendant can concede that reputational harm has been caused to the plaintiff but of course would not concede that the harm was serious. In other words, the court process now needs to investigate the distinction between ordinary harm and serious harm. The plaintiff only wins if he can establish that the harm to his reputation has or will be serious. It also should be remembered that a person's reputation is not as that person views it. A person's reputation is determined by the community's view of that person. The purpose of the change in the legislation was to remove trivial claims where there is very little actual damage to a person's reputation. The position before this amendment was that a plaintiff could bring proceedings, be successful and obtain only a very small amount of damages. The defendant, because he was unsuccessful, would mostly likely have to pay the costs of the plaintiff as well as their own costs even where the amount of damages awarded to the plaintiff was quite small. This change in the legislation was made to prevent that occurring. The Court now can quite properly find that a plaintiff's reputation has been harmed but no serious harm had been done to it. The plaintiff therefore loses the case and most likely would need to pay the costs of the defendant. As a result of this change there will be a lot less cases brought to the courts.

   There was an interesting case decided in the Supreme Court in Queensland in 2024 – *Peros -v- Nationwide News Pty Ltd & Ors (No. 3) [2024] QSC 192*. In that case the plaintiff had been charged with the murder of Shandee Blackburn. After trial in 2017 he was found not guilty of that charge by a jury. After that in 2019 the coroner conducted an extensive investigation into the death of Ms Blackburn. There was evidence in that coronial enquiry that was not before the jury in 2017 which included additional and enhanced CCTV recordings and police questionings of the plaintiff about his movements. The coroner in August 2020 published his findings online and they remain available online. The findings

included the fact that *'Ms Blackburn died due to injuries sustained in an incident involving violence with Mr John Peros who used a bladed instrument'*. The first defendant and Mr Hedley Thomas (the second defendant who was well known for like podcasts) began publishing an investigative podcast into the death of Ms Blackburn called *'Shandee's Story'*. The plaintiff sued the defendants in defamation. The defendant's response was that before their podcast was published the plaintiff's reputation had been effectively destroyed by the widespread reporting of the coroner's finding that Shandee Blackburn died due to injuries sustained in an incident involving violence with Mr John Peros who used a bladed instrument. It followed from that that the defendants contended that the podcast didn't cause or wasn't likely to cause *'serious harm to the reputation'* of the plaintiff. It might have caused a little additional harm but not serious harm. The court found that that was the case. The plaintiff was unsuccessful.

Case Study (Page 395 - 396)

Burrows v Houda [2020] NSWDC 485

6. The growth of the internet has increased the number of potential defamatory publications. It has increased simply by the virtue of the fact that forums in which people can express views have grown exponentially in number.

   As to whether this increase in potential defamatory publications is an advantage or disadvantage for freedom of expression is a question that needs careful consideration. It is clear from what we have been discussing about a requirement to prove serious harm to a person's reputation before a plaintiff can be successful in court. This will result in there being a very large number of defamatory publications but of such a minor nature that they will not become the subject of court proceedings. That could be regarded as an advantage or disadvantage in our society. However, it is difficult to see that the freedom to defame on the internet, where serious harm does not result to a person's reputation, is an advantage for freedom of expression. Most persons would argue that freedom of expression should not extend to the telling of untruths and to the making of defamatory statements. It is of course a question of opinion as to what weight should be attached to both arguments.

Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller [2021] HCA 27

1. Media companies can be found responsible for defamatory matter not posted by itself but posted by other on their platforms. They have facilitated and encouraged the posting of comments by Facebook users on their respective Facebook pages. This liability exists irrespective of whether the media company knew that the material had been posted and did not intend at any time to assist in the publication of defamatory material.

Practical Application (Page 397)

1. S3(b) of the *Defamation Act 2005* sets out an object of the *Defamation Act* namely: *'To ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance.'*

   The defences which relate to not placing an unreasonable limits on matters of public interest and importance are:

   - Absolute privilege.

- Public document.
- Fair report.
- Qualified privilege.

Each of these allow for the publication of matters of public interest and therefore if published in that mode then there is certainly no unreasonable limit placed on matters of public interest because these provide a defence to such publications.

2. Considering the balance of each of the defences set out on Page 396:
    - Justification—If that defence was relied upon and the defendant does not succeed in defending an action it follows that the published statement was not substantially true and therefore wouldn't be an unreasonable limit on the freedom of expression.
    - Contextual truth—Is a defence to a defamation claim that allows the defendant to successfully argue that even if some statements he made are untrue, when those statements are considered in the context of the whole of the statements, then the plaintiff's reputation has not been done any further harm because of the substantial truth of his other statements. If such a defence is successful then there is no harm to freedom of expression.
    - Honest Opinion—If a defendant pleaded honest opinion as a defence in the defamation action that defence protects statements made by the defendant that are recognised as opinions rather than factual assertions. If the defence was unsuccessful then the lack of success arises from the statements that were made not being opinions but were factual assertions. It is very unlikely therefore that that could be regarded as a unreasonable limit on the freedom of expression. The difficulty in this defence is if it is shown that it is an opinion (as opposed to the assertion of a fact) then the defendant needs to show that the opinion is based on 'proper material'. That is the person stating the opinion must have a reasonable basis to express that opinion (see s31(c) of the *Defamation Act 2005* (Qld)).
    - Innocent Dissemination—This defence arises where a defendant can prove that he published the defamatory material merely in his capacity as an employee or agent and he didn't know or ought reasonably not to have known, that what he published was defamatory. Such a defence is not a very broad defence as described above. It is therefore not really an affront to freedom of expression.
    - Triviality— As previously described this defence gives greater scope for freedom of expression. It is therefore not an affront to it.

Case Study (Page 397)

1. The letter sent by the plaintiff attempting to resolve the matter would have sought appropriate arrangements such that it would become very clear to anybody who had read the post that it was not only mistaken but false. Secondly, the demand would include an extensive publication such that anybody who could possibly have read the initial post or the subsequent publication and re-publication would become aware of the falsity of the initial post. That is almost impossible to do. Certainly, the plaintiff might require a more public retraction. What would need to be balanced would be the need for the plaintiffs to dampen down any publication of the initial false post but at the same time ensuring anybody who accessed the false post was advised that the post was in fact false.

   The response letter from the defendant suggests similar things to the plaintiff.

The plaintiff taking the defendant to court and obtaining a judgment against him has two very good effects.

- The compensation is paid and in that sense the publisher is punished.
- It is an extremely useful public record of the falsity of the initial post because it has been found to be false and defamatory by a court process. That gives the plaintiff a very broad publication of the falsity of the initial post. The plaintiffs can always refer to the court case as proof of the falsity of the post.

Practical Application (Page 399)

1. A public display of prohibited Nazi symbols or giving Nazi salute is an offence. A person commits the offence if he/she causes a thing to be displayed in a public place or makes a gesture in a public place and the thing is a prohibited Nazi symbol or the gesture is a Nazi salute. It must be considered what is a prohibited Nazi symbol. It is defined as one of the following:
    a. The Nazi Hakenkreuz—This word means a twisted or hooked cross in German and it is a swastika which was used by Hitler as a Nazi symbol.
    b. The Nazi double-sig rune—Runes were letters used in Germanic alphabets used as far back as the second century AD. These ancient letters were used during the Nazi period in Germany and in particular by the SS (Schutz Staffel) on their uniforms and flags. The SS adopted 2 sig runes drawn side by side in the shape of lightning bolts flattened at the top and at the bottom.
    c. Further a prohibited Nazi symbol is something that so nearly resembles either (a) or (b) above.
    d. If that prohibited symbol referred to above is displayed in a public place then that constitutes a criminal offence. A thing is displayed in a public place if it is capable of being seen by a member of the public who is in a public place or if it is included in a document (for example, in a newspaper, magazine, a program, leaflet or ticket) or it's displayed in a film or video or television program that is distributed to the public. It also is displayed if it is a document or video or television program that is distributed to the public by means of telephone, telegram or some like service.
    e. As to the making of a gesture in a public place that occurs when the gesture is capable of being seen by a member of the public who is in a public place.
2. The enforcement as a criminal offence might represent a limit to the freedom of expression because that firstly represents a direct limiting of the freedom of expression by persons who wish to espouse Nazi ideology. It might also have unintended consequences by limiting other freedom of expressions by persons who don't hold such an ideology. These would include:
    - People who have in other organisations, including military organisations, which have used the swastika as their own symbol. These include the Finnish Airforce on their flag, Polish Mountain Infantry insignia, a Polish Rifle Regiment and even the United States 45th Infantry Division (up to 1914). You will be able to see photographs of such use included in a paper by Mr Michael Murray-Jones addressed to the Parliament of Joint Committee on Intelligence Security which is available on the net and which includes photographs of such uses.
    - Collectors of memorabilia including military memorabilia related to the Nazi period.

- The swastika symbol has been used as a symbol of prosperity and good fortune and has been used in the ancient world as well as the modern world. It appears on ancient coinage, and appeared in early Christian and Byzantine art. It was a symbol also used in India as a various auspicious symbol for Hindus and Buddhists. It was widely used by the Hindus (and Jonahs) in their books of account. Any continued use for these purposes appear to be caught by the provisions of publication of a prohibited symbol. The following question deals with the types of people where citizens can be used for using such symbols.
- As to the Nazi salute the act is clearly specifically aimed at prohibiting any arm gesture which is akin to a Nazi salute. There might well be citizens who use that form of gesture for non-ideological reasons or even without any Nazi reference. To that extent this is a limit on the freedom of expression for those persons.

3. This section sets out the circumstances in which a person would not be guilty of an offence. In short it is not an offence if sub-section (9) applies. If the conduct of causing a prohibited symbol to be displayed in a public place or making a gesture in a public place is for a purpose that is set out in this sub-section, then there will be no criminal offence. It follows from this that while a swastika is often used as a religious symbol then such use would not be a criminal offence. Similarly, if the symbol is used for academic, educational, artistic or literary purposes then it is not a criminal offence. It goes further on to say that if it is engaged in the making of a news report or a current affairs report for the public interest and is made by a person working in such a capacity then no criminal offence occurs. The real issue is, is the width of the exceptions contained in sub-section (9) enough to ensure that there is a sufficient protection for the freedom of expression in Australia. Examples of the defence available in sub-section (9) are:
    - A person writing history in which these symbols are discussed and used.
    - TV crews showing Nazi symbols being used by bikie gangs.

Practical Application (Pages 400 - 401)

1. December 6, 2023.
2. The support in Federal Parliament was a unanimous vote for the passage of the bill through Parliament.
3. Suggested definitions below:
    a. Neo is an English word which means new or recent or cast in a modern form. It is used widely, and, in this instance, it means simply a Nazi in a modern form.
    b. A transgender rights protestor is simply a person protesting for rights of transgender people who are people whose gender identity differs from that typically associated with the sex that they are assigned with at birth. Nazis are advocates of not only racial purity but sexual purity and are firmly and staunchly against transgender people.
    c. The Holocaust was the extreme form of ethnic cleansing in which the Nazi Government of Germany systemically persecuted and murdered 6,000,000 European Jews. The killing of Jews in the Holocaust was an official Government policy of Nazi Germany between 1933 and 1945.
    d. Hamas is an Islamist movement in Palestine dedicated to the overthrow of Israel. It embraces the use of violence including acts of terrorism as a means to achieve its

goal. Both the United States, the European Union and Australia have listed it as a terrorist organisation. It was listed as a terrorist organisation in Australia on 4 March 2022. The listing of an organisation as a terrorist organisation is for the purposes of offences which are set out in the *Criminal Code Act 1995* (Cth) ('the *Criminal Code*'). Part of those laws is to ban the display of flags and other symbols associated with a terrorist organisation. The Nazi salute and other Nazi symbols are now in the same category as the Hamas flag.

4. The warning given by the Australian Spy Agency was that far-right groups are on the rise in Australia and that they are becoming more organised and visible. That prompted the Federal Government of Australia to pass such legislation.
5. One lobby vitally interested in the passing of the legislation was the Executive Council of Australian Jewry.

What do you think? (Page 401)

[Answer asks for an opinion.]

Research Task (Page 401)

[Answer asks for an opinion and will vary based on section chosen.]

19.2 Right to protest and the freedom of assembly and association

Research Task (Page 404)

[Answer asks for an opinion and will vary based on section chosen.]

19.3 Freedom of religion

Case Study (Page 406)

1. The Chief Justice said that freedom of religion was not absolute and that it was subject to the powers and restrictions of the Government essential to the preservation of the community.

   It is likely that most people would agree that the free exercise of religion should be subject to the preservation of our Australian society. In short it must give way especially in circumstances where a country is at war for the need for the country to defend itself.

   The Chief Justice said, as a legal principle, the right of a person to the free exercise of his/her religion must not prejudice the defence of the Commonwealth or the efficient prosecution of a war in which Australia might be involved. In short, the whole of the rule of law in the country, the very existence of the Constitution of Australia and for that matter the very existence of Australia must take precedence.

Case Study (Page 407)

1. The way the majority expressed a decision was that because the word 'for' was used in s116 it had the meaning that legislation could only breach s116 if the purpose of the legislation was to actually prohibit the free exercise of religion. It is of no consequence that a subsidiary effect or consequence of the legislation was to in fact prohibit the free exercise

of religion. It had to be the very purpose of the act to do so. That could be described as a narrow view as opposed to a wide view. A wide view would be that any legislation which has the effect whether a primary subsidiary, or even incidental, of prohibiting the exercise of any religion would be invalid. A silly but accurate example might be ... imagine a law is passed allowing for and promoting the extermination of all cockroaches in Australia. Imagine then that there is a religious movement which worship cockroaches as being the incarnation of their God. That law would obviously affect the free exercise of those adherends religion because it was directed at exterminating the God which they worshipped in a cockroach form. The purpose of the legislation was not to interfere with religious rights but to exterminate cockroaches. Clearly that legislation would not be in breach of s116 of the Constitution on the wide view. Other examples can be made up as well.

Case Study (Page 408)

1. This case study was one in which a challenge was raised that the Government was in breach of s116 of the Constitution. An organisation called Defence of Government Schools (DOGS) took issue with the Commonwealth Government funding non-Government schools which were operated by religious organisations. Their argument was simply that such finding breached s116 of the Constitution. The issue therefore was whether the legislation providing for such funding was invalid. You have to express the view as to whether you agree or disagree with that proposition. The High Court of Australia had no difficulty disagreeing with that proposition. One can see that there is some argument that it assists in the promulgation of the religion by funding such religious run schools and therefore it assists a religion to function much more financially which of course means that the religion may be able to attract more adherents. There are arguments therefore that suggest that such funding assists a religion in developing its standing in the community. However, the more commonly held view, certainly in the High Court of Australia, is that funding of religious schools isn't really establishing a religion. However, arguments can be raised for each position.

2. In this situation one would need to draft a law which expressly says that it is making a religion to be the state religion of the country and that it is mandatory for all citizens over the age of 18 years to become members of that religion. Any provision to that affect would clearly be a provision establishing religion. You may advise other more complicated and more argumentative.

19.4 Right to vote

What do you think? (Page 412)

[Answer asks for an opinion.]

Review

Comprehend (Page 412)

1. The *Peaceful Assembly Act 1992* (Qld) sets out that people have a right to assemble and protest but subject to the restriction of:

   - Public safety.
   - Public order.
   - The protection of rights and freedoms of other persons.

   It is clear as to why restrictions would exist for the purposes of public safety. Those reasons not only relate to the safety of the public that is not engaging in this assembly but also for those that are engaging in it themselves. To allow people to assemble on 35th storey of a building which is not properly completed and therefore is extremely dangerous to be present at, would be prohibited even though no other member of the public other than those engaging in the assembly would be involved. Apart from that fact there may well be other grounds relating to protection, rights and freedoms which would give rise to that assembly in such a way being an unlawful act. There are no doubt provisions under the *Building Act* and regulations, or under health and safety acts, which give rise to obligations on the developer and/or owner of buildings to ensure the safety of people who enter upon the sites.

   There are many obviously public order violations which would detract from a right to assembly for example people throwing objects either at the police or other citizens or other protest groups, or threatening to do so.

   Even simple matters like interfering with the rights of citizens to go about their ordinary business often occurs if assemblies take place. If such assemblies are to occur access must be restricted to certain parts of the city which otherwise people would have. It is for that purpose that the Act provides a provision for approval of such assemblies. When such assemblies are approved then the restriction of access of other citizens as they go about their business is quite lawful. After such an authority has been given and the assembly is conducted in a peaceful and substantially in accordance with the conditions imposed then no person in the assembly attracts any civil or criminal liability because of the obstruction of a public place.

   Being in an assembly and protesting in such a group does not allow citizens to engage in any criminal behaviour or civil disturbance. No authority to assemble could ever override that proposition.

2. There are many restrictions on the freedom of expression. There is a list of them provided on Page 392 of the text. They include non-violent restrictions such as infringement of copyright and restrictions of violent behaviour as a form of expression. Civil right not to be defamed is a very important restriction on freedom of expression. This provides a civil remedy. Other forms of freedom of expression such as pornography, national security, threats of physical harm to other persons, racial vilification are restrictions on expression which involve criminal sanctions.

3. The freedom of religion exists in Australia and each citizen is able to worship whichever God they choose and any manner that they choose. There is no general Commonwealth law prohibiting discrimination on the grounds of religious belief or protecting a person's

religious practices. In the *Constitution of Australia* (s116) imposes prohibition on the Commonwealth Government in the making of laws to:

- Establish a religion.
- Impose any form of religion observance on anybody.
- Prohibit the free exercise of any religion by any person.
- Require for religious tests or qualifications for any office or public service.

In Queensland however there is legislation prohibiting discrimination on religious grounds (see s124(a) *Anti-Discrimination Act 1991* (Qld)). The usual process is that if a citizen believes that they have been discriminated against on religious grounds then they make a complaint to the Queensland Human Rights Commission who investigate. If no solution can be reached there then that case proceeds to QCAT. An example of a hearing in QCAT is given in *Emanuel & Anor v State of Queensland* [2011] QCAT 731. That was an unsuccessful case. Another case you might find interesting is *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 (10 July 2020). In that case the complainant was a student at the Australian Christian College Moreton. The school insisted that the Applicant cut his hair before the commencement of second semester 2020 or be unenrolled. The case was based on discrimination on the basis of race, sex and religion. You will see that there was evidence that the Cook Islands/Niuean culture from which the Applicant's family came had a traditional practice whereby the eldest son in the family didn't have his hair cut until around 7 or 8 years of age, and that the haircut was usually done in a ceremony which was, in his culture a male right of passage that symbolises a boy's transition to manhood. Despite the parents being advised of the school's rules with respect to haircuts they enrolled him in the school and then when steps were taken for the boy to either have his hair cut or to be dis-enrolled the case was brought. The decision was that the school had discriminated against the boy based on race. It was held that the school should approach such situations on an individual basis and not rigidly apply a policy across the entire student population.

4. The type of right to protest is first and foremost a right of association as well as a right to gather together in groups. This is a right of all citizens to group together for a common goal, or to form an association such as a political party or a sporting club etc. There is no provision in the Australian Constitution for a protection of the freedom of association but to the extent it has any political connotations the High Court of Australia accepts that this freedom may be part of the implied freedom of political communication set out in *Lange v Australian Broadcasting Corporation [1997] HCA 25*. There are examples of statute law on page 403 in which the freedom of association is restricted to members of terrorist organisations but more generally an assembly of persons supporting or promoting the commission of an offence of engaging in hostile activities or engaging in incursions into foreign countries.

Apart from these Commonwealth offences there are State laws in Australia called consorting offences. Consortium refers to a person who habitually consorts with convicted offenders. The reason behind having such offences in the States of Australia is that it is to prevent consorting which may end up in criminal offences being committed. This is set out in the case *Tajjour & Ors v The State of New South Wales [2014] HCA 35* in which there was a challenge to the State law in New South Wales which made an offence for a person to consort with convicted offenders. The challenge against the validity of the law was unsuccessful. S77(b) of the *Criminal Code 1899* (Qld) sets out that a person commits an offence if he habitually consorts with at least 2 recognised offenders whether together or

separately and at least one occasion on which the person consorts with each recognised offender happens after a person has been given an official warning for consorting in relation to the offenders. There is a Court of Appeal decision in Queensland, namely *R v Barbaro; Ex parte Attorney-General (Qld) [2019] QCA 286* (6 December 2019) in which the Court dealt with the requirements of giving of a valid official warning.

Analyse and evaluate (Page 413)

1. The students are required to analyse and evaluate as to whether the Commonwealth Government and State Governments of Queensland should pass any legislation restricting the display of Nazi symbols or the making of Nazi gestures. What really needs to be considered is whether there is sufficient reason to restrict such freedom of expression. The issue isn't whether the behaviour of the parties using such symbols or making such gestures is distasteful or not. The real issue is whether it is sufficiently disruptive to the operations of our society that it should be criminalised. The 3 considerations on page 403 should form part of the analysis.
2. There are 3 sources set out on Page 413 and 414 which of course give different views on voting restrictions for people who are incarcerated.

   The first of those sets out a position that all prisoners should be entitled to vote irrespective of the length of their sentence. This is supported by an argument that because of the size of the population of Aboriginal and Torres Strait Islanders in prison a large number of voters from the Aboriginal and Torres Strait Islander population would be disenfranchised if there was any incarceration time preventing a right to vote.

   The second source is a source from the Liberal National Party which argues that no prisoner should have the right to vote. Such view is put on the basis that any person who breaks the law should have lost the right to participate in deciding who makes the law.

   The third source sets up a philosophical background to the issue putting both positions, that is the anti-disenfranchisement argument and the pro-disenfranchisement argument. This source refers to the argument in *Roach* – the High Court decision. The issue therefore to be discussed and an opinion expressed is what would be the ideal condition under which a person serving a prison sentence can vote. Should it be that irrespective of any period of time to be spent in jail the prisoner should be allowed to vote. Should it be that any person convicted of any offence attracting a prison sentence shouldn't be allowed to vote. Should there be a position in between where a decision is made as to the period of time of incarceration prevents a prisoner exercising a right to vote. It is a matter of opinion.
3. This source is one which argues that increasing and unjustifiable number of restrictions placed by the Commonwealth and State Governments making it more difficult for a law abiding citizen to protest in Australia. The best that can be done in this situation is for the student to express his view on whether he agrees or not with those comments contained in the source material. It would require an enormous amount of research to come up with the final answer because the time to do so would be prohibitive. The best that can be done by the student here is for the student to be able to give an opinion based on their state of knowledge and from what they've observed as they proceed through their lives as to whether there are a number of restrictions on protesting is too great or not.

Chapter 20: Resolving human rights complaints

20.1 Introduction

Research Task (Page 419)

[Answer will vary on source(s) selected.]

20.2 Protesting Infringement of Human Rights

Practical Application (Page 420)

1. It was formed in 2010 after meetings in New South Wales and Queensland of land holders, organisations and communities, all concerned with the expansion of coal and coal seam gas development. Later that year diverse groups from Qld, NSW, Vic and Sth Aust. met at Broke in the Hunter Valley, NSW, to discuss the problems associated with that development.

   Another meeting was held in South East Qld at Warra, North West of Toowoomba on the Darling Downs to specifically discuss the further approval of coal seam gas developments. At that meeting 'Lock the Gate' was coined to mark this strategy of refusing to allow access of coal and gas companies to their land. The movement grew and became a company on 6 March 2012. It has continued to grow.

2. The rights sought to be protected by the movement are rights to water, rights to use of land, and the protection of future rights which might be extinguished by an expanding and invasive coal and seam gas industry.

Research Task (Page 421)

[Answer will vary on source(s) selected.]

Practical Application (Page 421)

1. The issues raised were:

   - The effect on migrating whales.
   - The effect on endangered flora and fauna.
   - The impact on tourism and associated industries.
   - The impact on commercial fishing.
   - The effect on shipping movements.
   - The visual impact of wind farms.

   These issues indirectly affect human rights. For example, the impact on tourism and commercial fishing are likely to impact on the human right to employment (the right to work). The impact on migrating whales and flora and fauna is likely to impact on the human right to a safe, clean, and sustainable environment.

2. Yes—they expressed their view by gathering at Wollongong's Flagstaff Hill in a group of 1500 to 2000 people and then again by a paddle-out from Wollongong City Beach – attracting press coverage in the local newspaper.

Practical Application (Page 422)

1. The response allows for a broad ranging description of the effect of transmission lines across land. These could include:

- Radio and TV interference.
- Interference with computer use.
- Health effects of electric and magnetic fields (if any).
- Interference with livestock.
- Audible noise from wind turbines.
- Reduction in value of pastoral or farming property.
- Inability of owners of land to use easements under the powerlines with a further result in the diminution in value of property.
- Possibility of fire.

Compensation is generally not payable for the above list even though losses may be suffered.

The right to own property and conduct affairs without interference is a human right. The right to a clean, safe, and sustainable environment is a human right. These rights should be addressed in negotiations with landowners and members of local communities when the development of wind turbines is planned and implemented.

Practical Application (Page 423)

1. The point of view is favourable to offshore wind farms. People rallied in their support.

2. The overriding human right relied upon to support that view is the right to employment, with workers, doctors, teachers and environmental activists supporting the renewable energy project. This article speaks of support for the Hunter Offshore HWZ, whereas the earlier article speaks of the lack of support for the Illawarra Coast Windfarm. Of course, the purpose of these wind farms is to produce electricity to provide energy which is renewable to combat climate change.

20.3 Lobbying for Human Rights

Practical Application (Page 424)

1. The Lobbying Code of Conduct makes it mandatory for any person engaged in lobbying to be registered. This applies to all those persons engaged in any conduct defined as lobbying which entails communicating with an Australia Government representative to make or change legislation, to develop or change government policy, to award government contracts or grants, or to allocate funding in a specific area. The purpose of the Code is to ensure that there is transparency as to who is trying to access the ear of the Commonwealth Government to obtain support for their own or, more importantly, paying clients' agendas.

Practical Application (Page 425)

1. For the very purpose of protecting their sources of income – $9.56 billion dollars in 2024 for online gambling, and gaming machining gambling. It is clear from this article that the gambling industry in influencing government policy has been highly successful by:

    - Ramping up political donations to the political party not in government.
    - Conducting scare campaigns in seats held only marginally by the government.

2. As to whether the Australian Government should restrict gambling to protect Australian families, that is a personal opinion. To express such an opinion, one would need to weigh up the advantages of gambling (or certain types of gambling) e.g. freedom of choice,

entertainment value, available monies to promote and fund sporting organisations, with the clear financial and emotional costs to family life of gambling. Policies which protect the family unit and supported have their origins in the human right to live in families in our community.

Practical Application (Pages 426 – 427)

1. The Murphy Inquiry was an inquiry into online gambling and online gambling harm. The central recommendation was that there should be a comprehensive ban on gambling ads on TV, radio and online.

2. The human rights supported by this recommendation related to health and wellbeing of citizens and the areas of adverse impact on them of gambling – financial, health, relationships, breakdowns, psychological, and effect on work or study.

3. No. The protection of such rights interferes with the interests of their clients, or of themselves.

Practical Application (Page 427)

1. It is clear from the material you have before ye that the alleged breach of the code was to bypass the Minister responsible and the officials in the Department to seek a direct audience with the Prime Minister.

2. The evidence was contained in documents tabled in Parliament consisting of letters, emails, meeting agendas and memos, following a Senate order which had been prompted by Senator David Pocock who accused the Government of pandering to the gambling industry.

Research Task (Page 428)

[Answer will vary on source(s) selected.] Essentially this exercise encourage students to read more widely, focus on research skills, and to develop their own opinions based on authentic subject matter.

What do you think? (Page 428)

[Answer asks for an opinion.]

1. The best evidence available to answer this question comes from the report on the Murphy inquiry, which found that a comprehensive ban on gambling ads on TV, radio, and online was the best policy to protect children and people at risk from addiction. The Murphy inquiry was assisted by expert opinion and by the views of many people. Again, the evidence before the Murphy inquiry was that children were affected by TV advertising and the gambling addicts had their addiction triggered by the advertising. It is a human right to be protected from the harmful effects of gambling advertising, especially if the indirect effect is losing your home, and a family suffering because income is diverted from what is necessary to keep families safe in the community.

2. The reason why lobbyists in the gambling industry seek to influence government, is to advance the cause of the gambling industry, to make more money. They are not concerned with the harm it causes, because they argue against restrictions on advertising. Even though a code of conduct is not a law, the same principle should apply to it. Persons seeking to influence government decisions should be treated equally, as if the rule of law requires. The purpose of the code would not be achieved unless it was enforced strictly.

Practical Application (Page 429)

1. Lobbying is the attempt to influence the decision making of the State Government by communicating with a Government representative in:

    - Making amending or repeal of legislation; or
    - In the development, amendment or abandonment of Government policy or programs; or
    - In the awarding of a Government contract or grant; or
    - In the allocation of funding; or
    - In the making of planning decisions on the giving of development approvals under the *Planning Act 2016* (Qld).

    The definition extends to communicating with an opposition representative in an effort to influence opposition decision-making, including:

    - The making amendment or repeal of legislation; or
    - The development, amendment or abandonment of an opposition policy or program; or
    - The position or view of the opposition in relation to a decision of the state government or local government including, for example, a matter set out in the first point.

Practical Application (Page 430)

1. The right to be protected is the right to an individual's liberty, which will be taken away by the removal of the usual requirements that a police officer needs to have, that is, a reasonable suspicion before searching somebody.

2. The arguments are:

    - The loss of liberty described above.
    - There is no clear evidence that this law will be effective in reducing crime to any significant degree.
    - Based on past experience, this power given to police will be abused by them by their use of this power by selecting to search people having regard to their own prejudices and generalisations about people in the community (e.g. a disproportionate number of indigenous people will be searched).
    - Inevitably pressure will come to expand this power further as it has already been done. Originally it was to be used in night precincts, then it was extended to public transport, then the shopping centres, and then to recreational venues.
    - Apart from humiliation and shame experienced by innocent people that will experience feelings of a diminished sense of belonging, of fear, insecurity, anxiety, intimidation and helplessness.

Practical Application (Page 431)

1. The YAC adopted a point of view in which they expressed their concern that there is internal political pressure in Queensland to adopt a ‘tough on crime’ approach, which could result in the removal of ‘detention as a last resort’. The point of view of the YAC is consistent with

its aims to influence governments to act in the public interest. It is not acting as a lobbyist for personal gain. Other lobbyists, such as those acting on behalf of the gambling industry, seek to advance the aged of that industry. This is not what an ethical lobbyist does and is and is why we need a code of conduct for such lobbyists.

20.4 Court action involving human rights

Case Study (Pages 432 – 433)

1. Mr Bolt said that there are fair-skinned people in Australia, essentially with European ancestry, but with some Aboriginal descent, who pretend to be Aboriginal People to gain benefits such as career opportunities or to be able to engage in political activism. This offended the human rights of Ms Eatock by racially discriminating against her because it was found by the Judge that Mr Bolt's discrimination applied to her.

Case Study (Page 433)

McBain v Victoria [2000] FCA 1009

1. Dr McBain who specialised in reproductive technology brought the case. Presumably he did so because he thought his patient, Ms Meldrum, was not being treated fairly under the law. Refusing her treatment which would enable her to become pregnant was discriminatory.

2. The word 'service' in the *Sex Discrimination Act 1984* (Cth). Section 22 sets out that it is unlawful for a person who provides goods, services or facilities to discriminate against a person on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy or breastfeeding – by refusing to supply goods and services on those grounds. So, if the infertility treatment was a service, then any state legislation prohibiting the provision of that service could not override the requirement in the Commonwealth legislation that the person providing that service had to provide it or be in breach of the Commonwealth statute.

3. It would have an enormous effect. A very large number of women seeking infertility treatment could be not married and not in a de facto relationship. They were now entitled to treatment enabling them to conceive.

Case Study (Page 434)

1. To ensure that not only he, with his disability, is able to access the facilities of the hospital and navigate his way around the hospital, but also to ensure others with his, or like disability, are able to do so as well.

Case Study (Page 434 – 435)

1. The Trial Judge ordered only general damages of $20,000.00. He made no award for economic loss, which are damages for Mr G's loss of wages as a result of the unlawful dismissal. On appeal the general damages were increased by $70,000.00. These damages are a payment to the plaintiff for among other matters pain and suffering. We do not have access to any medical evidence about the extent of his pain and suffering but there ought to have been some. Economic loss was awarded by the Appeal Court. There wasn't any awarded by the Trial Judge. So, the damages awarded by the Trial Judge do not include the actual loss suffered by Mr Gutierrez – that is, loss of wages etc. It is always important to recompense a successful plaintiff for the losses he actually suffered as a result of the

unlawful action of the defendant. In personal injury cases it is always calculated and awarded. It should be so in cases where the case does not only involve negligence but cases giving rise to damages such as a breach of a statute. Mr Gutierrez be treated equally to other plaintiffs. The rule of law expects fair and equal treatment when damages are assessed.

Case Study (Pages 436 - 437)

1. The type of discrimination against the plaintiff was discrimination because of his personal political belief or activity. He had a right to be treated equally to other applicants for the same job.

2. The relevant section identifying the type of discrimination the work area set out in s14 of the *Anti-Discrimination Act 1991* (Qld).

3. It was the common position of the applicant Dr Davis and the respondent, that Dr Davis, the only qualified applicant, was not appointed because the position was withdrawn and was to be covered by an internal rearrangement of the work duties of other staff. Dr Davis argued that internal rearrangement which meant he no longer could apply for the job was unreasonable and discriminatory and the hospital argued that it was necessary and reasonable.

4. The Tribunal found that it was unreasonable because the standard recruitment procedures weren't followed. The Tribunal therefore was able to infer that the decision not to appoint the doctor in fact a was less favourable treatment of him. An inference therefore could be, and was made, that the reason he was not appointed was because of his political beliefs or activities. The Tribunal found that the discrimination caused Dr Davis to change from a confident, high achieving medical professional, capable of managing and directing an entire department of a major public hospital, to an anxious, despondent, socially isolated person who demonstrated a lack of purpose and drive. The Tribunal found that such an impact had been long lasting and was ongoing. This resulted in him receiving the amount of compensation which covered both his present economic loss, his future economic loss, and general damages. A substantial award of $1,450,771.69.

5. The case demonstrates that where discrimination occurs is appropriate for a plaintiff to take court action damages and to show others that this is what should be done when discrimination happens. It is matter of personal opinion as to which kind of discrimination is easier to prove, because it very much depends on the factual circumstances in each case.

Case Study (Page 437)

1. The child was discriminated against because her health problem made the child rely upon an assistance dog, and, the body corporate rules were such that the child was separated from the dog because the child and the child's grandmother were required to use another exit.

2. The respondent was unable to provide any explanation as to why dogs were required to be transported in a trolley in the common area except to say that it was simply a requirement of the body corporate community. This of course was an inadequate explanation.

3. This is a matter of opinion. The sum of $13,000.00 in total should be seen in light of the fact that this was not a permanent situation, but it was simply holiday accommodation. Therefore, the plaintiff was not subjected to any prolonged discrimination.

Case Study (Page 438)

1. It was part of the claim by RM that he had suffered a workplace injury which was psychological and psychiatric in nature, and that it had arisen partly by bullying from fellow police officers. The fact that the claim and its details were wrongfully distributed to 10 other police officers reinforced Member Deane's view that the publication was another form of bullying behaviour. RM had lodged a WorkCover claim. It was clearly an improper use of the details of RM's claim which should have been given to WorkCover only and not published to other police officers.

Review

Comprehend (Page 439)

Question 1

a. Fido's purpose was to protect Fraser Island from ravages connected to mining.

b. The Lock the Gate alliance purpose was to prevent ongoing and rapid expansion of coal and coal seam gas development by refusing access to gas companies to their land and refusing to sell properties to coal companies.

c. The purpose of the Anti-Offshore Wind Farm Rally was to demonstrate against the development of a wind farm at the Illawarra coast.

d. GCCL's purpose was to protect the human rights and civil liberties of all Queenslanders.

e. YAC's purpose was to support young people through giving them free legal services, free social support and family support services and to engage in a legal education program.

2. The Lobbying Code of Conduct endeavours to control lobbying activities which are defined as communications with Australian Government representatives in an effort to influence Federal Government decision making, by ensuring that such activities cannot be engaged in unless the lobbyist is registered before such communications take place. The Code doesn't apply to lobbyists who make representation to government on behalf of their employer as such representations are considered sufficiently transparent. Lobbyists are remunerated for their efforts by the organisation employing them. On the other hand there are many lobbyists who seek to protect the rights of citizens and to promote human rights. These are referred to in general terms as ethical lobbyists.

3. The environmental implications in FIDO's attempts to save the island from mining include preserving:

    - the dunes on the East Coast of the island in which there are several large Aboriginal middens;
    - The integrity of the 60 freshwater lakes
    - The island vegetation which ranges from heaths to rainforests all growing out of sand.

    Most people would regard Fraser Island (K'gari Island) as a unique environment requiring preservation. Doing so would meet the criteria appropriate to satisfy the right to a safe, clean, sustainable environment.

4. The protestors against the Illawarra wind farm alleged that there were serious effects on their human rights as follows:

    - The effect on migrating whales.
    - The effect on endangered flora and fauna.
    - The impact on tourism and associated industries.
    - The impact on commercial fishing.
    - The effect on shipping movements.
    - The visual impact of wind farms.

The human rights which are most directly affected by wind farms right to employment, which will be a positive outcome of establishing wind farms, and the production of clean energy, reducing emissions and controlling climate change. On the other hand, there are negative effects, such as interference with the marine environment.

Analyse and evaluate (Page 439)

1. For an individual who has a human rights complaint, being able to take a court action is extremely important in the Australian legal system. Courts have the power to make orders which will compensate, and where appropriate, correct the behaviour which has led to the complaint. All of the cases are set out in this chapter illustrate how courts can make decisions to enforce the rights of individuals, while at the same time extending the scope of the right to cover potential infringements of rights in other situations. A good example of this is Ryan's case where orders were made to improve the design and construction of hospital facilities so that people like Ryan did not have to deal with the same problems.

   There are course many other occasions when the legal process is indirectly affected by a change in the law. In this chapter we have seen those large-scale protests (e.g. Lock the Gate) have been used to influence outcomes in the legal process protects rights.

   However, it is doubtful whether there is any better way of enforcing human rights in Australian legal system and going to Court. Sometimes, in our adversarial system, it is the only way.

Additional Resources

Case Study

ZIL v Queensland Police Service [2019] QCAT 79

Facts

Senior Constable Neil Punchard accessed the QPrime records of the Queensland Police Service (QPS) without lawful authority to find out ZIL's residential address. He did so at the request of a childhood friend. At the time there was a domestic violence order in place to protect ZIL and her children from her estranged husband- Senior Constable Punchard's friend. ZIL alleges her ex-husband used this information to further breach domestic violence orders.

Legal issue

Did Senior Constable's Punchard's actions breach the QPS's obligations under the *Information Privacy Act 2009* (Qld) and the *Information Privacy Principles* (IPPs) 4, 9, 10 and 11? Did the QPS take all reasonable steps to prevent unauthorised use or disclosure of ZIL's personal information?

Decision

The QPS had no systematic auditing procedures to check whether people's accessing to QPrime was lawful. For this reason, the QPS did not satisfy the tribunal that they had taken all reasonable steps to prevent unauthorised use or disclosure of personal information. The QPS is under an obligation to ensure information is not used for another purpose than the purpose for which it was obtained. The tribunal found the QPS breached Information Privacy Principles (IPPs) 4 and 10.

Note: This decision was appealed (shown below).

'GUT-WRENCHING': QUEENSLAND POLICE TRY TO BLOCK COMPENSATION FOR DOMESTIC VIOLENCE VICTIM

The Queensland police service has launched another attempt to block compensation to a domestic violence victim, who was forced into hiding after her details were accessed by a senior constable and leaked to her abusive former partner.

Julie* won a landmark breach of privacy case against the police in the Queensland Civil and Administrative Tribunal (QCAT) last month. The ruling would have entitled Julie to compensation, including for the cost of having to relocate her family, capped at $100,000.

On Friday, the state government's legal office, Crown Law, filed an appeal against the tribunal decision, likely dragging the case through another complex hearing.

"This appeal is gut-wrenching because I've worked so hard to fight for justice," Julie told Guardian Australia. "This just adds another devastating level to the abuse and the Queensland police service failing to accept responsibility. When will this end?"

The Queensland government has already come under intense criticism for refusing to settle Julie's compensation claim in the first instance, instead choosing to fight the breach of privacy case in QCAT.

Throughout the case, police have not disputed that Julie's privacy was breached. Instead they claimed police were not responsible for that breach.

Crown Law claims, in the application to appeal, that the tribunal erred on several grounds, including by taking into account that Julie was a domestic violence victim.

Source: Ben Smee, 'Gut-wrenching: Queensland police try to block compensation for domestic violence victim,' *The Guardian* (Online, 29 April 2019) <theguardian.com/australia-news/2019/apr/29/gut-wrenching-queensland-police-try-to-block-compensation-for-domestic-violence-victim>.

1. Identify the court or tribunal that heard this case. [C]
2. Identify the Act that protects Queenslanders' right to privacy. [C]
3. The applicant in this case represented herself. Outline one benefit and one limitation of this approach. [A]
4. What grounds of appeal are being used by Crown Law? How is this impacting the complaint? [C]
5. The Guardian Australia found that most cases involving inappropriate access to QPrime result in no punishment. Why do you think this is? [E]
6. Do you believe the QPS's actions were in line with community expectations of how its law enforcement agency deals with citizens' protection and privacy? Explain your point of view. [E]

Papers and submissions

The Youth Advocacy Centre has been contributing to public discourse surrounding young people's rights and well-being for over 40 years.

Orange Papers

Our Orange Papers are reports that summarise issues and provide context for those wishing to understand them more deeply.

Orange Paper 1 - The use of Queensland watch houses to hold children

Orange Paper 2 - A ten-point evidence-based plan for investment to address youth offending

Orange Paper 3 - Raising the minimum age of criminal responsibility

Other papers and submissions

Submission - Making Queensland Safer Bill 2024

Submission - Queensland Community Safety Bill 2024

YAC Submission - Education (General Provisions) and Other Legislation Amendment Bill 2024

Second Submission to the Youth Justice Reform Select Committee - January 2024

Submission to the Youth Justice Reform Select Committee - November 2023

Submissions on the Strengthening Community Safety Bill - February 2023

Submission regarding Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021

Submission re Raising the Age of Criminal Responsibility 2020

Submission to the Inquiry of the Legal Affairs and Community Safety Committee In relation to the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

Submission to the Inquiry of the Legal Affairs and Community Safety Committee In relation to the Human Rights Bill 2018

Submission to Queensland Productivity Commission's Issues Paper: Imprisonment and recidivism 2018

Submission to the Qld Ombudsman's Investigation into the Accommodation of Young People in Watch Houses 2018

Submission re Youth Justice Strategy 2018

Submission to the National Children's Commissioner re Implementation of the Convention on the Rights of the Child 2018

Response to Review of Blue Card System 2017

Response to Youth Detention Review 2016

Submission YJ (17 yr olds) Bill 2016

Submission on a Human Rights Act for Qld (April 2016)

Submission re Human Rights Act Appendix 1

Submission re Human Rights Act Appendix 2

Inquiry on strategies to prevent and reduce criminal activity (July 2014)

Youth Justice and Other Legislation Amendment Act 2014 (Feb 2014)

Education Discipline in Schools (Sept 2013)

Response to Safer Streets Discussion Paper (June 2013)

Justice Reinvestment (March 2013)

Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012 (Nov 2012)

Child Protection Inquiry Submission (Oct 2012)

Source: Youth Advocacy Centre, *Papers and Submission*, <yac.net.au/papers-and-submissions/>.

Chapter 21: Protecting and advocating for human rights in Australia

21.1 Introduction

No questions.

21.2 Statutory bodies

Practical Application (Pages 443 – 444)

a. The Australian Human Rights Commission (AHRC) protects human rights by:
   - investigating and conciliating discrimination and human rights complaints
   - advocating to government and others for human rights to be considered in laws and policy making
   - promoting and raising awareness of human rights through education and training
   - undertaking research into human rights and discrimination issues in Australia
   - providing legal advice on human rights obligations to courts
   - producing guidelines for employers and providing training and resources to assist organisations in embedding and supporting diversity and inclusion
   - running international education and training programs for other human rights institutions in the Asia Pacific region
   - monitoring and scrutinizing Australia's performance in meeting its international human rights commitments.

b. You would have realised that all of the roles that the AHRC carries out to protect human rights are also the roles in which it advocates for them.

Practical Application (Pages 444 – 446)

1. The total number of complaints increased each year from 2018 to 2022 but then declined in 2023. A possible explanation might be that there were more complaints during Covid19, which ended during 2022.

2. Most of the complaints were made pursuant to the *Disability Discrimination Act 1992* (Cth). There were many persons alleging discrimination.

3. There were 1961 complaints (77%) from aggrieved persons who had a disability. Presumably they felt that their fellow workers or employers did not treat them equally and accepted their disability.

4. The data suggest that the focus for disability discrimination reform should be in the workplace.

Research Task (Page 447)

[Unnecessary to answer.]

Practical Application (Page 447)

1. The Terms of Reference for the Inquiry required the Commission to examine practices, attitudes and Commonwealth laws that deny or diminish equal participation in employment and to make recommendations to address employment discrimination against older Australians and Australians with disability.

2. The key findings of the Commission's Report are recommendations which amount to advocating employers to behave in a way which reduces employment discrimination against older Australians and against Australians with disability.

Practical Application (Page 448)

1. The ALRC aims to ensure that the proposals and recommendations it makes do not trespass unduly on personal rights and liberties of citizens or make those rights and liberties unduly dependent on administrative, rather than judicial decisions, and as far as is practicable, that they are consistent with Australia's international obligations.

2. When the ALRC considers the recommendations and proposals it plans to make it assesses whether such proposals and recommendations are consistent with the obligations Australia has pursuant to the various treaties and covenants of the United Nations to which it is a signatory.

Inquiry

Source 1 (Page 449)

1. At least 10 years. It suggests that the issue was a difficult one for governments to deal with and about which to make decisions.

Source 2 (Page 449 - 450)

1. The main areas of tension between religious freedom and antidiscrimination laws arise where religious freedom intersects with antidiscrimination laws, creating the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

2. The purpose of Commonwealth antidiscrimination laws is to give effect to Australia's international treaty obligations, and other relevant international instruments, and to eliminate various forms of discrimination that have negative social, health, and financial effects for individuals and society. They make it unlawful to discriminate against a person on the basis of a person's personal attributes, such as their sex or sexual orientation, and in areas of public life such as employment, education and the provision of goods services and facilities.

3. If the exemptions for religious organisations of antidiscrimination laws are narrowed or removed, this would make it harder for a person of strong religious beliefs to observe antidiscrimination laws.

4. It is always important to test the limits to which discriminatory conduct which is objectionable extends, in order to achieve a legitimate religious objective. Such conduct should not be arbitrary and should be proportionate so as not to unnecessarily discriminate against a person.

Source 3 (Page 451)

1. Attorney General Dreyfus asked the Australian Law Reform Commission to advise on amendments to federal law to deliver the Labor Party's election promise. Labor's promised legislation would ensure:
    - religious schools cannot discriminate against LGBTIQ+ students or staff under federal law

- religious schools can give preference to people of the same faith as the school when hiring staff under federal law
- the legislation will be drafted in such a manner that it does not remove existing legal protections against other forms of discrimination.

The brief is consistent with Australia's international legal obligations. The brief does not invite major changes to the existing law. It invites changes to satisfy the human rights of both parties, by making any change subject to the legal test of whether it has been proportionate and reasonable.

Source 4 (Page 452)

1. The changes proposed would mean that under Federal law religious schools would be in much the same position as all other schools, except that religious schools would not be prohibited by the Fair Work Act from being able to give preference in employment to a person of the same religion where that is reasonably necessary and proportionate to the school's objective of building a community of faith.

Sources 1-4 (Page 453)

1. The role of the ALRC is to report on matters which governments requests it to report on, in an efficient and timely fashion. It aims to ensure these reports do not trespass unduly on personal rights and liberties of citizens. The ALRC is independent of government.

   The reports it has produced between 2014 and 2024 have achieved its aims. It has provided clarity and focus on the issues on which had it has been asked to report. For example, in *ALRC Report 129*, it set out the different approaches in which stakeholders expressed their concerns that freedom of religion might be vulnerable to erosion by antidiscrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination. It also set out alternative approaches which could involve the enactment of general limitations clauses, under which definitions of discrimination would recognise religious practice or observance as lawful discrimination, with the conduct being a proportionate means of achieving legitimate religious objectives. This report was made in 2016 but the government at the time did not pursue any legislative change.

   In Source 4, which discusses the ALRC report made in early January 2025, it similarly set out specific suggestions to deal with the interaction of discrimination law and religious belief. Again, this report has not yet led to legislative change. It appears that the government was not prepared to commit itself to new laws in this area at this time, which is close to a federal election.

   The ALRC performed its role admirably, but the politics were too difficult at the time. Its recommendations have been consistent and appropriate, reflecting judicial reasoning at the highest levels.

21.3 Legal organisations and special interest groups

Research Task (Page 454)

[Unnecessary to answer.] Students, provided they have access to the Internet, should be encouraged to do this exercise. From references in the text, most of these organisations can be covered a certain extent. The media would help. For example, at the time of writing,

Red Crescent Society is very much in the news because several of their members were killed by the Israeli Defence Force in Gaza. An article is reproduced in the additional resources section about this issue.

Inquiry

Source 1 (Pages 455-456)

1. The three main arguments are:
   - The minds of children. Children are morally different from adults. They do not have the same judgment skills, self-control and ability to know right from wrong. They take more risks, pay less attention to negative consequences, are impulsive and look at short term outcomes and not at long term perspectives. They also suffer from peer pressure.
   - Universities of crime. Children learn a lot of bad habits in prison and are at risk of becoming chronic long-term offenders through exposure to harmful environments and the isolation from family and support networks.
   - The correct approach. The best approach is to address the underlying causes of young children offending, accept that the majority of child offending is a consequence of the failings of institutions intended to support children, and invest in early intervention to prevent offending before it starts.

2. *[Answer asks for an opinion.]* The arguments are convincing and persuasive. The authors have experience in the area and support their opinion with evidence. This is a different question to the question of punishing children who commit serious crimes if they can understand what they are doing.

Source 2 (Pages 455 – 457)

1. The approach of the Queensland Council of Civil Liberties (QCCL) is more succinct and focussed than the approach of the Youth Advocacy Centre (YAC). The YAC raises the same issues as the QCCL but it raises other issues and concepts as well, such as:
   - the range of environmental factors which affect the maturing process of the brain
   - the views of the UN committee for the Convention on the Rights of the Child
   - the fact that many children are in the care system
   - the tendency of youth detention centres to exacerbate rather than address offending behaviour
   - there are a large number of children on remand awaiting a hearing.

2. [Answer asks for an opinion.] The arguments are convincing and persuasive. The YAC has experience in the area and support their opinion with evidence. The YAC is focused on the needs of children and young people. Its opinion carries weight because of its history as an advocate.

Source 3 (Pages 457 – 458)

1. The committee recommended that Parliament should not pass Greens MP Michael Berkman's private members bill raising the age of criminal responsibility to 14. It commented that 'there is more work to be done' before such a move is made. This included national efforts among Australian Attorneys General to increase the age young people can be held responsible for criminal actions from 10 to 12, as called for by former Queensland police commissioner Bob Atkinson in his landmark 2018 youth justice system report.

2. Mr Berkman welcomed recommendations around training in residential aged care and court settings, but said these were 'severely undermined' by the unwillingness to raise the age to 14.

3. Mr Berkman added that locking up children does not stop offending behaviour. It damages young people and makes everyone less safe. The clearest pathway to improving community safety is keeping children away from the criminal legal system, creating alternatives to criminal justice responses and addressing the disadvantage these children face.

Sources 1-3 (Pages 454 – 458)

1. There is no direct evidence that the committee responded specifically in its report to Parliament to the arguments raised by the QCCL and the YAC. However, presumably the committee addressed all submissions made to them and paid particular attention to the arguments which were raised, given the important contribution to debate of each organisation in Queensland. In the absence of any explanation or evidence to the contrary, such a response would be inadequate in the circumstances.

   This is a serious issue and has considerable impact on young children in Queensland, and for that matter throughout Australia. We can only hope that the various Attorneys General will one day meet in circumstances where they give further consideration to the question of raising the age of criminal responsibility to 12 or to 14.

21.4 Media

Inquiry

Source 1 (Page 460)

1. The 2 media organisations mentioned are Guardian Australia and SBS the Feed.

2. The focus of this investigation is the use of police watchhouses to lock up children in adult holding cells.

3. There has been a year-long investigation into this issue.

4. Other non—government and government bodies cited in the news story are Voice for Victims, the Queensland Council of Social Services, the Queensland Aboriginal and Torres Strait Islander Child Protection Peak Limited, and QCOSS. While each of these organisations may have other agendas, there are united in their opposition to the jailing of children in adult watchhouses.

Source 2 (Pages 460 – 461)

1. Guardian Australia and SBS the Feed succeeded in getting a video of the Bill in an isolation cell in an adult watch house in Queensland.

2. Students' personal research necessary. The ICCPR and the ICESCR contain provisions which would be relevant to the treatment of children in adult watchhouses in Queensland.

3. *[Answer based on personal research.]*

4. By exposing the treatment of children in adult watchhouses in Queensland, the media has put forward a version of events demanding that children should be protected from such breaches of their human rights. In doing so, they are advocating for human rights of children in detention in adult watchhouses.

Source 3 (Pages 461 – 463)

1. The different human rights groups are Amnesty International, the Queensland Council of Social Service, the Queensland Aboriginal and Torres Strait Islander Child Protection Peak Limited, and the Australian Human Rights Commission.

2. Generally, the media will print stories given to them by human rights groups if it considers that they are sufficiently newsworthy, and at times, if they fit into a particular agenda that the media has. There is a variety of media, with different points of view, so it would be necessary to look at a particular story, the nature of the media concerned (print or online), and the status of the human rights organisation, to provide an accurate description of the relationship between the media and human rights groups with respect to that issue.

3. *[Answer asks for an opinion and personal research.]* In relation to the issue of children in adult watchhouses, the point of view of the human rights groups is to promote and advocate for the rights of the children. As a group they probably would not have a particular view about the political sensitivity of the story for the government in power. However, at times, the media will publish stories if they are interested in promoting their own views or the views of a particular group or political party.

What do you think? (Page 463)

[Answer asks for an opinion.] The evidence of the source material is that the media has promoted and advocated for the rights of children held in adult watchhouses in Queensland. There could be many reasons why the position is unchanged at the time of writing this book. Certainly, the source material you have studied indicates that this issue was raised under the previous Labor government, and now continues under the current LNP government, recently elected. There are always many issues of importance to the voters, so it is possible that this particular issue was influential and may be a matter of waiting to see if the LNP government does anything about it in the future.

The ultimate legal sanction in a democracy is the exercise by the people of their votes to remove a government whose policies are not supported by a majority vote.
It would be appropriate, in this case, to say that the media did not fail to promote or advocate for the human rights of children in watchhouses. If their objective was to remove the previous Labor government, they achieved their objective. Whether this is the case or not students should decide for themselves, although it appears the evidence may not be conclusive.

Review

Comprehend (Page 463)

1. Four statutory bodies are:
   - Australian Human Rights Commission (AHRC)
   - Australian Law Reform Commission (ALRC)
   - Queensland Human Rights Commission (QHRC)
   - Queensland Law Reform Commission (QLRC)

2. The role of the Australian Human Rights Commission (AHRC) is set out on its website under the heading 'What we do'. Essentially, all of the functions the AHRC performs can be interpreted to both protect and advocate for human rights. These are:
   - investigating and conciliating discrimination and human rights complaints
   - advocating to government and others for human rights to be considered in laws and policy making
   - promoting and raising awareness of human rights through education and training
   - undertaking research into human rights and discrimination issues in Australia
   - providing legal advice on human rights obligations to courts
   - producing guidelines for employers and providing training and resources to assist organisations in embedding and supporting diversity and inclusion
   - running international education and training programs for other human rights institutions in the Asia Pacific region
   - monitoring and scrutinizing Australia's performance in meeting its international human rights commitments.

3. *[Answer based on choice.]* Two groups about which we have written in this chapter are the Queensland Council of Civil Liberties (QCCL) and the Youth Advocacy Centre (YAC).

   Both of these made submissions to the Parliamentary committee reporting on Mr Berkman's private members bill to legislate for the age of criminal responsibility to be raised from 10 to 14. Both of them have an important advocacy role.

   Both of these groups (QCCL and YAC) regularly contribute to discussions about legal reform in the media. For example, they both contributed to the discussion about proposals to make 'Jack's law' permanent. Both of them were opposed to the idea.

Analyse and evaluate (Page 463)

1. The Australian Human Rights Commission (AHRC) has a number roles including its role to receive complaints about human rights abuses from Australian citizens. Of the complaints it receives, the largest number are made under the Disability Discrimination Act. When a complaint is made to the AHRC, it is considered, and if suitable for conciliation, conciliation is attempted. If conciliation is not successful or it is not suitable for this method of alternative dispute resolution, the AHRC President terminates the complaint. The complainant then has the option of taking the complaint to the Federal Court of Australia or the Federal Circuit Court of Australia. In this way, the human rights of complainants are protected by a fair court process.

2. The arguments of both the QCCL and the YAC are convincing and persuasive. Many senior lawyers) for the QCCL. Their arguments are always well researched and thought through.

The YAC has experience in the area and supports its opinion with evidence. The YAC is focused on the needs of children and young people. Its opinion has weight.

The three main arguments of the QCCL in support of raising the age of criminal responsibility are:

- The minds of children. Children are morally different from adults. They do not have the same judgment skills, self-control and ability to know right from wrong. They take more risks, pay less attention to negative consequences, are impulsive and look at short term outcomes and not at long term perspectives. They also suffer from peer pressure.
- Universities of crime. Children learn a lot of bad habits in prison and are at risk of becoming chronic long-term offenders through exposure to harmful environments and the isolation from family and support networks.
- The correct approach. The best approach is to address the underlying causes of young children offending, accept that the majority of child offending is a consequence of the failings of institutions intended to support children, and invest in early intervention to prevent offending before it starts.

The approach of the Queensland Council of Civil Liberties (QCCL) is more succinct and focussed than the approach of the Youth Advocacy Centre (YAC). The YAC raises the same issues as the QCCL, but it raises other issues and arguments as well, such as:

- the range of environmental factors which affect the maturing process of the brain
- the UN committee for the Convention on the Rights of the Child supports raising the age to 14
- the fact that many of the children in the protective care system
- the tendency of youth detention centres to exacerbate rather than address offending behaviour
- the large number of children on remand waiting for a hearing.

3. In the words of the ALRC President, Justice Bromberg: 'For the law to narrow the circumstances in which it is lawful for religious schools to discriminate against students and staff whilst preserving their capacity to maintain a community of faith, manages the intersection of human rights according to the international law obligations Australia is obliged to respect'.

Over a 10 year period from 2014 to 2024 the ALRC has been asked a number of times to examine the intersection of discrimination and freedom of religion, to enable government policy to be put into effect.

In ALRC Report 129, it set out the different approaches in which stakeholders expressed their concerns that freedom of religion might be vulnerable to erosion by antidiscrimination law, if religious practice or observance was respected only through exemptions to general prohibitions on discrimination. It also set out alternative approaches under which definitions of discrimination would recognize religious beliefs so that the conduct legislated would be a proportionate and reasonable means of achieving legitimate religious objectives. This report was made in 2016 but the government at the time did not pursue any legislative change.

In Source 4, which discusses the ALRC report made in early January 2025, it similarly set out specific suggestions to deal with the interaction of discrimination law and religious belief. Again, this report has not yet led to legislative change. It appears that the government would not commit itself to new laws without broad cross-party political support because the issue was so divisive.

Additional Resources

GAZA PARAMEDICS SHOT IN UPPER BODY 'WITH INTENT TO KILL', RED CRESCENT SAYS

PRCS calls for international investigation after postmortem results add to evidence contradicting Israel's account

Autopsies conducted on 15 Palestinian paramedics and civil emergency responders who were killed by Israeli forces in Gaza show they were shot in the upper body with 'intent to kill', according to the Palestinian Red Crescent, which is demanding an international investigation into the attack.

The killings took place in the southern Gaza Strip on 23 March, days into a renewed Israeli offensive in the Hamas-ruled territory, and sparked international condemnation.

The results of the postmortems join a growing body of evidence that sharply contradicts Israel's account of the incident, including video footage that shows the vehicles were travelling with headlights and flashing red lights that identified them, with personnel wearing hi-vis vests, at the time they were fired on.

Germany, one of Israel's closest backers in the EU, called for an urgent investigation into the incident on Monday. 'There are very significant questions about the actions of the Israeli army now,' the foreign ministry spokesperson Christian Wagner said after the video footage emerged.

'An investigation and accountability of the perpetrators are urgently needed,' he said, adding that a full investigation of the incident would be 'a question that ultimately affects the credibility of the Israeli constitutional state'.

Those killed included eight Red Crescent staff, six members of the Gaza civil defence agency and one employee of the UN agency for Palestinian refugees.

The bodies were later found buried near the site of the shooting in the Tal al-Sultan area of Rafah city, in what the UN office for the coordination of humanitarian affairs described as a mass grave.

The Israel Defense Forces (IDF) initially said its soldiers 'did not randomly attack' any ambulances, insisting they fired on 'terrorists' that were approaching in 'suspicious vehicles'.

Members of the Palestinian Red Crescent and other emergency services pray on 31 March by the bodies of fellow rescuers killed a week earlier by Israeli forces.

Lt Col Nadav Shoshani said troops had opened fire on vehicles that had no prior clearance from Israeli authorities and had their lights off, a statement contradicted by video recovered from the mobile phone of one of those killed.

The IDF later changed its story and conceded its earlier account had been 'mistaken'. It claimed on Sunday that at least six of the medics were linked to Hamas but has provided no evidence. None of those killed were armed.

It said on Monday that its initial investigation into the killings had shown that the incident occurred 'due to a sense of threat', and claimed six Hamas militants had been in the vicinity.

The Israeli army chief, Lt Gen Eyal Zamir ordered a more in-depth investigation into the attack after completion of the initial one.

The president of the Red Crescent in the Israeli-occupied West Bank, Younis al-Khatib, told journalists in Ramallah: 'There has been an autopsy of the martyrs from the Red Crescent and civil defence teams. We cannot disclose everything we know, but I will say that all the martyrs were shot in the upper part of their bodies, with the intent to kill.'

He called for an international investigation into the killings, which the IDF has separately announced it was looking into.

'Why did you hide the bodies?' Khatib asked of the Israeli forces involved in the attack. 'We call on the world to form an independent and impartial international commission of inquiry into the circumstances of the deliberate killing of the ambulance crews in the Gaza Strip.

'It is no longer sufficient to speak of respecting the international law and Geneva convention. It is now required from the international community and the UN security council to implement the necessary punishment against all who are responsible.'

In the past 18 months of war Israeli forces have conducted attacks that have killed hundreds of medical workers and the staff of NGOs and UN organisations, including foreign nationals working in Gaza. Six members of World Central Kitchen, including the Briton James Kirby, died in a sustained Israeli attack on their clearly marked vehicles.

Human rights organisations have long accused Israel of a culture of impunity with few soldiers ever facing justice.

A Palestinian journalist was killed and several others wounded on Monday, when Israel struck a media tent near Nasser hospital in Khan Younis.

According to the Palestinian Civil Defence, an organisation affiliated with Hamas's interior ministry, two people – Helmi al-Faqawi and a civilian, Yousef al-Khazandar – were killed when the Palestine Today agency's tent was struck.

Source: Peter Beaumont, 'Gaza paramedics shot in upper body with intent to kill red crescent says,' *The Guardian*, (Online, 8 April 2025) <theguardian.com/world/2025/apr/07/gaza-paramedics-shot-in-upper-body-with-intent-to-kill-red-crescent-says>.

Chapter 22: Human rights principles in Australian case studies

22.1 Treaties with First Nations people

Practical Application (Pages 466-467)

1. In Western Australia the *Noongar Settlement* is the largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history. In all other states of Australia except for Queensland, there have been or are continuing negotiations to enter a treaty, with some states more advanced in the process. In Queensland the *Path to Treaty Act 2023* (Qld) was repealed by the recently elected LNP government. The first Nations Treaty Institute and the Truth Telling and Healing Inquiry in Queensland have, as a consequence, been stopped, and funding withdrawn. At the Commonwealth level, following the loss of the referendum for the Voice, there is no Treaty process currently in progress.

Inquiry Focus (Pages 467-473)

Source 1 (Page 468)

1. The articles from UNDRIP state that:

    - Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs.
    - Indigenous peoples should be provided with ways and means for financing their autonomous functions.
    - Indigenous peoples have the right to belong to a community or nation, in accordance with the traditions and customs of the community or nation concerned.
    - Indigenous peoples have the right to self-determination.

    Knowing the above would be important to a First Nations representative in negotiations for a treaty with an Australian State or Territory. It establishes a basis of the rights which would apply to a treaty. The Australian State or Territory would probably accept these rights in the process of negotiation.

2. The fact that Australia is a signatory to the ICESCR and the UNDRIP means that it has obligations which would apply under international law when negotiating these treaties. Australian states would not be obliged to comply with the obligations in the treaties unless they were contained in legislation passed by the Australian government or the Australian states and territories involved. However, whenever Australia breaches the International obligations in a treaty to which it is signatory, and which it has ratified, the processes of monitoring and reporting which the United Nations instrumentalities carry out are influential in ensuring that we meet our international obligations.

Source 2 (Page 469)

1. The importance of the *Mabo* decision of the High Court of Australia to First Nations people is that it recognised native title. Now the only way native title could be changed or taken

away from First Nations people would be by an Act of Federal Parliament. It also recognised them as the original inhabitants of Australia before European settlement. This is important because the rights of First Nations people as the original inhabitants includes their right to make a claim to some form of sovereignty over the land.

2. Essentially the rights of First Nations people are found in the articles of the *Universal Declaration,* ICESCR, and UNDRIP. For example, they have the right to determine their own identity or membership in accordance with their customs and traditions. This does not stop them obtaining citizenship of Australia. They can determine the structures and membership of their institutions in accordance with their own procedures.

3. Australian law, as set out in *Mabo* and in the *Native Title Act* does establish the point of view that First Nations people, prior to European settlement, lived according to a particular form or system of government, in an organised community or communities and were therefore a polity. This point of view is established by the evidence about First Nations communities which the High Court of Australia received in the *Mabo* case.

Source 3 (Pages 470-471)

1. Settlement agreements under the *Native Title Act* in Australia are legally binding agreements covering such matters as:

    - land use and access
    - indigenous cultural heritage protection
    - co-management of land and sea
    - economic development
    - employment
    - resolving land claims

    First Nations groups in Australia have made hundreds of these agreements with Australian governments at all levels.

2. In drafting the *Noongar Settlement* the parties not only covered the matters set out above normally contained in legally binding agreements, they also ensured that the elements that distinctively made the settlement a treaty, were included. The features of the Noongar settlement that the author Bartholomew Stanford identifies as being essential to treaty are:

    - recognition of First Nations as distinct polities
    - negotiation in good faith
    - a settlement that deals with claims and that enables a form of Indigenous self-government

Source 4 (Pages 471)

1. The Noongar people are described as the traditional owners of lands in the south-west of Western Australia. In the preamble it says that

- they continue to have a living cultural, spiritual, familial and social relationship with the boodja (Noongar earth)
- they have cultural responsibilities and rights under Noongar law and custom
- they have inhabited their lands from time immemorial
- they have made, are making, and will continue to make, a significant and unique contribution to the heritage, cultural identity, community and economy of the State.
- Treaty recognises the Noongar as both traditional owners of the land and as a distinct polity, differentiated from other Western Australians.

The description of the Noongar people in the Preamble is important because it is a common set of facts that the parties have agreed to accept, which then establishes the basis for the operative part of the agreement which sets out the rights and obligations relating to those matters set out in **Source 3,** that is

- land use and access
- indigenous cultural heritage protection
- co-management of land and sea
- economic development
- employment
- resolving land claims

2. The compromise, which is being made by the Noongar people, is that in exchange for the package of measures which are agreed and contained in the settlement, they will cease to make any further claim under the *Native Title Act*. Part of this settlement involved the Western Australian government not only giving financial compensation as part of the settlement, but also giving land to the Noongar people, as well as agreeing for them to have, at the local level, autonomy in how they run their affairs, much like a shire or local government council would in other parts of the community. They can make rules for people to follow on land for which they are responsible by ownership or management, subject to the overall supervision of the West Australian government.

Source 5 (Pages 471-472)

1. Roger Cook, the Deputy opposition Leader in the Western Australian Parliament in 2015, who is now the Premier of Western Australia, described the *Noongar Settlement* in the following words:

   By its very nature, the Noongar agreement is in fact a classic treaty: it is a coming together between two nations to agree upon certain things, and in doing so, finding a way forward together and recognising each other's sovereignty. By recognising each other's sovereignty, they decided how they would continue to coexist in a manner agreed to through negotiation.

2. In drafting the *Noongar Settlement* the parties not only covered the matters set out above normally contained in settlements which are legally binding agreements under the *Native*

Title Act, they also ensured that the elements that distinctively made the settlement a treaty, were included. According to Hobbs and Williams, these were:

- recognising the Noongar as both traditional owners of the land, and as a distinct polity, differentiated from other Western Australians. This meant negotiations were on a 'nation to nation' basis;
- agreeing to the settlement via a political negotiation respectful of each party's equality of standing, bringing a commitment to secure a just relationship between Indigenous peoples and the State; and
- finalising a settlement which contains more than mere symbolic recognition. In consideration of surrendering their native title rights and interests and validating all potentially invalid acts committed on their territory, First Nations people should receive a package of benefits similar to those negotiated under Canada's model including ensuring they are guaranteed a sizeable land base, non-exclusive rights to resources over an extended area, a large sustained financial contribution from the State or Federal government, and enhanced cultural heritage protection.

Sources 1-5 (Pages 472-473)

1. The purpose of a treaty is for the parties to find a way forward together and to recognise each other's sovereignty. By recognising each other's sovereignty, they decide how they would continue to coexist in a manner that they agree to through good faith negotiations.

2. In Western Australia, the settlement agreement known as the *Noongar Settlement* reached in 2015 involves three distinct elements which are set out in question 2 above. It is all those matters as well as those generally included where negotiated under the *Native Title Act*, if required by the parties.

3. One process would be to use a court or tribunal and hear evidence in the same way that the High Court of Australia heard evidence in the *Mabo* case, and for a judge or tribunal member to make a decision about the nature and scope of the polity to which the members of the First Nations community involved belong. This would establish how the group could be represented so that the group's representative has authority on behalf of those who belong to it to receive the benefits of settlement; money, land, management rights, other non-exclusive rights, and the authority or power to administer the rules and perhaps laws which would apply.

   Another process would be to use the current structures under the *Native Title Act* to conduct negotiations in good faith, utilising the strategy of mediation, if necessary, to allow the parties (in this case the Commonwealth and an identifiable First Nations group) to come to an agreement within legislated guidelines.
   As we have seen, in addition to the *Native Title Act*, there is state legislation, in many cases, which supports the treaty process.

There would be other options. These could be chosen because they were fit for purpose and able to be used in a fair and just manner, leading to acceptable and sustainable outcomes for all parties.

4. 'Good faith negotiations' are negotiations conducted with the following guidelines in mind:
   - a commitment to achieving a just, equitable, and sustainable outcome
   - a commitment to open and full disclosure of all relevant information
   - a commitment to treating the other party in a respectful and dignified manner
   - a negotiation respectful of each party's equality of standing, bringing a commitment to securing a just relationship between First Nations people and the Commonwealth
   - a settlement that deals with all claims and one that enables Indigenous self-government.
   - acceptance that a just outcome can only be achieved when the partie had equality of standing in the negotiations (this means, for example, equal access to all relevant information).

   Students will recall studying the *Australia v Timor-Leste* case which Timor-Leste brought in the ICJ, and the outcome of the case. It was a good example of how not to conduct negotiations.

5. The first step is for an Australian government, state or federal, is to accept the *Mabo* decision. This means that First Nations people, when coming to negotiations about treaty, come to the table holding their sovereign rights in their hands, despite the history of neglect and abuse of their people.
   The *Native Title Act*, in Its *Preamble*, makes these propositions clear, and states that the people of Australia intend to ensure that First Nations people receive full recognition and status within the Australian nation which history, their prior rights and interests, and to which their rich and diverse culture, fully entitled them to aspire.
   The question, then, is for First Nations people to decide what they want in exchange for their sovereign rights. They should have a shopping list just like the Noongar people. Land, money, mineral rights, shared decision-making and most of all, recognition about what is being given up in exchange for these things. Different First Nations People or groups will have different agendas.
   The issue of sovereignty was obviously not an insurmountable barrier in the negotiations between Premier Colin Barnett's conservative Western Australian government, and the Noongar people. Because the negotiations were conducted between equals, because the negotiations were conducted in good faith, and because the Noongar people were prepared to compromise their claim to sovereignty, and to recognise that any form of sovereignty which they achieved would be a compromise with the West Australian government, there was a positive outcome. Achieving a level of autonomy was the best outcome possible for them. It led to a treaty being written and signed.
   Underlying all the negotiations is the decision of the High Court of Australia in *Mabo*.

22.2 Climate change

Practical Application (Page 474)

1. The resolution was important because the United Nations General Assembly said climate change and environmental degradation were some of the most pressing threats to humanity's future. It called on states to step up efforts to ensure their people have access to a 'clean healthy and sustainable environment'. In this way, the importance of climate change to individual human rights is emphasised, and countries will be aware that their policies, if not supportive of climate change, will negatively affect their citizens.

Inquiry Focus (Pages 474-483)

Source 2 (page 475-476)

1. The *United Nations Framework Convention on Climate Change* (1994) (UNFCCC) established arrangements for State Parties to meet annually, to measure progress and negotiate multilateral responses to climate change.

   Australia's obligations are decided at these annual meetings, some of which are very significant. For example:

   The *Kyoto Protocol*. Australia ratified the *Kyoto Protocol* in 2007 and had emissions targets for the first and second commitment periods (2008-2012 and 2013-2020, respectively), limiting emissions growth to 108% and 99.5% of 1990 levels, respectively. In a general sense Australia commits to the Kyoto protocol in the *Objects* of the *Climate Change Act*.

   The *Paris Agreement*. Australia Is a signatory to the *Paris agreement* from 2015, where the UNFCCC reached a landmark agreement to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low carbon future.

2. *[A matter of personal opinion]*. It would be appropriate at some point in the future, for the United Nations General Assembly to propose an *Optional Protocol* that invites all parties to the UNFCCC to agree that everyone is entitled to a '**clean, healthy, sustainable environment'**. This is because international human rights law can only be advanced when State Parties become signatories to such treaties, which promote human rights.

Source 3 (Pages 476-478)

1. The objectives of the *Climate Change Act 2022* (Cth) are:
   - to advance an effective and progressive response to the urgent threat of climate change drawing on the best available scientific knowledge;
   - to prepare an annual climate change statement on the advice of the Climate Change Authority;
   - to set out Australia's greenhouse gas emissions reduction targets to contribute to Australia's global goals; and

- to receive from the Climate Change Authority advice on greenhouse gas emissions reduction targets included in any new or adjusted nationally determined contribution.

2. There have been some significant meetings at which Australia became a signatory to certain protocols, establishing its commitment to reduce emissions. Notable were the *Kyoto Protocol* (1997) and the *Paris Agreement* (2015). The central aim of the *Paris Agreement* is to keep the global temperature rise this century well below 2°C above preindustrial levels. At the latest Conference of the Parties (COP), in Baku in Azerbaijan, there was an agreement calling on developed countries to deliver at least $300 billion per year to developing countries by 2035 to reduce greenhouse gas emissions and protect lives and livelihoods from the worsening impacts of climate change.

3. In Queensland, all new and amended legislation is subject to review to ensure that the provisions of the *Human Rights Act 2019* (Qld} are consistent with the provisions of the new legislation.

4. In the same way, when there is new or amended ACT legislation, it must be done in a way that is compatible with the *Human Rights Act 2004* (ACT) This means considering human rights when making new laws and interpreting existing ones in a way that is most compatible with the Act. In this way, the human rights principle of 'a clean, healthy, sustainable environment' will be used to guide ACT legislation, thereby promoting this human rights principle.

5. The *New Vehicle Efficiency Standard Act 2024* (Cth) establishes a new vehicle efficiency standard to regulate the carbon dioxide emissions of new passenger and light commercial vehicles in Australia. This Act will reduce emissions of carbon dioxide from motor vehicles in the future through the standards it sets. This should contribute to 'a clean, healthy, and sustainable environment'. We should value the quality of the air we breathe, and the future of our environment which will determine the quality of life of the next generation and those to follow. All Australians support this human rights principle, irrespective of whether or not they accept the science of climate change.

Source 4 (pages 478-479)

1. Pacific Island communities are threatened by climate change by
   - storms and rising sea levels, and ocean changes are swallowing land and impacting traditional food sources.
   - people being displaced from their communities.

2. Australian communities are threatened by climate change by:
   - extreme heat, bushfires, floods, storms and rising seas which are swallowing land and impacting traditional food sources in the Torres Strait

- extreme weather disasters, floods, fire, and drought
- displacing communities in Lismore
- the Black summer fires of 2019-2020, and the east coast floods (particularly in Lismore) of 2022.

3. The whole of the Pacific region, both Australia and the Pacific Islands, faces changing patterns of weather over time, and weather events are becoming more extreme and frequent. The frequency of bushfires and cyclones (and other rain events) are particularly concerning on mainland Australia and affect our coastlines. When these occur in the Pacific, they are more likely to be weather events, that, combined with the global phenomena of rising sea levels, lead to loss of agricultural land, and loss of land on which traditional communities reside and depend for their livelihoods. The effects are different, but similar, because overall people feel threatened and are concerned about being displaced now and in the long term.

Practical Application (479-480)

1. Tuvalu's island group sits less than five meters above sea level, making it the world's second lowest lying country and highly vulnerable to the impacts of climate change. It is particularly vulnerable to tidal surges and rising sea levels.

2. Australia is partnering with Tuvalu, under the UN Secretary General's Adaptation Pipeline Accelerator (APA) initiative, to advance the Long-Term Adaptation Plan. Australia is working with the government of Tuvalu through the Australian Infrastructure Financing Facility for the Pacific (AIFFP) to ensure that critical infrastructure is climate resilient. Australia also works closely with Tuvalu's National Disaster Management Office and has supported a Disaster Risk Management and Response Coordinator position through the Australia Assists Program.

   Australia's commitment to Tuvalu is consistent with its legal obligations as a signatory of the UNFCCC and the COP 29 climate change agreement. When COP 29 concluded on 24 November 2024 there was agreement to call on developed countries to deliver at least $300 billion per year to developing countries by 2035 to reduce greenhouse gas emissions and protect lives and livelihoods from the worsening impacts of climate change.

Practical Application (Pages 480-481)

1. [Unnecessary to answer. Students individual research work.]

Case Study (Pages 481-482)

Sharma and others v Minister for the Environment [2021] FCA 560

1. In the course of the appeal heard in the Full Federal Court of Australia, the Court rejected the Minister's argument that the primary judge made findings based on evidence of climate change that were unfounded.

2. This means that the primary judge's findings of fact about the risk of harm of climate change to children remain. The Full Federal Court noted that the nature of the risks and the dangers from global warming, including the possible catastrophe that may engulf the world and humanity, were never in dispute. Lower Courts in the hierarchy, would find this decision of the Full Court of the Federal Court (legally regarded as *obiter dictum*), highly persuasive in a future case.

Case study (Pages 482-483)

Youth Verdict v Waratah Coal **[2020] Q LC 33; [2021] Q LC 4 [2021] Q LC 36; [2022] Q LC] 3; [2022] 21.**

1. The legal issues raised by the cases in source 5 are similar. In both instances the plaintiffs make application to stop coal projects from proceeding.

   In the *Sharma* case, the application is for an injunction to stop the Australian government approving an extension of the Whitehaven Vickery coal mine. The plaintiffs sought an injunction to prevent the Minister from approving the project under the *Environment Protection and Biodiversity Conservation Act,* on the grounds that the Federal Minister had a duty of care for young people, alleging that digging up and burning coal would exacerbate climate change and harm young people in the future.

   In the *Waratah* case, the application was by way of an objection to the *Queensland Land Court* to the proposed Galilee Coal Project on human rights grounds. The allegation was that the mine, by contributing negatively to climate change, would infringe on the plaintiff's right to life, on the protection of children, and on the right to culture, as protected by the *Human Rights Act 2019*) (Qld).

2. There is a common purpose to the climate change litigation. In both cases it is alleged that the mining operations would cause climate change to be negatively impacted, and that this would infringe the human rights of the plaintiffs.

Sources 1 to 5 (page 483)

1. Australia supports the human right to a 'clean, healthy and sustainable environment because,

   - In source 1, the Australian government representatives and Australian climate scientists played a major role in the establishment of the *Intergovernmental Panel on Climate Change* and continue to make significant contributions to its work.
   - In source 2, Australia is a signatory to the *United Nations Framework Convention on Climate Change,* the *Kyoto Protocol*, and the *Paris Agreement,* all of which are agreements to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low carbon future.
   - In source 3, the *Climate Change Act 2022* (Cth) and the ACT *Human Rights Act 2004* contain provisions set out in their objects in support of climate change policy, including to the human rights principle, 'a clean, healthy and sustainable environment' respectively.

- In source 4, there is support for Australian policies and actions to restrict and mitigate climate change that is harming our Pacific Island neighbors, and our own citizens.
- In source 5, both of the Federal Court of Australia and the Queensland Land Court made decisions which showed that they were prepared to seriously consider actions by the plaintiffs who both argued that there were grounds available in our law to apply the principle of a' clean, healthy and sustainable environment'.

2. Essentially, Australia is involved in the issues which our Pacific neighbors are raising about climate change because we are experiencing similar effects in Australia from climate change to those experienced in Pacific countries. Rising sea levels and extreme weather conditions for example.

   Australia is a sovereign state and so are all of its Pacific neighbors. Our legal relationship is governed by international law. It is governed by the treaties to which we are signatory, by customary international law, by general principles of international law, and by other accepted writings of jurisprudence and academic significance. Australia already has a number of treaty obligations with many of our Pacific Neighbours, and we have historical links to them.

   It is a matter of personal opinion, whether or not you support Australia's policies in the Pacific region. The authors are of the view that we are heading in the right direction and currently managing these relationships satisfactorily.

22.3 National Bill of Rights

Research Task (Page 484)

[Unnecessary to answer. There will be different answers depending on the choices made by students]

Practical Application (Pages 485-487)

1. The Australian Human Rights Commission says that Australia needs a National Human Rights Act to ensure that the rights of all people are protected all of the time. The advantages of this approach are:

   - Government administrators and public service providers would be required to consider human rights and to act in accordance with human rights when making policy or decisions that affect individual lives.
   - Parliament would be required to place greater priority on the human rights impacts of all new proposed laws.
   - Courts would be required to interpret legislation, where possible, in a way that is consistent with human rights.
   - Limitations could be placed on some human rights in certain circumstances, for example, balancing freedom of expression with the right to privacy and the right religious belief.

- Individuals who consider that their human rights have been breached would have the option of making a complaint to the Australian Human Rights Commission or taking action in court.

Whether the advantages of a National Human Rights Act outweigh the arguments in favour of entrenching the human rights of Australians in the *Australian Constitution* is a matter of opinion and depends upon the arguments that each student favours. There is not space to cover these arguments here. There are set out in the relevant chapter in *Legal Studies for Queensland* Volume 2, (Eighth Edition).

Practical Application (Page 487)

1. This is a matter of interpreting the tone of the article. A likely inference is that the author supports the same view as the Australian Human Rights Commission. That is, support for a Statutory Bill of Rights to align with our existing statutory framework before being legislated.

   The author does point out that the Australian Human Rights Institute notes a statutory Bill of Rights could be changed by the Commonwealth Parliament but could remain relevant by evolving and adapting to societal changes. The trade-off is that the Bill could be easily changed by the government of the day but perhaps this is the price to pay to avoid the stalling experienced by more rigid systems, such as entrenching a Bill of Rights in the *Constitution*.

   It is worth noting that in early 2023 the Attorney-General Mark Dreyfus announced an inquiry into the Australian human rights framework, with the report due to be published in May of this year (2025). It also recommends the introduction of an Australian Human Rights Act for Australia.

Review (Page 488)

Comprehend

1.

a. **Polity:** a particular form or system of government, or the condition of being constituted as a state or other organised community or body.

b. **Makarrata**: the coming together after a struggle. It captures First Nations peoples' aspirations for a fair and truthful relationship with the people of Australia and a better future for their children, based on justice and self-determination.

c. **Shared sovereignty:** Sovereign rights can be shared. Native title co-exists with other forms of title to land in Australia. The High Court of Australia found that occupation of Australia by the British did not extinguish their title to land (native title) which existed before European settlement.

2. The High Court of Australia changed the law when it declared in *Mabo* that the doctrine of *terra nullius* no longer applied in Australia, and that instead native title had existed prior to European settlement and could now be relied upon by First Nations people to make claims to land. The claims they could make to land became a creature of statute when the Commonwealth government passed the *Native Title Act*.

3. The current position of treaty negotiations between Australian governments and First Nations people varies considerably from State to State in Australia and has not progressed at the Commonwealth level since the failure of the referendum in October 2024 to elevate the Voice to constitutional status.

   In Western Australia the *Noongar Settlement* is the largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history. In all other states of Australia except for Queensland, there have been or are continuing negotiations to enter a treaty, with some states more advanced in the process. In Queensland the *Path to Treaty Act 2023* (Qld) was repealed by the recently elected LNP government. The first Nations Treaty Institute and the Truth Telling and Healing Inquiry in Queensland have, as a consequence, been stopped, and had their funding withdrawn. At the Commonwealth level, following the loss of the referendum for the Voice, there is no Treaty process currently in progress.

4. We have seen that there have been hundreds of settlement agreements entered into under the *Native Title Act* which cover the many matters that the claimants have wished to address in their claims. The claims have been against the Crown (the ultimate owner of the land), the owners of the current title and other persons who have interests in the land (e.g. mining interests). None of these settlement agreements are necessarily treaties.

   In drafting the *Noongar Settlement* in Western Australia, the parties not only covered the matters set out above normally contained in settlement agreements, they also ensured

that the elements that distinctively made the settlement a treaty, were included. According to Hobbs and Williams, these were:

- recognising the Noongar as both traditional owners of the land, and as a distinct polity, differentiated from other Western Australians. This meant negotiations were on a 'nation to nation' basis;
- agreeing to the settlement was via a political negotiation respectful of each party's equality of standing, bringing a commitment to secure a just relationship between Indigenous peoples and the state; and
- finalising a settlement which contains more than mere symbolic recognition. In consideration of surrendering their native title rights and interests and validating all potentially invalid acts committed on their territory, First Nations people received a package of benefits similar to those negotiated under Canada's model, including ensuring they are guaranteed a sizeable land base, non-exclusive rights to resources over an extended area, a large sustained financial contribution from the State government, and enhanced cultural heritage protection.

5. The human rights principles underlying the process of agreeing to treaty negotiations are found in the articles of the *Universal Declaration,* ICESCR, and UNDRIP. For example, First Nations people have the right to determine their own identity or membership in accordance with their customs and traditions. This does not stop them obtaining citizenship of Australia. They can determine the structures and membership of their institutions in accordance with their own procedures.

6. Many agreements that have been entered into by First Nations people are settlement agreements, usually under the *Native Title Act*, and are not treaties. These settlement agreements usually cover matters such as:

    - land use and access
    - indigenous cultural heritage protection
    - co-management of land and sea
    - economic development
    - employment
    - resolving land claims

7. The latest evidence from the IPCC about climate change is

    - There is a narrow path to avoid climate catastrophe, which is only through immediate deep and sustained emissions reductions
    - climate change is already wreaking havoc around the world
    - every choice and every fraction of a degree of avoided warming matters
    - current atmospheric concentrations of carbon dioxide are higher than at any time in the last 2 million years
    - Human influence has warmed the climate at a rate that is unprecedented. Our climate is not merely changing, the rate of change is now accelerating.

8. Any new or amended legislation in the ACT must be done in a way that is compatible with the *Human Rights Act 2004* (ACT). This means considering human rights when making new laws and interpreting existing ones in a way that is compatible with the Act. In this way, the human rights principle of 'a clean, healthy, sustainable environment' will be used to guide ACT legislation.

9. The *Climate Change Act 2022* (Cth) puts into law the policies of the Australian government to meet its objectives and obligations under international treaties. This supports the human rights principle of 'a clean, healthy and sustainable environment'. By legislating its climate change objectives and emissions targets under the UNFCCC, the government has incorporated into domestic legislation its international obligations. The objectives of the *Climate Change Act 2022* (Cth) are:

    - to advance an effective and progressive response to the urgent threat of climate change, drawing on the best available scientific knowledge.
    - to prepare an annual climate change statement on the advice of the Climate Change Authority.
    - to set out Australia's greenhouse gas emissions and reduction targets, and to contribute to Australia's global goals; and
    - to receive from the Climate Change Authority advice on greenhouse gas emissions reduction targets included in any new or adjusted nationally determined contribution.

Analyse and evaluate

1. When lawyers are drafting agreements, there form is very important. The Preamble of the *Noongar Settlement* (sometimes referred to as a Recital in legal agreements), is regarded by lawyers as a set of common facts, to which both parties agree. They usually set out the particulars of the parties, and their common intentions, which are then put into effect in the body of the agreement which says what is going to happen and how the relationship is to be governed. Students should read the Preamble carefully and note what it says.

    In addition, the *Noongar Settlement* goes beyond what is normally contained in a settlement agreement under the *Native Title Act*. The essential elements of a treaty, according to Hobbs and Williams, are set out already in the answer to question 4 above. Add to this the criteria that are set out in the *Noongar Settlement*, which ensure that the elements that made the settlement a treaty, were included. These features of the *Noongar Settlement* are those that the author Bartholomew Stanford identifies as being essential to treaty, namely:

    - recognition of First Nations as distinct polities
    - negotiation in good faith
    - a settlement that deals with claims and that enables a form of Indigenous self-government.

2. Many climate change experiences are shared by Australia with its Pacific Neighbours. We share the experience of rising sea levels, coastal inundation and receding shorelines. We share extreme weather events such as cyclones and hurricanes. Australia perhaps

experiences more extremes in its weather patterns because of the size of its land mass. Tuvalu and the Torres Strait Islanders are losing their traditional food sources.

There are of course differences. Australia experiences flooding to a great extent, while the South Pacific recently experienced a tsunami in Tonga.

Australia has shared many other experiences that are not climate related with our South Pacific neighbours. Being assisted by the people of Papua and New Guinea in World War II, using labour from the Pacific, starting with Kanakas (forced labour in the late 19th century) and today importing labour to meet shortages in our agricultural industry, are two examples. There are many other ties to the South Pacific, significantly in sport.

The point is, we are in a position to help our Pacific Neighbours. Recent agreements reflect these realities. Climate change is a shared experience which has led to new legal agreements, like the ones with Tuvalu.

Elsewhere, in Chapter 17, there is discussion about whether or not, Australia and its Pacific Neighbours, and others in the broader Pacific, should take the lead in encouraging the United Nations to promote a regional Human Rights Council, with all the benefits it might bring. This would be a matter of opinion, and students should revisit this issue when answering this question.

Legal Studies for Queensland
Units 3&4

Legal Studies 2025 Syllabus Volume 2 - Ninth Edition

This **Ninth Edition of Legal Studies for Queensland, Volume 2**, is the second book in a revised and substantially updated two book series, with **Solutions and Resources Manuals,** specifically for teachers and students of the dynamic subject Queensland Senior Legal Studies. Electronic use is available to users of the book.

VOLUME 2 TOPICS

UNIT 3: LAW, GOVERNANCE AND CHANGE:

Topics 1-2: Governance in Australia, Law reform within a dynamic society.

UNIT 4: HUMAN RIGHTS IN LEGAL CONTEXTS:

Topics 1-3: Human Rights, Australia's legal response to international law and human rights, Human rights in Australian contexts

DISTINCTIVE FEATURES OF THIS EDITION INCLUDE:

A WIDE RANGE OF PRACTICAL ACTIVITIES

This text uses a wide range of practical activities, including inquiry and research tasks, case studies, practical applications, hypotheticals and what do you think? activities that have been interpreted and implemented to allow students to **experience all syllabus objectives.**

A STRUCTURED INQUIRY-BASED LEARNING APPROACH

The **mastery of syllabus objectives** are also developed by our use of a **structured inquiry-based learning approach**, that is central to Legal Studies. Throughout each topic, students are given a contemporary legal issue, question or problem, and components (such as source material or activities) to develop their confidence and independence to become learners responsible for their own learning.

IMPROVED TERMINOLOGY AND PRESENTATION by the introduction of

- key terms, including those recognised in the syllabus
- closer identification of activities and questions, classified under the icons of [C] comprehend, [S] select, [A] analyse, [E] evaluate, and [R] respond, to facilitate the development of learning skills.

WHO SHOULD READ THIS BOOK?

Legal Studies students and their teachers who want an accurate, current and comprehensive overview of Queensland law.

Teachers and students at TAFE and other tertiary institutions who require an introductory text on the law and legal procedure in Queensland.

General readers seeking a topical, up-to-date and engaging discussion of the law in action.

ISBN 978-0-6484495-9-1